McGEE *vs.* OVERBY ET AL.

Joint trespassers may be sued separately, and recovery had against each; and judgment against one cannot be pleaded in bar of a recovery against another, unless the judgment has been satisfied, or at least an execution issued.

To constitute a good plea of former recovery, it is not necessary to show that the same action, in form, has been previously prosecuted against the party, but it is essential, in order to constitute a bar, that the recovery set up should be founded upon the identical cause of action.

This was trespass against defendants for taking and converting the mule

of plaintiff. Defendants pleaded that they took the mule, and sold it to one J., against whom plaintiff brought replevin, in the detinet, and recovered judgment for the mule, and damages for its detention: HELD, On demurrer, that the plea was not good; that the original taking of the mule by defendants, and its detention by J., to whom defendants sold it, and who was not a joint trespasser with them, were separate and distinct causes of action.

Appeal from Johnson Circuit Court.

This was an action of trespass by Newman McGee against William Overby, Daniel J. Matthews, and Lemuel H. Matthews, determined in the Johnson Circuit Court, at the September term, 1850, before the Hon. W. W. FLOYD, Judge.

There were two counts in the declaration. The first charged that defendants, on the last day of January, 1850, at, &c., with force and arms, took the brown black mule of said plaintiff, of great value, to wit: of the value of $125, and carried the same off, and converted it to their use, &c.

The second count was the same as the first, except that it charged the trespass to have been committed on the last day of March, 1850, instead of the last day of January.

The defendants filed a special plea, as follows:

"Defendants come, &c., and say *actionem non,* because they say that, heretofore, to wit: on the first day of June, A. D. 1850, at, &c., they, the said defendants, took the said mule, in the said plaintiff's declaration mentioned, out of the possession of him the said plaintiff, and afterwards, to wit: on the day and year aforesaid, at the county aforesaid, they, the said defendants, sold the said mule to one Absalom B. Joiner: and, the said defendants further aver that, afterwards, *to wit*: on the day and year aforesaid, the said plaintiff commenced his certain action of replevin in the detinet against the said Joiner for the recovery of the same mule in the said declaration mentioned in the Circuit Court of said county of Johnson; and that afterwards, *to wit*: on the 4th day of September, 1850, and at the September term of said Court in that year, such proceedings were had in the said action of replevin, that the said plaintiff, by the consideration and

judgment of our said Circuit Court, recovered judgment against the said Joiner for restitution of the said mule, and for the sum of six dollars and fifty cents for his damages, caused by the detention of said mule, together with all his costs in that behalf, laid out and expended, as by the record and proceedings thereof remaining of record in our said Court appears. And the said defendants further aver that the said plaintiff's action of trespass and the said action of replevin, wherein a recovery was had as aforesaid, were simultaneously instituted, the one for the taking and the other for the detention of the same mule, and so the said defendants aver that the said plaintiff hath, in his said action of replevin, recovered against the said Joiner, his damages by him sustained by reason of the several supposed trespasses in his said declaration set forth; and this, they are ready to verify, &c.

To this plea, plaintiffs demurred on the grounds: 1st, that the recovery set up in the plea was for the detention of the mule, whilst the present action was for the original taking: 2d, that it was not shown by the plea that Joiner was a joint trespasser with defendants in taking said mule, &c.

The court overruled the demurrer, and plaintiff rested, and permitted final judgment to go for defendants, and appealed.

E. H. ENGLISH, for the appellant. The plea is clearly bad, for even if it had shown that Joiner was a joint trespassser with the defendants, still a recovery against him would be no bar to the present action, unless satisfaction had followed the judgment, or at least an execution had been issued on it. (*Livingston v. Bishop, 1 John. Rep.* 290.) But the plea does not show that Joiner was sued for the same trespass: on the contrary, the action and recovery against him were for the property and damages for the detention; and the present is for damages for the original taking. A plea of former recovery must show that the matter of the second suit was directly in issue in the former suit, and that the verdict and judgment were directly upon the points sought to be litigated in the second suit, and of necessity involved their considera-

tion and determination. *McKnight vs. Dunlop,* 4 *Barber* (*N. Y.*) *Rep.* 36.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The legal sufficiency of the plea interposed by the appellees, is the only matter presented by the record for the consideration and decision of this court. The plea admits the taking of the property mentioned in the declaration, but, by way of a bar to this suit, sets up that they afterwards sold it to one Absalom B. Joiner, against whom the plaintiff subsequently brought his action of replevin in the detinet, and recovered a judgment for the restitution of the said property and for the sum of six dollars and fifty cents for his damages caused by its detention, together with all his costs in that behalf laid out and expended. This plea does not contain such matter as would constitute a valid bar to the present action of trespass, if it were even in proof that the defendant in the replevin suit and the defendants here were all liable as joint trespassers in the original taking. If they had all united in the original taking, they could still have been sued separately and separate recoveries had against each, and one judgment could not have been pleaded as a bar to a suit against the other defendants. Where a recovery has been had against a joint trespasser, there must, at least, be an execution thereon, and that may be deemed an election by the plaintiff *de melioribus damnis,* and sufficient to conclude him. This is the doctrine laid down by the Supreme Court of New York, in the case of *Livingston vs. Bishop and others,* (1 *John. R.* 290,) where the authorities are cited and fully discussed. It is conceded that it is not necessary to show that the same action, in form, has been previously prosecuted against the party, but it is essential, in order to constitute a bar, that the recovery set up should be founded upon the identical cause of action. What is meant by the same cause of action, is, where the same evidence will support both actions, although they happen to be grounded on different writs. See *Rise vs. King* (7 *John. R.* 19,) and *Johnson vs. Smith,* (8 *John. R.* 383,) in the latter of which cases it was said, "The former suit

was for cutting and carrying away wheat, and was for the same cause of action, and though the former action was denominated by the justice an action of trespass on the case, and this was trespass, it did not alter the application of the rule, which depended not upon the identity of action, but upon the same proof in both cases." Let us test the case before us by the rule here laid down, and see whether the former recovery set up in the plea can be permitted to prevail as a bar to this suit, or, in other words, was the proof the same in both cases. The action in which the recovery relied upon was had, was replevin in the detinet, and prosecuted against the vendee of the present defendants. It is admitted that the mule, which was in controversy in both suits was one and the same, yet it cannot be properly said that each case involved precisely the same points, and that the proof was necessarily the same. If the plaintiff had instituted his action of replevin in the detinet against the present defendants, thereby waiving the tort of the original taking, and had prosecuted his suit to final judgment, there can be no doubt but that such judgment would have been a complete bar to the present action. But the state of case is wholly different when the recovery is had against a stranger, as he was not guilty of any wrong in the original taking, and consequently there was none for the plaintiff to waive. The plaintiff's cause of action against the present defendants was complete the moment the trespass was committed, and it was not destroyed, or in any wise affected, by the sale and transfer of the property to a stranger. If the property has been restored to the plaintiff, either by the voluntary act of the defendants, or by means of a suit prosecuted against their vendee, it is manifest that he cannot recover its value in this action; and that evidence of such restoration would be admissible for the purpose of mitigating damages. True it is that the plea avers that the recovery in the replevin suit covers all the trespasses complained of in this declaration, yet such averment cannot aid the plea, as the question of the tortious taking was not involved in that suit; and consequently if damages were recovered for such taking, such recovery cannot relieve these defendants from their respon-

sibility. We are satisfied, therefore, the plea interposed by the defendants in this case is wholly insufficient as a bar to the present action, and that consequently the demurrer to the same ought to have been sustained.

For this error, therefore, the judgment of the Johnson Circuit Court is reversed, annulled, and set aside, and the cause remanded, with instructions to be proceeded in according to law and not inconsistent with this opinion.