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LEGAL concepts are necessary and useful tools for the development of the law. But their relation to the actualities of the problems with which they deal must be constantly kept in mind. When decisions, in the instances is which a concept is ostensibly used, are reached for reasons independent of it and unrelated to its content, and in other instances are rendered in open disregard of it, serious consideration should be given to whether the concept itself ought not to be discarded.

These comments apply with peculiar force to the doctrine known as merger by judgment. It is the belief of the present writer, developed in the pages which follow, that the doctrine serves no useful purpose and cannot be relied upon as a guiding principle of law; that every problem for the solution of which it is invoked can be, and in fact usually is, resolved by the courts without its help, that it has caused considerable uncertainty and confusion in various fields of law; and that it is merely the survival of false analogies and artificial generalizations indulged in during the early common law period.

The principal consequences following upon the rendition of a judgment are well known. Under the familiar principles of res judicata, if judgment is rendered for the plaintiff, he will not be allowed to sue the defendant again on the same cause of action. A similar result follows if judgment is rendered for the defendant. The plaintiff cannot maintain another action against the defendant on the same cause of action. In either case, it is unfair to defendant and an unnecessary burden on the courts to permit the second action. The plaintiff has had his day in court. It is not unfair to

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expect him to abide the result. So far as concerns the judgment for the defendant, this ends the matter. It is not ended when judgment goes for the plaintiff. In that case it is said that the plaintiff's cause of action has become merged into the judgment and extinguished by it and that it is for this reason that he cannot bring the second action. This is an application of the doctrine of merger by judgment. The denial of the second action is one instance in which the doctrine is used as an explanation. But there are also other consequences said to follow which will be considered in the course of this discussion.

Probably the most complete and sympathetic, but not always consistent, acceptance of the doctrine appears in the Restatements of several subjects of the American Law Institute. Its first appearance is in the Restatement of Contracts and is in the following form

> "A contractual duty or a duty to make compensation is discharged by merger when a judgment to enforce that duty is rendered against the party subject to the duty, and in favor of the party having the correlative right, by any court having jurisdiction over the subject matter and of the parties."[1]

This Restatement evidently considers the concept of merger as having broader application than merely to judgments for there are sections also on merger by award,[2] merger by sealed instruments,[3] merger by informal writing[4] and merger by negotiable instruments.[5] There is also a general definition of merger to the effect that it consists of the substitution of a new duty for an earlier one.[6] Merger also appears to be considered as involving principles distinct from those of res judicata for the following section under the heading "Discharge by Adjudication" provides

> "A contractual duty or a duty to make compensation is discharged by adjudication where a judgment of any court, having jurisdiction over the subject-matter and of the parties, is rendered in a litigation between the party owing the duty and the party entitled to its performance

[1]Restatement of Contracts, sec. 444.
[2]Restatement of Contracts, sec. 445.
[3]Restatement of Contracts, sec. 446.
[4]Restatement of Contracts, sec. 447
[5]Restatement of Contracts, sec. 448.
[6]"A contractual duty or a duty to make compensation is discharged by merger, when the duty is replaced by a duty between the same parties, based on different operative facts, for the same performance or for a performance differing only in liquidating a duty that was previously unliquidated." Restatement of Contracts, sec. 443.

in which the existence and extent of the duty are issues that in fact were or ought to have been finally determined."[7]

It will be noted that under this section the judgment is to have the effect stated whether it is in favor of the plaintiff or of the defendant. The distinction is further developed in the following comment to this section.

"Though many cases of discharge by previous adjudication also illustrate discharge by merger, the principles are distinct, and in some cases only one of them is applicable. In merger by judgment a later and more important basis of legal duty replaces an earlier and less important one. Discharge by adjudication on the other hand is based on the policy of preventing unnecessary litigation between the same parties regarding the same subject matter. If a judgment were always compensation for such breaches of duty as have actually occurred, the rule of merger would completely cover the matter. But this supposition is not true, in some cases the rule of discharge by adjudication where it is applicable, by prohibiting further litigation, discharges pre-existing duties for which the prior judgment gave no compensation."[8]

"The greater breadth of the rule stated in the Section than that governing merger by judgment is shown by the fact that a right may be discharged by adjudication where the judgment is in favor of the defendant in a case where he is in fact subject to a duty. This may happen from the inability of the party having the right to establish its existence owing to a failure to secure evidence or to some other cause."[9]

Merger by judgment is considered to a limited extent in the Restatement of Conflict of Laws. Following the section on the effect of a foreign judgment there is a comment entitled "Merger" and another entitled "Res judicata in action in personam." In the former it is said.

"If the judgment was rendered in favor of the party who is now plaintiff at the forum, no action can be maintained upon the original cause of action, if by the law of the state where the former judgment was rendered such cause of action has been merged therein. Thus, whether the effect of the former judgment is to merge the plaintiff's cause of action is determined by the law of the state where the judgment was rendered."[10]

[7]Restatement of Contracts, sec. 449.
[8]Restatement of Contracts, sec. 449, comment a.
[9]Restatement of Contracts, sec. 449, comment b.
[10]Restatement of Conflict of Laws, sec. 450, comment f.

In the second comment the same point appears to be dealt with under the heading of res judicata

> " if by the law of the state where a valid judgment in favor of a plaintiff is rendered, the plaintiff is prohibited from maintaining a subsequent suit upon a part of the original cause of action upon which the judgment is rendered, other states will give a similar effect to the judgment."[11]

Merger appears next in the Restatement of Restitution

> "A cause of action for restitution against another is terminated by its merger in a valid judgment against the other, based upon the facts establishing the cause of action for restitution."[12]

The nature of merger is explained in the comment to this section

> " the duty to return a benefit, its value or proceeds, based upon the operative facts which led to the judgment, is ended and a new duty is created based solely upon the rendering of a judgment which is the crystallization and specific definition of the preceding duty This rule results from the desirability of not having two distinct claims against one person, based upon the same operative facts, existing simultaneously "[13]

This language would indicate that merger is but a phase of res judicata. There is, however, a separate section on res judicata which reads

> "A cause of action for restitution against another is terminated by a valid judgment on the merits in favor of the other. "[14]

This suggests a different basis for the distinction between merger and res judicata than was offered in the previous Restatements. Merger applies to judgments for the plaintiff, res judicata to those for the defendant. Both result in the denial of a second action to the plaintiff on the same cause of action.

Merger is next considered by the Restatement of Torts

> " a cause of action by one person against another for a tort is terminated by its merger in a valid judgment against the other based upon a part of that cause of action."[15]

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[11]Restatement of Conflict of Laws, sec. 450, comment g.
[12]Restatement of Restitution, sec. 145.
[13]Restatement of Restitution, sec. 145, comment a.
[14]Restatement of Restitution, sec. 146.
[15]Restatement of Torts, sec. 897. Comment b. to this section states that the rule given by the section is "an application of the general principle that where a person who has a claim against another obtains a judgment based upon the operative facts creating it, the original claim ceases to exist and in its place is a claim based upon the judgment."

The suggestion, implicit in this section, that merger does not apply when the judgment is upon the whole of the cause of action obviously was not intended. The section evidently was drawn with the question in mind which occurs when a plaintiff brings a second action on a new state of facts, which are, nevertheless, but part of the cause of action, as judicially defined, which was asserted in the first action. In the language of the courts, the plaintiff cannot thus split his cause of action. The section above states this in terms of merger. Comments to the section state the conditions which determine whether a single cause of action is or is not involved.

The same Restatement defines the doctrine of res judicata as follows.

> "A cause of action against another for a tort is terminated by a valid judgment on the merits in favor of the other in an action brought for such tort."[16]

This section appears to be confined to judgments in favor of the defendant, yet the following comment to the section seems to regard it as involving a principle applicable to judgments for the plaintiff as well:

> "The principle by which a person is denied a second opportunity to litigate the existence of a cause of action between himself and another which has once been decided in a judicial proceeding terminating in a final judgment has application to the law of torts."[17]

The latest Restatement which deals with the subject is that of Judgments. Naturally this deals more fully with the subject than any of the preceding Restatements. But the latter had set the pattern, and the pattern was adhered to. It would be unrealistic to expect the Institute to abandon a position which it had so completely and persistently followed. Three sections present the framework which is developed in detail by supporting comment. These sections read:

> "Where a valid and final personal judgment is rendered in an action to recover money, the judgment is conclusive between the parties, except on direct attack, to the following extent:
>
> (a) if the judgment is in favor of the plaintiff, the cause of action is extinguished and a new cause of action on the judgment is created,

[16]Restatement of Torts, sec. 898.
[17]Restatement of Torts, sec. 898, comment a.

(b) if the judgment is in favor of the defendant and is on the merits, the cause of action is extinguished."[18]

"The rules stated in § 45 are applicable to judgments in actions other than for the recovery of money, except that where the judgment is given for the plaintiff there is no merger of the cause of action in the judgment."[19]

"Where a valid and final personal judgment in an action for the recovery of money is rendered in favor of the plaintiff,

(a) the plaintiff cannot thereafter maintain an action against the defendant on the cause of action, but

(b) the plaintiff can maintain an action upon the judgment."[20]

The supporting comments develop the application of these sections in terms of merger or non-merger. It will be observed that this Restatement introduces a distinction which had not been made in the earlier Restatements, namely, that merger applies only when the judgment for the plaintiff is for the recovery of money The origin of this distinction will appear from later discussion. The Restatement of Judgments appears also to attempt no distinction between merger and res judicata. The principles which both include are stated under the single general heading "Former Adjudication" and both are sometimes included within a single section.[21] Evidently merger was being considered only in terms of the right of the successful plaintiff to bring another action on the same cause of action.

All of the Restatements thus accept to the full the doctrine of merger by judgment as an active and usable principle in the law They vary only as to the scope of its application and as to its relation to res judicata.

Even a casual perusal of standard texts and encyclopedias will disclose that this acceptance of merger finds ample support in judicial decisions. Judicial definitions of the doctrine tend to take on a stereotyped form which goes back to the opinion of Lord Coke in *Higgens's Case*.[22] In this case an action of debt was brought by

[18]Restatement of Judgments, sec. 45. Subdivision (c) deals with what is commonly called estoppel by verdict, namely the effect of an adjudication of a particular issue.

The comment to clause (a) states "Where a valid and final judgment for the payment of money is rendered in favor of the plaintiff, the claim is *merged* in the judgment. This means that the claim, whether valid or not, is extinguished and a new claim on the judgment is substituted for it."

[19]Restatement of Judgments, sec. 46.

[20]Restatement of Judgments, sec. 47

[21]See Restatement of Judgments, sec. 45, quoted in the text at footnote 18.

[22](1606) 6 Co. Rep. 44 b., 77 Eng. Repr. 320.

an executor and executrix upon a bond executed by the defendant to the plaintiffs' testator. As a defense the defendant pleaded that during his life the testator had brought an action on the bond and had recovered. To this defense the plaintiffs interposed a demurrer and argued that the plaintiffs had an election to sue either upon the prior judgment or upon the bond. The argument was rejected and among the reasons given by Lord Coke were the following:

> "But it was resolved, that as long as the judgment remains in force, he cannot have a new action upon the same bond, for as he who has a debt by simple contract, and takes a bond for the same debt, or any part of it, the contract is determined. So when a man has a debt on a bond, and by ordinary course of law has judgment thereon, the contract by specialty which is of an inferior nature, is by judgment of law changed into a matter of record, which is of a higher nature. 2. If he who recovers may have a new action and a new judgment he may have infinite actions, and infinite judgments to the perpetual vexation and charge of the defendant *& infinitum in jure reprobatur* 3. On every judgment the defendant shall be amerced, and if he be a duke, marquis, earl, viscount or baron, he shall be amerced to one hundred shillings, and so the defendant might be infinitely amerced on one and the same obligation, which would be mischievous, *& interest reipublicae ut sit finis litium.*"

The reasons given by the court did not rest on merger alone. Arguments favoring an end to litigation were added typical of those associated with the principles of res judicata, namely, that it is unjust to the defendant and against the interests of the state to permit continued litigation. The right to bring a second action was the specific question involved, and in such cases it is common for the courts to give both the argument of merger and that of res judicata in support of their decisions.

Lord Coke's argument on merger rested on classifying the obligation created by the judgment as of a higher order than the cause of action on which it was based. It then invoked the analogy of sealed instruments which also were regarded as of a higher order than, and hence merged, the obligations which they superseded when these were not under seal.[23] Classification of this

[23] "Owing to the peculiar sanctity attached to the use of the seal, and owing to the unusual character of the written instrument as a species of evidence, the specialty has always been considered as of a higher nature than the simple contract. Consequently where one delivers an obligation for a simple debt already owing, the latter is merged in the former and ceases to be a separate ground of action." 2 Street, Foundations of Legal Liability 9, citing Brooke Abr., tit. *Contract,* pl. 29 (29 Hen. VIII.).

character was typical of the early common law There were higher and lower forms of action.[24] There were the higher courts of the king as contrasted with the inferior or lower courts such as the county courts or the foreign courts.[25] Classifying the judgment of a court as of a higher nature was, therefore, but characteristic of the mode of legal analysis of the day The analogy to the sealed instrument seemed complete. It was the more easily resorted to since it produced the desired result of denying a second action to the plaintiff. The analogy is, of course, only a superficial one. A sealed instrument supersedes the simple contract for which it is given because this will usually accord with the intention of the parties.[26] If the intention was otherwise, as where the sealed instrument was given merely as collateral security, there was no merger even at common law [27] Merger by judgment,

[24]Walton v. Hoath, (1313-1314) 6 & 7 Edw. II., 29 Seldon Soc. 79; Year Books, (1345) 19 Edw. III., Pike's Ed., p. 66, No. 25. (writ of escheat of higher nature than assize of novel disseisin). All the courts appear to have meant in cases such as these is that some actions, those of a higher nature, were more inclusive of the issues adjudicated than others. Thus, in this sense, we might speak of ejectment as being of a higher nature than the action of forcible entry and detainer. This was not clearly perceived by Lord Coke in Ferrer's Case, (1598) 6 Co. Rep. 7 a., 77 Eng. Rep. 263, in which he says "If the demandant be barred in a real action by judgment on a verdict, demurrer, confession, etc. yet he may have an action of an higher nature, and try the same right again, because it concerns his freehold and inheritance." That the question turned on whether the same cause of action or issues were involved was pointed out in Outram v. Morewood, (1803) 3 East 346, 355, 102 Eng. Repr. 630.

[25]For this reason, the English royal courts refused to consider that there was a merger when judgment was rendered by an inferior court. See Higgens's Case, (1606) 6 Co. Rep. 44 b., 77 Eng. Repr. 320. This view was applied also to foreign courts so that a foreign judgment did not bar a second suit in England on the original cause of action. For authorities and criticisms see Piggott, Foreign Judgments (2nd ed. 1884) 27, et seq., Read, Recognition and Enforcement of Foreign Judgments (1938) 111, et seq., Goodrich, Conflict of Laws (2nd ed. 1938) 549. The same position has been taken by some courts in this country with respect to judgments of foreign countries. Swift v. David, (C.C.A. 9th Cir. 1910) 181 Fed. 828, Eastern Townships Bank v. Beebe, (1880) 53 Vt. 177, 38 Am. Rep. 665. Under the full faith and credit clause, U. S. Const., Art. IV., sec. 1, the judgments of one state have equal status with those of other states. The original ground for permitting a second suit in another state on the original cause of action is, therefore, no longer present. 2 Black, Judgments (2nd ed. 1902) sec. 864, 3 Freeman, Judgments (5th ed. 1925) sec. 1394. That there may be, however, other and constitutionally valid grounds for permitting the suit where the judgment is an equitable decree other than for the payment of money only, see footnote 41.

[26]"When a *bond* or *sealed instrument* is taken for a simple contract debt, the former is of a higher nature than the latter, and the simple contract is merged, lost, and discharged by the bond. The presumption is, that such was intended by the parties where a security of a higher nature is received, and that, too, whether it be the bond of the debtor or a third person." McNaughten v. Partridge, (1842) 11 Ohio 223, 38 Am. Dec. 731.

[27]See Higgens's Case, (1606) 6 Co. Rep. 44 b., 77 Eng. Repr. 320; Drake v. Mitchell, (1803) 3 East 251, 102 Eng. Repr. 594.

on the other hand, does not depend on, or purport to give effect to, the intention of either party but often operates to defeat it.

The legal approach which thus characterized the early common law has, of course, long disappeared. Nevertheless, courts[28] and writers,[29] as well as the Restatements, have continued to repeat the formula that a judgment merges the cause of action because it is of a higher nature.

An examination of the authorities discloses that the doctrine of merger by judgment has been used as an argument to buttress decisions reached primarily in three classes of cases. These include, first, the right of a successful plaintiff to bring another action on the same cause of action, second, the effect of a judgment in an action upon a prior judgment; and, third, the effect of a judgment against less than all of several joint obligors. As later discussion will indicate, these are not the only instances in which the doctrine has been relied upon, but they include the majority of cases which deal with the subject. In each instance the decisions which the application of merger by judgment supposedly produces have for their underlying justification reasons quite independent of the doctrine. The doctrine could be eliminated completely from our law with no other consequence than clarification of the reasons upon which the decisions invoking it actually rested.

Cases are legion in which merger is used as the justification for denying the plaintiff the right to bring a second suit on the original cause of action after having once recovered judgment upon it. This was the question before the court in *Higgens's Case.* It was the question with which the Restatements were primarily, if not wholly, concerned. The argument is that, since the cause of action is merged in the prior judgment, it is gone and there is nothing left on which the plaintiff can sue. But the doctrine contributes little in these cases. It is not necessary to engage in such conceptualistic reasoning to deny the second action to the plaintiff and it is not in reality the controlling consideration in such cases. What controls is the importance of preventing multiplicity of suits with the attendant expense to and oppression of the defendant and unnecessary labor for the courts. That these reasons are commonly added to the statement of merger[30] indicates pretty well that, of itself, the doctrine means little. If further demonstration

[28]For a recent example, see Moore v. Justices of Municipal Court of City of Boston, (1935) 291 Mass. 504, 197 N. E. 487, discussed and quoted in text at footnote 76.

[29]See 6 Williston, Contracts (rev. ed. 1938) secs. 1875, 1875E.

[30]See text at footnote 76.

is needed it appears in the cases which hold that the plaintiff cannot split his cause of action and obtain judgment for a part only and then sue again for the balance. In the large majority of these cases not a word is said about merger and the decisions are put strictly upon the necessity of avoiding excessive and unnecessary litigation.[31] That the doctrine logically applies in such cases cannot be doubted. The whole cause of action is merged in such cases although only a part of it was asserted by the plaintiff.[32]

The use of merger as a justification for denying the right of the plaintiff to bring a second action on the same claim originated in the common law courts. Denial of the right to bring a second *legal* action is well settled. When the similar effect of an *equity* decree is considered, one runs into a quagmire of confusion and conflict. To this the doctrine of merger has contributed no small part. Some of the difficulty has been occasioned by differences in views as to the nature and effect of an equity decree. Thus, the right to sue again on the original cause of action is affected by views held as to the right to bring an action upon the decree itself. Interwoven with these considerations have been conflict of laws concepts and constitutional law principles relating to the effect of foreign judgments. As if these alone did not render solution of the problem sufficiently difficult, the doctrine of merger has been thrown in with its usual effect of thoroughly obscuring the issues presented.

In order to observe the operation of the doctrine in equity cases, somewhat detailed discussion of the effect of equity decrees, particularly in depriving the plaintiff of the right to sue again on the original cause of action, seems unavoidable, notwithstanding the valuable contributions already made by others in this field. In extenuation, it may be said that the influence of the doctrine of

[31]For illustrative cases see Secor v. Sturgis, (1858) 16 N. Y. 548, Williams-Abbott Electric Co. v. Model Electric Co., ((1907) 134 Ia. 665, 112 N. W 181, 13 L. R. A. (N.S.) 529; King v. Chicago, M. & St. P Ry. Co., (1900) 80 Minn. 83, 82 N. W 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238, Pakas v. Hollingshead, (1906) 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 111 Am. St. Rep. 601, 6 Ann. Cas. 60. Thus, in the King case, supra, the plaintiff recovered judgment for injuries to his person. In the second action he sought to recover damages for injury to property.

In Minnesota, the use of the doctrine is practically non-existent. Brief reference to it was made in John Hancock Mut. Life Ins. Co. v. Meester, (1927) 173 Minn. 18, 22, 216 N. W 329.

[32]Merger is sometimes relied on in cases of this kind. See Hellstern v. Hellstern, (1938) 279 N. Y. 327, 18 N. E. (2d) 296 (first action to establish a trust in certain funds—second action for conversion of same funds denied), Magnolia Petroleum Co. v. Hunt, (1943) 64 S. Ct. 208. The section of the Restatement of Torts dealing with merger applies particularly to such cases. See text at footnote 15.

merger in these cases appears to have been only partially considered. With the Restatement of Judgments resorting to the doctrine in stating its solutions to the problems involved, such influence may assume even greater proportions than it has in the past.

That there is no merger when an equitable decree is rendered upon a cause of action has been stated in the following terms:[33]

> "Indeed, it may be stated broadly that a decree in chancery has not in itself (i.e. independently of what may be done under it) any legal operation whatever. If a debt, whether by simple contract or by specialty, be sued for in a court of law, and judgment recovered, the original debt is merged in the judgment, and extinguished by it, and the judgment creates a new debt of a higher nature, and of which the judgment is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree. Undoubtedly it has often been said by chancellors that their decrees are equal to judgments at law, but that only means that they will, to the extent of their power, secure for their decrees the same advantages that judgments have at law; it does not mean that a decree is by law equal to a judgment."

In so far as the equity court was concerned it would not permit another suit on the original cause of action. To have allowed it would have been counter to the well known policy of the court against multiplicity of suits.[34] The equity court was not, however, concerned with the use of conceptualistic arguments such as merger to strengthen its position. Its justification was simply that the defendant should not be put to unnecessary expense and trouble by more than one law suit when the whole matter could be included in one.[35]

The author of the quotation above contends, however, that so far as the law courts are concerned they would grant the plaintiff

[33]Langdell, Summary of Equity Pleading (2nd ed. 1883) sec. 43, p. 37, note 4.

[34]Story, Equity Pleading, sec. 287

[35]In Purefoy v. Purefoy, (1681) 1 Vern. 28, the bill was for an accounting by a trustee of two separate estates. The plaintiff asked leave to drop one of them. This was denied, the court saying, "it is allowed as a good cause of demurrer in this court, that a bill is brought for part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes and make a multiplicity of suits."

With the same judges and courts now commonly administering both legal and equitable relief, there is a tendency in modern cases to speak in terms of merger when considering the effect of a judgment in an equitable action. See text at footnotes 36, 40.

the right to bring a legal action on the original cause of action notwithstanding the equity decree, because the decree was only a direction to the defendant, of a personal nature, to perform his duty The legal right on which it was founded continued in existence.

Today, this view is probably not accepted to the extent of its full implications anywhere. Extensive changes have taken place in England, in most states and in the federal system so that the same court and judge now generally administer both legal and equitable relief. As a result this concept of the effect of an equitable decree is rapidly disappearing. Courts refuse to regard their judgments in equity proceedings as have a fundamentally different character than those which they render when acting in matters characterized as legal.

When the decree is for the recovery of money only it is well settled that a legal action cannot thereafter be brought on the original cause of action. In *Mutual Life Ins. Co. v Newton*[36] the plaintiff recovered a deficiency judgment in an action to foreclose a mortgage. The present action was on the bond accompanying the mortgage. Counsel for the plaintiff took the position that there was no merger of the original cause of action because an equity decree is not a judgment. The argument was rejected, the court saying

> "The doctrine of *res adjudicata* is plain and intelligible, and amounts simply to this, that a cause of action once finally determined without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding, either by the same or any other tribunal. And this is true, whether the first adjudication is in a court of law or equity If the decree is final, then its result is to merge the original cause of action."

It will be noted that the court extends the concept of merger to an equitable decree. This is a frequent tendency in this country and is, itself, an illustration that the nature of judgments in equitable actions is not regarded as different from that of judgments in legal actions. The underlying ground of the decision of the case is, however, *res judicata* which it identifies with merger.

In *Harrington v. Harrington*[37] the plaintiff had recovered a decree in Rhode Island in an equitable proceeding to establish a trust. The decree provided in part for the payment to the plaintiff

[36](1888) 50 N. J. L. 571, 14 Atl. 756.
[37](1891) 154 Mass. 517, 28 N. E. 903.

of some moneys collected by the defendant as rents and profits from the real estate involved. In the present suit, brought in Massachusetts, the plaintiff sought to obtain judgment for the same money in an action for money had and received. The equity decree was held a bar, the court stating:

> "Whether the court in that State was 'a court of law or equity, or admiralty or of probate,' the matter in the controversy and the parties being the same in this suit as in that, the judgment of that court is conclusive, and is a bar to the present action."

The result reached was the same as that reached in the *Newton Case* but without invoking the doctrine of merger.

Both of these cases involved money decrees. Can a second action be brought on the original cause of action when the decree rendered upon it is for the performance of some act other than the payment of money? Necessarily the second action would usually also be an equitable one. The Restatement of Judgments makes a distinction in such cases, stated in terms of merger,[38] and would permit the second action. There is no merger if the decree does not require the payment of money only. The contention is that this is so because an action cannot be maintained on the decree. In developing this point the Restatement says.

> "Since the original cause of action is not merged in a decree in favor of the plaintiff which is not a decree for the payment of money, the plaintiff is not thereby precluded by the doctrine of res judicata from maintaining an action at law or a suit in equity upon the original cause of action. . If the decree has not been performed, the plaintiff can maintain a suit in another State on his original claim, since otherwise he could not obtain a remedy there, because he could not enforce the decree in another suit and could not maintain an action on the decree. Where he brings an action in the same State on his original claim, he will not be precluded by the doctrine of res judicata, but the court may dismiss the action on the ground that it is unnecessary to permit the plaintiff to maintain such an action and that it would be a hardship to the defendant to subject him unnecessarily to a second action."[39]

These views raise a number of points involved in the general problem and, since the quotation affords an illustration of the confusion that merger can introduce, a closer examination of it may be justified. The first sentence assumes that some kind of

[38]Restatement of Judgments, sec. 45, quoted earlier in the text at footnote 18.

[39]Restatement of Judgments, sec. 46, comment a.

phenomenon takes place which is referred to as merger. Whether it takes place depends upon the right to maintain an action on the decree. If merger is not present, the doctrine of res judicata does not apply The Restatement was considering whether another action can be brought on the original cause of action after a decree has been rendered upon it. The quotation evidences no recognition of the fact that on that question res judicata and merger are one and the same thing. Res judicata states more directly what the court is in fact doing, namely, denying the second action. Merger is merely a mental process indulged in to justify the denial in conceptualistic terms. It describes or refers to no factual event to which one can look to ascertain its presence. The first sentence of the quotation might as well read

> "Since the plaintiff is not barred from bringing another action on the original cause of action by a decree in his favor which is not a decree for the payment of money, the plaintiff is not thereby precluded by the doctrine of res judicata from maintaining an action at law or a suit in equity upon the original cause of action."

Simply put. A plaintiff, who may sue again, may sue again.

Whether the state of authorities is such that the distinction made by the Restatement of Judgments can be said to represent a majority view is open to question. That the plaintiff may sue again on the original cause of action when the prior decree is not for the payment of money is directly contrary to *Memphis & Charleston R. R. Co. v. Grayson.*[40] In this case, a stockholders' suit was brought in Alabama to cancel a lease executed by their corporation to another, for an accounting for the use of the property under the lease, and to enjoin the issuance of certain stock in connection with the transaction. Pending this suit, a second action was commenced in Tennessee also seeking cancellation of the lease and an accounting. Judgment for the plaintiff was rendered in the latter suit and this was then asserted as a bar in the Alabama action. The defense was sustained.

> "The *gravamen* of the bill in each case, was the existence of the void leases of the M. & C. Company to the E. T., V & G. Company, possession and use by the latter of the former's property under these leases, and the indebtedness of the lessee to the lessor on account of such possession and use. The Tennessee decree determined each and all of these matters. It cancels the leases, it enforces a surrender of the property, and it settles the accounts between the parties.

[40](1889) 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69.

> After that decree, there was no lease in existence to be upheld or annulled by our court; no property of one party in the wrongful possession and enjoyment of the other, to be restored to its rightful control and use, nothing due from the E. T., V. & G. Company to the M. & C. Company, to be decreed to be paid by the former to the latter. Complainant's cause of action had been destroyed by being merged into the decree of a competent court, and there was nothing left for the Chancery Court of Madison to act upon."

Cases taking the opposite view have not been discovered. Whatever the correct rule, nothing is gained by stating it in terms of merger or non-merger. To do so only obscures the nature of the problem involved and the factors determining its solution.

The quotation under consideration from the Restatement of Judgments makes it evident that the principal concern of its authors was over the necessity of providing the plaintiff with a remedy in a foreign state. Since they regarded the right to bring an action on the decree, when not for money, as non-existent, the only alternative was to allow suit on the original cause of action. This problem is present only in the foreign state, for in the state in which the decree was rendered the decree itself can be enforced directly without a further action upon it. It should follow that the right to bring the action on the original cause of action should be confined to the foreign state. However, the doctrine of merger gives but a single answer applicable to both situations. A cause of action is either extinguished or it is not. It cannot be merged for one purpose and not for another. The quotation from the Restatement follows this reasoning through to its logical conclusion. In both states, the foreign and the domestic, the plaintiff "will not be precluded by the doctrine of res judicata" from bringing another action on the original cause of action. Evidently, for the domestic state this appeared undesirable for the Restatement adds that the courts will not permit the plaintiff to sue again because it is not necessary and is a hardship to the defendant. This appears to be nothing more than applying the principles of res judicata and withholding the name.

It may well be that the plaintiff should, in some cases at least, be permitted to sue in a foreign state on the original cause of action when it is something more than a simple money decree. It does not follow that he should be able to do so in the state where the decree is rendered. The answer might properly turn on the practicability and effectiveness of proceeding by action in the

foreign state on the decree. Decrees requiring acts or forbearance not involving the payment of money have no fixed form and often are drawn with conditions in mind as they prevail in the state in which the decrees are rendered. Such a decree might not prove suitable for enforcement in a foreign state. If so, the plaintiff might well be permitted, though not necessarily required, to sue again in the foreign state on the original cause of action.[41] These are considerations independent of the doctrine of merger, which has nothing to contribute to the solution of the problem.

Open also to question is the position of the Restatement that an action can be brought upon a judgment only if it is for the payment of money The effect is to exclude equitable decrees calling for other kinds of acts. An examination of the decisions suggests that the Restatement in this respect has not kept pace with judicial developments to date.

At common law the right to sue upon a judgment was recognized in the action of debt which, except for its earliest stages, was an action for the recovery of money due to the plaintiff. The common law rules were stated by Blackstone as follows:[42]

> "So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereon, he may afterwards bring an action of debt upon this judgment, and shall not be put upon the proof of the

[41]This would not be inconsistent with the full faith and credit clause of the federal constitution and its implementing statute. U. S. Const., Art. IV, sec. 1, U. S. Code, Title 28, sec. 687 Full recognition of the decree would be given notwithstanding suit was allowed in the foreign state on the original cause of action. The decree would be conclusive of every issue decided or which might have been decided in the first suit. The only purpose of the second action on the original cause of action would be to bring about a more complete realization of plaintiff's rights adjudicated in the first action by adapting the second decree to conditions existing in the foreign state. Resort to the original cause of action would be only for this purpose. This is consistent with Magnolia Petroleum Co. v. Hunt, (1943) 64 S. Ct. 208. In this case a Texas award of workmen's compensation was held to bar proceedings for a further award in Louisiana, since in Texas, pursuant to its statute, the award was given this effect. There is broad language in the opinion to the effect that the purpose of the full faith and credit clause is "to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other." This must be read in the light of the problem which the court was considering. There is nothing in the opinion that denies the possibility of giving different effect in a foreign state to a judgment or decree when necessary to complete realization of the rights established. That the court was considering only money judgments appears from the statement, "We are aware of no such exception *in the case of a money judgment rendered in a civil suit.*" (Italics supplied.)

[42]3 Blackstone, Commentaries, 160.

> original cause of action, but upon shewing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay it. This method seems to have been invented, when *real* actions were more in use than at present, and damages were permitted to be recovered thereon, in order to have the benefit of a writ of *capias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the statute 25 Edw. III., ch. 17.) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harrassing the defendant with the costs of two actions instead of one."

There were probably other reasons than those assigned by Blackstone for allowing the action. It has been said that the action was allowed to enable the plaintiff to recover interest on the judgment since execution on the judgment at common law was only for the principal sum.[43] The more substantial reason probably was that a writ of execution was not available after a year and a day had elapsed from the entry of the judgment. Revivor of the judgment by writ of scire facias was confined to real actions until the writ was extended by the statute of Westminster II.[44] Hence, in the remaining actions, the only means of enforcing a judgment after a year and a day was by bringing an action of debt upon it and obtaining another judgment. When the statute removed this reason by extending the writ of scire facias to all actions, it did not take away the right to bring the action of debt and it continued to be allowed.

Expressions of concern over the dangers implicit in allowing multiple judgments, similar to that of Blackstone, may be found[45] and in some states the right to bring an action on a judgment so long as the judgment can be enforced directly has been denied.[46] Thus, in *Lee v. Giles*[47] the court said.

> "The whole matter depends on the question, whether a judgment is operative for a year and a day at common law;

[43]Clark v. Goodwin, (1817) 14 Mass. 237, Carter v. Colman (1851) 34 N. C. (12 Ired.) 274, Stevens v. Stone, (1901) 94 Tex. 415, 60 S. W 959, 86 Am. St. Rep. 861.

[44]13 Edw. I Stat. 1, ch. 45.

[45]Biddleson v. Whitel, (1764) 1 Wm. Black. 506, 3 Burr. 1545.

[46]Lee v. Giles, (1830) 1 Bail. L. (S.C.) 449, 21 Am. Dec. 476; Pitzer v. Russel, (1871) 4 Or. 124.

[47](1830) 1 Bail. L. (S.C.) 449, 21 Am. Dec. 476.

> for if it is, why within that time have any other remedy? No sensible reason can be given why there should be, whilst it cannot escape observation, that it would be uselessly oppressive if there were. I can never sanction the idea that a new action should be permitted, by way of punishing the debtor for not paying his debt. There is something barbarous in it, and wholly inconsistent with the mild, benignant, and just spirit of the common law As long as the judgment is operative, the creditor has the means of enforcing payment, and if the debtor can pay, an execution is as effectual as another suit, and more expeditious."

There is considerable justification for believing that the early common law held the logical position that during the year and a day, the action of debt was not available since the judgment could be enforced by execution.[48] Most courts, however, have permitted the action on the judgment notwithstanding execution is available and ignore the possible danger that the defendant will be harassed by a multiplicity of suits.[49] The stock answer to the objections raised against this position is that the defendant can avoid all hardship by paying the obligation.[50] Evidently the consequences of this holding have not always been satisfactory for, in numerous states, statutes have been enacted restricting the right to bring the action thus authorized.[51]

With the rise of the equity court, the effect of its decree as creating a cause of action inevitably came up for decision. The

[48]See discussion of the early common law authorities in Lee v. Giles (1830) 1 Bail. L. (S.C.) 449, 21 Am. Dec. 476.

[49]Merchants' National Bank v. Gaslin, (1889) 41 Minn. 552, 43 N. W 483, Davis v. Foley, (1916) 60 Okl. 87, 159 P 646, L. R. A. 1917A 187, and note, 2 Black, Judgments (2d ed. 1902) sec. 958, Restatement of Judgments, sec. 47 (b), quoted in text at footnote 20.

[50]Ames v. Hoy, (1858) 12 Cal. 11, Simpson v. Cochran, (1867) 23 Iowa 81.

[51]The New York Civil Practice Act, sec. 484 provides

"Except in a case where it is otherwise specially prescribed in this act, an action upon a judgment for a sum of money, rendered in a court of record of the state, cannot be maintained between the original parties to the judgment, unless, either

1. Ten years have elapsed since the docketing of such judgment, or,

2. It was rendered against the defendant by default for want of an appearance or pleading and the summons was served upon him otherwise than personally; or

3. The court in which the action is brought has previously made an order granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court that personal notice cannot be given with due diligence, in which case notice may be given in such manner as the court directs."

See also 2 Mason Minn. Stat., 1927, sec. 9476, 2 Minn. Stat., 1941, sec. 549.08 (costs denied if brought without leave of court), 2 Black, Judgments (2d ed. 1902), sec. 958.

question has been completely settled, however, only with respect to money decrees. While the early view of the common law courts may have been otherwise, the modern tendency, as has already been noted, is to recognize no distinction between the character of judgments in legal actions and those in equitable suits. Hence, it is generally held that a legal action such as debt may be brought upon an equitable decree for money only.[52] The action is sustained on the ground that such a decree has the same qualities, dignity and finality as has a judgment at law and should receive the same recognition. There can be no doubt that the analogy is complete. Some respectable courts, however, deem a second suit unnecessary for the protection of the plaintiff's rights, consider it a hardship on the defendant and have refused to extend the rule, applied to common law judgments, to equitable decrees. This appears to be the English view[53] and an occasional court in this country has taken the same stand.[54] Where a legal action is brought on a foreign money decree, all courts agree that the action is a proper one.[55]

On the question whether an *equitable* action may be brought on a money decree the decisions are in conflict. In *Weidman v. Weidman*[56] the right to bring a bill in equity in Massachusetts on a New York alimony decree was denied on the ground that since a legal action was available an adequate remedy was available and

[52]Dubois v. Dubois, (1826) 6 Cow. (N.Y.) 494, and see cases collected in Note, 11 Ann. Cas. 658, 659.

[53]In Carpenter v. Thornton, (1819) 3 Barn. & Ald. 52, 106 Eng. Repr. 582, the right to an action on a decree of the chancery court of England was denied on the broad ground that a decree did not create a legal obligation. In Henley v. Soper, (1828) 8 Barn. & Cr. 16, 108 Eng. Repr. 949, a legal action on a decree of a foreign court was recognized, the court stating, "There is a great difference between the decree of a colonial court and of a court of equity in this country. The colonial court cannot enforce its decrees here, a court of equity in this country may; and, therefore, in the latter case there is no occasion for the interference of a court of law, in the former there is, to prevent a failure of justice."

[54]Boyle v. Schindel, (1879) 52 Md. 1, 7, Allen v. Allen, (1868) 100 Mass. 373; McKim v. Odom, (1835) 12 Me. 94, 104. See Pennington v. Gibson, (1853) 16 Wheat. (U.S.) 64, 79, 14 L. Ed. 847, Warren v. McCarthy, (1860) 25 Ill. 95.

[55]Henley v. Soper, (1828) 8 Barn. & Cr. 16, 108 Eng. Repr. 949; Pennington v. Gibson, (1853) 16 Wheat. (U.S.) 64, 14 L. Ed. 847, Post v. Neafie, (1805) 3 Caine (N.Y.) 22; 2 Freeman, Judgments (5th ed. 1925), sec. 1066.

[56](1931) 274 Mass. 118, 174 N. E. 206, 76 A. L. R. 1359. In White v. White, (1919) 233 Mass. 39, 123 N. E. 389, a lower Massachusetts court rendered an equitable decree on a foreign decree for alimony. Contempt proceedings were held proper for the enforcement of the Massachusetts decree.

equitable intervention was unnecessary [57] The contrary and more realistic view was taken by the Minnesota court in *Ostrander v. Ostrander* [58] The plaintiff in this case had obtained a South Dakota decree for the payment of permanent alimony The present action in Minnesota was brought "not to recover that amount as a debt by ordinary judgment and execution, but to compel its payment through whatever power our courts may have, on the equity side, to resort to sequestration, receivership, or even contempt proceedings, against defendant." The relief granted by the court was explicitly framed to give to the plaintiff all the remedies available for the enforcement of domestic decrees of alimony This was sustained for reasons which were stated by the court as follows

> "Because of the nature of defendant's obligation and its origin, the enforcement of his duty is as much in need of attention by sovereign power as though he had remained in South Dakota. Transplantation of the parties from one state to another has not reduced the obligation to the ordinary category of a 'debt of record.' Migration of the parties across a state line has wrought no change in the nature and basis of the obligation. Its purpose remains the payment of alimony needed for the support of a former wife and the child of herself and her debtor. To the ordinary mind, untroubled by legal nuances, the money due from defendant remains alimony wherever they or either may be. We prefer that nontechnical view which regards the substance of the matter as unchanged by mere removal of the debtor across a state line.
>
> "The decree ordered below is distinctly one ordering the payment of alimony to a divorced wife. It is just as much a need here of society and justice that such alimony be paid as it was in South Dakota, when the original decree was entered. Defendant's duty to plaintiff was fixed originally by the South Dakota decree. In neither ethical nor legal quality would his obligation be otherwise had it been imposed by a Minnesota judgment. The only difference is that such a judgment would be directly enforceable against him without the preliminary process of another for its enforcement. The present action is of the latter nature. Its purpose is to get a local judgment, not strictly for the enforcement *here* of the South Dakota judgment, but that, because of that decree, the duty shall be binding upon defendant here as well as in South Dakota. The mandate

[57] Accord. Davis v. Headley, (1871) 22 N. J. Eq. 115, Bennett v. Bennett, (1901) 63 N. J. Eq. 306, 49 Atl. 501, Mayer v. Mayer, (1908) 154 Mich. 386, 117 N. W 890, 19 L. R. A. (N.S.) 245, 129 Am. St. Rep. 477

[58] (1934) 190 Minn. 547, 252 N. W 449.

> enforced locally will be that of our own court. Only in that secondary sense does the court of another state, by its own process, enforce the judgment of another state."

There is substantial disagreement where the decree is for the performance of some act other than the payment of money, but the trend is to allow the action on the decree. The leading case usually referred to in this connection is *Burnley v. Stevenson*.[59] In this case a Kentucky court had rendered a decree directing the conveyance of certain Ohio lands to the plaintiff. The defendants in that action then brought the present action in Ohio to recover possession of the lands from the successors of the former plaintiffs. The latter set up the decree as a defense and this was sustained. In the course of its reasoning the court said.

> "This decree was *in personam*, and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans [the plaintiff in the original suit], was thus established by the decree of a court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it (had) become and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that court by attachment as for contempt; and the fact that the conveyance was not made in pursuance of the order, does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy."

After referring to the full faith and credit clause of the United States constitution, the court continued.

> "That this decree had the effect in Kentucky of determining the equities of the parties to the land in this state, we have already shown, hence, the courts of this state must accord to it the same effect. True, the courts of this state can not enforce the performance of that decree, by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud."

While the foreign decree was asserted only as a defense, the point is clearly made by the court that it could also serve as a basis of a cause of action. This was permitted in *Mallette v.*

[59] (1873) 24 Ohio St. 474, 15 Am. Rep. 621.

Scheerer[60] in which plaintiff had obtained an Illinois decree for alimony "to be satisfied by the defendant by conveying to the complaintant" certain real estate in Wisconsin. The defendant, instead, conveyed the land to the present defendants. The present action was brought in Wisconsin to set aside the deed and obtain a decree directing the husband to convey the real estate to the plaintiff in conformity with the Illinois decree. Relief was granted because "the plaintiff is entitled to the relief in the courts of this state of enforcing the Illinois decree by the judgment of our courts." The decision in *Ostrander v. Ostrander*[61] indicates that similar views will prevail in this state.

The contrary view is based largely on the conception of the nature of an equitable decree already discussed.[62] In *Bullock v. Bullock*[63] this was expressed as follows

> "The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or to make our decrees operate as process."

The court also referred to the long-standing view that the courts of one state could not affect or determine rights in land located in another and felt that to allow the action "would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded."

It is this view that has been adopted by the Restatement of Judgments.

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[60](1916) 164 Wis. 415, 160 N. W 182. See also Matson v. Matson, (1919) 186 Ia. 607, 173 N. W 127, Rowe v. Blake, (1893) 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45. Numerous writers favor this view. See Barbour, The Extra-Territorial Effect of the Equitable Decree, (1919) 17 Mich. L. Rev. 527, Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land, (1925) 34 Yale L. Jr. 591, Goodrich, Enforcement of a Foreign Equitable Decree, (1920) 5 Ia. L. Bull. 230; Messner, The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State, (1930) 14 Minn. L. Rev. 494, Bentley, Equity Decrees in Sister States, (1934) 8 So. Cal. L. Rev. 1, Goodrich, Conflict of Laws (2nd ed. 1938) sec. 214.

[61](1934) 190 Minn. 547, 252 N. W 449.

[62]See text at footnote 33 et seq.

[63](1894) 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528. See also Fall v. Eastin, (1909) 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N.S.) 924, 17 Ann. Cas. 853, Pound, Progress of Equity, (1920) 33 Harv. L. Rev. 420, 423.

Most of the cases dealing with the right to bring another action upon a decree have involved decrees of a foreign state. Influenced, probably, by the doctrine of merger, courts generally have not made the distinction suggested by decisions in England and in some states in this country between domestic and foreign decrees.[64] Yet, it would seem that the problem is inherently different in the two classes of cases. There is ordinarily little reason for permitting another action on the decree in the state in which it was rendered since the decree itself can be enforced there.[65] This ground for denying the action is absent when the action is brought in a foreign state. If the terms of the decree are such that enforcement in the foreign state is feasible and practicable, and it does not conflict with judicial policies such as that, possibly, which leaves the determination of rights in land to the state in which it is located, the plaintiff's right to sue on the decree should be recognized.

The second class of cases dealing with merger concerns those in which an action is brought upon a prior judgment or decree and a second judgment or decree is recovered. Assuming that such an action may be brought, the question is raised whether there is a merger in the second judgment so that the prior judgment is no longer in existence. Since the doctrine is based on the premise that merger takes place only when an obligation of a higher order supersedes one which is lower, the logical answer should be that the prior judgment remains in existence. Confining discussion for the moment to the case where the second action is in the same state as that in which the first judgment was rendered three views appear to be held. Some courts, and probably the majority, adhere to the logic of the doctrine. Merger cannot take place when a judgment is rendered upon a judgment for the cause of action is of equal dignity with the judgment rendered upon it. The prior judgment therefore remains in existence.

Various results follow In *Millard v. Whitaker*[66] the plaintiff, who had already recovered a judgment on the original judgment, was permitted to bring yet another action on the same judgment and recover still a third. "The second judgment was of no higher nature than the first, and there was consequently no extinguishment." That judgments can thus be multiplied in geometric proportions did not appear to disturb the court.

[64]See text at footnotes 52-54.

[65]But compare Rowe v. Blake, (1893) 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45, in which another action in the same state was allowed on a decree directing the sale of some real estate to enforce a lien on it. The court felt no distinction should be made between money and other judgments.

[66](1843) 5 Hill (N. Y.) 408.

Because there is no merger, the defendant is not entitled to an entry of satisfaction of the first judgment merely because a later judgment has been obtained on it.[67] Execution may be levied under the first judgment notwithstanding the existence of the second since it has not been extinguished.[68] But there is a limit. Courts have not overlooked the obvious fact that the various judgments which have been permitted, in substance represent but a single claim and hence, irrespective of how many judgments the plaintiff may have, anything which constitutes satisfaction of one of them will be held a satisfaction of the others also.[69]

In *Springs v Pharr*[70] the plaintiff held a judgment which, under the laws of the state constituted a lien on the debtor's homestead. He brought an action on it and obtained a second judgment. Preceding this, however, but subsequent to the rendition of the plaintiff's original judgment, a third party had also obtained a judgment against the debtor This was not a lien on the homestead. The debtor died leaving insufficient assets to pay both claims. The representative of the estate sold the homestead and the question was presented whether the plaintiff was entitled to priority of payment over the third party or whether he had lost his preferred status under his original judgment by obtaining a second judgment upon it. It was held that the priority continued because

> " a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a *cause of action* is merged in the judgment. Here, by virtue of the Act of 1885, the justice's judgment, when docketed, remained a lien on the homestead after the lapse of ten years, but would lose its validity as to any other property after ten years and could not be sued on after seven years. Is there any

[67]Mumford v. Stocker, (1823) 1 Cow. (N.Y.) 178, Griswold v. Hill, 2 Paine 492, 11 Fed. Cas. 63, No. 5836.

[68]Preston v. Perton, (1600) Cro. Eliz. 827, 78 Eng. Repr. 1043, Andrews v. Smith, (1832) 9 Wend. (N.Y.) 53.

[69]See Carter v. Colman, (1851) 34 N. C. (12 Ired.) 274, McLean v. McLean, (1884) 90 N. C. 530; Millard v. Whitaker, (1843) 5 Hill (N.Y.) 408, Doty v. Russel, (1830) 5 Wend. (N. Y.) 129. In Harvey v. Wood, (1830) 5 Wend. (N. Y.) 221, the recovery of costs substantially increased the amount of the second judgment. On levy of execution under the second, an amount was obtained sufficient to cover the first judgment but not the second. In the present action to revive the original judgment, relief was denied, the court saying, "The law makes the application of the money received by the plaintiffs to the original judgment, which thereby becomes extinguished. The proceedings of the plaintiffs are oppressive by thus unnecessarily accumulating costs. The effect of the argument urged upon us by the plaintiffs would be to keep alive two judgments, which might be injurious to *liens* obtained by other creditors subsequent to the first and prior to the second judgment."

[70](1902) 131 N. C. 191, 42 S. E. 590, 92 Am. St. Rep. 775.

> reason why the judgment creditor can only keep it alive and enforcible as to subsequently acquired property outside of the homestead by paying as a penalty the surrender of the priority of lien which he holds on the homestead under the first judgment? We know of none, and there is no precedent in this State to that effect."

It is evident that the court was actuated primarily by the undesirability of the practical consequences of the contrary holding. The application of the doctrine of merger produced the desired result.

The problems with which the courts were dealing in these instances are essentially unrelated to each other. The right to bring multiple suits on a judgment is one question. A wholly different question is presented in considering whether priorities are lost by obtaining a second judgment. Still another problem is involved in determining whether execution should be permitted on the original judgment. Independent consideration ought therefore to be given to each of these questions. That a plaintiff may or may not bring more than one action on a judgment should have no bearing on whether priority rights survive as against an intervening judgment. The answer to the latter question should not determine whether execution is available. Yet the doctrine of merger lumps all of these issues together and gives but a single answer.

The second view, adopted on this question by some courts, takes a position contrary to the preceding authorities and holds that a judgment for the plaintiff in an action upon a prior judgment does result in a merger. The leading authority for this view is *Gould v. Hayden*.[71] The plaintiff had obtained a judgment in Indiana which was a lien upon the debtor's real estate located there. He commenced an action in Ohio upon this judgment and recovered another judgment there. In the meantime, the judgment debtor conveyed his real estate in Indiana to a third party who brought the present suit to enjoin enforcement of the Indiana judgment against the real estate. Relief was allowed. The court reasoned

> "The judgment plaintiff, of course, controls his judgment. He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he

[71] (1878) 63 Ind. 443. The second suit was in a foreign state but the decision is clearly applicable also where the second suit is in the same state. Accord. Denegre v. Haun, (1862) 13 Ia. 240; Bertram v. Waterman, (1865) 18 Ia. 529; McDonald v. Culhane, (1940) 303 Ill. App. 101, 24 N. E. (2d) 737 (lien of intervening judgment of third party held to prevail over second judgment of plaintiff).

> may elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment, but the very freedom with which this may be done, *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition—is, to our minds, a convincing and conclusive reason why each successive personal judgment ought to and must be regarded as a complete merger and extinguishment of the preceding judgment, with all its qualities and incidents. If the precedent judgment is merged, as we think it must be, in the succeeding judgment, then it follows of necessity, as it seems to us, that the former judgment is completely extinguished. It has ceased to exist for any purpose, it can not be used again as the foundation of another action, and all its qualities and incidents are lost and swallowed up in the judgment obtained thereon."

Fear of the abuses, which complete freedom to bring repeated actions on a judgment might produce, was what led the court to its decision. The doctrine of merger was resorted to as a means of penalizing the plaintiff and thus deterring him from further actions on the judgment. To extend the penalty to instances where the plaintiff sought to enforce his rights under the judgment in a foreign state in open to question.[72]

Still a third view regards merger as logically taking place when a judgment is based on a prior judgment, but holds that there are exceptions to its application in cases where it would produce hardship and injustice. Typical is *Lawton v. Perry*.[73] In this case, after the plaintiff secured judgment on the original cause of action, the debtor died. The judgment was a lien upon the debtor's real estate. The plaintiff, instead of presenting the judgment as a preferred claim against the estate of the deceased, brought an action against the administrator of the estate and secured another judgment. This raised the question whether he had lost his preferred status and hence was compelled to share the assets of the estate in common with other general creditors. It was held that this was not the result. While the court recognized that "so far as dignity or rank as between the judgments they were the equal one of the other, for each was a judgment," and that "no new dignity was created," yet it took the position that "usually it happens that the

[72]See text at footnote 64, et seq.
[73](1893) 40 S. C. 255, 18 S. E. 861.

cause of action is so completely absorbed in the judgment that it is not competent longer to consider such cause of action apart from the judgment." But the case before the court was considered as presenting an exception on the ground that the general rule, if applied, would result in hardship.

> "Would it not be hardship to declare this judgment of Perry, trustee, obtained in 1889, to have destroyed that of 1867? It seems to us that it should fall among the exceptions to the general rule, and not affecting the general rule."

In *Gilchrist v. Cotton*[74] the plaintiff had recovered a judgment for alimony. She brought an action upon this and recovered another judgment. Subsequently the defendant was adjudged a bankrupt and after the usual proceedings received his discharge. Under the bankruptcy act a judgment for alimony is excepted from the effect of such a discharge. In determining the status of the plaintiff's claim in proceedings for the administration of the estate of the defendant after his death, the court held that the second judgment was still for alimony and was not barred by the discharge in bankruptcy. The court recognized the Indiana rule on merger as asserted in *Gould v. Hayden*[75] but asserted that "where justice requires it, a judgment will be adjudged to be an old debt in a new form, and will not be regarded as creating a new debt." Of course, the problem before the court was wholly unlike that involved in *Gould v. Hayden* and, except for the doctrine of merger, no one would have supposed that a decision in the latter case should have any bearing on the question being considered by the court.

The three views just discussed consider the doctrine of merger as it relates to judgments in actions upon judgments within the same state. More commonly the point has arisen when the second judgment is rendered in a foreign state. That there should be a distinction is not often recognized. The problem is again approached from the fruitless inquiry whether there is or is not a merger. A good example of such decisions is *Moore v. Justices of Municipal Court.*[76] The plaintiff had obtained a judgment in a Massachusetts court. He then brought an action in Maine upon this judgment and recovered another judgment there. The present proceeding was a supplementary process based on the original judgment in Massachusetts. This was resisted on the ground that the latter judgment had become merged in that rendered in Maine.

[74](1925) 83 Ind. App. 415, 148 N. E. 435.
[75](1878) 63 Ind. 443. See footnote 71.
[76](1935) 291 Mass. 504, 197 N. E. 487

The court held that the supplementary process was proper because there was no such merger.

> "The underlying principle on which the doctrine of merger rests is that a judgment is an obligation of higher quality than the original cause of action as to defenses, permanence and remedies for collection. The public welfare and the interests of parties require that there be not a repetition of the trials of the same issues. The reasoning on which the doctrine of merger rests is not applicable where an action on a judgment rendered in one State is brought in another State and a second judgment is there recovered. No obligation of stronger attributes is thus created. Commonly, there is no difference in the quality attaching to the judgments of courts of different States. They stand on the same footing in essential particulars. One has no superiority over the other, one is of as high a nature as another."

On like reasoning, it has been held that another action may be brought on a judgment in the state in which it was rendered, notwithstanding that a judgment was recovered prior thereto in another state.[77] Similarly, the judgment rendered in the second state does not bar an action on the original judgment in still a third state.[78] The existence of the judgment in the foreign state does not bar proceedings in the state of the original judgment looking to the enforcement of the judgment such as a creditor's bill to set aside a fraudulent conveyance and to subject the property conveyed to the satisfaction of the judgment.[79]

There are very substantial reasons why the plaintiff should be allowed to enforce his claim by judgments in several states. But these reasons are not to be found in considerations of merger or non-merger. When the assets of the defendant are distributed over several states or in states other than that in which the original judgment was rendered, it would seem but simple justice to permit the plaintiff to use the procedures available in each state for realizing satisfaction of his claim without being penalized in the others. One of the few decisions in which these considerations have been given recognition states them in the following language:[80]

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[77]Weeks v. Pearson, (1831) 5 N. H. 324.

[78]Lilly-Brackett Co. v. Sonnemann, (1912) 163 Cal. 632, 126 Pac. 483, Ann. Cas. 1914A 364, 42 L. R. A. (N.S.) 360.

[79]Wells v. Schuster-Hax Nat. Bank, (1897) 23 Colo. 534, 48 Pac. 809. See Bates v. Lyons, (1838) 7 Paige (N.Y.) 85. Gould v. Hayden, (1878) 63 Ind. 443, is contra to the cases cited in footnotes 76-79. The case is discussed supra in another connection. See footnote 71.

[80]Van Winkle v. Owen, (1896) 54 N. J. Eq. 253, 259, 34 Atl. 400.

In Wolford v. Scarbrough, (1929) 224 Mo. App. 137, 21 S. W (2d) 777, it was held that the allowance by a probate court of a judgment as a claim against the estate was merely a means of collecting the judgment and

"I am unable to see any reason in law or in public policy why, if A. recovers a judgment against B. in the State of New York and acquires a lien by virtue of it upon property insufficient to pay it, and immediately afterwards brings a suit on that judgment and recovers upon it in the State of New Jersey, he must, as a condition of recovering that judgment in New Jersey, lose his lien by virtue of his judgment in New York and all remedy thereunder."

Again in *Matter of Williams*,[81] in denying that a judgment rendered on a foreign decree for alimony was discharged by bankruptcy of the defendant, the court after holding that there was no merger, said.

"It may be inconvenient that two judgments should subsist in the same state against the same person on the same judgment, but no such inconvenience can exist in the case of judgments rendered in different states, and there is no sufficient reason for the application of the purely technical doctrine of merger subversive of substantial justice as it would be in such cases."

The reasons which justify permitting judgments to exist in several states on the same claim are quite absent when actions are brought upon judgments in the same state. Decisions permitting the former should not be relevant, therefore, to cases involving the latter. Likewise decisions denying the latter should not be held to bar the former. The doctrine of merger, however, is entirely blind to practical distinctions of this kind and gives but a single answer in both classes of cases.[82]

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did not result in its merger. By way of analogy the court referred to cases involving judgments of a foreign state and stateed, "courts will not go beyond the reason of the rule to hold that a judgment is merged in a subsequent judgment thereon if there is any reason why the creditor needs more than one judgment to collect his debt."

[81](1913) 208 N. Y. 32, 101 N. E. 853, 46 L. R. A. (N. S.) 719.

[82]It was the objections to local actions on judgments which led the court in Gould v. Hayden, (1878) 63 Ind. 443, to hold that a foreign judgment on an Indiana judgment merged the latter so that an intervening conveyance by the debtor of lands on which the Indiana judgment was a lien took priority over it. See text at footnote 71.

In Anderson v. Anderson, (1942) 155 Kan. 69, 123 P (2d) 315, the plaintiff recovered judgment in Kansas in a prior action for instalments due under a Colorado decree for support money for the child of the parties. The present suit was a new action in which the plaintiff sought to impress the homestead of the defendant with a trust on the ground that moneys used by the defendant to buy it should have been used to pay the support money. After holding that grounds for a constructive trust were absent, the court added the hastily considered argument that the plaintiff's cause of action was merged in the Kansas judgment. In so far as the argument has any meaning, it could only be that the plaintiff should have asserted her present claim in the first Kansas action and that she was attempting to split her cause of action by her present suit contrary to the principles of res judicata.

The third class of cases in which the doctrine of merger has been commonly invoked includes those in which judgment is taken against less than all of the obligors to a joint obligation. A good statement of the position of the courts is given in *Brady v Reynolds.*[83] After holding that a joint obligation was involved, the court continued

> "The undertaking of the Harpers, and the defendant being then regarded as joint, the principal question raised upon the appeal is susceptible of a ready solution. The payee sued the Harpers upon the guaranty, and recovered judgment. The entire contract was merged in that judgment. The defendant was not made a party to the suit, and as he was only liable jointly with the Harpers, the effect of the judgment was to relieve him of all responsibility . There is no rule better settled than that a judgment against one on a joint contract of several, bars the action against the others, even though the latter were dormant partners unknown to the plaintiff when the original action was brought.[84] When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment has passed, being gone, their entire liability is extinguished. They cannot be sued separately, for they have incurred no several obligation, they

[83](1859) 13 Cal. 31. See also Note, 1 A. L. R. 1601. In Restatement of Contracts, sec. 119 and Restatement of Judgments, sec. 101, the rules are stated without putting them in terms of merger.

The question has most commonly been considered in connection with judgments against one or more but less than all of several partners. See Mason v. Eldred, (1867) 6 Wall. (U. S.) 231, 18 L. Ed. 783, United States v. Ames, (1878) 99 U. S. 35, 44, 25 L. Ed. 295, Fleming v. Ross, (1907) 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas. 314, 2 Williston, Contracts (rev. ed. 1936) sec. 330; 2 Freeman, Judgments (5th ed. 1925) sec. 568.

In Davison v. Harmon, (1896) 65 Minn. 402, 67 N. W 1015, the plaintiff had commenced the action against both of two joint obligors. On failure of one of them to answer, he entered a default judgment against him. This was held to release the other defendant because of the resulting merger. The decision was prior to the statutes cited in footnote 91, which it probably helped to bring about.

Highly technical and complex rules prevailed where the obligation was joint and several. Thus, a judgment in a joint action against all barred further action against any obligor individually. Likewise, judgment against one obligor barred a joint action against all or the remainder. A judgment against some but less than all barred either a joint or an individual action. See Sessions v. Johnson, (1877) 95 U. S. 347, 24 L. Ed. 596; Bangor Bank v. Treat, (1829) 6 Me. 207, 2 Williston, Contracts (rev. ed. 1936) 337, Freeman, Judgments (5th ed. 1925) sec. 571. In Stearns v. Aguirre, (1856) 6 Cal. 176, a default judgment against one in an action against two joint and several obligors was held to discharge the other obligor. Merger was frequently invoked to justify these results. The comments in the text are equally applicable.

[84]Citing Smith v. Black, (1822) 9 Seargt. & Rawle (Pa.) 142, Ward v. Johnson (1816) 13 Mass. 148.

> cannot be sued jointly with the others, because judgment has been already rendered against the latter, who would otherwise be subject to two suits for the same matter."

Standing alone, this would appear to give the doctrine of merger substantial force on its own accord. But, considered with other well settled rules governing joint obligations, it seems evident that merger played but a minor role in the development of the principles stated. The common law sought to give effect to the policy that a joint promise of several persons should be treated as far as possible as the single obligation of all and the individual obligation of none of them. Hence, all had to be included as parties to the action.[85] A release of any released them all.[86] It was but a corollary of this policy that any judgment on the obligation must be against all of the obligors. To give separate judgments against the different parties would be at variance with the singleness of the obligation. "The liability being joint, the action and judgment must be of the same nature.[87]

The policy which prescribed this result was of independent and early origin. Professor Williston believes that it was suggested by the analogy to joint estates in real property and was first applied to joint covenants.[88] But merger came in as a useful tool for the development of the policy. Res judicata could hardly be appealed to as a reason for denying an action against the remaining obligor for he had not been a party to the first action. It was no hardship to him to be subjected to the suit. The doctrine of merger, however, applied neatly to the situation. With the cause of action merged in the first judgment, there was nothing left with which to sue the remaining obligor.

Controlling in these cases, then, is not any concept of merger but the insistence of the courts that a joint obligation be kept joint in the judgment rendered upon it. When it has been felt that the policy ought not to be applied, merger has not been allowed to stand in the way. In *Crehan v. Megargel*[89] the joint obligors were in different states so that it was not possible to sue them all in one action. It was held that a judgment against those in one state did not prevent an action against the others located in other states. Note the following language.

> "This rule of merger of joint obligations is a technical

[85]Chitty, Pleading, 42.
[86]2 Williston, Contracts (rev. ed. 1936) sec. 333.
[87]Warren v. Rickles (1924) 129 Wash. 443, 225 Pac. 422.
[88]2 Williston, Contracts (rev. ed. 1936) sec. 318.
[89](1922) 234 N. Y. 67, 84, 136 N. E. 296.

> one inherited from the common law, which often has been productive of injustice and which is enforced by courts with more or less restlessness and repugnance. Whatever the origin of the rule, it is qualified today by the principle of election, it being held that where a creditor holding the joint obligation of several parties proceeds to recover judgment against part of them it is evidence of a choice to thus hold part and let the others go. Therefore, various exceptions have been engrafted upon the rule to the effect that when the action of the creditor is controlled by circumstances which negative any idea of an election he will be exempted from the effects of the judgment as a merger.[90]
>
> "Whatever course of reasoning may have been adopted in various decisions, it is in accordance with this rule that it has been held in many jurisdictions that where a creditor bringing suit upon a joint obligation is unable to get service upon some of the obligors because they are beyond the jurisdiction in which he is acting, his judgment there recovered will not be regarded as a bar against the obligors not served, when he is able to obtain jurisdiction of them in some other forum."

Whatever the artificiality of some of the reasoning, the significance of it is that the doctrine of merger, which was so readily invoked to support the general rule, was with like readiness discarded when the court felt that the underlying considerations required a different result.

Today, in many states, this problem is largely one of historical interest only Statutes have been enacted abrogating the common law rules stated above.[91] With them goes the effect of merger in these cases. It never had any force anyway Its main effect was to obscure the real reasons for the consequences which it purported to produce.

The three major classes of cases discussed in the preceding paragraphs, namely, those dealing with the right to bring another suit on the original cause of action, those considering the effect of a judgment in an action upon another judgment, and those involving judgments against less than all of several joint obligors, are the principal cases in which the doctrine of merger has been invoked. It is believed they justify the conclusion that the doctrine has been of little or no value in offering any real solution to the specific problems presented by them and that the real grounds of

[90]Citing U. S. Printing & Lith. Co. v. Powers, (1922) 233 N. Y 143, 134 N. E. 225.

[91]For summary of these statutes see 2 Williston, Contracts (rev. ed. 1936) sec. 336. See 2 Mason Minn. Stat., 1927, sec. 9411, 2 Minn. Stat., 1941, sec. 548.20.

decision lie in considerations which the doctrine entirely ignores.

The doctrine is not, of course, confined to these instances. Logically, it postulates all the consequences incident to the disappearance of the cause of action. But other instances in which the doctrine is applied only confirm the conclusion already reached. Thus, if an action is brought upon a cause of action which abates upon the death of a party, there is no abatement if judgment is recovered by the plaintiff before the death occurs. It is said that the cause of action is merged in the judgment, "which has all the attributes of a judgment in actions *ex contractu*."[92] The latter, of course, survive. All that is involved is the question whether the policy of regarding a cause of action at an end with the death of either party, which prevails in certain classes of cases, applies after judgment is rendered. The reasons for the answer will not be found in the empty words of merger.

A debt upon which a judgment has been rendered has been held not to be subject to garnishment in an action against the judgment creditor in another state by a third party.[93] This was put upon the ground that the debt is merged in the judgment and so is no longer in existence. The underlying reasons, however, are practical ones. In the first place, relitigation of the debt should not be permitted in the garnishment proceedings. The debtor's liability has been fixed by the judgment. Secondly, the foreign court is not in a position to stay process upon the judgment pending the disposition of the garnishment proceedings. To allow the judgment would, therefore, expose the judgment debtor to the risk of double liability, or at least difficulty and inconvenience in avoiding it.[94]

[92]Fowden v. Pacific Coast Steamship Co., (1906) 149 Cal. 151, 154, 86 Pac. 178, Ahearn v. Goble, (1932) 90 Colo. 173, 7 P (2d) 409; Carr v. Rischer, (1890) 119 N. Y. 117, 124, 23 N. E. 296. See Vitale v. Duerbeck, (1936) 338 Mo. 556, 571, 92 S. W (2d) 691, stating, "A judgment is a debt, a property right which goes, upon the owner's death, to his personal representative regardless of what may have been the cause of action upon which it was obtained."

The case last cited illustrates some of the artificiality of reasoning to which the doctrine of merger can lead when the court says: "When a judgment is affirmed by an appellate court, the cause of action which became merged in it, when it is rendered, merely remains merged therein. When a judgment is reversed, it ceases to exist, and the merger is terminated because there remains nothing in which the cause of action could be merged. The reversal is really a determination that it was never properly merged because of prejudicial error in rendition of the judgment, and therefore, it reverts to its original status of merely a cause of action."

[93]Detroit F & Marine Ins. Co. v. Stewart, (1916) 123 Ark. 42, 184 S. W 438, Tourville v. Wabash R. R. Co., (1899) 148 Mo. 614, 50 S. W 300, 71 Am. St. Rep. 650, aff'd Wabash R. Co. v. Tourville, (1900) 179 U. S. 322, 21 S. Ct. 113, 45 L. Ed. 210.

[94]For these reasons the judgment also is not subject to garnishment. See Drake, Attachment (7th ed. 1891) sec. 625.

Merger has been used in considering the effect of an assignment for collection which had been given by the holder of a claim.[95] The assignment included authority in the assignee to make a settlement. It was held that the authority did not extend to a judgment obtained by the assignee on the claim. This was put partly on the ground that the claim assigned came to an end by merger in the judgment, but the real issue before the court was the determination of the scope of the authority conferred by the assignment. Again, a statute prescribing the mode of assignment of a cause of action was held not to apply to an assignment of the judgment on it because, in part, "all rights of the litigants are merged in the judgment and such judgment is assignable without" compliance with the statute, but the real ground of decision was "that the statute was intended to regulate assignments of causes of action after suit and before judgment."[96] Merger has also been used in determining the applicability of a statute of limitations.[97] The rule followed in the state in which the question arose was that the running of the statutory period on actions on county warrants was suspended by absence of funds in the county treasury It was held that this rule did not apply to a judgment on the warrants, because the cause of action to which the rule applied was merged in the judgment. It is evident that practical considerations might easily have weighed with the court in favor of the decision rendered.

A case of more than passing interest is *Williamsburgh Savings Bank v. Bernstein*[98] in which the doctrine of merger was used to justify the denial of the right to an action of interpleader. Money had been deposited by a deceased party during his lifetime with the bank in trust for Y X, a third party claiming the money, commenced an action against the bank and Y to recover the account. The bank disclaimed any interest in the controvery Y interposed a counterclaim against the bank and obtained judgment. X, after securing appointment as administrator of the estate of the deceased depositor, then brought an action as such against the bank and Y to recover the account for the estate. The present action by the bank followed in which X and Y were interpleaded and in which the bank obtained an order restraining Y from enforcing his judgment pending the outcome of the action. On appeal it was

[95]Titus v. Miller, (1942) 132 N. J. Eq. 541, 29 A. (2d) 550.

[96]Pigford Grocery Co. v. Wilder, (1917) 116 Miss. 233, 76 So. 745.

[97]City of Harper, Kan., v. Daniels, (C.C.A. 8th Cir. 1914) 211 Fed. 57, 129 C. C. A. 242.

[98](1938) 277 N. Y. 11, 12 N. E. (2d) 551.

held error to grant this order. Merger was one of the principal reasons:

> "The cause of action which [Y] had on her counterclaim in the first above-mentioned action arose out of the contract of the bank under which it agreed to pay the amount of the deposit to the one entitled thereto. That cause of action, embracing the claim to the deposit, ripened into and was merged in the judgment procured by her in that action. . . . No longer did the relation between [Y] and the bank rest upon a contract engagement between the parties or their privies, for the contract relation involving mutuality had ceased. A new and different obligation on the part of the bank arose whereby the law implied a promise on the part of the bank to pay. The right of [Y] to receive payment of an account as a depositor or as a *cestui que trust* had ceased. Her claim against the bank became that of a judgment creditor. Such rights or obligations upon entry of judgment became final."

After pointing out that for interpleader the conflicting claims must be to the same thing, fund, debt, or duty the court continued.

> "It is here alleged that the adverse claims of defendants are to the account and deposit. So far as [Y] is concerned there is no account or deposit. The subject-matter of the action has disappeared. It is not alleged, nor could it be alleged and successfully established, that there are adverse claims to the judgment as between the defendants."

The point before the court, which appears neither complex or difficult of solution, is completely obscured by the argument based on merger. The liability of the bank to Y had already been adjudicated. The principles of res judicata forbid permitting the question to be relitigated, by interpleader or otherwise. Liability to the estate being the only issue open to dispute, there was no basis for interpleader. Merger only confused the problem. It does not accord with the facts to say that the parties after Y's judgment were not making claim to the same thing or fund. Both parties were claiming the money deposited in the bank. The claim of Y is still the same, the only difference is that the judgment established its validity so that the bank no longer could question it and makes available means for its enforcement.

The discussion thus far illustrates how varied the problems are which the doctrine of merger can be made to answer and how devoid it is of pointing to the controlling factors which determine their solution. When one turns to the cases in which the application of the doctrine is denied when logically called for, the attempt

to find any content in it proves even more futile. A leading author of a work on the subject states a well recognized qualification of the doctrine in the following, frequently quoted language:[99]

> "The doctrine of merger is calculated to promote justice and will be carried no further than the ends of justice require. The judgment does not annihilate the debt. The essential nature of the cause of action remains the same. The law of merger does not forbid all inquiry into the nature the cause of action. If the prevailing party was entitled to certain privileges, or exemption from certain burdens, under his contract he may be entitled to the same privileges and exemptions under his judgment. Whenever justice requires it, the judgment will generally be construed not as a new debt but as an old debt in a new form."

This principle is commonly applied to give to the judgment the preferred status which the original cause of action had. Thus, if the cause of action is not subject to discharge by bankruptcy of the debtor, the judgment thereon is likewise not discharged.[100] In a leading United States Supreme Court decision, the court said:[101]

> "The argument is that the judgment now existing against Boynton is not the debt that existed at the time bankruptcy proceedings were initiated, that by the change of character of the debt from an ordinary claim or obligation to a judgment of a court of record it ceased to be the same debt and became a new and different debt as of the date of the judgment.[102] But this court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before, that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still

[99]2 Freeman, Judgments (5th ed. 1925) sec. 550. Quoted with approval in State v. Citizens State Bank, (1927) 115 Neb. 593, 214 N. W 6, incorporated as part of the opinion in Gould v. Svendsgaard, (1919) 141 Minn. 437, 170 N. W 595, cited in Cobbey v. Peterson, (1931) 89 Colo. 350, 3 P (2d) 298.

[100]Boynton v. Ball, (1887) 121 U. S. 457, 7 S. Ct. 981, 30 L. Ed. 985, Woehrle v. Canclini, (1910) 158 Cal. 107, 109 Pac. 888, stating, "It certainly would be a somewhat absurd situation if the person having a claim for such willful and malicious injuries who had procured a legal adjudication thereof occupied a worse position under the Bankrupt Act, than one who had not procured such a judgment."

[101]Boynton v. Ball, (1887) 121 U. S. 457, 7 S. Ct. 981, 30 L. Ed. 985.

[102]Compare Restatement of Judgments, sec. 45, quoted in text at footnote 18. The section is reconciled with the principle discussed in the text in the following manner: "Although by the judgment the original cause of action is extinguished and a new cause of action is created, advantages to which the plaintiff was entitled with respect to the original cause of action may not be destroyed by the judgment," Restatement of Judgments, sec. 47, comment d.

remains the same debt on which the action was brought in the state court and the existence of which was provable in bankruptcy."

A preference given by state laws to premiums due for workmen's compensation insurance is retained notwithstanding they have been reduced to judgment.[103]

There are other instances also in which merger has not been permitted to impose a harsh and unjust result and which do not involve the preferred status of a claim. Where judgment is rendered against a principal and his guarantor on a note and mortgage, which the guarantor pays, he is entitled to an assignment of the note and mortgage and the principal debtor cannot successfully contend that their assignment is impossible because they have become merged in the judgment which was paid.[104] The right to set off a claim against the assignee of a cause of action against the defendant is not lost by obtaining judgment on the claim in an independent action on it subsequent to plaintiff's assignment. The argument that the claim was merged in the judgment and so cannot be used as a set off and that the judgment came into existence after the assignment and so also cannot be used is untenable.[105] When parties to an action settle the controversy and a judgment for the amount agreed on is entered in favor of the plaintiff, the lien of the plaintiff's attorney on the cause of action is not lost by merger.[106] Judgment for an attorney's services does not so merge the cause of action that he loses his lien on funds deposited in court in the course of the action.[107] All of these cases were decided on the ground that, in the interests of justice, merger, which called for the contrary decision, will be ignored and the judgment construed as a new form of the old debt.

State v. Citizens State Bank[108] bears out the same point and makes interesting comparison with *Williamsburgh Savings Bank*

[103]In re Williams H. Deason & Co., (C.C.A. 7th Cir. 1927) 19 F (2d) 275.

[104]Cobbey v. Peterson, (1931) 89 Colo. 350, 3 P (2d) 298, stating, "It would be a rare application of the principle invoked to say that the guarantor of a note upon being required to pay a judgment given against him thereon should thereby suffer the loss of his universally conceded right to pursue the primary debtor." Accord. Saieed v. Abeyounis, (1940) 217 N. C. 644, 9 S. E. (2d) 399.

[105]Gould v. Svendsgaard, (1919) 141 Minn. 437, 170 N. W 595.

[106]Byram v. Miner, (C.C.A. 8th Cir. 1931) 47 F (2d) 112.

[107]American Automobile Ins. Co. v. Niebuhr, (1938) 124 N. J. Eq. 372, 2 A. (2d) 46, stating, "The doctrine of merger arises out of the quality of a judgment which renders it conclusive; to permit a second suit on the original cause of action would be treating it as still open to controversy... The doctrine of merger is not pushed to extremes."

[108](1927) 115 Neb. 593, 214 N. W 6.

v. Bernstein.[109] A state law created a guaranty fund for the protection of depositors in banks within the state. A depositor commenced an action against a bank on his deposit and recovered judgment. It was argued that by this he lost his status as a depositor and became merely a judgment creditor and hence not within the protection of the guaranty fund. After pointing out the "anomalous" and "farcical" situation which this would produce by permitting unscrupulous bankers to defeat protection of the guaranty fund by denying payment and forcing legal action, the court refused to apply the doctrine of merger and held that the depositor, notwithstanding the judgment, continued to remain so.

None of these decisions denying the application of the doctrine can be questioned. What is open to question is the doctrine itself which has to be repudiated in order to avoid results which are unjust, anomalous and farcical. One may also legitimately ask what becomes of a doctrine whose applicability must itself in each instance be tested by the desirability or justice of the results which it produces. Is it not the elements which make up the desirability or justice, rather than the doctrine, which determines the course of the decisions? It is these that should be stated and made the basis of the controlling principles of law which are enunciated, and the doctrine of merger should be eliminated and forgotten.

Since the doctrine of merger by judgment is based on no reality, some of the decisions have produced opportunities for interesting dialectical acrobatics. It has been held that a judgment on a note secured by a mortgage extinguishes the note but the debt remains in the form of the judgment and continues to be secured by the mortgage. Hence a further action to foreclose the mortgage is proper.[110] Notwithstanding the general rule followed in some states that an amendment of the complaint cannot introduce a new cause of action, the plaintiff may amend from a cause of action on a note to one on a judgment on the note.[111] Evidently merger is nothing which inheres in a judgment for the parties may agree that the judgment for the plaintiff shall not constitute

[109](1938) 277 N. Y. 11, 12 N. E. (2d) 551. See text at footnote 98.

[110]Rossiter v. Merriman, (1909) 80 Kan. 739, 104 Pac. 858, 24 L. R. A. (N. S.) 1095.

[111]Teberg v. Swenson, (1884) 32 Kan. 224, 4 Pac. 83. Contra. Green v. Starr, (1880) 52 Vt. 426. See Schroll v. Noe, (1927) 297 S. W 999, aff'd on certiorari in State v. Cox, (1929) 323 Mo. 520, 19 S. W (2d) 695, holding that both may be alleged in the alternative. At common law both the judgment and the cause of action on which it was based could be joined by separate counts in one declaration. Downer v. Shaw, (1851) 23 N. H. 125.

a merger.[112] Another action will also be permitted on a portion of a cause of action not included in the first action in cases where its exclusion was induced by the fraud of the defendant.[113] It is not necessary to vacate the judgment and restore the cause of action. If the defendant fails to raise the proper objection, he may find two judgments against him on the identical cause of action,[114] a logical impossibility if merger had any meaning. Attempting to give it meaning in this connection produced some extraordinary judicial analysis in *Price v. First Nat. Bank.*[115]

Price had been indebted to the defendant Bank on some notes which were secured by a trust deed on certain real estate. These notes were later renewed and as additional security a mortgage was given on Price's homestead. The renewal notes not being paid, the Bank brought two actions. The first was on all of the notes and foreclosure of the mortgage on the homestead was asked for. A personal judgment was secured together with a decree of foreclosure of the mortgage. A foreclosure sale was had, the homestead was purchased by the Bank and the usual deed was executed to it. In the second action, brought at the same time, some but not all of the notes were sued upon, a personal judgment was sought and, in addition, foreclosure of the trust deed was asked. After judgment was rendered in the first action, the second action was tried, judgment was rendered for the amount of the notes included in this suit, foreclosure of the trust deed was decreed and the property ordered sold. In the present action Price sought to set aside the deed to the homestead executed in the foreclosure proceedings under the judgment in the first action. He was held entitled to the relief asked in consequence of the judg-

[112]Frick Co. v. Rubel Corporation, (C.C.A. 2nd Cir. 1933) 62 F. (2d) 768, stating, "The first judgment might indeed have merged this cause of action, except for the stipulation, for ordinarily a party may not split his claim. However, there is no objection to an agreement that the first judgment shall not be a merger, the purpose of the doctrine being only to avoid the vexation of two suits when one will serve." Compare Woods v. Locke, (1930) 49 Ida. 486, 289 Pac. 610.

[113]Vineseck v. Great Northern R. Co., (1917) 136 Minn. 96, 161 N. W 494, 2 A. L. A. 530 and note; State ex rel. White Pine Sash Co. v. Superior Court, (1927) 145 Wash. 576, 261 Pac. 110; White v. Adler, (1942) 289 N. Y. 34, 43 N. E. (2d) 798, 142 A. L. R. 898 and note. This view is criticized in 2 Freeman, Judgments (5th ed. 1925) sec. 554, as a collateral attack on the judgment. This author's belief is that the proper remedy should be by application in the first action to have the judgment set aside. This is but an attempt to give substantive effect to the doctrine of merger and requires a procedure much more cumbersome and indirect than that resulting from the prevailing view.

[114]Daniels v. Runyons (1915) 164 Ky. 309, 175 S. W 358. See Doerr v. Schmitt (1941) 375 Ill. 470, 31 N. E. 971.

[115](1901) 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419.

ment rendered in the second action. The court reasoned

> "While the several causes included in the first action became merged in the judgment therein rendered, and thereby extinguished, the debt still existed in that judgment, and the second judgment, being for the debt included in the first judgment, is a total extinguishment of that judgment. The judgment itself having been thus extinguished, there was nothing to support the order of sale, and the sale conveyed no title."

The court's reasoning appears to be that the life and validity of the first judgment depended on the cause of action which had become merged into it. The second judgment extracted the cause of action from this judgment and left it a lifeless form incapable of sustaining the sale which it ordered. Why the merger in the first judgment did not leave the second without its necessary prop is not explained. The primary factor prevailing upon the court was the danger, which the court believed existed, of harm to the defendant in having two judgments against him on a single obligation.[116] It failed to recognize that this situation is not uncommon[117] and that the defendant could have avoided it by taking proper objection to the pendency of the second action, or, after the first judgment was rendered, pleading it as a bar to the second suit.

Finally, as if to underline the vacuity of the whole doctrine of merger by judgment, it has been held that a judgment may become merged in an obligation of a lower quality In *News-Dispatch Printing & Audit Co. v. Board of Com'rs*[118] the plaintiff had obtained judgment against the defendant county The county issued certain bonds to pay the judgment and issued also some warrants to the plaintiff. The plaintiff failed to receive the warrants intended for him. He thereupon brought mandamus to compel the county to pay the judgment. Relief was denied, for, says the court

> "When the funding bonds were issued, plaintiff's judgment thereby became merged into the bonds. When the funding bonds were issued and sold, and thereby became an

[116]"It is claimed by counsel for defendant in error that the judgment debtors in this case were amply protected. We find nothing in either judgment that protects them. In the first action the defendant in error recovered a judgment for $16,728.09 and costs. This was the total amount of the Prices' indebtedness. In the second action it recovered another judgment in the sum of $11,047.84 and costs. Both of these judgments were liens, so far as the record is concerned, on the property of the defendants, and were subject to enforcement. To say that the judgment debtor could have gone into court and pleaded the satisfaction of one as the satisfaction of both, is not a protection."

[117]It exists whenever an action is allowed upon a judgment and it is held that no merger results. See discussion supra, footnote 66 et seq.

[118](1927) 130 Okla. 152, 266 Pac. 437

> outstanding obligation against the county, the judgment no longer existed as an entity aside from the bonds. The facts that plaintiff's judgment was not paid out of the proceeds did not have the effect to revive the judgment which passed out of existence, as such, upon the issuance of the bonds."

One might suppose that a concept so devoid of meaning, contributing so little to the development of the law and subject to such numerous deficiencies would be headed for ultimate discard. It is too much to expect. The doctrine of merger by judgment has had, if not the understanding, at least the recognition of eminent judges and writers. Courts have paid homage to it for centuries. It now has been sanctified by the American Law Institute. Decisions and discussions in terms of merger will undoubtedly continue. But, if the doctrine is to remain with us, it should not be too much to expect of those that use it, that it be used with an understanding of its limitations. It should not be permitted to obstruct from view the real issues present for determination. Neglect of vital considerations which should control decisions should not be indulged by succumbing to the enticing simplicity of solution which the doctrine appears to offer. This much one should be entitled to ask. But, if these precautions should be observed, we would very probably hear no more of the doctrine.