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Insolvency of the Defendant as a Basis of Equity Jurisdiction

Rawlings Ragland

INSOLVENCY OF THE DEFENDANT AS A BASIS OF EQUITY JURISDICTION*

The purpose of this note is to examine, in part, insolvency as a basis for equitable jurisdiction. The question arises frequently in both tort and contract cases. An examination of the text-book writers and a general scanning of the cases will reveal an apparently wide divergence both as to the rule on insolvency as a jurisdictional fact and as to what should be the proper rule. In the light of such a conflict, a more minute study of the cases presenting the problem in its varied aspects is necessary The cases themselves should present the status of the law on the point and should afford a proper background for a decision as to what should be the proper rule.

I. Trespass Cases.

It has been stated that insolvency alone has been held sufficient to give equity jurisdiction. Many text-book writers make such assertions and cite cases to uphold their contention.[1] Dicta in many cases indicates such a rule. However, an examination of the cited cases show no instance of a single trespass plus insolvency in which equity gained jurisdiction. Many of the cases cited do present, however, situations in which insolvency is an important element and these cases are declared by some authorities to uphold the contention that insolvency is a jurisdictional fact. These cases are all similar in that the remedy at law, *as a practical matter, appears* adequate unless the insolvency of the defendant makes the remedy inadequate.

(1) In *Paiges V Akins*,[2] suit was brought to enjoin the defendant from harvesting and removing a crop of summer-fallow from the plaintiff's land. The insolvency of the defendant was set out. The court granted the injunction, stating: "Absolute and complete insolvency need not be shown. The

*This is the first of a series of notes to be published under the same general heading

[1] Lawrence on Equity, Section 79. Pomeroy on Equity Jurisprudence, Section 1911.

[2] 112 Cal. 401, 44 Pac. 666 (1896).

granting of injunctions are to some extent matters of discretion, and should be exercised in favor of the party most likely to be injured."

In *West* v *Smith*,[3] the plaintiff was in possession of public land and plowed and sowed it. A bill for injunction to restrain the defendant from harvesting the crop was allowed. The court stated. "The plaintiff having alleged and proven that the title to the *standing* grain was in himself and that the defendant is insolvent, is entitled to an injunction to restrain the defendant from harvesting and removing the crop" The standing crop was here apparently considered as part of the realty and thus the case is one of trespass in the nature of waste.

In *Amoskeag Manufacturing Company* v *Shurley*,[4] the plaintiff was granted an injunction to restrain the defendants from tearing down his flashboards. The defendants threatened to do it again after having done such act once. The defendants were insolvent.

In *Sooy Oyster Company* v *Gaskill*,[5] the plaintiff was allowed an injunction to restrain some fifty defendants from a threatened raid upon the oyster beds owned by the plaintiff. The insolvency of the defendants was alleged.

Admittedly, under the modern codes one suit at law could be brought to recover damages for such repeated trespasses over a short, definite period of time. Admittedly, the cases put nearly all the emphasis on the insolvency allegation. On the other hand, most of the cases allowing injunction in such type of case are old cases and it is entirely possible that separate suits would be necessary But conceding that one law action would be sufficient to cover all such trespasses, yet it does not necessarily follow that insolvency in such cases is a jurisdictional factor. Two explanations are possible

(a) All the cases present a situation in which repeated trespasses are threatened. A party has a right to sue after each trespass, thus equity may take jurisdiction to prevent a multiplicity of suits. The point has been presented in *Gulf Compress Company* v *Harris, Cortner & Company*,[6] that where a party

[3] 52 Cal. 322 (1877).
[4] 69 N. H. 269, 39 Atl. 976 (1898).
[5] 69 Atlantic 1084 (1908).
[6] 48 So. (Ala.) 477 (1908).

may wait and recover all damage in an action at law that Equity will force him to wait. The holding of the *Gulf Compress Company* case, *supra,* on this point appears to be a minority view.

(b) Historically, equity had jurisdiction to enjoin all threatened repeated trespasses. Recent decisions have shown a tendency to limit the rule and not allow an injunction in all cases of repeated trespasses.[7] Whenever a case presenting the question of repeated trespasses is presented, the recent tendency is to look to the facts, and see if as a practical matter the remedy is adequate. Insolvency here does not give jurisdiction, but aids the court in the use of its discretionary power of granting injunctions after jurisdiction has been obtained. It is significant that the courts invariably declare in this type of case that "the granting of injunctions is largely a matter of discretion. Insolvency aids the court in its decision", *Hicks* v *Compton,*[8] rather than that insolvency gives equity jurisdiction.

Thus the cases mentioned supra appear in theory correct without regard to insolvency as a jurisdictional factor. The cases indicate such a theoretical basis.

In the majority of cases in which the authorities call insolvency the "make-weight", the remedy as a practical matter would be adequate at law apart from the insolvency of the defendant. Here, the courts again use repeated trespasses as the pass-word to allow equity to take jurisdiction.

In *Missouri Pacific Railway Company* v. *Hobbs,*[9] the defendant was restrained from selling his wares on the plaintiff's property Apart from the defendant's insolvency, a law action would admittedly restrain him. Yet the court in granting the injunction stated. "Equity may restrain repeated trespassing on another's property to avoid a multiplicity of suits, especially where the defendant is insolvent."

In a similar case *Wilson* v *Hill,*[10] the court declared that they would grant an injunction to restrain an insolvent trespasser from threatened trespasses, but that if the trespasser had

[7] *Hume* v. *Burns,* 90 Pac. 1009 (1907), *McIntyre* v. *McIntyre,* 287 Ill. 544, 122 N. E. 824 (1919).
[8] 18 Cal. 206 (1861).
[9] 13 S. W. (2d) 610 (1929).
[10] 46 N. J. Eq. 369, 19 Atl. 1094 (1890).

been solvent, then the injunction would not have been granted. Yet, the court indicated that insolvency alone was not sufficient to give equity jurisdiction.

In a similar case *Hicks* v *Compton*,[11] the court declared in a case of threatened trespasses over an indefinite period. "The granting of injunctions is largely a matter of discretion. Insolvency aids the court in its decision"

In nearly all the "make-weight" cases, the courts stated that apart from insolvency, the remedy at law was in fact adequate, that insolvency caused the courts to allow the injunction to be granted. But the courts, in order to guard against establishing insolvency as a jurisdictional factor practically all added "insolvency alone is insufficient to give equity jurisdiction."

Those cases which have overthrown the theoretical basis of equitable jurisdiction as discussed supra have denied the equitable relief asked for on the ground that equity has no jurisdiction to hear the matter. The cases present the situation of threatened trespasses by an insolvent trespasser where the remedy at law is, in fact, adequate apart from insolvency and relief is denied.[12]

II. WASTE.

The courts have consistently held that equity has jurisdiction to enjoin waste. *Poertner* v *Russell*.[13] Thus, in waste cases there is no need to give any consideration to the possible insolvency of the defendant *Brigham* v *Overstreet*.[14] The reason for such a rule is clear as waste is injury to realty and realty is unique.

The rule applied in waste cases is also applied in case of trespass in the nature of waste. *More* v *Messm*.[15] "The trespass is in the nature of waste, thus, the injury is irreparable in itself" *Richards* v *Dower*[16]

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[11] 18 Cal. 206 (1861).

[12] *Mechanic's Foundry* v. *Ryall*, 75 Cal. 601, 17 Pac 703 (1888), *Moore* v. *Halliday*, 72 Pac. 801 (1903), *Hume* v. *Burns*, 90 Pac. 1009 (1907), *Dunkart* v. *Rinehart*, 87 N. C. 224 (1882).

[13] 33 Wis. 193 (1873).

[14] 128 Ga. 447, 57 S. E. 484 (1907)

[15] 32 Cal. 594.

[16] 64 Cal. 62, 28 Pac. 113 (1883).

III. SEVERENCE OF NON-UNIQUE CHATTELS.

(1) The case often arises where a tenant commits waste which results in creating non-unique chattels, severed from the soil and lying around on the ground. The defendant is insolvent and threatens to remove the chattel. The courts have consistently held that an injunction will not be issued to restrain the defendant from carrying off the chattel.[17] Common law replevin might not lie in such a situation, but clearly statutory replevin is an adequate remedy apart from any question of insolvency The cases clearly show that replevin will lie.[18] An analagous situation arises where an insolvent trespasser threatens to carry off non-unique personal property of the plaintiff. Replevin appears to be an adequate remedy apart from insolvency In some cases where the tenant or trespasser is insolvent, the courts, however, allow an injunction to restrain the removal of the chattel.[19] These courts do not contend that insolvency gives jurisdiction. For example, *Spear* v *Cutter*[20] states. "But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an accounting and satisfaction for waste already committed, to avoid a multiplicity of suits, the court will enjoin the defendant from removing the timber already cut if the removal of the timber will cause irreparable injury Insolvency makes the injury irreparable." *Gray* v. *Malone*[21] likewise gives jurisdiction by showing the relation of the chattel with the previous waste or trespass in the nature of waste.

CONTRACT CASES

In the consideration of insolvency as a jurisdictional factor in contract cases, it must be noted in the first place that the American Bankruptcy Act seeks to prevent any transfer by insolvent debtors on account of pre-existing obligation, by making it an act of bankruptcy, and if bankruptcy supervenes within

[17] *Watson* v. *Hunter*, 5 Johns. Ch. 169 (1821), *Simmons* v. *Williford*, 60 Fla. 339, 53 So. 452 (1910).

[18] *McNally* v. *Connolly*, 70 Cal. 3, 11 Pac. 320 (1886), *Warren County, Supra* v. *Gans*, 80 Miss. 76, 31 So. 593 (1901).

[19] *Spear* v. *Cutter*, 5 Barbour (N. Y.) 486 (1849), *Gray* v. *Malone*, 142 Ark. 609, 219 S. W 742 (1920), *Kaufman* v. *Weiner* (1897), 169 Ill. 596, 48 N. E. 479.

[20] See Note 19.

[21] See Note 19.

four months, making the transaction voidable, if the creditors had reasonable cause to believe that a preference would be effected. Thus, the field in which insolvency could be a jurisdictional matter is definitely limited at the present time.

The Bankruptcy Act does not apply to the sale of land or unique chattel. Insolvency plays no part in the granting of specific performance in such case, however, as equity will take jurisdiction to compel specific performance merely because the chattel is unique.

The query thus narrows down to this. will equity take jurisdiction to compel specific performance of a contract for non-unique chattels because of the insolvency of the defendant?

In *Henry* v *Whidden*[22] the defendant breached a contract for the sale of cattle to the plaintiff at a stated price. The defendant was disposing of the cattle to a third party The defendant was wholly execution proof and insolvent. The court declared that no sufficient basis existed for equity jurisdiction.

The court in *McLaughlin* v. *Piatti*[23] denied specific performance of a contract for the sale of cattle. In regard to the allegation of the defendant's insolvency the court said "equity jurisdiction is not based on the accident of insolvency"

The court in *Warren County* v. *Black Coal Company*[24] stated. "The insolvency of the seller does not confer jurisdiction on a court of equity to enforce a contract, the accident of insolvency does not affect the question of jurisdiction"

The courts, however, do allow insolvency to be an important element when combined with other causes for equitable interposition.

(1) In *Ridenbaugh* v *Thayer*[25] the petitioner made large advances on a contract for the purchase of 2,500 cords of wood. After partial performance, the defendant, insolvent, refused to carry out the remainder of the contract. The court allowed specific performance. The court stressed the insolvency of the defendant, but apparently found a trust relation between the parties.

[22] 48 Fla. 268, 37 So. 571 (1904).
[23] 27 Cal. 452 (1865).
[24] 85 West Va. 684, 102 S. E. 672 (1920).
[25] 10 Idaho 662, 80 Pac. 229.

(2) *Clark* v. *Flint*[26] is frequently cited by writers holding that insolvency alone is sufficient. The court in allowing specific performance said "A bill in equity may be maintained for the specific performance of a written contract relating to personal property, if the plaintiff has not an adequate remedy at law A remedy by an action at law for damages against an insolvent person is not a plain, adequate, and complete remedy at law". It is undeniable, however, that recognized grounds for equitable jurisdiction existed apart from insolvency as boats are unique, a trust relation existed, and the complaint asked for an accounting.

In *M'Namara* v *Home Land & Cattle Company,*[27] and *Chastian* v *Smith,*[28] the courts apparently held that insolvency gave jurisdiction.

In summary, it may be stated that an overwhelming majority of the courts clearly hold that insolvency is not a jurisdictional fact in contract cases, although it may be a controlling factor in the court's decision as to the use of its discretionary power. Apparently, a few cases declare that insolvency is a jurisdictional factor, but such cases are rare. In both trespass and contract cases, the courts speak loosely of insolvency when jurisdictional factors are clearly present, but the courts clearly declare that insolvency of itself will not give jurisdiction whenever they render a decision which apparently allows insolvency to give jurisdiction.

It remains only that brief attention be given to a view as to what should be the rule. Equity should give relief where the remedy at law is not adequate. When should the remedy at law be considered adequate is the vital question.

One view is that "by inadequacy of the legal remedy is not meant a failure to produce the money, but that in its nature or character it is not fitted or adapted to the end in view" *Duffy Company* v *Lodebush.*[29] Any other view would "throw into equity practically the entire field of tortious liability, as inadequacy of damages could be readily established in probably a majority of the tort cases by the irresponsibility of the defendant"

[26] 22 Pick (Mass.) 231 (1839).
[27] 105 Fed. 202 (1860).
[28] 30 Ga. 96 (1860).
[29] 159 N. Y. S. 299, 173 App. Div. 205 (1916).

Another view is that "the legal remedy must be as complete, practical and efficient as that which equity could afford", *Terrance* v. *Thompson.*[30] If the defendant is insolvent "the legal remedy is worse than bootless" *Clark* v *Flint, Supra.*

It is submitted that the insolvency cases present the view that inadequacy of the remedy at law means that the remedy in its nature or character is not adapted to the end in view, rather than that the remedy fails to produce the money The great majority of the cases show clearly grounds giving equity jurisdiction apart from insolvency It is the rare case in which it may even be argued that the remedy at law apart from insolvency is adequate. The rarity of such cases, the lack of cases in which insolvency is the only possible factor giving jurisdiction, and the clarity with which the courts declare that insolvency of itself will not give jurisdiction whenever they render a decision, which apparently allows insolvency to give jurisdiction, indicates that adequacy of legal remedy does not mean a production of the money

As to whether the insolvency cases present the better view as to adequacy of the remedy at law, there is serious doubt. It is somewhat of an exaggeration to say that the result of any other definition of adequacy would "at once throw 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 irresponsibility of the defendant"[31] Of course it is not desirable to substitute specific relief for damages as a normal relief. However, the modern cases show a tendency to grant specific performance more freely as a remedy in the place of damages. Such a result is desirable to a limited extent. On this basis, the allowance of insolvency as a make-weight is to be defended. The further extension of specific performance as a remedy which would result from a recognition of insolvency as giving jurisdiction is certainly not a present reality, but would perhaps be wise from a practical viewpoint.

RAWLINGS RAGLAND.

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[30] 263 U. S. 197, 44 Supreme Ct. 15 (1923).
[31] Walsh on Equity, page 318.