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STUDENT NOTES

INSOLVENCY AS A GROUND OF EQUITY JURISDICTION
IN WEST VIRGINIA*

In cases involving trespass to land, the West Virginia court has both by direct holding¹ and by dictum² frequently and consistently asserted that the insolvency of the trespasser will entitle the plaintiff, upon showing good title³ to an injunction because in such case that party could have no adequate remedy at law.⁴ In order to emphasize insolvency as the jurisdictional factor in these cases,⁵ it might be pointed out that prior to the case of *Pardee v. Lumber Co.*,⁶ the cutting of timber upon the land of another was repeatedly held, in this state, to be a mere trespass for which the law gave adequate compensation in damages⁷ and the legal remedy became inadequate only when the trespasser was insolvent.⁸ Thus it may be argued that the *Pardee* case definitely establishes insolvency as the jurisdictional factor in those earlier cases,⁹ and that it was not a mere make-weight¹⁰ aiding the court in the ex-

* This note is confined to trespass to land and contract cases.

¹ *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724 (1890), where the plaintiff failed to allege insolvency; *Lloyd v. Blackburn*, 57 W. Va. 217, 50 S. E. 741 (1905); *Marcum v. Marcum*, 57 W. Va. 285, 50 S. E. 246 (1905), but a mere allegation of insolvency when denied by the defendant must be proven.

² *McMillan v. Ferrell*, 7 W. Va. 223 (1874); *Western M. and M. Co. v. Virginia Channel Coal Co.*, 10 W. Va. 250 (1877); *Cox v. Douglass*, 20 W. Va. 175 (1882); *Cresap v. Kemble*, 26 W. Va. 603 (1885); *Hanley v. Watterson*, 39 W. Va. 214, 19 S. E. 536 (1894); *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271 (1896); *Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521 (1901); *Stevenson & Coon v. Burdett*, 56 W. Va. 109, 48 S. E. 846 (1904).

³ *Western M. & M. Co. v. Virginia Channel Coal Co.*, *supra* n. 2. The bill is fatally defective if it does not aver good title in the plaintiff.

⁴ *Lloyd v. Blackburn*; *Marcum v. Marcum*, *supra* n. 1. Insolvency makes the cutting of timber an irreparable injury.

⁵ *Supra* n. 1.

⁶ 70 W. Va. 68, 73 S. E. 82 (1911). *Accord*: *Kunst v. Mabie*, 72 W. Va. 201, 77 S. E. 987 (1913); *Stybr v. Lumber Co.*, 110 W. Va. 337, 158 S. E. 669 (1931).

⁷ *McMillan v. Ferrell*, *supra* n. 2. Speaking of a wrongful cutting of timber the court said "In ordinary cases the damages to be assessed by a jury, will be adequate for a check, and for a recompense especially if the trespasser is not insolvent"; *Stevenson & Coon v. Burdett*, *supra* n. 2.

⁸ *Supra* nn. 1 and 2.

⁹ *Supra* n. 1.

¹⁰ WALSH ON EQUITY (1930) § 63. Walsh says that in nearly all, if not all cases discussed in which equity has intervened to restrain torts the insolvency of the defendant seems to have been a mere makeweight argument appealing to the discretion of the court, but other reasons existed which justified equitable relief. "Surely it has never been seriously contended that equity will restrain a wrongdoer from a threatened wrong merely because the defendant could not satisfy a judgment that might be recovered against him."

ercise of its discretionary power to grant or deny an injunction.¹¹ On the other hand insolvency as the jurisdictional factor may be opposed by showing that in each of those cases¹² a repeated trespass was threatened¹³ and while as a general rule equity will not enjoin a mere naked trespass to realty, yet if the acts are repeated and continuous, even though the party has a right to sue at law after each offense, equity may take jurisdiction to prevent a multiplicity of suits.¹⁴ What the court may do in a future case involving a single threatened trespass¹⁵ where the defendant is insolvent, therefore, seems questionable. It might conceivably adopt the latter approach and deny relief upon the theory that insolvency alone is not enough in the absence of the other jurisdictional element, a continuous trespass. However, it is submitted that this ground of jurisdiction was not an operative fact before the court and that any distinction between single and continuous acts was either overlooked or disregarded and that the right to take jurisdiction was based solely upon insolvency.¹⁶

The position of our court with respect to insolvency as a ground for equitable intervention in contract cases may be fairly accurately ascertained by a review of the following cases. In *Warren v. Coal Co.*¹⁷ the court unmistakably held, that in the absence of any other equitable features, the mere accident of the defendant's insolvency will not entitle the plaintiff to specific performance of a contract or to an injunction. The earlier case of *Knott v. Manufacturing Co.*¹⁸ in denying relief against an insolvent defendant, held, that in determining the adequacy of the legal remedy the solvency or insolvency of the defendant is immaterial, for the rule of law is the same in either case. Nevertheless there is much dicta to the contrary¹⁹ and *Hogg v. McGuffin*,²⁰ often

¹¹ *Clayborn v. Camilla Coal Co.*, 128 Va. 383, 105 S. E. 117 (1921).

¹² *Supra* n. 1.

¹³ In the majority of these cases the trespass involved consisted of the cutting and removal of timber, or other continuous acts such as the drilling of an oil well.

¹⁴ *Bennet v. Barnes*, 72 W. Va. 161, 78 S. E. 374 (1913).

¹⁵ Where the injury is not permanent, this appears to be the test. Obviously if the single act is completed equity is as incapable of giving adequate relief against an insolvent defendant as is a court of law.

¹⁶ *Supra* n. 1.

¹⁷ 85 W. Va. 684, 102 S. E. 672 (1920).

¹⁸ 30 W. Va. 790, 5 S. E. 266 (1888).

¹⁹ *Renick v. Renick*, 5 W. Va. 285 (1872); *Annon v. Brown*, 65 W. Va. 34, 63 S. E. 691 (1909); *Morgan v. Bartlett*, 75 W. Va. 293, 83 S. E. 1001 (1914); *Williams v. McCarty*, 82 W. Va. 158, 95 S. E. 638 (1918).

²⁰ 67 W. Va. 456, 68 S. E. 41 (1910).

cited as an authority for this position,²¹ appears to be merely dictum also since it involves a basis for jurisdiction apart from the insolvency of the defendant. The suit concerned shares of stock in a "close corporation".²² It may be concluded that in cases of contract in this state, the insolvency of the defendant alone will not entitle the plaintiff to relief in equity.

It is self-evident that a judgment at law against an execution-proof defendant is not an adequate remedy,²³ all formalistic reasoning to the contrary²⁴ notwithstanding. The rendition of a judgment is often a step only in the process of granting relief on a legal claim, which is not completed until execution issues and quite often not until suggestion proceedings are had against a third party holding debts or property due the judgment debtor. Thus, to say the law has adequately served the plaintiff by the rendition of a judgment is to disregard this subsequent phase of the remedial process entirely and to substitute vindication for compensation. The principle arguments against insolvency as a ground of equity jurisdiction present no insurmountable objection. That "such a doctrine would turn over to equity all actions at law for damages where this financial condition of the defendant could be established whether in tort or in contract"²⁵ is not a necessary consequence,²⁶ and if it were, would not be a sufficient reason to deny

²¹ *Williams v. McCarty*; *Morgan v. Bartlett*, *supra* n. 19.

²² The syllabus, however, complicates matters by enumerating in the disjunctive several conditions, one of which is the insolvency of the defendant, which will entitle the plaintiff to specific performance of a contract for an exchange of shares of stock, and the syllabus is sometimes said to be the law of the case in this state. *Kuhn v. Coal Co.*, 215 U. S. 349, 30 S. Ct. 140 (1910); *State v. Pell Splint Co.*, 36 W. Va. 802, 15 S. E. 1000 (1892).

²³ Horack, *Insolvency and Specific Performance* (1918) 31 HARV. L. REV. 702, 703. "The proper test of the adequacy of the legal remedy in any case is, whether the plaintiff can take the sum of money recovered, and with it put himself in the same situation as if the contract had been kept."

²⁴ *Knott v. Manufacturing Co.*, *supra* n. 18. "It may be said that this remedy is inadequate by reason of the insolvency of the company, but the reply to this objection is that courts do not provide the means to pay debts but only the means of enforcing their payment. Whether the debtor is solvent or insolvent is immaterial. The rules of law are the same in either case."

²⁵ WALSH, *op. cit. supra* n. 10.

²⁶ McClintock, *Adequacy of Ineffective Remedy at Law* (1932) 16 MINN L. REV. 233, 255. "Not many of the torts for which redress is not already sought in equity could be prevented by injunction. Obviously an injunction could ordinarily be obtained only where a continuing or a repeated tort was involved," or where a single tort was threatened. Obviously also where the payment of money is alone the reason for the suit, relief in equity, where the defendant is insolvent, is as ineffectual as is the remedy at law. *Cf. Morgan v. Bartlett*, *supra* n. 19. Where a vendor sought specific performance of a contract to sell land.

adequate relief upon a just debt or claim. That such a doctrine would be inequitable in contract cases in that it would create a preference in favor of one creditor of the insolvent over others,²⁷ may be prevented by the exercise of sound discretion by the court as is done in numerous other instances where equity properly has jurisdiction.²⁸ Whether such a doctrine would be more justifiable in tort cases due to the absence of the consensual relationship or in contract cases because the defendant cannot in fairness object to a decree which requires him to perform his obligation²⁹ is of little importance once it becomes established that the legal remedy against an insolvent defendant is inadequate.³⁰

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²⁷ Warren Co. v. Black Coal Co., *supra* n. 17.

²⁸ Horack, *op. cit. supra* n. 23, at 706. "Though the jurisdiction of the court may be perfect, equity in many situations very properly refuses to exercise it and on this basis specific performance should not be given to one creditor in his suit against an insolvent defendant when such relief would result to the prejudice of other creditors occupying similar positions and who are equally entitled to relief."

²⁹ WALSH, *op. cit. supra* n. 10.

³⁰ McClintock, *op. cit. supra* n. 26, at 235. "No reason appears why the test of inadequacy should be different in the two cases, nor is it apparent why judgment for damages against an insolvent is not as glaringly insufficient as a remedy where it is given for the breach of the contract as when it is given for a trespass."