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IS INSOLVENCY ALONE SUFFICIENT TO GIVE
EQUITY JURISDICTION?*

KENNITH A. HOWE†

As indicated by the historical development of the court of chancery,1 the general principle is that equity has jurisdiction where an adequate remedy cannot be obtained in the common law courts. The rule is generally stated in the negative form that equity will not entertain jurisdiction where there is an adequate remedy unless it is shown that there is some feature peculiarly within the province of a court of equity, or unless jurisdiction has been conferred by statute.2 It is well settled that the existence of a remedy at law does not deprive equity of jurisdiction unless such remedy is adequate.3 However there is no hard and fast rule as to what constitutes adequacy. Various text-writers4 and courts have formulated two tests to determine the adequacy of the legal remedy. On the one hand it has been held that if the plaintiff can obtain a valid judgment by a proceeding at law the legal remedy is adequate,5 that “the want of a remedy is entirely distinct from the inability to obtain the fruits of a remedy, and where there is a complete remedy at law the fact that there is difficulty in its execution will not authorize the courts of equity to grant relief.”6 On the other hand it has been held that the remedy at law is not adequate unless the plaintiff can obtain pecuniary compensation which will place

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* The following authorities will aid in a study of this problem:

1 Lawrence on Equity, Chap. 3 (1929); Walsh on Equity, Chaps. 1, 2 (1930); Equity, 21 Corpus Juris, Sec. 2.

2 Equity, 21 Corpus Juris, Sec. 14, and cases cited in notes 15, 16, 17, 18, 19.

3 Lawrence on Equity, Vol. I, Sec. 79 (1929).

4 Lawrence on Equity, Sec. 31 (1929).

5 Lassar v. Baldridge, 33 Mo. App. 362 (1888); Gillett v. Warren, 10 N. M. 523, 62 Pac. 975 (1900); Tampa, G. C. R. Co. v. Mulhern, 73 Fla. 146, 74 So. 297 (1917).

him in the same situation as if the contract had been performed or the tort had not been committed.

This latter test seems to be more in harmony with general equity principles, and if the defendant is insolvent it seems to follow that there cannot be an adequate remedy at law. In such a case it logically follows that equity should take jurisdiction. In spite of this fact the majority of the courts have refused to take jurisdiction on the ground of insolvency alone, although most of them have considered it a make-weight argument.

It is the purpose of the writer to examine some of the cases and formulate a definite conclusion as to whether insolvency alone should be sufficient, and to find if there is a respectable number of cases to support it.

The cases naturally fall into two grand divisions: tort and contract. The conclusion reached in each division must depend upon whether there is an adequate remedy at law, in fact, when the defendant is insolvent.

I. TORTS.

A. Waste.

Absolute ownership over property gives absolute control and dominion over it including the right to permanently change it, subject only to the limitation imposed on all that the owner shall not maintain a nuisance on his land. In the case of tenants of all kinds (except tenants at will), whose ownership is limited, a further limitation is imposed: that they shall not commit waste. Waste has been variously defined as: (1) the destruction or alteration of any part of the tenement by a tenant to the injury of the person entitled to inheritance; (2) as an unlawful act or omission of duty on the part of the tenant which results in injury to the inheritance; and (3) as an unreasonable and improper use and abuse, or omission of duty touching the real estate by the one rightfully in possession, which results in substantial injury thereto.

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1 Parker v. Garrison, 61 Ill. 250 (1871); Draper v. Stone, 71 Me. 175 (1880); Lyman v. Suburban R. Co., 190 Ill. 320, 60 N. E. 515 (1901).
2 See 32 Corpus Juris, 805-811, for a discussion of the various meanings of insolvency. Insolvency in this connection should be taken to mean only the inability to satisfy a judgment should one be rendered against the defendant.
3 Walsh on Equity, Sec. 63 (1930).
4 Davenport v. Magoon, 13 Ore. 3, 4 Pac. 299 (1884).
6 Moore v. Twin City Ice Co., 92 Wash. 608, 159 Pac. 779 (1916).
Chancery for the first time intervened to prevent waste by an injunction in the fifteenth century. The Chancellor, however, probably acted in these cases because of the lack of a remedy at law, and not because of the inadequacy of damages as a remedy. We find that, until the case of Horner v. Popham, equity intervened only in the absence of any remedy whatsoever, and not because of the inadequacy of any remedy that existed. But since that time the jurisdiction of equity to grant specific relief by means of an injunction against waste has become well established in both England and the United States. The reason is plain, as waste is a wrong which cannot be adequately compensated in damages, as all realty is unique, and as it should be met at its earliest approaches by a decisive preventive remedy which is prompt and yet affords the party restrained a speedy hearing.

It seems that the granting of an injunction to stay waste has become almost a matter of course whether the damages threatened or being done are committed by one who is solvent or insolvent. It is within the scope of this article to examine some of the waste cases, and to determine whether the insolvency of the defendant has had any influence upon the courts in granting injunctive relief.

1. Where the injunction is sought to prevent the continuance of waste.

In the case of Woolworth v. Nelson, the lessor filed a bill for an injunction to restrain the lessee and sub-lessee from cutting doors through a party wall. The defendants offered evidence tending to show that the building could be restored to its original condition, and offered to give bond for such restoration at the end of the term. However, the court granted the injunction on the ground that the proposed alteration amounted to waste, and that the landlord was entitled to relief regardless of the irreparability of the injury or the solvency or insolvency of the defendant.

This decision seems to be in conflict with the general equity principle that a wrong will be enjoined only when the legal remedy is inadequate. The reason for granting relief seems to

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32 Walsh on Equity, 135 (1930).
33 Colles 1, 1 Eng. Rep. 150 (1697); Walsh on Equity, 136 (1930).
34 294 Ala. 172, 85 So. 449 (1920).
have been the landlord's right to have the premises remain in
the condition in which they were leased.

In *Stephenson v. National Bank of Winter Haven*\(^\text{19}\) the ten-
tants had begun the construction of partitions on the interior of
the building, which they had leased from the plaintiff, for the
purpose of converting the building into an "arcade building". An
injunction was granted to restrain the defendants from mak-
ing any further change, the court stating that the insolvency of
the defendant or the irreparability of the injury was im-
material.\(^\text{17}\)

That the mortgagee may maintain a suit in equity to stay
waste of the mortgaged premises seems to be the rule in all juris-
dictions in which the problem has arisen, but there is some slight
conflict as to the degree of the injury which is necessary in order
that the aid of a court of equity may be invoked. By far the
greater weight of authority limits the right of a mortgagee to
maintain a suit to stay waste to cases where the mortgage debt
is impaired, or there is danger of the property becoming an
insufficient security for the mortgage.\(^\text{18}\)

In some of the cases the insolvency of the mortgagor was
stated to be or evidently was the decisive factor which induced
the court to grant an injunction. In *Robinson v. Russell*,\(^\text{19}\) an
injunction was refused to stay waste by an execution creditor
whom the mortgagor had authorized to remove some nursery
trees, on the ground that it was not stated or shown that the
mortgagor was insolvent or was unable to respond in damages
for the threatened injury. In *Bunker v. Locke*\(^\text{20}\) it was held
that an insolvent mortgagor would be restrained from cutting
timber from the mortgaged premises where the mortgage secu-

\(\text{16} 32 \text{ Fla. 347, 109 So. 424 (1926).}\)
\(\text{17} \text{ See also Burton v. Steverson, 206 Ala. 508, 91 So. 74 (1921); Harris v. Bannon, 78 Ky. 568 (1880); Hastings v. Perry, 20 Vt. 272 (1848).}\)
\(\text{18} \text{ Coker v. Whitlock, 54 Ala. 180 (1875).}\)
\(\text{19} \text{ 24 Cal. 467 (1864).}\)
\(\text{20} \text{ 15 Wis. 702 (1862).}\)
\(\text{21} \text{ 26 N. J. Eq. 452 (1875).}\)
moval of timber cut upon the mortgaged premises, and the injunction was refused because insolvency was not alleged.\textsuperscript{22}

In other cases, however, the insolvency of the mortgagor was either stated to be an immaterial factor, or was not mentioned by the court in its opinion when discussing the grounds upon which the relief was granted.\textsuperscript{23}

Therefore, as a conclusion, we can say that in cases where waste has begun and an injunction is being sought to restrain the further commission, insolvency plays no part, except in cases where the mortgagee seeks to restrain the mortgagor from committing waste, and these decisions occur in only a few jurisdictions where the problem has arisen.

2. \textit{Threatened waste.}

It seems to be well settled that an injunction will be granted to prevent threatened waste regardless of the solvency or insolvency of the defendant. In \textit{Brigham v. Overstreet}\textsuperscript{24} the tenant threatened to remove some fixtures which he had placed on the land, and also some manure produced in the course of good husbandry. The court granted the injunction, stating, "... But injunction to stay waste or prevent waste has been held proper, regardless of the question as to whether the damages threatened would be irreparable, and without reference to the solvency or insolvency of the party sought to be enjoined." In \textit{Palmer v. Young}\textsuperscript{25} the lessees were enjoined from removing certain fixtures (plate glass, radiators, and elevators) which they had placed in the building on the ground that the insolvency of the threatening party need not be shown. In \textit{Triplett v. Parmalee}\textsuperscript{26} it was also held that a mortgagee could maintain a suit for an injunction against the mortgagor and a stranger who threatened to commit waste without regard to their solvency or insolvency.\textsuperscript{27}

3. \textit{Trespass in the nature of waste.}

Acts of a trespasser, without title, causing damage, which

\textsuperscript{22} Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. 184 (1889).
\textsuperscript{23} Terry v. Robbins, 122 Fed. 725 (1903); Williams v. Chicago Ex.
Co., 138 Ill. 19, 65 N. E. 611 (1900); Beaver Flume Lumber Co. v.
Eccles, 43 Ore. 400, 72 Pac. 201 (1903).
\textsuperscript{24} 128 Ga. 264, 57 S. E. 484 (1907).
\textsuperscript{25} 108 Ill. App. 252 (1904).
\textsuperscript{26} 16 Neb. 649, 21 N. W. 403 (1884).
\textsuperscript{27} See also Tidwell v. H. H. Hitt Lumber Co., 198 Ala. 236, 73 So.
486 (1916).
if done by a tenant would be waste, will be enjoined by equity in a few jurisdictions because damages would be inadequate just as damages are inadequate for similar acts by tenants in case of waste. Thus, we have the following statement in an early federal case:

"The technical distinction between waste and trespass has long been disregarded by courts of equity, and the rule now is that wherever trespass is accompanied by irreparable injury, or a multiplicity of suits, an injunction will be allowed as in a case of waste."

These cases seem to be disregarding the insolvency of the defendant in discussing the grounds upon which relief is granted.

In *Merced Mining Co. v. Freemont* the plaintiff owned a mining claim, and the defendants entered and removed some quartz avowing their intention to continue. The court held that in cases of mines and timber, the statement of the injury was sufficient; that the taking of the minerals is in itself an injury which is irreparable; and that an allegation of insolvency is not necessary in these cases because the right to an injunction is based upon the injury and not upon the party's ability to respond in damages.

In the case of *Richards v. Dower* we find the court still enunciating the same doctrine. The defendant in that case excavated a tunnel under the plaintiff's lot, but it was not shown that it would affect the surface of the plaintiff's land. The court granted the injunction quoting from *Moore v. Massini*:

"The gravaman is a threatened trespass upon the land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled the plaintiff would be deprived of a part of the substance of the inheritance which

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28 Shipley v. Ritter, 7 Mo. 408 (1855). The following statement in this case is clearly evidence of the advanced state of the law in some jurisdictions at an early date: "We consider it the settled law of this state that although an injunction will not be granted to restrain a trespasser merely because he is a trespasser, yet equity will interfere where the injury is irreparable or where an adequate relief cannot be granted at law or where the trespasser goes to the destruction of the property as it had been held and enjoyed, or where it is necessary to prevent a multiplicity of suits."


30 7 Cal. 317 (1857).

31 64 Cal. 62, 28 Pac. 113 (1865).

32 32 Cal. 590 (1867).
could not be specifically replaced. In the class to which this case belongs no allegation of insolvency is necessary."

4. Where waste consists of the severance of chattels.

Where the waste consists of the severance of chattels, and the insolvent tenant threatens to carry them away, the question arises as to whether there is an adequate remedy at law if he is allowed to do so. The common law action of trover would not be an adequate remedy, because he is insolvent, and it is doubtful whether replevin would be as he is rightly in possession. But the common law action of detinue appears to be the proper remedy. Under the codes there is undoubtedly an adequate remedy in such a case. Thus, in those cases in which insolvency was present, it seems to have been a very material element, but in only two does it appear that insolvency alone was sufficient.

In American Trust Co. v. North Belleville Quarry Co. the mortgagor quarried some stone from the mortgaged premises and threatened to remove it. The court granted the injunction to restrain the threatened removal, and it seems that insolvency was the only basis.

In Spear v. Cutter the complainant asked for an injunction to restrain the removal of timber already cut, and also to restrain the future commission of waste. The insolvency of the defendant was proven. The court granted the injunction, stating that: "...as the defendant is insolvent, the injury to the plaintiff will be irreparable, if the defendant is allowed to remove or dispose of the timber already cut." It seems that the insolvency of the defendant was the only ground upon which the injunction was granted. Although there was an allegation of waste, this element cannot be linked with the insolvency as a ground for the injunction as to the removal of the timber already cut. Had there not been an element of insolvency the court would have undoubtedly granted the injunction merely to restrain the future commission of waste, and would have refused it to prevent the removal of the severed timber.

33 To the same effect see Walsh on Equity 151, note 17 (1930) and cases there cited; Bettes v. Brower, 184 Fed. 342 (1911); Pardoe v. Camden Lumber Co., 70 W. Va. 68, 73 S. E. 82 (1911); Kock v. Story, 47 Colo. 335, 107 Pac. 1093 (1910).
34 Shipman's Common Law Pleading 114, 118, 120 (3rd ed. 1923).
35 Kentucky Civil Code, Secs. 181, 388.
36 31 N. J. Eq. 89 (1879).
37 5 Barb. 486 (N. Y. 1849).
In *Kistler v. Weaver*\(^3\) it was held that an injunction would not be granted to prevent the removal of timber already cut, unless the defendant was insolvent, for if the defendant was solvent the plaintiff can obtain an equivalent in money in an action at law. This case while not emphatically stating that insolvency alone is sufficient, presents a very strong argument for the adherents of that view.

But in *Watson v. Hunter,*\(^3\) the court refused to grant an injunction upon the ground of insolvency alone. The court stated that insolvency is a danger applicable to all other cases of ordinary damages; and it is not such a case of special mischief as will justify this extraordinary preventive remedy.

**B. TRESPASS.**

1. *Mere trespass.*

A distinction formerly existed between cases which were formerly in trespass and cases of waste. Originally, a court of equity, though it would act to prevent waste would not act to prevent trespass. The jurisdiction to grant such relief in the latter class of cases is of comparatively recent origin as a result of a reluctant, but nevertheless, gradual recognition by the judiciaries of the necessities of the exercise of such power to prevent irreparable injury for which there is no adequate remedy at law.\(^4\)

It is now the general rule that equity will not restrain by an injunction the commission of a mere or ordinary trespass. The nature of the trespass or the injury resulting therefrom must be such as to require equitable interference on the theory that the plaintiff will be left to his legal remedy, unless some element exists such as irreparable injury or other conditions which renders the courts of law inadequate. The presence of some one or more of these factors is essential, and in their absence the common law remedy is adequate and perfectly competent to give compensation as well as to deter and prevent the repetition of the trespass by the damages which it will inflict.

Regardless of the fact that when the defendant is insolvent there can be no true remedy at law, it seems to be the general rule that the insolvency of the defendant alone cannot give

\(^3\) 125 N. C. 388, 47 S. E. 478 (1904).
\(^4\) 5 Johns. Ch. 169 (N. Y. 1821).
\(^4\) 14 R. C. L. 145; 32 A. L. R. 464.
equity power to grant an injunction in the absence of other circumstances justifying equitable interference. Thus, in *Hume v. Burns* the court stated that the general doctrine was that a court of equity will not grant an injunction to restrain a mere trespass where the injury complained of is not irreparable and destructive of the plaintiff's estate, and that if it is susceptible of pecuniary compensation, and he may obtain adequate satisfaction in the course of law, the insolvency of the defendant is no ground of relief in equity in a suit of this character. It was also held in *Warlier v. Williams* that the plaintiff was not entitled to an injunction to remove from his real estate one who had without title unlawfully entered and wrongfully remained thereon, although such trespasser be insolvent.

However, in other jurisdictions insolvency seems to be an important jurisdictional basis, although it has never been held sufficient in itself. In *Hanley v. Waterson* the court held that an injunction would be granted to enjoin a mere trespass where it is alleged in the bill that the defendant is insolvent, because in such a case the remedy at law is inadequate. In *Hall v. Henninger* it was held that an injunction to prevent a mere trespass on land would not be granted in the absence of some distinct ground of equitable interference, such as the insolvency of the defendant or irreparable injury. In *West v. Walker* it is said that the court will interfere to prevent a mere trespass, where from the irresponsibility of the defendant or otherwise the complainant could not obtain an adequate relief at law, citing two cases which upon examination are believed to sustain this statement.

2. *Repeated and continuing trespasses.*

Although the interference of courts of equity by way of injunction to prevent repeated or continuing trespasses is of comparatively recent origin, the law is now well settled that an

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41 50 Ore. 124, 90 Pac. 1009 (1907).
42 53 Neb. 148, 73 N. W. 539 (1897); see also Parker v. Furlong, 37 Ore. 248, 62 Pac. 490 (1900).
43 39 W. Va. 214, 19 S. E. 538 (1894).
44 145 Iowa 230, 121 N. W. 6 (1909).
45 3 N. J. Eq. 290 and Note B at 290 (1871).
injunction will lie to restrain acts of trespass which are continuous or constantly re-occurring where irreparable injury will result, and the court will award the relief that the nature of the action demands. It is clear that when the defendant is insolvent there can be no adequate remedy at law, nor generally when he is solvent, because there is a multiplicity of suits involved.

Several cases, however, have been cited as sustaining the view that insolvency alone is sufficient. But, upon examination it is found that they do not sustain this contention. In Wilson v. Hill where the defendants placed their fishing nets upon the plaintiff's land, the court granted the injunction, stating that it was the irresponsibility of the defendants which made the remedy at law valueless and inadequate. This case seems to be good authority for the proposition that repeated trespasses without more is not sufficient, but it is not authority for the proposition that insolvency alone is sufficient to give equity jurisdiction. Were it not for the irresponsibility of the defendants it is doubtful whether the court would have granted the injunction, but the case does not definitely state that insolvency alone is sufficient because we have repeated trespasses causing a multiplicity of suits. In Tharpe v. Severling the court again did not grant the injunction on the ground of insolvency alone, but upon the grounds of insolvency, speculative damages, and continuing trespasses. It does not seem that insolvency was by any means a major element.

It seems that in about twenty states cases have been decided in which it has been held that the solvency or insolvency of the trespasser may be an important factor in determining whether an injunction should be granted to restrain the repeated or continuing trespassers. In Carney v. Hadley it was held that in the case of repeated or continuing trespasses upon timber rights insolvency alone may not be sufficient, yet it is an important element in determining whether or not a court of equity should act in granting an injunction. In Miller v. Wills it was held that although mere insolvency is not generally decisive of the right to grant an injunction, it constitutes in particular cases

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48 46 N. J. Eq. 367, 19 Atl. 1097 (1890).
49 123 Kan. 235, 276 Pac. 821 (1929).
50 See also Woodstock v. Quinn, 201 Ala. 631, 79 So. 253 (1918).
51 32 A. L. R. 495 and cases there cited.
52 32 Fla. 344, 14 So. 4 (1893).
53 95 Va. 337, 28 S. E. 337 (1897).
an important element in determining whether a court should award it, for the trespasser being insolvent, a legal remedy, though theoretically adequate, would be practically fruitless. In *Webster v. Cooke* it was held that in a petition alleging insolvency an additional ground was shown.

It also seems well settled that solvency will not defeat the equitable right to an injunction, but that an injunction may be an appropriate remedy notwithstanding the trespasser’s solvency on the grounds of irreparable injury or the avoidance of a multiplicity of suits.

In many decisions, however, it has been held that insolvency alone is not sufficient to give equity jurisdiction. Thus, in *Centreville & A. Turnpike Co. v. Barnett* an injunction was sought to enjoin the Turnpike Co. from continuing the grading of a road because of the improper manner in which the work was being performed. It was held that insolvency was not sufficient to warrant relief by an injunction in the absence of other circumstances warranting such relief such as irreparable injury, or the inadequacy of the legal remedy.

### C. Insolvency Alone Is Sufficient.

It seems that there is a small class of cases in which it is held that insolvency alone is sufficient to give equity jurisdiction. When there is a case of threatened, repeated or continuing trespasses over a short period of time, the plaintiff can, under the modern Codes permitting a joinder of causes of action, wait until that time has elapsed, and then sue in a law court and get an adequate remedy. But if the defendant is insolvent the remedy at law is in fact inadequate, and if equity grants an injunction, it seems to follow that it would be granted on the ground of insolvency alone.

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54 23 Kan. 637 (1880).
56 Keil v. Wright, 135 Iowa 383, 112 N. W. 633 (1907); Graham v. Wonack, 82 Mo. App. 618 (1900).
57 2 Ind. 536 (1851).
58 See also *Watson v. Holmes*, 5 Ky. L. Rep. 515 (1883); *Musselman v. Marquis*, 1 Bush 463 (Ky. 1866); *Caney v. Hadley*, 32 Fla. 344, 14 So. 4 (1898).
59 *Gulf Compress Co. v. Harris Courtner Co.*, 158 Ala. 343, 48 So. 477 (1908).
Thus, in *Paige v. Atkin*,\(^6\) where the defendant was a tenant on the plaintiff's land, and was retained to cultivate the land after the expiration of his term, an injunction was granted to restrain the removal of a crop of wheat. The insolvency of the defendant was the only ground upon which the injunction was granted, and the court went so far as to say that absolute and complete insolvency need not be shown. It seems that the plaintiff in this case could have waited until the entire crop had been removed, and then he would have had an adequate remedy at law, notwithstanding the technical right to sue every day. (But if he sued every day he would be bringing upon himself a multiplicity of suits.) If he were insolvent there could be no adequate remedy at law, and the injunction was undoubtedly granted on the ground of insolvency alone. In *West v. Smith*\(^6\) the defendants entered and begun harvesting the plaintiff's wheat. The court granted an injunction to restrain the defendants on the ground of insolvency alone. The same line of reasoning applies to this case as to the one above.\(^6\)

In *Sooy Oyster Co. v. Gaskill*,\(^6\) which is a case similar in facts to the above case, the same logical reasoning applies. However, the argument has been advanced that the fact there were many (fifty) defendants furnished two grounds upon which the decision was based. This argument seems untenable, because under the modern Codes there may be a joinder of defendants in such a case.

D. ASPORTATION OF CHATTELS.

Where one has trespassed upon the land of another and wrongfully taken unique chattels, or threatens to do so, equity will give specific reparation for the tortious detention or restrain the removal, regardless of the solvency or insolvency of the defendant.\(^6\) The relief at law in such a case is inadequate, because damages are insufficient due to the unique character of the goods. A court of equity, being able to command the defendant to produce the chattels,\(^6\) or restrain the threatened

\(^6\)Clark: *Principles of Equity*, 53 (1919).
\(^{52}\)Also Hicks v. Compton, 18 Cal. 206 (1861).
\(^{53}\)SAmes': *Cases on Equity*, 532 note 3, and cases there cited (1927).
removal by an injunction can thus deal with the situation more effectively than a law court.

Where the chattels taken or threatened to be taken are non-unique, the plaintiff may bring an action of trover or trespass at law, or the modern actions similar to the above forms of action. In either case he will ordinarily get a judgment for the value of the chattel. If the plaintiff wishes to get back the chattel in specie he may do so either by detinue or by the modern statutory replevin.

Equity has generally refused to grant relief in the case of non-unique chattels because the remedy at law is adequate. It seems, however, that the remedy at law may be rendered inadequate if the defendant is insolvent, and in such a case equity should take jurisdiction. Upon an examination of the cases it will be found that equity has in only a few instances given relief on the ground of insolvency alone.

In Rohrer v. Babcock the defendant trespassed upon the plaintiff's land and commenced removing hay to feed his cattle. The plaintiff filed a bill for an injunction alleging the insolvency of the defendant. The court granted the injunction stating that the plaintiff could not have maintained an action in the nature of replevin, because the hay would have been consumed before writs for its redelivery could have been obtained and served. The only available remedy at law was trover and the court stated that this would be abortive because the defendant was insolvent. As it was the insolvency of the defendant alone which rendered the remedy at law inadequate, it naturally follows that insolvency was the only ground upon which the court took jurisdiction.

In Bristol v. Halyburton it was held that a court of equity would not interfere by an injunction to stay an execution regularly issued on a judgment at law because the sheriff had levied on property not subject to sale under execution, or because the property belonged to another, except where the property levied upon was personal property, and the sheriff and the plaintiff were both insolvent. In Kaufman v. Weiner it was held that the allegation of insolvency was in no sense material to the par-

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6 Clark: op. cit., supra, note 64 at 259.
67 114 Cal. 124, 45 Pac. 1054 (1896).
68 93 N. C. 384 (1885).
69 169 Ill. 596, 48 N. E. 479 (1897).
ties upon right and justice, but only important because, if the defendant was solvent, a court of law would have been the proper forum.70

Other cases have been decided in which insolvency has been considered, but, in none of these, has it been emphatically stated that insolvency, in the absence of other equitable grounds, would have been sufficient. In Milan v. Hickey71 where the defendants opened a log boom and took a number of the plaintiff's logs, an injunction was granted upon the grounds of insolvency and the avoidance of a multiplicity of suits. In Lewis v. Christian72 the tenants, at the expiration of the terms of the contract, threatened to carry away their share of the crops. The plaintiffs filed a bill for an injunction to restrain them until the damages which she had suffered because of their bad management could be ascertained and decreed. It was alleged in the bill that the defendants were insolvent. The court granted the injunction stating that the insolvency of the defendant made the remedy at law less efficient.

II. Specific Performance of Contracts

There is also much conflict in the decisions and among text writers as to whether insolvency alone is sufficient to give equity jurisdiction to grant the specific performance of a contract. It can hardly be said that the plaintiff has an adequate remedy at law for the damages which he has suffered when the remedy thus provided will yield him no actual returns. It is clear that, when the plaintiff has contracted for unique subject matter, and has advanced the purchase price, equity has jurisdiction and may grant relief regardless of the solvency or insolvency of the defendant.73 The very character of the goods makes it impossible to replace them with any sum of money, and it seems to be equally clear that, when he has contracted for non-unique subject matter, and the defendant is insolvent, his remedy at law is just as inadequate, no matter how accurate the ascertainment of the damages may have been. His remedy is not inadequate because he needs the particular goods, but because he cannot with the money recoverable from the seller buy such goods in quality and amount as the contract calls for.

70 See also Hitt v. Ehrlich, 89 Ga. 824, 15 S. E. 770 (1892).
71 59 N. H. 241 (1851).
72 40 Ga. 187 (1867).
73 Clark: op. cit., supra, note 64, Secs. 45-46; 36 Cyc. 557.
Nevertheless, in only a few instances, has insolvency alone been held sufficient. Many courts express considerable doubt as to whether the defendant's inability to respond to a judgment against him is sufficient grounds upon which equity may take jurisdiction, though it is generally conceded to have a very material bearing upon the question of granting or refusing relief.

In the case of *Clark v. Flint*,¹⁴ which has often been cited as sustaining the view that insolvency alone is a basis for equity jurisdiction, it is found that there are other elements present, and that the court did not have to decide the case upon that ground alone. There were elements of trust relationship, unique property (historically, boats were considered unique property, but that argument has probably been done away with today), and an accounting for profits. In the case of *Texas v. Central Fuel Oil Co.*,¹⁵ which has also been cited as sustaining the above mentioned proposition, there were other equitable grounds, such as multiplicity of suits, difficulty of the ascertaining of damages, and monopoly of the source. In *Rau v. Sidlinberg*¹⁶ an injunction was granted on the grounds of insolvency and the impossibility of the ascertaining of damages due to the unknown value of the stock. In *Hogg v. McGuffin*¹⁷ the court granted a decree of specific performance of a contract for the exchange of shares of stock. It seems that the grounds of the decision were the peculiar value of the stock, insolvency, and the impossibility of the ascertaining of damages. In *McNamara v. Homeland Cattle Co.*¹⁸ the complainant sued for specific performance of a contract for the sale of cattle, alleging that the defendant was insolvent. The court granted the decree, and it has been stated that insolvency was the only basis of the decision. But upon a close examination of the facts, there seems to be an element of fraud present; nevertheless it is a very strong case for those who maintain that insolvency alone should be sufficient.¹⁹

It seems that in a few jurisdictions where the problem has arisen the courts have refused to grant a decree of specific performance upon a mere allegation of insolvency. In *Warren v.*

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¹⁴ 22 Pick. 232 (Mass. 1839).
¹⁵ 194 Fed. 1 (1912).
¹⁷ 67 W. Va. 466, 68 S. E. 41 (1910).
¹⁸ 105 Fed. 203 (1900).
¹⁹ See also Doty v. Doty, 171 N. Y. Supp. 852 (1918).
Black Coal Co.\textsuperscript{80} a decree for the specific performance of a contract for the sale of coal was refused on the ground that insolvency alone was insufficient to give equity jurisdiction. In Gillett v. Warren\textsuperscript{81} it was held that the insolvency of the vendor standing alone would not authorize specific enforcement of a contract, the bill not furnishing other grounds as a basis of equitable jurisdiction. In Cincinnati, etc., R. Co. v. Washburn\textsuperscript{82} specific performance of an agreement of an insolvent railroad company to fence its right of way and to deliver freight bonds was refused. And in Hendey v. Whidden,\textsuperscript{83} where the defendant was execution proof and insolvent, the court refused to decree specific performance of an agreement to deliver a certain number of cattle at a specified price per head.\textsuperscript{81}

Though generally courts have refused to grant specific performance of a contract on the ground of insolvency alone, a few have held that it alone was sufficient. In Dilburne v. Youngblood\textsuperscript{85} the court refused a decree of specific preformance to transfer a note and chattel mortgage, stating:

"Ordinarily a court of equity will not decree specific performance of a contract in reference to personal property unless it clearly appears that on account of the nature of the contract a court of law is incapable of affording a full and adequate remedy for a breach of the subject matter. Insolvency will render the court of law incapable of affording a full and adequate compensation, but as it is not alleged in this case the plaintiff must fail."

In Parker v. Garrison\textsuperscript{86} an agreement to deliver one-half of the corn raised upon land was enforced against an insolvent tenant who attempted to remove the same. In Ames v. Witbeck\textsuperscript{87} specific performance of a contract for the transfer of stocks and bonds was decreed. In Chastain v. Smith\textsuperscript{88} the performance of a parole contract which was not within the Statute of Frauds was granted. The court held that, "... whenever the parties cannot be restored to their status quo, nor adequately compen-

\textsuperscript{80} 85 W. Va. 684, 102 S. E. 672 (1920).
\textsuperscript{81} 10 N. M. 523, 62 Pac. 975 (1900).
\textsuperscript{82} 25 Ind. 259 (1865).
\textsuperscript{83} 48 Fla. 268, 37 So. 571 (1904).
\textsuperscript{84} See also Livesly v. Johnston, 45 Ore. 30, 76 Pac. 13 (1904); Ridenbaugh v. Thayer, 10 Idaho 662, 80 Pac. 229 (1905); Heilman v. Union Canal Co., 37 Pa. St. 100 (1860).
\textsuperscript{85} 85 Ala. 449, 5 So. 175 (1888).
\textsuperscript{86} 61 Ill. 250 (1871).
\textsuperscript{87} 179 Ill. 458, 53 N. E. 969 (1899).
\textsuperscript{88} 30 Ga. 96 (1860).
sated in damages by turning them over to their action in a court of law it would be fraud to refuse it” (specific performance).89

The most plausible argument that has been urged against the specific performance of a contract during the defendant’s insolvency is its violation of the spirit of our bankruptcy legislation.90 In a few situations equity refuses to exercise its power, because specific performance should not be granted one creditor in his suit against an insolvent defendant, when such relief would result to the prejudice of other creditors.91 For instance, if one, who contracts to sell ordinary chattel property, becomes bankrupt, the property is the assets of the estate, and, if the bankrupt has been paid in advance before the bankruptcy, and has subsequently delivered the goods within four months prior to the filing of the petition, he would have given a preference. Therefore, where there are many creditors who are in practically the same situation, specific performance is obviously impossible since all of them cannot be paid, and specific performance would be a violation of the above mentioned legislation. “... such relief is also opposed to the fundamental principles upon which equity courts act in all other situations, where its relief is depending on the question of whether it can be granted without doing harm to third persons.”92

However, in case of a bona fide contract made by the insolvent, even up to the very date of filing the bankruptcy petition, which is wholly executory on both sides, and made in good faith, it is not a preference for a court of equity to grant specific performance of the contract; but, if the insolvent, prior to the performance on his part, has already received the whole or part of the consideration for his own promised performance so that a debt or obligation is due from him, the situation is different, and to grant specific performance in this case would

89 See also Brett v. Warneck, 44 Ore. 511, 75 Pac. 1061 (1904); Williams v. Carpenter, 14 Colo. 477, 24 Pac. 558 (1890); Glassbrenner v. Groulik, 110 Wis. 402, 85 N. W. 962 (1901).
90 “... The American statute seeks to prevent any transfer by insolvent debtors on account of pre-existing obligations, by making it an act of bankruptcy, and, if the bankruptcy supervenes within four months, making the transaction voidable, if the creditors had reasonable cause to believe that a preference would be effected. The motive of the debtor is immaterial.” 1 Williston on Sales, Sec. 145, note 67 (2d ed. 1924).
92 31 Har. L. Rev. 762, 706 (1918).
be a preference. In any case it must always appear that the title to the goods purchased has passed, or that an equitable lien exists, or that the money paid in advance is to be kept as a distinct fund to become the bankrupt's only on the delivery of the goods; otherwise he is really a creditor.

It may also happen that the complainant is the only creditor of the insolvent so that no third person can be injured by granting specific preformance. Again it may happen that, even though there are other creditors, the situation may be such that no question involving the settlement and distribution of the debtor's assets is raised. The debtor may belong to a class of those who cannot be forced into involuntary bankruptcy, and he may pay such debts as he wishes, and his other creditors cannot object to his so doing; and, if he is compelled to perform his obligation to the complainant, his other creditors are not injured any more than if he made such payment voluntarily. The conclusion to which we must come in our study of this section is that a judgment at law, for damages, against an insolvent defendant, for a breach of a contract, is obviously inadequate, and that there is no reason why equity cannot grant specific preformance when the interest of no third party will be thereby injured.

CONCLUSION

It is therefore submitted, in conclusion, that the instances in which insolvency has been held sufficient are very rare. The courts are far from being in harmony as to the significance of insolvency as a jurisdictional basis; many holding that it is very material, others holding that it is immaterial. However, these decisions are sufficient to show the glaring insufficiency of a mere worthless judgment at law, which no one, if he will disregard the technical rule, can conscientiously say is adequate. These cases should be recognized by the courts as the precedent

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93 1 Williston, op. cit., supra, note 90, Sec. 144.
94 Remmington on Bankruptcy, Sec. 1316 (2d ed. 1915).
95 Horacek: Insolvency and Specific Performance, 31 Har. L. Rev. 702, 719, note 45 (1918): "In cases involving the Statute of Frauds the refusal of equity to grant specific performance has no bearing on the question of insolvency as a basis of jurisdiction, for, whether the legal remedy is inadequate because of the character of the property or the financial condition of the defendant, the proposition before the court is the observance and enforcement of the provisions of the statute rather than any question of the adequacy or inadequacy of the legal remedy."
of a new doctrine which will meet the demands of a modern civilization. Judges should disregard all decisions to the contrary, and in the furtherance of general equitable principles, grant equitable relief against an insolvent defendant.

It may be boldly asserted, that even though there were no precedent, this fact should not be fatal to the power of a court of equity to grant relief in such a case. Present day laws are not infallible. It is only through criticism and change that flaws in existing things are pointed out and corrected, and progress is furthered. Clinging to precedent is natural, and is often a safeguard against untried and dangerous doctrines which would tend to overthrow all established order. Nevertheless, as painful and fearsome as the operation may appear to be, the human race is compelled from time to time, in response to the irresistible forces of progress, to cast off old and impeding doctrines, and adopt new ones, better suited to meet the requirements of an advanced order of things. The historical development of our law is a record of such processes. The rejection of the old rule, as to the adequacy of the legal remedy, would be only another forward step.

There does not seem to be any limitation to place on this doctrine when applied in tort cases, because the rights of third parties would not be infringed, and equity could in all cases grant relief where the defendant was insolvent. But, if the contract is of such a character that the rights and interests of third persons would be affected by granting specific performance against an insolvent defendant, equity should decline to take jurisdiction.

Therefore, in all those cases in which equity can grant relief without injuring third persons, equity should do so, if the courts are to be instruments through which justice is to be rendered, rather than bodies bound by harsh technicalities, thereby defeating the purpose for which they were created.
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