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Adequacy of Ineffective Remedy at Law

By Henry L. McClintock*

By a process of inclusion and exclusion, the classes of cases in which courts of equity consider that the remedy at common law is inadequate to meet the needs of justice have been fairly well determined, and whenever a case in equity falls into one of those classes we may be quite confident that the court will grant equitable relief unless some factor is present which, according to other principles of equity, precludes relief even though the remedy at law is concededly inadequate. But it often happens that in a case which belongs to a class where the remedy at law is ordinarily adequate, some fact renders that remedy ineffective in the particular case. The most common of such facts is the practical impossibility of collecting a judgment for money damages because the defendant is insolvent, which is used in these cases in the sense of execution proof.¹ But other causes may prevent successful enforcement of the judgment; the defendant may, though not generally insolvent, have insufficient property within the jurisdiction to satisfy the judgment; pressure of public opinion or an actual show of force may prevent the enforcement of the judgment; or it may be impossible for the sheriff to deliver specific real or personal property to the plaintiff as commanded by the writ of execution. It is not so easy in these cases to predict whether a court of equity will consider that the ineffectiveness of the remedy in the particular case makes it inadequate, or will follow the general rule that the common law remedy in that class of cases is adequate.

Courts and text writers have often confused the question of whether the common law remedy in such cases is inadequate, so as

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¹For different legal meanings of term "insolvency" see Insolvency 32 C. J. 805. When equity is considering the adequacy of a remedy at law against an insolvent, it is quite clear that it is concerned with the possibility of satisfying a judgment for money damages which may be rendered against him.
to authorize a suit in equity, with the question whether the specific relief asked ought to be given. For example, it has been said as a reason for holding that the insolvency of the defendant does not make the common law remedy for breach of contract inadequate, that to grant specific performance would create an inequitable preference in favor of plaintiff over other creditors. In certain fact situations that reason may justify refusal of specific performance, but that does not necessarily imply that the remedy at law is adequate. In cases involving contracts of such a nature that the recovery of damages for their breach is admittedly an inadequate remedy, courts have refused to decree specific performance because to grant that relief would prejudice the interests of the public, or of other persons not parties to the contract. In this article the discussion will be limited as far as practicable to the sole question whether a court ought to refuse to entertain a suit on the ground that the remedy at law is adequate when it appears that in the particular case that remedy will be practically ineffective.

In states where actions at law and suits in equity have been combined in a single civil action the question is still important, for we have to determine whether in a given action we will give specific relief, or substituted redress in the form of a judgment for money damages, and, in deciding that question, our courts mainly apply the principles which formerly determined whether courts of equity had jurisdiction or whether the only relief was by an action at law. The extent to which the question has been, or ought to be, affected by the fusion of law and equity will be considered later in connection with the discussion of the reasons for refusing to hold that an ineffective common law remedy is an inadequate remedy.

An examination of current equity text books will show the existing confusion of thought upon this subject. Pomeroy's Equity Jurisprudence, in the chapter dealing with jurisdiction for

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3 This distinction is clearly brought out by Horack in, Insolvency and Specific Performance, (1918) 31 Harv. L. Rev. 702, 706.
6 Since the courts often discuss the two questions as if they were the same, it is not possible to separate them entirely in any discussion of the cases.
7 Infra, p. 254.
specific performance, says: "Insolvency of the defendant, rendering him unable to respond in damages, is recognized by dicta in a few cases as a sufficient ground for relief, although damages, if collectible, would be an adequate remedy." In the note to that text he expresses his belief that in no case has insolvency alone been the ground for relief and that the cases seem in conflict with sound principles in two respects: first, the rule makes one under such a contract a preferred creditor; and, second, the inadequacy of the legal relief which is the basis of equitable remedies is ordinarily in the nature of that relief in cases of a certain type not in the difficulty of collection of damages in the individual instance.

In an earlier chapter in the same volume dealing with injunctions against trespass he says:

"The inadequacy of legal remedies, ordinarily, against an insolvent trespasser is obvious, and the reason for equity's intervention in such cases is clear. The number of cases in which the defendant's insolvency is made a material part of the court's reason for granting an injunction is very great. The number of cases in which the question has arisen whether insolvency alone is enough to support an injunction is not so large, but is sufficient to show the general recognition by the courts of the glaring insufficiency of a judgment for damages against an insolvent."

Possibly these two statements might be reconciled by considering that the one relating to trespass deals with the inadequacy of the remedy while the one relating to specific performance deals with the right to relief. Such basis of reconciliation is difficult to sustain in view of the second reason given for the specific performance rule. 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 when it is given for breach of a contract as when it is given for a trespass.

Lawrence on Equity Jurisprudence, in the section dealing generally with adequacy of the remedy at law, says there is considerable confusion as to adequacy of a legal remedy which fails to produce results because the judgment cannot be enforced, quoting from cases which state that the true test is whether a valid judgment could be obtained, not whether it would produce satisfaction; on the other hand insolvency of the defendant has been deemed to render the remedy inadequate. Lawrence concludes:

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101 Lawrence, Equity Juris. sec. 79.
“This viewpoint seems more in harmony with the practical character of equitable relief.” However, in his discussion of specific performance, he says: “Irreparable injury in the equitable sense does not grow out of the mere fact that a defendant is insolvent and that a claim for damages against him is unenforceable.” And in discussing injunction against trespass he says that in several cases the insolvency of the trespasser is sufficient to justify the injunction on the theory that thereby an otherwise adequate remedy at law becomes ineffective but that in most of these cases other elements of equitable relief are present and it may be questioned whether insolvency alone is thoroughly established as a ground for the jurisdiction.

Here is not only an apparent inconsistency between the statement of the general principle and its application to suits for specific performance of contracts or for injunction against a trespass, but the author seems to state more positively that insolvency alone does not make inadequate the legal remedy for trespass, the situation where Pomeroy found the remedy to be glaringly insufficient, than for breach of contract, where Pomeroy concludes the remedy is not inadequate.

Walsh in his chapter on specific performance says:

“In a considerable number of the cases in which equity has intervened to restrain torts, discussed in preceding chapters, the insolvency of the defendant is stated to be one of the reasons for equitable action. In nearly all, if not all, of these cases, this seems to have been a make-weight argument, a fact appealing to the court’s discretion, but, where other reasons existed, amply justifying 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. Such a doctrine 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.

“In the field of contract a more serious effort has been made to establish the right to equitable relief in the form of specific performance because of inadequacy of damages by setting up and proving the defendant’s insolvency. Certainly the mere fact that the defendant is insolvent or execution proof is not by itself sufficient. 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, and none of

111 Lawrence, Equity Juris. sec. 265.
122 Lawrence, Equity Juris. sec. 870.
13Equity, sec. 63.
ADEQUACY OF INEFFECTIVE REMEDY AT LAW

the cases establish any such doctrine. It may be argued with some reason that the defendant could not object fairly to specific performance, which requires him to perform his obligation, and where the rights of other creditors are not interfered with there would be no one else to object. But this argument hits the entire system of damages at law in its weakest point, and if accepted, would go a long way to substitute specific relief for damages as normal relief generally, like relief under the civil law on the continent of Europe, and would be in the nature of a revolutionary change, probably desirable, but very far from being accepted by the courts. We cannot start, therefore, with the assumption that specific performance will be given where a judgment for damages will be uncollectible in cases where the rights of other creditors under the bankruptcy laws would not be affected adversely. The cases holding or stating that insolvency is a reason for specific performance were based on other facts making damages inadequate, of the various kinds discussed in the foregoing sections, and insolvency was, therefore, a make-weight reason, of real importance in close cases in determining the exercise of the court's discretion to grant or withhold specific relief, but of no importance in other cases in which such relief would be given irrespective of the defendant's insolvency. Most of these cases assert that insolvency alone is not enough to justify specific performance."

This author, in disapproving the application of the doctrine in any case, disagrees with both Pomeroy and Lawrence, but he is, at least, consistent with himself. In recognizing that there is more authority for holding the common law remedy against an insolvent inadequate in suits for specific performance than in suits to enjoin torts, he is more nearly in accord with Lawrence than with Pomeroy but less in accord with the actual state of the cases.

The lists of cases cited by these text writers in support of their respective texts vary from each other almost as much as the conclusions drawn therefrom. Each list is but a small selection of a great number of cases that have at least some bearing upon the question. The number is much too large for even a bare citation of them to be possible here. Many of them are of very

44In making a study of this question a list of cases was compiled composed of those cited by Horack in his article, Insolvency and Specific Performance, (1918) 31 Harv. L. Rev. 702, 706; those cited by the three authors here referred to; those cited in relevant sections in Corpus Juris and Cyc, and in Ruling Case Law and various notes referred to therein; and finally of cases cited by the various courts which had not been cited in any of the reference books consulted. By this method a list of 284 cases was compiled all of which have been examined. There is no assurance this list is exhaustive for each reference has contained citations of many cases not listed by others.
little value as authority, such as those cases which merely say, in
denyng equitable relief, that it is not alleged defendant is insolvent
or those which, in granting equitable relief for other reasons, add
the statement that defendant is insolvent. Another very large
group of cases includes those which enumerate several grounds
for holding the remedy at law inadequate, among them the impos-
sibility of enforcing a judgment at law if one should be obtained.
These cases are authority only for the proposition that the inef-
ficativeness of the legal remedy may be considered along with other
reasons in determining whether equity will afford its extraor-
dinary relief, a proposition that appears not to be disputed by any-
one and which is questioned only by Walsh.15

Since the cases which refuse to grant relief on the ground that
the remedy at law is adequate, even if it appears that a judg-
ment at common law cannot be effectively enforced, are in the
minority numerically and seem to be opposed to the ordinary
meaning of the term "adequate," we shall impose the burden of
proof on those cases and call them first for examination. For
convenience we shall group them according to the nature of the
relief sought.

The resistance of cities and counties to the payment of rail-
road aid bonds led the bondholders in some cases to attempt to
resort to equity for relief. In two of these cases16 which were
finally determined by the United States Supreme Court the ques-
tion was considered whether equity could enforce the levy or col-
lection of taxes to pay such bonds where the remedy at law had
proved to be ineffective because the officials whose duty it was to
levy or collect them resigned from office or refused to qualify.
In both cases the court stressed the lack of power in equity to
make the levy or collection of taxes either directly or through its
receiver, because such levy and collection were legislative acts and
could be performed only by the persons designated by the legis-
lature. Then the court discussed the contention that the remedy
at law by mandamus was not adequate because it had proved to
be ineffective. In denying equity jurisdiction on this ground the
court said in the earlier case:

"The remedy is in law and theory adequate and perfect. The
difficulty is in its execution only. The want of remedy and the
inability to obtain the fruits of a remedy are quite distinct and
yet they are confounded in the present proceeding."

15Walsh, Equity, sec. 63.
16Rees v. Watertown, (1873) 19 Wall. (U.S.) 107. 22 L. Ed. 72;
472.
The court then referred to a situation once existing in New York where tenants of large estates composing the majority of their communities banded together to prevent the enforcement of dispossess warrants and stated:

"It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. 17 The present case stands on the same principle."

In the latter case the court quoted with approval much of this language from the earlier case and added:

"By inadequacy of the remedy at law is here meant, not that it fails to produce the money—that is a very usual result in the use of all remedies—but that in its nature or character it is not fitted or adapted to the end in view."

These cases were followed by two lower federal courts in refusing to enjoin a city from paying out any of its funds for the support of its schools until it had discharged the bonds held by plaintiff 18 and in refusing to enforce against the property of individual taxpayers the lien for the tax which the legislature had created. 19 The Florida court also expressly followed Rees v. Watertown 20 in refusing to enjoin a sale for taxes of property of a claimant who claimed a right to set off against the taxes the amount of his claim against the city. 21 Apparently no court has ever attempted to give equitable relief in a case of this character. The refusal of relief may be sustained on the ground first stated, the lack of power in a court of equity to levy or collect taxes, or it might also be sustained on the ground that relief in equity would be equally ineffective. The obligation to pay taxes cannot

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17 It may be noted that at one period of English legal history a large proportion of the petitions for relief addressed to the chancellor or the King's Council were based on allegations of a situation substantially analogous to the one referred to here, the inability of the common law courts to give effective relief against a defendant powerful enough to overawe or resist the officers charged with the execution of the common law judgments. See 10 Selden Society, Select Cases in Chancery, Introduction p. xxi; Plucknett, Concise History of the Common Law, 138, 139. But jurisdiction over these cases seems to have passed to the Court of Star Chamber rather than to the Court of Chancery and to have disappeared with the abolition of the former institution. Under our modern systems where the chancellor is no longer a powerful officer exercising the delegated power of the King, but merely a judge dependent on ministerial officers for the enforcement of his decrees, it may be doubted whether he could give relief in such cases which would be any more effective than the common law judgments.

18 Safe Deposit, etc., Co. of Baltimore v. Anniston, (C.C.A. Ala. 1899) 96 Fed. 661.


20 (1873) 19 Wall. (U.S.) 107, 22 L. Ed. 72.

be made a personal obligation of the taxpayers, and it is probable that doubt as to the validity of a sale, by an officer of the equity court, of property to pay the taxes would be so great that the sale would yield very little revenue.

Most of the cases in which the question of the adequacy of an ineffective legal remedy has been raised have been suits to enjoin the commission of some tort, generally equitable "trespass." Generally the injunction has been issued, either on the ground of insolvency alone, or on other grounds plus insolvency, but in a few jurisdictions courts have refused to enjoin an insolvent trespasser.

The apparently settled rule in Florida that the insolvency of a defendant is not sufficient alone to warrant relief in equity was first laid down in *Pensacola, etc., R. R. v. Spratt*, where plaintiffs asked that the court enjoin the operation of trains over a branch line of the railway which had been constructed by plaintiff as contractor and on which he claimed a lien. The issues raised by the pleadings involved hostile claims as to the respective rights of those to whom the property had been given by the military authorities of the Confederate and Federal governments respectively. The trial court did not grant the relief prayed for but entered an interlocutory decree impounding the revenues of the railroad. The Supreme Court stated several reasons why that relief should not have been given, chief stress being placed on the right of plaintiff to enforce any lien which he might be able to establish against the property in the hands of the solvent transferee so that he was in no danger of losing his claim because of the insolvency of the transferrer. The court then added:

"The insolvency of the debtor is never a sufficient reason of itself for the exercise of the extraordinary power of the court by way of injunction, and courts have never acted upon the insolvency of the debtor unless there was some other equitable ground for its interposition."

One judge dissented on the ground that it had been held in previous cases that insolvency was a sufficient basis for relief. The majority opinion explains *Yonge v. McCormick*, where collection of notes for the purchase price of land which had been conveyed to plaintiffs by an insolvent vendor, and title to which had totally

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22It should be recalled that the term "trespass" is used by courts of equity to include all cases of physical interference with property claimed by plaintiff, regardless of who may be in possession, unless there is such privity of title between the parties as to make the case waste.
24(1855) 6 Fla. 370.
25(1850) 3 Fla. 269.
failed, was enjoined, as based, not on insolvency alone, but on a failure of consideration and insolvency, though that case and the earlier case of Hunter v. Bradford had stated that after conveyance had been made by warranty deed the purchaser must rely on his action at law for breach of warranty if the title fails and that collection of the purchase price will not be enjoined unless the defendant is insolvent. It would seem that, even though the remedy at law were considered to be inadequate equity ought not to enjoin the operation of a railroad to force it to pay its debts, though that was the decree threatened in Prevolt v. The Chicago etc., Ry. Co. against an insolvent railroad corporation if it did not pay to plaintiff the amount awarded to him in proceedings to condemn his land for its right of way. The Pensacola Case established the rule which has since been consistently followed in Florida that insolvency of defendant alone does not make an otherwise adequate remedy at law inadequate.

Another early case refusing to enjoin trespass by an insolvent which has been frequently cited in other jurisdictions is Centerville, etc., Turnpike Co. v. Barnett where the corporation plaintiff alleged that it had terminated defendant's contract to construct its turnpike because the work of the defendants was unsatisfactory but that defendants were remaining in possession of the work and continuing to construct the road grade and were insolvent. The court stated in usual language the rule that equity would restrain a trespass only in exceptional cases and found it hard to believe that two insolvent men working on a turnpike with a few men and teams would cause irreparable injury even if their work was not substantially beneficial, an allegation which the court

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26 This seems to be the uniform rule. See Yarborough v. Thornton, (1906) 147 Ala. 221, 42 So. 402, and the numerous cases cited therein; Jones v. Stanton, (1848) 11 Mo. 433. These cases are an application of the principle which underlies the doctrine of equitable setoff which is applied only when the defendant is insolvent. See Horack. Insolvency and Specific Performance (1918) 31 Harv. L. Rev. 702, 715 and cases cited in note 40. No equity case has been found which refuses to protect plaintiff against being compelled to pay money to an insolvent defendant against whom he has a claim arising out of the same transaction, or which refuses to protect him by preventing the payment of a fund, to which he has a claim, by a third person to an insolvent defendant.

27 (1879) 69 Mo. 633.


29 (1851) 2 Ind. 536.
apparently accepted with considerable reserve since the engineer of the corporation had, up to the time of the declared rescission, passed upon the work as completed from time to time and authorized payments to defendants. After manifesting by its whole opinion a disbelief in the merits of plaintiff's case the court added:

"The fact that the trespasser is insolvent will not give chancery jurisdiction to enjoin his acts where the other circumstances of his case preclude it." No reason or authority is given for this statement, and it is doubtful if the court meant thereby to hold that an injunction against a threatened trespass by an insolvent trespasser would be refused merely because the remedy at law was deemed to be adequate. In two later tort cases the Indiana supreme court, in granting an injunction, stated that the remedy at law against an insolvent was inadequate, but in each case the injunction was stated by the court to be sustainable on other grounds.

In Oregon it seems to be settled by a series of uniform decisions that insolvency alone will not authorize an injunction against tort. The first of these cases was a suit to enjoin trespass on a mining claim, but the court stated only a single act of trespass to divert water was shown. It then relied on *Pensacola R. R. v. Spratt* as authority for the proposition that "the mere insolvency of the defendant is never a sufficient reason of itself for injunctive relief" and added that the only evidence of defendant's insolvency was the hearsay testimony of plaintiff. The second case cited *Centerville, etc., Turnpike Co. v. Barnett* and *Mechanic's Foundry v. Ryall*. The later cases have relied on these two. None of them attempts to discuss the question apart from the authorities cited nor refers to any of the cases which have allowed relief for insolvency.

In Pennsylvania this question was first presented in the case of *Heilman v. The Union Canal Co.* which was a suit to enjoin diversion of water by an insolvent canal company unless it should

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30Stone v. Curry, (1886) 110 Ind. 514; Champ v. Kendrick, (1892) 130 Ind. 549, 30 N. E. 787.
31Parker v. Furlong, (1900) 37 Or. 248, 62 Pac. 490.
32(1867) 12 Fla. 269, 91 Am. Dec. 747, supra note 23 and accompanying text.
34(1851) 2 Ind. 536, supra note 29.
35(1888) 75 Cal. 601, 17 Pac. 703, infra note 45.
36Hume v. Burns, (1907) 50 Or. 124, 90 Pac. 1009; Stewart v. Erpelding, (1915) 76 Or. 309, 148 Pac. 1129; Smith v. Howell, (1918) 91 Or. 279, 176 Pac. 805.
37(1860) 37 Pa. St. 100.
pay past damages and give security for the future. It appeared that for more than twenty years the plaintiff had accepted compensation for the diversion of its water from the canal company under an agreement between the parties and appeared to be willing to permit the diversion to continue if it were paid therefor. The court said that it would not, in view of that assent which proved that the injury was not irreparable, destroy the defendant's works, now an important public thoroughfare, by restraining their use as a public highway, and plaintiff was referred to his remedy at law which was said to be adequate. With reference to the insolvency of the defendant the court said:

"The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law on account of the insolvency of the defendants is not, of itself, a ground for equitable interference. The remedy is what is to be looked at. If it exists, and is ordinarily adequate, its possible want of success is not a consideration."

The court added it did not mean to hold that the insolvency of the defendant was never a consideration moving a chancellor; it frequently was such a consideration but was not alone sufficient. This case was followed on similar facts in *Slump's Appeal* with no added discussion of the principle. It was also followed by the lower court in *Bersch v. Rust* which refused to set aside an alleged fraudulent conveyance to an attorney to pay for services rendered by him, after the property conveyed to him had been assigned for the benefit of his creditors. On appeal, the supreme court set out the lower court's opinion in the statement of facts but held that the bill was properly dismissed because the alleged fraud was not proved.

In some cases in other jurisdictions the court has refused to enjoin the commission of a tort by an insolvent, but the opinion itself or the holding in other cases in the same jurisdiction seems to indicate that the refusal was not based on the ground that the remedy at law was adequate. *Willis v. O'Connell* refused to enjoin a threatened defamation of plaintiff's patent medicine and of those who gave testimonials. The trial judge, in refusing the relief on the ground that equity will not enjoin a libel, also said: "The mere fact that defendant cannot be compelled to pay a judgment at law cannot make the plaintiff's remedy there inadequate." Any other rule would mean that the rich man could

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38 (1880) 1 Walk. (Pa.) 420.
39 (1915) 249 Pa. 512, 95 Atl. 108.
utter libels while the poor man would be deprived of a jury trial in such cases because of his poverty. That the court did not mean to lay down a general principle that the recovery of damages at law against an insolvent was an adequate remedy appears from the fact that it quoted from Deegan v. Neville \(^{41}\) a statement that the insolvency of the defendant who is threatening to commit trespass will make the threatened injury irreparable.

In a suit \(^{42}\) in Alabama by administrators to compel relatives of decedent to restore money, account books and papers which they had taken from the safe of decedent shortly before his death and against his expressed prohibition, where defendants were alleged to be insolvent, the court held there was no fraud or breach of confidence on which to base a constructive trust but only a larceny or trespass. In its opinion the court said:

"Of course, the mere fact that plaintiff's legal remedies will prove abortive because of the insolvency of the respondents cannot impart equity to the bill. There must be some ground of equity jurisdiction stated, and that inadequacy of legal remedies which results from the impotence of process out of courts of law can never be a basis for equitable interposition."

The court cited no authorities for the statement, and it appears to be inconsistent with the holding \(^{43}\) of the same court that collection of the purchase money by a grantor who had conveyed, with warranty, a title which had failed could be enjoined if the grantor is insolvent but not otherwise. The Alabama court has often \(^{44}\) stressed the insolvency of the defendant as a ground for enjoining trespass to land, but has never apparently had to base the injunction on that fact alone.

In Mechanic's Foundry v. Ryall \(^{45}\) an injunction to restrain a discharged employee from re-entering plaintiff's place of business was denied, and the court said: "Nor will equity interpose to restrain a trespasser merely because he is a trespasser and is insolvent," citing Centerville, etc., Turnpike Co. v. Barnett. \(^{46}\) The court then stated that the defendant might be excluded from plaintiff's place of business by gentle force or by calling a policeman. If this case intended to hold that insolvency alone did not make the remedy at law against an insolvent trespasser inadequate, it is

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\(^{41}\)(1900) 128 Ala. 471, 29 So. 173, 85 Am. St. Rep. 137.

\(^{42}\)Chambers v. Chambers, (1893) 98 Ala. 454, 13 So. 674.

\(^{43}\)Yarborough v. Thornton, (1906) 147 Ala. 221, 42 So. 402, and cases cited therein.


\(^{45}\)(1888) 75 Cal. 601, 17 Pac. 703.

\(^{46}\)(1851) 2 Ind. 536, supra note 29.
contrary to other California cases, particularly *De Groot v. Peters*, where an injunction to restrain an insolvent defendant from intruding into a store where he claimed to be a partner was sustained. The *Ryall Case* was distinguished on the ground that in the instant case bodily ejection did not terminate the injuries since defendant was assuming control over the business. Both the *Ryall Case* and the Indiana case on which it relied involved trespasses of so trivial a nature that perhaps only nominal damages could have been recovered. In such cases it may very reasonably be held that the insolvency of the defendant is immaterial.

In *Morgan v. Palmer* an injunction was refused, but the case is clearly not based on the principle that the remedy at law against an insolvent was adequate. There the defendant, claiming a right of way, was removing the bars which plaintiff had placed across the way and allowing plaintiff's cattle to escape. The court cited *Winnipissiogee Lake Company v. Worster* to the effect that in determining whether to exercise its discretion to enjoin a trespass the court would consider the fact of defendant's insolvency but that such fact was not decisive and added: "Where the injury apprehended is not serious nor its nature irreparable, but the main object of the suit would be to settle the title, a court of equity, we think, ought not to interfere by injunction even if the defendant be insolvent." The cited case has been very frequently cited in other jurisdictions for the proposition that insolvency of the defendant renders the remedy at law inadequate, but the opinion in that case also finds that the injury threatened, the destruction of a dam, would have been irreparable in its nature.

In specific performance cases we find a situation similar to that which exists with reference to injunctions against torts. In Florida and Indiana the courts have refused relief in cases where the defendant was insolvent. In the Indiana case the court stated that the claim that plaintiff was entitled to specific performance of a contract to deliver bonds and release plaintiff from a stock subscription because of the insolvency of the defendant

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47(1889) 124 Calif. 406, 57 Pac. 209, 71 Am. St. Rep. 91. Compare Rohrer v. Babcock, (1896) 114 Calif. 124, 45 Pac. 1054 which enjoined the cutting of hay by an insolvent trespasser on the ground that the remedy at law was inadequate, but cited the *Ryall case* for the proposition that an ordinary trespass would not be enjoined.

48(1869) 48 N. H. 336.

49(1854) 29 N. H. 433.

50*Hendry v. Whidden*, (1904) 48 Fla. 268, 37 So. 571 (See note in (1905) 18 Harv. L. Rev. 454 based on this case); *Simms v. Burnette*, (1908) 55 Fla. 702, 46 So. 90.

51*Cincinnati, etc., R. Co. v. Washburn*, (1865) 25 Ind. 259.
was a novel proposition to which the court was not prepared to assent, which would seem to imply that no authorities allowing such relief had been cited to the court. In Oregon the court has stated in two suits in which specific performance against an insolvent was asked that insolvency alone is not sufficient to authorize resort to a court of equity, but in both cases it found other grounds for equitable relief and relied upon the insolvency of defendants as a make-weight inducing the court to exercise discretion in favor of the relief.

In Arkansas, Connecticut and New Mexico, which apparently have no cases deciding this question in connection with a suit for injunction against a tort, we also find cases which have denied specific performance of a contract although the defendant was insolvent. In the Arkansas case the contract was for the sale of a quantity of cotton, and the court stressed the fact that the sale was not one of specific property. It added that the plaintiff "has his remedy at law, and the insolvency of the company does not change the rule." No reason or authority is given. In Connecticut the suit was to enjoin breach of a contract by a dentist not to compete after selling his practice but providing that he should have liberty to compete if he paid the plaintiff one thousand dollars. The court construed this contract as giving the defendant the option to resume practice so that the only relief to which plaintiff was entitled was recovery of the sum fixed. In answering a suggestion in plaintiff's brief that the defendant was insolvent the court said:

"There is no finding to that effect; and if it were so that fact


53 Horack, Insolvency and Specific Performance, (1918) 31 Harv. L. Rev. 702, n. 3, argues that the additional ground for equitable relief suggested in these cases, a trust relationship arising from advances by plaintiff to defendant to grow the crops which were to be sold to plaintiff, was untenable. But Hurley v. Atchison, etc., R. Co., (1909) 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729 holds that advances by a railroad to a corporation to mine coal to be sold to the railroad give an equitable right to have the coal mined and delivered which can be enforced against the trustee in bankruptcy of the coal corporation. No distinction is apparent between such advances and advances to grow a crop.

54 Block v. Shaw, (1906) 78 Ark. 511, 95 S. W. 806.

55 In Ellsworth v. Hale, (1878) 33 Ark. 633; Collins v. Haratopsky, (1880) 36 Ark. 316; Myers v. Hawkins, (1900) 67 Ark. 413; and Little Red River Levee Dist. v. Thomas, (1922) 154 Ark. 328, 242 S. W. 552, there are statements by the court that insolvent trespassers may be enjoined, but the decisions were not necessarily based thereon.

would not give to a court of equity the right to issue an injunction. It is the contract itself which gives to or takes away from the court its jurisdiction, not the wealth or poverty of the party defendant."

That language might mean only that the insolvency of the defendant does not deprive him of his option, except that the court cites a New York special term opinion\textsuperscript{7} which expressly held that the insolvency of the defendant did not give equity jurisdiction where the contract had fixed liquidated damages and thereby eliminated the impossibility of ascertaining damages as a ground for equitable relief. In the New Mexico case\textsuperscript{8} specific performance of a contract to sell a piano to plaintiff's wife was sought after the wife had died and plaintiff had agreed to resell the piano to another. The court held that the insolvency of the defendant would not alone give equity jurisdiction and found no other basis for equitable relief. The court gave no reasons for its holding except a citation of authorities denying relief, which it distinguished from others in which the relief had been granted on the ground that in the latter cases there were other reasons for allowing equitable relief.

In some other jurisdictions where insolvency has been held sufficient to enjoin torts, courts have refused specific performance of contracts where defendant was insolvent, but generally those cases are easily sustainable on other grounds though the courts often cite in support of their decisions cases which have held or stated that the insolvency of a defendant does not make the legal remedy inadequate. An early federal case\textsuperscript{9} denying relief against an insolvent estate of a decedent was principally based upon the ground that to grant relief would be contrary to the equitable principle of dividing the assets of an insolvent estate equally among the creditors. In a later federal case\textsuperscript{10} a railroad contractor sued to enjoin the railroad from interfering with his work under his contract and to require the delivery of specified bonds in payment therefor. The court stated that something more than insolvency of defendant was necessary to give jurisdiction to equity. But the real basis of the decision was the impracticability of supervising the performance of the work, which was a prerequisite to the delivery of the bonds, as appears from the authorities cited,

\textsuperscript{7}Nesle v. Reese, (1855) 19 Abb. Pr. 240, 29 How. Pr. 382.
\textsuperscript{8}Gillett v. Warren, (1900) 10 N. Mex. 523, 62 Pac. 975. This case is unusual in that it cites cases on both sides of the question.
\textsuperscript{10}Strang v. Richmond, etc., R. Co. (C.C. Va. 1899) 93 Fed. 71.
none of which discuss the effect of insolvency. A California case, often cited for the proposition that insolvency alone does not give equity jurisdiction to enforce a contract specifically, involved a contract to sell five hundred head of cattle to be selected out of defendant's herd. The court did say:

"The equitable jurisdiction to enforce specific performance in this class of contracts is not based either in whole or in part upon the accident of insolvency, but upon the general principle or truth that in the excepted cases there can be no adequate compensation in damages at law, the solvency of the defendant being given."

No reason or authority is given for this statement, and the court thereafter stated that under the contract plaintiff had a right to take possession of defendant's entire herd in order to select the five hundred head to which he was entitled and that such right to possession could be enforced by the code action of claim and delivery. Another case frequently cited as denying that insolvency gives jurisdiction to enforce specific performance is United, etc., Ry. and Canal Co. v. Hoppock. That was a suit by executors for specific performance of a covenant to furnish water for a mill and for damages. The court held that the right to the water passed with the land to the heirs of the covenantee so that his executors, the plaintiffs in this case, had only a right to damages. The court said: "Nor will the allegation that the companies have no property upon which to levy under a judgment rendered in a court of law, upon this claim for damages, give equity jurisdiction to establish the claim itself." The court added that, after judgment had been obtained on the claim, a bill in equity might lie to discover assets. It would seem clear that this language, when considered in connection with the facts, was not intended as a statement that where the plaintiff may properly demand specific relief equity will deny that relief on the ground that a recovery of money damages against an insolvent would be an adequate remedy. Where the only relief to which plaintiff is entitled under the contract is a recovery of money, a remedy in equity against an insolvent would be as ineffective as a remedy at law. Though West Virginia has consistently held and

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62 See citations to that effect in Horack, Insolvency and Specific Performance, (1918) 31 Harv. L. Rev. 702, n. 1; 1 Lawrence, Eq. Jurisprudence, sec. 265; Walsh, Equity, sec. 63; notes in (1905) 18 Harv. L. Rev. 454 and L. R. A. 1918E 611.
63 (1877) 28 N. J. Eq. 261. See citations of this case in Horack, Insolvency and Specific Performance, (1918) 31 Harv. L. Rev. 702, 703, n. 5; 1 Lawrence, Equity Jurisprudence 265; Walsh, Equity, sec. 63.
64 See Aspinwall v. Aspinwall, (1895) 53 N. J. Eq. 684, 33 Atl. 470,
oftener stated\(^6\) that the insolvency of the defendant is a basis for
injunction to restrain a trespasser, it has refused specific perfor-
mance in two cases where the defendant was insolvent. The
first of these cases\(^6\) gives no reason or authority for the rule,
though it would appear that the real reason was that the specific
relief desired, declaration of a lien, was not authorized by the
contract. The second case\(^6\) cites numerous authorities and also
gives as a reason for the rule the fact that enforcement of a con-
tract for the sale of ordinary chattels against an insolvent seller
would give the buyer an inequitable preference over other credi-
tors.

In the case of McNamara v. Home Land and Cattle Co.\(^9\) the
fact that defendant company had no assets subject to execution
within the state was held to be equivalent to its insolvency, and
specific performance of a contract by the company to sell range
cattle was decreed. There is no apparent reason why inability to
levy execution for this reason should not be treated the same as
inability because of want of any property not exempt from levy.
Hicks v. Compton\(^9\) is apparently the only case where general re-
sistance to the enforcement of a judgment at law was alleged in
the bill. An injunction against trespass was granted in that case,
the opinion of the court stating that the complaint showed the
injury would be irreparable and that judgments against the defen-
dants would be absolutely worthless. The opinion does not refer
to the allegations of forcible resistance.\(^7\)

holding that the constitutional prohibition against imprisonment for debt
prevents the enforcement by contempt proceedings of an equitable decree
for the payment of a money obligation arising from contract.

\(^6\)Marcum v. Marcum, (1905) 57 W. Va. 285, 50 S. E. 246; Lloyd

\(^6\)Cox v. Douglass, (1882) 20 W. Va. 175; Cresap v. Kimble, (1885)
26 W. Va. 603; Hanley v. Watterson, (1894) 39 W. Va. 214, 19 S. E.
30; Battman v. Harness, (1896) 42 W. Va. 433, 26 S. E. 271, 36 L. R. A.
656; Grobe v. Roup, (1897) 44 W. Va. 197, 28 S. E. 699; Fluharty v.


\(^6\)Warren Co. v. Black Coal Co., (1920) 85 W. Va. 684, 102 S. E.
672, 15 A. L. R. 1083, supra, note 2.

\(^6\)(C.C.A. Mont 1900) 105 Fed. 202, reversed on other grounds, Home
Land & Cattle Co. v. McNamara (C.C.A. 9th Cir. 1901) 111 Fed. 822.
Compare Overmire v. Haworth (1891) 48 Minn. 372, 51 N. W. 121, 31
Am. St. Rep. 660, where the rule that a creditor must obtain judgment
and have execution returned before he could enforce a resulting trust was
held not to apply where defendant was a non-resident.

\(^7\)(1861) 18 Cal. 206.

\(^7\)The application of the dictum in Rees v. Watertown, (1873) 19
Wall. (U.S.) 107, 22 L. Ed. 72, supra notes 16, 17, that such a situation
does not authorize the granting of equitable relief has apparently not been
called for by the facts in any modern case.
Not often have the courts been called upon to consider whether a judgment at law for specific recovery of chattels or land is rendered inadequate by the inability of the sheriff to execute the judgment. Generally where the chattels are unique or their value cannot be accurately ascertained, equity will give relief on the ground that recovery of their value and damages is not adequate relief, without considering the possibility of specific recovery by replevin or other statutory action at law. In Pollard v. Reardon it was held that the fact that goods were in the hands of a collector of customs so that, under the statute, replevin would not lie showed there was no action at common law to recover the goods so that equity had jurisdiction to foreclose a chattel mortgage. Massachusetts and Maine have statutes which authorize suits in equity to compel defendants to redeliver chattels secreted or withheld by them so that they cannot be replevied. In New Jersey, where it has been held that an encroaching structure on plaintiff's land is an ouster of plaintiff from possession so that ejectment will lie, and that that remedy is adequate, it was later held that equity might issue a mandatory injunction to compel defendant to remove the encroachment after an execution in ejectment had proved to be ineffective because the sheriff could not remove the encroaching portion without wrongfully interfering with parts of the structure which did not encroach. The little authority there is in this group of cases seems to be uniform in holding that an ineffective legal remedy is not an adequate remedy.

There is no need to consider in detail cases which grant the relief because of defendant's insolvency. Two of the most frequently cited cases are Clark v. Flint and Parker v. Garrison.

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72 See 1 Pomeroy, Equity Juris., 4th ed., sec. 185 and cases cited in note c.
73 (C.C.A. 1st Cir. 1895) 65 Fed. 848, 13 C. C. A. 171.
75 See Farnsworth v. Whiting, (1908) 104 Me. 488, 72 Atl. 314.
78 Hahl v. Sugo, (1901) 169 N. Y. 109, 62 N. E. 135, 61 L. R. A. 226, 88 Am. St. Rep. 539, is not contra to the New Jersey case, but only held that a mandatory injunction could not be sought in a later action after a former judgment for possession had been obtained and proved fruitless because of the policy of the code against splitting causes of action.
79 (1839) 22 Pick. (Mass.) 231, 33 Am. Dec. 733.
80 (1871) 61 Ill. 250.
The former might have been based on the fact that the interest involved, a share in a ship, was a unique chattel, but the basis for the decision was expressly stated to be that the remedy at law against insolvent defendants was inadequate. The case was expressly cited to that effect in the later Massachusetts case of *Slater v. Gunn*\(^{81}\) where an injunction to restrain trespass was granted and the case then under consideration was distinguished from one\(^{82}\) cited by defendant on the ground that in the cited case it did not appear that an action at law to determine the title had been brought or that the defendant was insolvent. In the Illinois case of *Parker v. Garrison* the court, after stating that the insolvency of the defendant rendered the remedy at law inadequate, added that defendant might also be considered to be a trustee for plaintiff of the latter's share of the crop.

*Schmitt v. Cassilus*\(^{83}\) was also a case where a landlord sought to obtain his share of the crop raised by an insolvent tenant, in this instance by asking for a receiver to divide the crop. The court held that the parties were tenants in common of the crop and the landlord clearly entitled to the relief, and then added:

"But even if we adopt the view that the title to the crops was wholly in the defendant, and that the one third was to be paid expressly as rent in kind, this action would still lie, in view of the fact that defendant had no tangible property which could be made subject to attachment or execution, and hence that an action at law would be unavailing."

In *Kern v. Field*,\(^{84}\) a suit to enjoin repeated trespasses, the insolvency of the defendant appears from the statement of facts, but is not mentioned in the opinion, which sustained the injunction, unless included in the expression "other facts found by the court" which, with the facts previously mentioned in the opinion, were held sufficient. *Marks v. Jones*\(^{85}\) was a suit to enjoin an insolvent tenant of the owner of the equity of redemption from removing crops. Relief was refused on the ground that either the crop belonged to defendant, or, if it belonged to plaintiff, his remedy by replevin was adequate. In *Fryberger v. Berven*\(^{86}\) the court subjected to payment of plaintiff's judgment, on which execution had been returned unsatisfied, a lien reserved by the debtor on property sold by him for contingent additional royalties on iron

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\(^{81}\) (1898) 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268.

\(^{82}\) Washburn v. Miller, (1875) 117 Mass. 376.

\(^{83}\) (1883) 31 Minn. 7, 16 N. W. 453.

\(^{84}\) (1897) 68 Minn. 317, 71 N. W. 393.

\(^{85}\) (1898) 71 Minn. 136, 73 N. W. 719.

\(^{86}\) (1903) 88 Minn. 311, 92 N. W. 1125.
ore mined on the lands. The court cited Overmire v. Haworth for the proposition that:

"The rule which forbids a resort to equity for relief where there is an adequate legal remedy is not to be applied with such strictness as to practically deny to a party having a right against another, legal or equitable, any reasonable available means of enforcing it."

So the Minnesota cases, as far as they have gone, seem to hold that an ineffective remedy is inadequate.

None of these cases, which allow relief on the sole ground of the inadequacy of the remedy at law against an insolvent, nor those containing dicta to that effect, discuss the reasons advanced by other authorities for the contrary view; they content themselves with stating as a fact that the remedy at law is inadequate or they cite other authorities as a basis for such holding.

From a consideration of all the cases, it would appear to be quite well settled in Florida, Oregon and Pennsylvania that the remedy at law will not be deemed inadequate merely because it is ineffective, when any form of equitable relief is sought except the prevention of the collection by an insolvent of money from plaintiff or from third persons where plaintiff has either a claim against the defendant or an interest in the fund. In the federal courts it is doubtful whether the reasoning in the tax cases would be applied where the only objection to equitable relief was that the remedy at law was adequate. The only dicta by the Supreme Court which bear on the question lean the other way, and the lower federal courts have not considered themselves bound to make such an application of the reasoning in the tax cases. In Alabama, Arkansas and Indiana strong dicta contrary to decisions that insolvency alone is insufficient render it doubtful what would be the ruling of the courts in the future. In Idaho

88See note 26 supra. Such relief was given in Wheeler v. Lack, (1900) 37 Or. 238, 61 Pac. 849.
91Supra, notes 42-44 and accompanying text.
92Supra, note 54 and accompanying text.
93Supra, note 30 and accompanying text.
there is a clear decision\textsuperscript{94} that insolvency alone is sufficient to sustain an injunction against trespass, but there are two later cases involving the right to specific performance of a contract where the court, without referring to the injunction cases, stated that insolvency alone was not sufficient. In the first of these cases\textsuperscript{95} specific performance was decreed on the ground that the remedy at law was inadequate for other reasons than insolvency; in the second case\textsuperscript{96} the relief was refused, but the statement with reference to insolvency was only dictum because the court found that the alleged insolvency of defendant was not proved. It would be unsafe to predict what the Idaho court would do in a future case. It might continue to apply different rules in tort and in contract cases. A similar situation exists in West Virginia\textsuperscript{97} where the latest decision states that insolvency does not render the remedy inadequate, notwithstanding two holdings and numerous dicta in earlier injunction cases and one strong dictum in a specific performance case that the recovery of a judgment for money damages against an insolvent is an inadequate remedy. In Connecticut\textsuperscript{98} and New Mexico\textsuperscript{99} it is doubtful whether the lone cases in each jurisdiction which deny that insolvency rendered the remedy at law inadequate would be followed in other cases where the objections to equitable relief were not so strong.

In practically all\textsuperscript{100} of the other jurisdictions it would be quite safe to prophesy that the courts would follow the majority of holdings and the still greater majority of dicta to the effect that a remedy at law which could not be effectively enforced is not adequate, assuming of course that the authorities on the subject are fully and properly presented to the court by the respective counsel and that no other equities against the relief present themselves. Such a prophecy would be based on the fact that the rule has been definitely rejected only in jurisdictions where the courts have been confronted with a case in which there appears ample reason to refuse equitable relief, even though the remedy at law is inadequate, and that case has been decided with a strong assertion that insolvency does not make the remedy inadequate, which assertion has thereafter been followed in other cases, even where

\textsuperscript{94}Shields v. Johnson, (1904) 10 Idaho 454, 79 Pac. 394.
\textsuperscript{95}Ridenbaugh v. Thayer, (1905) 10 Idaho 662, 80 Pac. 229.
\textsuperscript{97}Supra, notes 65, 66 and accompanying text.
\textsuperscript{98}Supra, note 56 and accompanying text.
\textsuperscript{99}Supra, note 58 and accompanying text.
\textsuperscript{100}A few jurisdictions have neither decisions nor reasoned dicta on the question.
there appear no other equities against granting equitable relief.

On principle there would seem to be little difficulty. The reason which is advanced very often for refusing to hold an ineffective remedy at law inadequate, that what equity requires is merely that the remedy be adequate in nature and character,\textsuperscript{101} is contrary to the ordinary definition of an adequate remedy.\textsuperscript{102} Very often it is stated\textsuperscript{102} that the test of what is an adequate remedy at law is whether the plaintiff can, with the money damages recovered at law, repair the injuries which would be inflicted or acquire the benefits to which he is entitled under the contract. This test clearly fails when it is apparent that no money would be forthcoming with which to repair the injuries or acquire the benefits. The objection is also contrary to the settled practice of equity in other respects. In the cases where the common law would give damages but the damages suffered could not be accurately ascertained, the common law remedy is "in nature and character" adequate, but that does not prevent equity from taking jurisdiction on the ground that, as a practical matter, the remedy is inadequate. Other illustrations to the same effect might readily be given; in fact, it might be asserted that, with few exceptions, the whole discussion of the question of the adequacy of the legal remedy has been based by courts of equity on practical rather than theoretical grounds.

The objection of many of the earlier cases against extending the jurisdiction of courts of equity is no longer of so much weight in most of our states,\textsuperscript{104} although everywhere it survives to a certain extent in the policy of protecting the right to a jury trial against encroachment by enlarging the number of cases for specific relief in which that right does not exist.\textsuperscript{105} The argument could be met in the trespass cases where it is most frequently made by treating the action as one at law for damages in which an injunction is sought as auxiliary relief. The objection that a holding that insolvency of a defendant made the legal remedy inadequate would result in drawing into courts of equity most of the trespass cases may be met by noting that most of the cases of that

\textsuperscript{101}See note 16 supra, and accompanying text.

\textsuperscript{102}The statement in Boyce's Exec's v. Grundy, (1830) 3 Pet. (U.S.) 210, 7 L. Ed. 655, that the remedy at law must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity, has been often quoted, and similar definitions are numerous. See Equity, 21 C. J. 50, note 32.

\textsuperscript{103}See, e.g., Walsh, Equity, secs. 25, 59, 60.

\textsuperscript{104}That this objection has had some weight with the courts may be deduced from the tendency to restrict the relief more in those jurisdictions where law and equity are still administered as separate systems.

\textsuperscript{105}For a comparatively recent case stressing this objection, see Simms v. Burnette, (1908) 55 Fla. 702, 46 So. 90, supra, note 50.
type have already been drawn into equity by the enlargement of its jurisdiction over trespass either by relaxation of the rule against enjoining trespass so as to allow the relief to prevent a multiplicity of common law actions or by statute. Walsh's modification of this objection to the effect that to allow the remedy would draw into equity practically the entire field of tortious liability does not carry much conviction. 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 when a continuing or a repeated tort was involved.

Most of the other arguments advanced against this rule have no application to a holding that an ineffective remedy at law is an inadequate remedy; they support only a contention that in some cases equity ought not to grant specific relief even though the remedy at law is inadequate. Few would deny that equity ought to refuse relief even though the remedy at law is ineffective where the plaintiff prays for a specific form of relief to which he is not entitled under the contract in suit or the rules of law, either common law or equity, applicable to the case; where the grant of equitable relief would give him a favored position over third persons to which he would not otherwise be entitled; or where some other recognized principle of equity would preclude the granting of any equitable relief.

The conclusion is that both by the weight of authority and on principle a remedy at law which is practically ineffective is not an adequate remedy within the meaning of that term as established by the usage of courts of equity.

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106 Supra, note 13 and accompanying text.