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# NOTES

## INSOLVENCY OF DEFENDANT AS BASIS OF EQUITY JURISDICTION

In considering the question of whether the insolvency of a defendant is alone sufficient to enable one to obtain equitable relief, it will be well to divide the cases on the subject into two principal groups, namely, cases involving a Tort, and, cases involving a Contract.

Further classification is more difficult, but for the purpose of this study, the Tort group of cases may well be further subdivided into: (1) those dealing with waste, (2) those dealing with trespass in the nature of waste, and (3) those dealing simply with trespass.

Although trespass in the nature of waste is treated by many courts as waste, thus tearing down the old rule that waste must be committed by one rightfully in possession, the cases here will be dealt with separately as of the old classification.

Under the Contract group of cases, the question as to the sufficiency of insolvency alone as a ground of obtaining specific performance will be considered.

(1) The pure waste cases logically divide themselves into two groups; the first consisting of cases in which waste has merely been threatened, and the second consisting of those cases in which the waste has already occurred.

(a) We shall look at some of the threatened waste cases before considering those in which the waste has occurred. These cases of threatened waste seem generally to hold that an injunction will lie to restrain waste even where the wrongdoer is solvent. In other words the plaintiff may get equitable relief in cases of this particular kind without alleging the insolvency of the wrongdoer. Thus it appears that insolvency is not necessary here, and is therefore of no consideration.

In *Brigham v. Overstreet*<sup>1</sup> an action was brought by the owner of property against his tenant. The defendant threatened to remove permanent fixtures, which act would amount to waste.

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<sup>1</sup> 128 Ga. 264, 57 S. E. 484 (1907).

The plaintiff sought an injunction. An injunction was granted, and the court said, at page 488, that an injunction to stay or prevent waste has been held to be 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 accord may be found *Fuller v. Montafi*.<sup>2</sup> In this case, an action by one cotenant against another, the cutting of trees was held to be waste, and it was held that equity would interfere. No insolvency was alleged. *Pardee v. Camden Lumber Co.*<sup>3</sup> was cited as authority for prevention of waste or trespass in the nature of waste by injunction.

Likewise in *Starks v. Redfield*<sup>4</sup> which was an action to enjoin waste brought by a mortgagee against a mortgagor, the court said that waste which diminished the value of the security was sufficient to entitle the plaintiff to an injunction without averring the defendant's insolvency.

These cases and others in which the courts expressed similar views seem to hold that equity will interfere to stay and restrain waste regardless of the wrongdoer's financial status. Therefore, in situations of this sort, it can never be said that the insolvency of the defendant is the lone factor which gives equity jurisdiction.

(b) And now we come to the consideration of those cases in which the waste has already occurred.

Will equity enjoin the removal of trees, etc., after these have been converted into personalty, the defendant being insolvent?

The statement in Clark's "Principles of Equity"<sup>5</sup> to the effect that "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 special circumstances appear" would seem to indicate that in that eminent authority's opinion, the defendant's insolvency might be the principal factor in giving equity jurisdiction in such cases.

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<sup>2</sup> 55 Cal. App. 314, 203 Pac. 406 (1921).

<sup>3</sup> 70 W. Va. 68, 73 S. E. 82 (1911).

<sup>4</sup> 52 Wis. 349, 9 N. W. 168 (1881).

<sup>5</sup> Sec. 189.

However in *Watson v. Hunter*<sup>6</sup> in which the plaintiffs seek an injunction to restrain the defendants from cutting timber and from removing that already cut, the court said that equity will interfere to restrain the defendant from cutting more timber, but will not interfere to prevent him from removing that already cut. Although the insolvency of the defendant was not alleged here, it does not appear that his insolvency would have made any difference.

The authority on this particular point is scarce, but the rule seems to be that insolvency alone is not enough to evoke equitable aid in restraining asportation of personalty.

(2) We now approach the second major group of the Tort cases, namely those involving trespass in the nature of waste.

In this type of case, the insolvency of the wrongdoer seems to be of no serious consideration as being a ground for equitable intervention, when the title to the land is not in dispute.

A very strong case on this point is that of *Pardee v. Camden Lumber Co.*<sup>7</sup> in which case it was held that an injunction would lie to restrain a trespasser from cutting timber on the plaintiff's land even though such trespasser was solvent.

This case overruled previous West Virginia cases, which held that the added element of insolvency was necessary in order to give equity jurisdiction. The court regarded timber as being unique and part of the realty, and when once cut, no matter of damages could reconvert it into timber. The court went so far as to say that it thought that a clear case of trespass by cutting trees should always be enjoined.

In *Bettes v. Brower*<sup>8</sup> the defendant was committing trespass in the nature of waste by severing standing timber to which the plaintiff had title. The plaintiff alleged the defendant's insolvency, and the court, at page 346, declared that equity had jurisdiction in such cases regardless of the defendant's insolvency.

In accord is *Tidwell v. Hitt Lumber Co.*<sup>9</sup> where it was held that a plaintiff land owner was entitled to an injunction against a trespasser cutting the plaintiff's timber even though the defendant was able to respond in damages.

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<sup>6</sup> 9 Amer. Dec. 225 (1821); 5 Johns Ch. 169.

<sup>7</sup> 70 W. Va. 68, 73 S. E. 82 (1911).

<sup>8</sup> 184 Fed. 342 (1911).

<sup>9</sup> 198 Ala. 236, 73 So. 486 (1916).

Walsh, in his work on "Equity,"<sup>10</sup> says, "The acts of a trespasser without title causing permanent damage, which would be waste if done by a tenant for life or for years, will be enjoined in equity everywhere because the damages would be inadequate just as the damages are inadequate for similar acts by a tenant. The cutting of timber causes permanent destruction, and will be enjoined irrespective of the money value of the timber. Any taking away of the corpus of the land, provided it actually results in substantial and permanent harm will be enjoined, though the courts have refused to interfere in cases where the damage, if any, would be very slight, or where the trespass is not in the nature of waste and will be neither continuous nor repeated indefinitely so as to ripen into an easement."<sup>11</sup>

Other cases seem to indicate that insolvency is sometimes an important factor in evoking equitable aid in cases of trespass in the nature of waste. For instance in *Hanly v. Watter-son*<sup>12</sup> the plaintiff sought an injunction to restrain a defendant trespasser from cutting and removing timber to which he was alleged to have no title, and the court said that equity would enjoin a trespasser to real property where good title in the plaintiff is alleged, and it is also alleged in the bill that the defendant is insolvent, because in such cases the party could have no adequate remedy at law.

In line with this last case is *West v. Walker*<sup>13</sup> where equitable relief was refused a plaintiff whose timber was being cut by a trespasser. The court assigned as the reason for refusal that there was not sufficient proof of irreparable injury, and that there was conflict in title. It went on to say that if the plaintiff would clearly establish title, then equity might interpose to prevent multiplicity of suits, and insinuated that an allegation of the defendant's insolvency might be an added factor in gaining equitable interposition.

There are other old decisions to the effect that the insolvency of the defendant may be an important consideration in cases of trespass in the nature of waste, but the later authority appears

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<sup>10</sup> Walsh on Equity, Sec. 29; 54 Conn. 67, 5 Atl. 858 (1886); 182 Ill. 192, 55 N. E. 50.

<sup>11</sup> 30 Atl. 251; 52 N. E. 736.

<sup>12</sup> 39 W. Va. 214, 19 S. E. 536 (1894).

<sup>13</sup> 3 N. J. Equity 279 (1835).

to be contra. In the more recent cases the tendency seems to be to consider trespass in the nature of waste in much the same light as pure waste. Consequently it follows that not only is insolvency never alone enough in this type of case, but it is not even a consideration. It is not necessary.

(3) Passing on to the third major group of Tort cases, namely that group involving trespass not of the "trespass in nature of waste" type, we might well divide this into two minor groups, to wit, that group in which the trespass is single, and that in which it is repeated or continued.

(a) Regarding the cases in which the threatened trespass is single, we find that equity refuses to give relief, even though the defendant in such cases is insolvent.

Walsh, on Equity,<sup>14</sup> says that equity will not restrain a wrongdoer from threatened wrong merely because he could not satisfy a judgment that might be recovered against him. If this were otherwise, there would be thrown into equity practically the entire field of tortious liability, as inadequacy of damages could be readily established in probably a majority of Tort cases by alleging and proving the defendant's irresponsibility.

Pomeroy's "Equity Jurisprudence,"<sup>15</sup> says that if a trespass to property is a single act and is temporary in nature and effect so that an action at law for damages is adequate, equity will not interfere.

This rule seems to indicate that where the defendant is insolvent, equity may interfere, but the majority of authority is to the effect that the insolvency of the defendant alone will not give equity jurisdiction in cases of single threatened trespass.<sup>16</sup> There must be some other ground.

(b) A study of the cases which involve threatened repeated or continued trespasses reveals that equitable relief is always given in these situations when the defendant is insolvent, and is given in some cases when the defendant is solvent.

For instance in *Missouri R. R. Co. v. Hobbs*<sup>17</sup> where an injunction was sought to restrain an insolvent defendant from peddling food on the plaintiff's premises, it was held that equity has jurisdiction to prevent repeated trespasses upon property by

<sup>14</sup> Sec. 63.

<sup>15</sup> Sec. 1537.

<sup>16</sup> 32 A. L. R. 494; 14 R. C. L. 59.

<sup>17</sup> 178 Ark. 1146, 13 S. W. (2d) 610 (1929).

injunction where the remedy at law for damages is inadequate, and to avoid multiplicity of suits, especially when the wrongdoer is insolvent.

In *Woodstock Operating Corp. v. Quinn*<sup>18</sup> where the bill was to enjoin the defendant from hurling debris on the plaintiff's land, the court said that the jurisdiction of a court of equity to prevent trespass on land by injunction will take account of the financial status of the defendant as bearing on his ability to respond in damages when the nature of the trespass is not irreparable.

Likewise in *Martin v. Davis*<sup>19</sup> where an insolvent defendant went on the plaintiff's land, and plowed, and threatened to continue, the court held that an injunction would lie to prevent the defendant from so doing.

And in *Colliton v. Oxborough*<sup>20</sup> in which a solvent defendant trespassed on the plaintiff's land and threatened to continue, the court said that the remedy at law was not adequate, for although each act of trespass would not be destructive of the freehold, and the legal remedy would be adequate if each act stood alone, equity will prevent the wrong by injunction, because the injured party has not a complete and adequate remedy by one action at law for the entire wrong.

This last case allows the plaintiff to get into equity on repeated trespasses alone. Following this authority it would seem that the insolvency of the defendant in cases of this sort would be unnecessary and not even good as a makeweight.

But in the cases where the trespass is a continuing one, the situation is different. In the case of *Boyden v. Bragow*<sup>21</sup> the plaintiff sought an injunction to compel the defendant to remove a tombstone erected upon the plaintiff's lot. Here equity would not interfere to compel the defendant to remove the stone when the cost to the plaintiff for such removal could be computed.

In *Eno v. Christ*<sup>22</sup> the action was for an injunction to compel the defendant to remove dirt which the defendant had placed on the plaintiff's lot. An injunction was given here because damages could not be estimated.

<sup>18</sup> 201 Ala. 681, 79 So. 253 (1918).

<sup>19</sup> 96 Iowa 718, 65 N. W. 1001 (1896).

<sup>20</sup> 86 Minn. 361, 90 N. W. 793 (1902).

<sup>21</sup> 53 N. J. Eq. 26, 30 Atl. 330 (1894).

<sup>22</sup> 54 N. Y. Supp. 400; 25 Misc. Rep. 24 (1898).

The rule seems to be that in cases of this type where the damages can be estimated, the remedy at law is held to be adequate even though the defendant is insolvent and unable to respond in damages. It follows that insolvency of the defendant in cases of this type is not enough.

A few cases appear to hold that the defendant's insolvency alone is sufficient to evoke equitable relief,<sup>23</sup> but in all of these there were the ever-present repeated trespasses. The majority of the authorities, however, state that in cases of threatened repeated trespasses, insolvency is only a makeweight, and is not enough alone.<sup>24</sup>

We now approach the second grand division of our study, namely, the question as to whether insolvency alone is sufficient ground to give equity jurisdiction to compel specific performance of a contract. A glance over the authority on this point discloses that it is not.

In *Chaffee v. Sprague*<sup>25</sup> the bill was to compel the transfer of stock. The defendant in her lifetime executed a deed of trust to the plaintiff, promising that her stock should be transferred to the plaintiff upon demand, by way of securing performance of the conditions of the deed. The defendant died, and the plaintiff demanded the stock. The administrator refused to deliver it. The estate was insolvent. It was held that equity had jurisdiction in such cases, but would not grant relief to the plaintiff because his claim was not superior to those of other creditors. Where an estate is insolvent, equity will not enforce a trust agreement which will operate as a preference against other creditors.

In *McLaughlin v. Piatti*<sup>26</sup> the suit was for specific performance of a contract to sell personalty. The defendant was insolvent. The injunction was refused, and the court said specifically that the insolvency of the defendant was never a ground for equitable jurisdiction. At 453, the court said that the inadequacy of damages was not founded on the idea that the party may not from the insolvency of the vendor be enabled to col-

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<sup>23</sup> 52 Cal. 322; 18 Cal. 206; 44 Pac. 666; 22 S. E. 940; 89 Ga. 824; 30 L. R. A. 98.

<sup>24</sup> 32 A. L. R. 494; 10 R. C. L. 20; 14 R. C. L. 59; 32 C. J. 44.

<sup>25</sup> 13 Atl. 121 (1888).

<sup>26</sup> 27 Cal. 451 (1865).



lect his judgment for damages, but that damages when collected would not afford a complete remedy.

So in *Knott v. Shepherdstown Mfg. Co.*<sup>27</sup> where the suit was to enforce a contract, and the defendant was insolvent, the court said, in refusing an injunction, that this remedy was inadequate by the reason of the insolvency of the defendant, but the reply to this objection is that courts do not provide the means to pay debts but the means of enforcing their payment, regardless of the solvency or insolvency of the defendant.

Williston, on Contracts,<sup>28</sup> states that for a court to decree specific performance of the contract because of the defendant's insolvency is not only a violation of the maxim that equality equals equity, but is nothing less than ordering the debtor to do something which the Bankrupt Act has forbidden. If the defendant's financial condition may properly have a bearing on the plaintiff's right to specific performance, not insolvency but lack of property which can be seized would be the test. He also states that if insolvency stands alone as the only real danger urged in the plaintiff's complaint for equitable relief, then he must fail. An insolvent may make a transfer for any return other than a pre-existing debt, if honestly bargained for as an equivalent, but if the insolvent, prior to 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 him, the situation is different. In that event, insolvency can never properly be a makeweight for the decision of a court. Unless a contract for specific chattel property gives an equitable property right in the chattel, or unless the decree requires the plaintiff to make a full contemporaneous exchange for the property in question, equity should not enforce the contract specifically because of insolvency. To do so is inconsistent with bankruptcy laws.

In 36 Cyc. 564 it is said that the fact that damages cannot be collected because of the defendant's insolvency is mentioned in a few cases as ground for relief, but in a few only has it been held to be the only ground.

In Pomeroy's "Specific Performance,"<sup>29</sup> it is said that the reason for specific performance sometimes advanced, to wit,

<sup>27</sup> 30 W. Va. 790, 5 S. E. 266 (1888).

<sup>28</sup> Sec. 1420.

<sup>29</sup> Sec. 26.

because a law court could not give the property but only give a remedy in damages, the beneficial effect of which must depend on the personal responsibility of the party, is objectionable, because under this principal, equity's aid would at times be extended to every kind of contract, but would never be extended to all contracts of any particular class. The aid would not depend upon the nature in terms of the contract sought to be enforced, but upon the pecuniary condition of the party.

Walsh, on "Equity",<sup>30</sup> says on the subject that the mere fact of the defendant's insolvency alone certainly is not enough to give equitable relief in the form of specific performance, but may throw the balance in favor of equitable relief when without it the court may have decided against specific performance. But insolvency should not be permitted to sway the court's decision, when the result would be a preference contrary to bankrupt law.

Thus it is seen that the authority is to the effect that insolvency alone is not sufficient ground for equitable intervention to compel specific performance of a contract. In all of the cases which have been reviewed, in which equity has interfered, there have been other elements present. In Contract as in Tort insolvency is at best a makeweight.

By way of summary, we may say that insolvency is of no consequence as a factor in the giving of jurisdiction to equity to stay and restrain waste, as equity has jurisdiction in cases of this sort regardless of the wrongdoer's financial status.

In those cases where waste has already occurred, insolvency alone is not sufficient to evoke equitable intervention to prevent the carrying away of the waste material.

Where an injury to realty has been perpetrated by a trespasser (trespass in the nature of waste) the rule is the same as in cases of pure waste. Insolvency is not necessary.

In cases of single threatened trespass, equity will not interfere on the lone ground of the defendant's insolvency.

Where there is threatened repeated or continuing trespasses, when the damage can be estimated, the remedy at law is held to be adequate even though the defendant is insolvent and unable to respond in damages. Thus it follows that in these cases insolvency alone is not enough.

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<sup>30</sup> Sec. 63; 27 Cal. 452; 201 Ala. 356, 78 So. 212 (1918); 36 Cyc. 564.

The weight of authority is to the effect that the defendant's insolvency alone is not a sufficient ground to evoke equitable aid in compelling specific performance of a contract.

Despite the weight of authority, the writer cannot help but be impressed by the views on the subject set forth by Horack in his law review article "Insolvency and Specific Performance,"<sup>31</sup> to the effect that the test of the inadequacy of the remedy at law should be the same whether the case involves Contract or Tort. In either case the remedy should put the plaintiff in the same condition as before. Equity should be satisfied with no less relief. Where relief can be given to the plaintiff without prejudicing the rights of others, the insolvency of the defendants bringing on inadequacy of legal remedy may be the sole ground upon which equity may be induced to exercise its jurisdiction.

Equally impressive is the view advanced by Lawrence in Section 79 of his work on "Equity." Here he states that the insolvency of a party against whom a remedy is sought has been deemed to render the remedy inadequate. On what plausible ground can it be contended that a judgment against any insolvent is an adequate remedy? If a party injured by breach of a contract cannot avail himself of his remedy at law for any beneficial purpose, or if it be doubtful, equity ought to compel specific performance.

These viewpoints appear to be more in harmony with the practical character of equitable relief than those which represent the weight of authority.

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<sup>31</sup> 31 Harvard Law Review 711.