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INSOLVENCY OF THE DEFENDANT AS A BASIS OF EQUITY JURISDICTION IN TORT CASES.

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It is fundamental that equity has no jurisdiction if there is an adequate remedy at law. The difficulty lies in determining whether or not the relief at law is "adequate" in a particular situation. An illustration of the difficulty occurs in cases where there is a remedy at law for the injury but it would be impossible to collect a judgment because of the insolvency of the defendant. Is this fact, of itself, sufficient to give equity jurisdiction?

The question arises frequently in both tort and contract cases. Its determination though in either type of case should depend upon whether the remedy at law is adequate, using the word in a reasonable and practical sense. Its meaning in this sense is substantially this, Could the plaintiff take the sum of money recovered from the defendant in a law action and put himself in the same position as if the tort had not been committed or the contract had been performed? Under such a test it would seem that the remedy at law is inadequate if the defendant is insolvent. If a judgment could not be collected the plaintiff would not be placed where he would have been had no injury occurred.

In spite of the apparent soundness of this deduction, there is a wide divergence of opinion in both texts and decisions as

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2For a discussion of the term "insolvency" see Clark, Principles of Equity, sec. 45 and note.
3Horack, Insolvency and Specific Performance, 31 Har. L. Rev. 702, 712 (1917).
to insolvency as a jurisdictional factor in equity.\textsuperscript{3} Because of this conflict, the following study of the problem as it occurs in certain divisions of the field of torts, has been made.

1. Waste

At common law a material distinction between waste and trespass consisted in the fact that in waste the wrongdoer was rightfully in possession. Waste may be defined as injury to the inheritance by one rightfully in possession, but having an estate less than a fee,—as, for example, a tenant for life or for years.\textsuperscript{4}

Quite early equity relieved against waste in certain instances where for purely technical reasons there was a \textit{total absence} of a legal remedy rather than because of the inadequacy of damages as a remedy. The intervention of equity to relieve against waste where the inadequacy of damages was the basis of jurisdiction came at a comparatively late date.\textsuperscript{5}

Waste, because of its nature, (injury to the inheritance, permanent damage to the land) necessarily results, if permitted to occur, in irreparable injury. Equity has always considered land to be unique.\textsuperscript{6} Therefore anything that results in its permanent or substantial injury creates a situation where the remedy at law in damages is inadequate. The reversioner or remainderman is entitled to receive the land in its rightful condition. No damages can compensate him for a failure to do so. It follows that an injunction should issue to prevent threatened waste. That one will issue is firmly established.\textsuperscript{7}

\textsuperscript{3} See article, Adequacy of Ineffective Remedy at Law, Henry L. McClintock, 16 Minn. L. Rev. 233.

\textsuperscript{4} "Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate, as, for example, a tenant for life or for years. The rightful possession of the wrongdoer is essential, and constitutes a material distinction between waste and trespass." Hayman \textit{v. Rownd}, 82 Neb. 598, 118 N. W. 328 (1908). Pomeroy's \textit{Eq. Jur.}, 4th ed., secs. 1348 and 1896; Clark, op. cit. supra note 1, sec. 183.

\textsuperscript{5} Walsh on \textit{Equity}, sec. 26.

\textsuperscript{6} Henry Cox, Specific Performance of Contracts to Sell Land, 16 Ky. L. Jour. 338.

\textsuperscript{7} Earl Bathurst \textit{v. Burden}, 2 Brown, Chan. Cas. 64 (1786); Robertson \textit{v. Meadors}, 73 Ind. 43 (1880); cases cited, Chafee, Cases on Equitable Relief Against Torts, page 9, notes; numerous cases cited, I Ames, \textit{Cas. Eq.} 461, note 1.
jurisdiction to relieve where there is a total absence of legal remedy still continues also. With these basic principles in mind as to the remedy of injunction in waste cases, the effect of the addition of the further element of the insolvency of the defendant will now be considered.

Many cases state that the insolvency of the defendant is immaterial where the injury threatened will result in waste. As a practical matter the statement is true but it is apt to be misleading. It is more accurate to say that it is not necessary for the court to consider whether the defendant is insolvent in order to relieve against threatened waste. According to the principles above stated, waste alone is sufficient to give the court jurisdiction to award an injunction since damages at law is not an adequate remedy for permanent injury to land. Threatened waste has become firmly established in equity as a basis of jurisdiction; insolvency has not become well established as a jurisdictional factor. Consequently, the insolvency element in a particular case is ignored and the court bases its jurisdiction upon the power of equity to enjoin waste.

Poertner v. Russell will illustrate the way the courts operate in a particular situation. In that case the plaintiff alleged that the defendant was in possession under a lease providing that all improvements put upon the premises should become the property of the lessor without cost as soon as annexed and should be left upon the termination of the tenancy. The defendant put in a middling separator and attached it to the floor. He was threatening to detach and remove it. Insolvency was alleged.

The court held that equity had jurisdiction in such a case and could issue a valid injunction. The court said:

"The jurisdiction of a court of equity to entertain an action brought by the owner of the reversion, against the tenant, whether for life or for years, to stay waste threatened or being committed, and to interpose its injunction to prevent such threatened waste, cannot be doubted. This jurisdiction has been so universally asserted and exercised by courts of equity, that all of the legal remedies for waste have nearly fallen into disuse. The common law action for waste is of rare

Clark, op. cit. supra note 1, sec. 185, n. 2.
33 Wis. 193 (1873). Accord, Brigham v. Overstreet, 123 Ga. 447, 57 S. E. 434 (1907); Woolworth v. Nelson, 204 Ala. 172, 85 So. 449 (1920); noted, 19 Mich. L. Rev. 105, 5 Minn. L. Rev. 79.
occurrence in modern times, and the various remedies given by the statute of Gloucester (13 Edw. I., ch. 22) and other English statutes, have given way to the action on the case for waste; and the latter, in its turn, has been very nearly superseded by the action in equity to stay waste. This equitable jurisdiction is sustained on the ground that the remedy at law is at best an inadequate one. Of course, there can be no remedy at law until the waste is actually committed, and it is well settled that the reversioner need not wait until waste has actually been committed before bringing his action.\footnote{Watson v. Hunter. 5 Johns Ch. 169, 9 Am. Dec. 295 (N. Y. 1821).}

The court then considered the alleged insolvency of the defendant and concluded that this allegation was not needed to give equity jurisdiction. Said the court:

"Within the principles above stated, this is enough to give the court jurisdiction to award the injunction without the further averment of insolvency of the defendant."\footnote{Ibid. 199.}

Although it is not necessary for the court to consider the insolvency of the defendant in order to obtain jurisdiction in a case of threatened waste, it may become a very material jurisdictional factor where waste has already occurred. In such a situation if the waste has consisted in creating chattels by severance from the land the remedy at law is ordinarily adequate unless they are unique. If equity takes jurisdiction and grants an injunction against their removal it must be because of some factor other than waste. Will the insolvency of the defendant supply such necessary factor?

In Watson v. Hunter,\footnote{Ibid. 201.} the court gave a negative answer to this question by way of dictum. In that case the defendants were in possession of land under a lease. They were cutting down large quantities of timber. The plaintiff asked for an injunction against cutting down any more timber and also from removing that already cut. The defendant was neither alleged nor proved to be insolvent but the court said that even in the event of the possible inability of the defendant to respond in damages an injunction would not lie. Said the court:

"This court will stay the commission of waste, or the transfer of negotiable paper in certain cases in order to prevent irreparable mischief; but the only mischief that can arise in the present case as to the timber already cut and drawn to the mills of the defendants is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not
an impending and special mischief, which will justify this extra ordinary preventive remedy by injunction."

It is submitted that the attitude expressed by the dictum in the above case is not the proper one. It is true that as a general rule equity will interfere only to restrain future waste and will not interfere in a case of waste already committed. That is because in the first situation the remedy at law is not adequate, while in the latter one it is generally adequate. But there may be very special circumstances which should cause equity to interfere in a case of waste already committed. In a case where waste has resulted in creating chattels, severed from the land, non-unique in character, and the wrongdoer is insolvent, equity should prevent him from removing them or destroying them, because in such a situation the remedy at law is inadequate.

This result was reached in Spear v. Cutter. Therein an injunction was granted not only restraining the commission of future waste but also preventing the removal of timber already cut. The defendant was insolvent. Under these circumstances it was held that the injury would be irreparable if the defendant were permitted to remove or dispose of the timber he had cut. It would appear that this holding is more in accord with practical equitable principles than the dictum in Watson v. Hunter, supra. It would further appear that the remedy at law under present codes is adequate in the absence of the defendant's insolvency.


Suppose the plaintiff is rightfully in possession of land. The defendant is threatening an injury, which because of its nature would amount to waste were he in rightful possession. But because of the technical distinction between waste and trespass such an injury would be a trespass. Such cases are

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13 Ibid. 172.
14 ib. 486 (N. Y. 1848).
15 "Where waste has consisted in creating chattels by severance from the soil, equity will not enjoin their removal from the land even though an injunction against future severance is asked and given, unless the defendant is insolvent or other special circumstances appear." Clark, op. cit. supra n. 1, sec. 189.
16 See authorities cited, supra n. 3.
not real trespass cases but rather situations of trespass in the nature of waste. Equity will grant an injunction for the same reasons as in cases of technical waste.¹⁷

Suppose in such a case that the further element of the insolvency of the defendant is added to the facts. Is it a material factor in determining whether equity has jurisdiction to grant an injunction in the case? In this situation as in the case of threatened waste by one who is insolvent, courts ignore the factor of insolvency and base their jurisdiction upon the power of equity to prevent trespass in the nature of waste.

For example, in Richards v. Dower¹⁸ the defendant had excavated and projected a tunnel under the lot of the plaintiff a distance of 15 feet, and was engaged in its further extension. His insolvency was alleged but the lower court found that he was not, in fact, insolvent. The appellate court held that the injury was a trespass in the nature of waste and that an injunction should have been granted without regard to the solvency or insolvency of the defendant, that it was an immaterial circumstance.¹⁹


The general rule supported by many cases is that equity will not restrain a trespass which is not in the nature of waste.²⁰ The basis of the rule is evident, the remedy at law is usually fully adequate. But there are cases of trespass where the remedy at law is not adequate and equity has shown a willingness to extend its injunctive protection in such instances on the theory of preventing irreparable injury.²¹ The place which the

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¹⁷ Lowndes v. Bettle, 3 New Reports 409, 33 L. J. Ch. 451 (1864); Erhardt v. Boaro, 113 U. S. 557 (1885). See also, Chafee, op. cit. supra n. 6 pp. 35-40.

²⁰ 64 Cal. 62, 28 Pac. 113 (1883).

²¹ "The gravamen is a threatened trespass upon 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 his inheritance, which could not be specifically replaced. In the class to which this case belongs no allegation of insolvency is necessary." More v. Massini, 32 Cal. 590, 594 (1887).


²³ 3 Boston Univ. L. Rev. 242.
Insolvency of the defendant plays in such extension presents an interesting phase of the general problem.

(1) **Repeated Trespasses.**

Equity will enjoin a succession of trespasses which threaten to be repeated indefinitely.\(^2\) This jurisdiction is generally put upon the ground of avoiding a multiplicity of suits. Some cases base the jurisdiction upon the prevention of the acquisition of an easement.\(^3\) It has been suggested that this basis is unsound since the plaintiff could prevent this by a physical interruption of the user or by bringing a suit before the close of any statutory period.\(^4\) But the plaintiff should not be forced to rely on self help and if the statutory period is short a multiplicity of suits will be necessary.

Where the facts present a situation of repeated trespasses plus the insolvency of the defendant what is the jurisdictional value of the insolvency element in the case.

In *Paige v. Akins*\(^5\) the plaintiff asked for an injunction to prevent the defendant from harvesting and removing a crop from his land. The court considered the evidence of the insolvency of the defendant to be sufficient to establish his inability to pay damages and granted an injunction. The facts of the case raise this important query, Is there an adequate remedy at law for repeated trespasses occurring over a short period of time?

If the plaintiff were compelled to bring a separate action at law for each trespass it is evident that such a vexations and expensive remedy would not be an adequate one. But he is not confronted by this difficulty where the trespasses are all committed to the same subject matter by the same defendant over a short period of time. He may recover in one action at law.


\(^{23}\) Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418 (1891).

\(^{24}\) Clark, op. cit. supra n. 1, sec. 195; Walsh, op. cit. supra n. 1, sec. 30.

\(^{25}\) 112 Cal. 401, 44 Pac. 666 (1896).
for all trespasses down to the bringing of his action. It would appear then that there would be an adequate remedy at law in the principal case were it not for the insolvency of the defendant. The court apparently came to this conclusion and based its injunction upon this sole ground. There is no mention in the opinion of repeated trespasses or other possible reasons for the holding. Quite a number of other courts have reached the conclusion that the insolvency of the defendant is sufficient to give equity jurisdiction in cases of repeated trespasses occurring over a short period.

Suppose though that the repeated trespasses instead of occurring at frequent intervals over a short period are threatened to be continued indefinitely or over a long period. In the various actions for damages the amounts recovered are not likely to be large in comparison with the costs of attorneys' fees and incidental expenses and the vexation of actions necessary to prevent the running of each successive statutory period, particularly if it be short, is sufficient to constitute a real hardship. In such cases the remedy at law is not adequate.

It would appear that in cases of this character the solvency

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26 "It is urged that the complainants would be put to numerous suits at law and hence the bill has equity upon the doctrine of the prevention of a multiplicity of suits. It cannot be denied but that the complainants might in one action at law sue to recover all of the surcharges paid for the entire cotton season. One suit or a multiplicity of suits therefore would be a matter of complainant's own election. There being no necessity for a multiplicity of suits the reason for the interference of a court of equity on the principle mentioned falls." Gulf Compress Co. v. Harris, Cortner & Co., 158 Ala. 343, 48 So. 477 (1908) See Leach v. Harbough, 3 Neb. (Unof.) 346, 91 N. W. 521 (1902); Tigard v. Moffitt, 13 Neb. 565, 14 N. W. 534 (1883).

27 West v. Smith, 52 Cal. 322 (1877); Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071 (1895); Hicks v. Compton, 18 Cal. 206 (1861); Booy Oyster Co. v. Gaskill, 69 Atl. 1084 (N. J. 1908).

28 Clark, op. cit. supra n. 1, sec. 195 with cases in the notes; Walsh, op. cit. supra n. 1, sec. 30, note 22.

or insolvency of the defendant is immaterial. Equity has jurisdiction to prevent a multiplicity of suits without the added element of insolvency. There are numerous cases which sustain this conclusion.30

(2) Continuing Trespasses.

Much of the discussion in the preceding section will apply to cases of continuing trespasses. Where the continuation of a trespass is threatened to be continued indefinitely an injunction lies and the solvency or insolvency of the defendant is immaterial.31 If the continuing trespass is likely to occur though over a short period it would appear that the remedy at law is adequate, if the defendant is solvent. The plaintiff would be able to recover in one action at law for all damages down to the bringing of the action. But if the defendant is insolvent the remedy at law is not adequate. In such a case it is the insolvency of the defendant, it is submitted, which is the jurisdictional factor in the case.

(3) Asportation of Chattels.

Generally equity will not restrain the asportation of personal property because the remedy at law is fully adequate.32 Where the chattel is unique though and the defendant is threatening to seize it and carry it away, equity will grant an injunction to prevent the injury but in such a case the solvency or insolvency of the defendant is immaterial since the jurisdiction of equity is based upon the protection of unique property.33 But where the chattel is non-unique the insolvency of the defendant becomes a material factor for without that element the remedy at law is adequate.

In Kaufman v. Weiner34 it was alleged that the defendants, trespassers and insolvent, were threatening to take cordwood belonging to the plaintiff. The court said that these allegations made a case upon the face of the bill authorizing the

30 Musselman v. Marquis, 1 Bush 463 (Ky. 1866); Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 55 N. E. 639 (1900); O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700 (1905); see cases abstracted, 32 A. L. R. 498-502.


33 Sanders v. Sanders, 20 Ark. 610 (1859); see cases, 1 Ames Cases in Eq. Jur. 532-533.

34 169 Ill. 596, 48 N. E. 479 (1897).
interference of a court of equity to restrain such threatened injury to the property of the plaintiff. In this situation the remedy at law is fully adequate in the absence of insolvency so it would appear that this factor is the material jurisdictional one in such a case. Other jurisdictions have come to this conclusion, where the defendant was insolvent in the case of threatened asportation of non-unique chattels, which would amount to a trespass.\textsuperscript{35}

It seems that in most of the tort cases which have been considered the solvency or insolvency of the defendant is ignored by the courts in determining whether equity has jurisdiction to grant relief. But apparently there are certain definite situations where the insolvency of the defendant is the jurisdictional factor since the remedy at law is fully adequate in the absence of this element. These situations are:

(1) Where a repeated trespass or a continuing trespass is likely to be committed by an insolvent defendant over a short period of time, the remedy at law is adequate in the absence of the element of insolvency.

(2) Where the asportation of non-unique personal property is threatened, the insolvency of the defendant becomes a material factor in giving equity jurisdiction to grant preventive relief for in its absence there is an adequate remedy at law.

\textsuperscript{35}"It is therefore held that in such cases an averment of the defendant's insolvency is necessary, for, if he is not insolvent, and the plaintiff can recover an equivalent in money for the loss sustained by the trespass, the damage cannot in any proper sense be called irreparable." \textit{Kistler v. Weaver}, 135 N. C. 388, 47 S. E. 478 (1904).