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the property owner receive just compensation. Furthermore, if such a position is adopted, assessed value does not bind the condemnor; it is merely used as some evidence of value for the consideration of the trier of fact.

In jurisdictions in which there is no requirement that property be assessed at market value or where the inaccuracy of assessments has been statistically proven, refusal to admit assessed value seems justified. The courts in such jurisdictions are forced to utilize rules of evidence to compensate for this inadequate assessment procedure. Statutory re-evaluation of both assessment and its admissability is necessary in such jurisdictions. But, in jurisdictions in which the assessment relates to market value, assessed value may be given the weight to which an act of a public official is entitled. A recent assessment is a disinterested statement by an expert and may be an invaluable assistance in the determination of just compensation.

Specific Performance and Insolvency — A Reappraisal

Equity courts have long imposed rather narrow restrictions on the availability of specific performance as a remedy for breach of contract. These restrictions are controlled by the concept of the adequacy of the remedy at law. The plaintiff's prayer for specific performance depends for its success on his ability to demonstrate that the remedy at law is, in fact, inadequate. Showing the uniqueness of the subject matter of the contract or the speculative character of the damages is usually sufficient to demonstrate such inadequacy. However, the insolvency of the defendant has generally not been accepted as a sufficient basis. It will be the purpose of this note to examine the soundness of this position and to explore the possibility of arriving at a more satisfactory alternative.

Specific Performance in General

Specific performance of a breached contract has long been considered by courts of equity to be an exceptional remedy, as contrasted to the ordinary relief of money damages. This attitude reflects the general character of equitable relief as complementary and supplementary to relief at law.[1] It has been the historical function of courts of equity to provide an injured party with an effective remedy only in those cases where the remedy at law is

[1] Walsh, Equity 22-26 (1930).

nonexistent or inadequate. In contracts for the sale of land, the legal remedy of damages is presumptively inadequate in that every tract of land is deemed unique in and of itself and not on the basis of its fertility or mineral contents.[2] Thus, the vendee of such a contract ordinarily need only show the subject of the sale to be a tract of land in order to support his prayer for equitable relief. Similarly, in contracts for the sale of chattels, the plaintiff-buyer may be entitled to specific relief if he can show that the chattel is of such a unique character that it cannot be replaced in any market with the damages which might be obtained at law from the vendor.[3] The inadequacy of the remedy at law is shown when plaintiff establishes, as to the particular chattel involved, that there is no substitute of comparable character and value available, as in the case of a work of art. Equity also recognizes a third situation wherein inadequacy of the legal remedy is present, *i.e.*, where the contract which has been breached is of such a character that the assessment of damages by a jury would be speculative and of doubtful compensatory effect. In cases involving such contracts, specific relief has been granted on the theory that, in the particular case, equitable relief is the only remedy which is capable of substantially compensating the injured party for the breach.[4] In each of these situations, equity interposes its jurisdiction to grant specific relief because, without it, the injured party could not be adequately compensated at law. In the case of contracts for the sale of land, this is presumed to be so, whereas, in contracts for the sale of chattels, it is found to be so on the basis of special circumstances involved in the subject matter or provisions of the contracts.

Specific Performance and Insolvency

Where the plaintiff seeks to predicate the inadequacy of his remedy at law for breach of a contract to sell chattels, not on the uniqueness of the chattels nor on the speculative nature of the damages, but solely on the insolvency of the defendant, equity courts have arrived at conflicting conclusions as to the propriety of granting specific relief.[5] The courts that have taken the position that insolvency is not by itself a sufficient basis for specific relief, have done so on the basis of the traditional equity concept of inadequacy. Disregarding the practical inability to collect dam-

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[2] Kitchen v. Herring, 42 N.C. 190 (1851).

[3] WALSH, EQUITY 307 (1930).

[4] Texas Co. v. Central Fuel Oil Co., 194 Fed. 1 (8th Cir. 1912); Eastern Rolling Mills v. Michlovitz, 157 Md. 51, 145 Atl. 378 (1929); Waddle v. Cabana, 220 N.Y. 18, 114 N.E. 1054 (1917).

[5] See generally Horack, *Insolvency and Specific Performance*, 31 HARV. L. REV. 702 (1918).

ages from an insolvent defendant, such courts have generally taken the position that "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."[6] In effect, if the legal remedy is adequate in the general class of cases, the peculiarities involved in a particular case are not a sufficient basis for departing from the general rule. Thus, in *McLaughlin v. Piatti*,[7] decided in 1865, the court denied specific performance of a contract to sell cattle on the grounds that the chattels involved were not unique, that damages at law were not too speculative, and, further, that the accident of insolvency had no effect on equity's jurisdiction to grant specific performance.[8] The position of the court was that, assuming the solvency of the defendant, the case was not one which contained one of the traditional equitable bases for specific relief. This position has been taken in later cases and stated very clearly in terms of the theoretical efficacy of the remedy at law, with little or no discussion of the practical inadequacy of a judgment which cannot be collected because of the defendant's insolvency.[9]

In contrast to the foregoing position, the Massachusetts court in *Clark v. Flint* [10] declared:

> If the party injured by a breach of a contract cannot avail himself of his remedy at law for any beneficial purpose, or if it be doubtful whether he can or not, a court of equity, if it can relieve him, ought certainly to interpose, and compel the other party to perform his contract.[11]

Such an approach involves a more practical, less technical concept of adequacy in that the mere form of the legal remedy is not controlling where the plaintiff can demonstrate that the defendant's insolvency will, in reality, render such remedy wholly ineffective to compensate him for defendant's breach. Courts utilizing this approach consider the illusory character of plaintiff's remedy at law [12] and perhaps grant relief on the basis of the general principle that the remedy available at law is inadequate unless it is "as

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[6] Heilman v. Union Canal Co., 37 Pa. 100, 104 (1860).

[7] 27 Cal. 452 (1865).

[8] *Id.* at 463.

[9] *E.g.*, Hendry v. Whidden, 48 Fla. 268, 37 So. 571 (1904); Cincinnati R.R. v. Washburn, 25 Ind. 259 (1865); Gillett v. Warren, 10 N.M. 523, 62 Pac. 975 (1900).

[10] 39 Mass. (22 Pick.) 231 (1839). Compare the approach of Parker v. Garrison, 61 Ill. 250 (1871).

[11] *Id.* at 238.

[12] See Draper v. Stone, 71 Me. 175 (1880) (dictum). See also Dilburne v. Youngblood, 85 Ala. 449, 5 So. 175 (1888); Avery v. Ryan, 74 Wis. 591, 43 N.W. 317 (1889).

practical and efficient to the ends of justice and its prompt administration, as the remedy in equity." [13]

Still other courts have dealt with the problem of defendant's insolvency as affecting plaintiff's right to specific relief by finding it to be but one factor which might, in a given case, be controlling as to the exercise of the established jurisdiction to grant specific performance.[14] The distinction is that between viewing insolvency as an independent ground for jurisdiction to grant specific relief and insolvency as an important factor in determining whether to exercise that jurisdiction. Thus, in *Parker v. Garrison*,[15] where the vendor had received full payment from the vendee for the crops which were the subject matter of the contract, the court considered the vendor's subsequent insolvency to be sufficient to render the vendee's remedy at law inadequate, and granted specific performance. Alternatively, the court declared that, on these facts, a constructive trust could be utilized to provide the plaintiff with the same relief.[16] So too, in *Livesley v. Johnston*,[17] the plaintiff-vendee had advanced funds for the cultivation of crops by defendant-vendor and, upon the insolvency of the defendant, the court granted the vendee specific performance. The court held that insolvency, although by itself insufficient for equitable relief, when taken with the "joint venture" character of the contract, which impressed on the parties a trust relationship,[18] warranted specific performance. In these cases, the factor of insolvency was purportedly only one consideration affecting the determination of the propriety of equitable relief and, in each case, the court ostensibly found a distinct and separate basis for granting such relief. But, as pointed out in *Bowman v. Adams*,[19] the equitable "title" or interest of the vendee in a contract for the sale of chattels is itself based upon such vendee's right to specific performance because of the uniqueness of the chattel or the inability to measure damages accurately.[20] Thus, to conclude that a vendee, in a contract for the sale of ordinary chattels, should get specific relief because he has some equitable interest, whether in trust or not, the court must weigh precisely the same factors which would be involved in determining whether to grant specific performance.[21] The constructive trust as an independent ground for specific performance is merely a statement of a conclusion which begs the

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[13] Boyce's Ex'rs v. Grundy, 28 U.S. (3 Pet.) 210, 215 (1830).

[14] Heilman v. Union Canal Co., 37 Pa. 100 (1860).

[15] 61 Ill. 250 (1871).

[16] *Id.* at 254.

[17] 45 Ore. 30, 76 Pac. 946 (1904).

[18] *Id.* at 52, 76 Pac. at 951. See also Livesley v. Heise, 45 Ore. 148, 76 Pac. 952 (1904).

[19] 45 Idaho 217, 261 Pac. 679 (1927).

[20] *Id.* at 225-26, 261 Pac. at 682.

[21] Note, 82 U. Pa. L. Rev. 515, 517 (1934).

question. As a result, the cases purportedly dealing with insolvency as a factor, merely complementary to other factors which are sufficient to grant specific relief, are, in fact, based solely on the insolvency of the defendant.[22]

Injunctions and the Insolvent Defendant

It is interesting to note that equity is much more willing to grant the specific relief of injunction against an insolvent defendant who threatens damage to property.[23] In such cases, the courts have recognized that the adequacy of the legal remedy is not a matter of formal efficacy, but, rather, a matter of the actual results which the plaintiff will acquire through recovery and satisfaction of a judgment. Where the property involved is of no unique value, the legal remedy is ordinarily completely effective against a solvent defendant since, with such damages, the plaintiff can restore his property to its condition prior to the wrong committed by the defendant.[24] Where, however, the defendant is insolvent, the denial of an injunction to the plaintiff whose property is threatened leaves him with the prospect of damage to such property for which he cannot hope to be compensated. In such a case, equity grants whatever relief may be necessary in order to protect the plaintiff,[25] and it does so solely on the ground that a judgment at law against an insolvent defendant is clearly inadequate in any meaningful sense of the term.

Effect of the Uniform Sales Act

In the ordinary situation lacking such unusual facts as would induce equity to give great weight to the defendant's insolvency in determining whether specific relief should be granted, the party injured by the breach could only pursue his inadequate remedy at law. The Uniform Sales Act operated generally to liberalize the remedies available to contracting parties in the event of breach. The rights of the buyer under the act depended upon the goods having been ascertained[26] and on the allocation of title according to the express or implied intent of the parties.[27] The act provided formulae by which the intent of the parties could be determined.

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[22] *Ibid.*

[23] Horack, *supra* note 5, at 711.

[24] See Burgess v. Kattleman, 41 Mo. 480 (1867); Brown v. Reed, 72 Neb. 167, 100 N.W. 143 (1904); Kistler v. Weaver, 135 N.C. 388, 47 S.E. 478 (1904).

[25] West v. Smith, 52 Cal. 322 (1877); Williams v. Carpenter, 14 Colo. 477, 24 Pac. 558 (1890); Milan Steam Mills v. Hickey, 59 N.H. 241 (1879).

[26] UNIFORM SALES ACT § 17.

[27] The intent would be evidenced by the terms of the contract, the conduct of the parties and usages of the trade. UNIFORM SALES ACT § 18(1).

One of the most important guidelines was the appropriation of goods to the contract.[28] Thus, if the seller, with the buyer's consent, set aside goods conforming to the contract and somehow marked them for the buyer, these were appropriating acts sufficient to indicate that the parties intended that title should pass to the buyer upon such appropriation.[29] When a buyer could establish such appropriation, he could recover such goods specifically whether the seller was solvent or insolvent; the seller, upon appropriation, was liable to the buyer for goods as if he were a bailee.[30] However, under the act, such presumptive intent to pass title by appropriation could be overcome by evidence of the parties' actual intent not to pass title. Thus, when title did not pass according to the provisions of the Uniform Sales Act, the buyer was left with his common-law remedy of damages for breach of contract or restitution of his advance payment. Where the buyer could not show title in himself, he was met, in any attempt to recover the specific goods, with the traditional requirements of equity that the goods be of unique character or that the court be unable to assess damages with some degree of accuracy.[31] Outside the scope of these Uniform Sales Act provisions, where the goods involved were ordinary and damages for breach of a contract of sale could be readily determined, the buyer was merely a general creditor of the insolvent seller. Thus the buyer was aided in the case of the seller's insolvency only where the buyer could show title to have passed to him, according to the intent of the parties as determined by the provisions of the act.

Effect of the Uniform Commercial Code

The shortcomings of the Uniform Sales Act in terms of modern commercial practice led to the development and widespread adoption of the Uniform Commercial Code. Under the Code, the legal effects of the various aspects of a sale are determined by concrete rules grounded in business realities, and are not dependent upon a difficult determination of the intent of the parties.[32] One of these business realities which gives rise to buyers' rights by such a rule is identification of the goods to the contract.[33] The Code provides that such identification of the goods gives the buyer a

[28] UNIFORM SALES ACT § 19(4)(1).

[29] Soss Mfg. Co. v. Mitchell Motors Co., 119 Misc. 290, 196 N.Y. Supp. 304 (Sup. Ct. 1922).

[30] Note, 79 HARV. L. REV. 598, 599 (1966).

[31] 5 POMEROY, EQUITY § 2170, at 4877 (5th ed. 1941).

[32] See, *e.g.*, UNIFORM COMMERCIAL CODE §§ 2-509, 2-510 (risk of loss); § 2-501 (insurable interest); §§ 2-502, 2-716 (general remedies) [hereinafter cited as U.C.C.].

[33] U.C.C. § 2-501.

"special property" in them,[34] and such special property is the basis of a new buyer's right to specific performance in the case of seller's insolvency.[35] But, this buyer's right to the goods is available only when he has paid part or all of the purchase price, and "if the seller becomes insolvent within *ten days* after receipt of the first installment on their price."[36] The Code provision is an advance over the case-law and Uniform Sales Act positions, in that identification is predicated on more readily determinable objective factors and thus introduces a greater measure of certainty into the transactions to which it applies. The remedy, however, is severely limited by the "within ten days" condition, and, in cases where the insolvency of the seller occurs either before or after this time period, the buyer would be confined to his pre-Code remedy.[37] It must be noted that the Code recites that the buyer has a right to specific performance "where the goods are unique or in other proper circumstances."[38] This provision would seem to be only a restatement of the equitable doctrine of specific performance.[39] Aside from this narrow remedy in the case of insolvency, the buyer's right to the goods can be established only where he can show title in himself by establishing that the goods have been identified to the contract and that documents of title or the goods have been delivered to him.[40] Thus, except for the limited coverage provided by section 2-502, the problem of the seller's insolvency and its effects on the rights of the buyer to obtain equitable relief remains essentially the same as it was prior to the enactment of the Code. In this regard, the courts have not reached consistent positions and have shown little inclination to re-examine the question of insolvency as a basis for specific performance.[41]

Should Insolvency Alone be Sufficient for Specific Performance?

The arguments advanced by courts and commentators in opposition to the recognition of insolvency as an independent ground for equitable jurisdiction to grant specific performance of contracts fall into roughly three areas: (1) the remedy in law is theoretically adequate and courts of equity should not hold otherwise merely on the basis of the peculiar financial circumstances of a particular

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34 U.C.C. § 2-501(1).
35 U.C.C. § 2-502(1).
36 *Ibid.* (Emphasis added.)
37 U.C.C. § 1-103.
38 U.C.C. § 2-716(1).
39 "Other proper circumstances" would not seem to include insolvency, which is specifically provided for in U.C.C. § 2-502.
40 U.C.C. § 2-401.
41 See American Cities Power & Light Corp. v. Williams, 189 Misc. 829, 835, 69 N.Y.S.2d 197, 203 (Sup. Ct. 1947).

defendant;[42] (2) the recognition of such a basis for equitable jurisdiction would flood equity with all contract cases wherein the defendant could be shown to be insolvent;[43] and (3) allowing insolvency as a basis for specific performance would violate the principle that equality is equity in that it would give the plaintiff an unfair advantage over other general creditors.[44]

The first argument, based on the formal presumption as to the efficacy of judgments at law, seems clearly untenable in light of the fact that defendants can be, and often are, judgment-proof and:

> [W]hen the defendant is insolvent . . . it is hardly a sufficient answer [to the plaintiff] that the *forms* of legal procedure provided are perfect . . . though the remedy thus provided will yield him no *actual* returns . . . . The jurisdiction of equity being founded upon the inadequacy of the legal remedy in the particular case before the court, what constitutes such inadequacy ought to be a matter of *fact* rather than of theory.[45]

It is no answer to say that equity grants relief only in a general class of cases. Rather, equitable relief should be based on the particular circumstances of the case before the court. Similarly, if it be argued that cases involving non-determinable or highly speculative damages themselves form a general class suitable for equitable cognizance, why cannot it be said that cases in which the defendants are insolvent also form a class suitable for equity's interposition? The persisting basis for accepting the former, while rejecting the latter, is that insolvency has not traditionally been recognized as sufficient to constitute the "inadequacy" necessary for equitable jurisdiction. But, the very justification for, and function of, courts of equity was to provide relief where justice required and the form and substance of the law provided none. That "equity will not suffer a wrong without a remedy" is a succinct, though over-simplified, statement of the nature of equitable jurisprudence,[46] and is extremely apt in pinpointing the weakness of the position that a remedy at law, even though fruitless by virtue of the defendant's insolvency, is an adequate remedy rendering equity's interposition unnecessary. In sum, the argument based on the formal adequacy of law judgments runs counter to the spirit and function of equity and cannot be sustained as a sufficient reason for denying specific performance based on the defendant's insolvency.

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[42] See cases cited *supra* note 9.
[43] WALSH, EQUITY 319 (1930).
[44] Horack, *Specific Performance and Insolvency*, 31 HARV. L. REV. 702, 710 (1918).
[45] *Id.* at 703. (Emphasis added.)
[46] MCCLINTOCK, EQUITY 76 (2d ed. 1948).

The second argument is based on the fear that the recognition of insolvency as an independent ground for equitable jurisdiction would result in the equity courts' supplanting the law courts in all cases wherein the defendant can be shown to be insolvent. It would seem that, as to this position, the primary inquiry should be as to whether such a result is desirable. It seems beyond dispute that, as between the plaintiff and the insolvent defendant, the former should not be left with an ineffective remedy when, without imposing any undue hardship on the latter, equity could provide a complete remedy. This involves no denigration of the law side of the court; rather, it merely gives recognition to the fact that any judgment for money damages rendered against an insolvent defendant is a mere exercise in form which leaves the plaintiff with a Pyrrhic victory. This principle has been recognized in some cases [47] and commentaries and further recognition of its basic soundness may be found in legislation declaring that the remedy of specific performance of a contract may not be denied merely on the ground of an adequate remedy at law, unless the defendant shows ownership of property which can be applied to the satisfaction of a judgment or gives a bond to assure his performance of the contract or payment of damages at law.[48] The objection that equity would assume a function previously allocated to the law courts loses its force when it is recognized that, with a merged system of law and equity, it is the same court, sitting in different capacities, which will decide the issues. There will be a shift and no increase in the total of litigation. Also, it will decide them on the basis of a realistic concept of what is inadequate, rather than on the basis of a purely formal concept which, despite the defendant's insolvency, leaves the plaintiff actually without a remedy.

The third argument, *i.e.*, that a prejudicial advantage goes to the plaintiff as regards other creditors of the insolvent defendant, presents more substantial grounds for objecting to the recognition of insolvency as an independent ground for specific performance. However, it is submitted that, even if such an objection is valid in some situations, it should be effective to prevent equitable relief only in those situations. Specific performance would be denied where other creditors will be prejudiced, but not as part of a blanket prohibition against recognizing insolvency as a basis for equitable relief. Furthermore, such an approach is entirely consistent with the traditional equitable principle that, even though jurisdiction is complete, equity may, in its discretion, decline to exercise that jurisdiction when to do so would prejudice the rights of innocent third parties. Where, for instance, the party seeking

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[47] See cases cited *supra* note 12.
[48] See MD. ANN. CODE art. 16, § 169 (1957).

specific performance has advanced part or all of the purchase price with reference to particular goods in the seller's possession, and not in general reliance on the seller's credit position, his obtaining specific relief should not be viewed as constituting a prejudicial advantage over general creditors who have relied on the seller's overall financial position[49] since their positions are inherently and essentially different in character. In such a case, equity's concern in avoiding a decree which will injure innocent third parties is not involved. As to the question of simple insolvency, it is submitted that it should be a sufficient basis for specific relief in all cases wherein it can be decreed in a manner consistent with equity's traditional discretion to avoid injury to innocent third persons.

Bankruptcy Proceedings

Where the insolvent vendor is subjected to bankruptcy proceedings, the granting of specific performance to the vendee creates the possibility of a conflict with the intent and purpose of the Bankruptcy Act to secure an equal distribution of the bankrupt's assets among his creditors.[50] To achieve this end, the Bankruptcy Act provides that the trustee in bankruptcy takes title to the bankrupt's property as of the date of the petition in bankruptcy.[51] Furthermore, the trustee is expressly empowered to adopt or reject executory contracts to which the bankrupt is a party[52] and the trustee will presumably exercise such power to maximize the assets of the bankrupt's estate for the benefit of its creditors, *i.e.*, he would seek to adopt the contract where the remaining balance of the purchase price exceeded the liquidation value of the goods due to a fall in market price. Conversely, he would seek to reject such a contract where a rising market has so affected the liquidation value of the goods that such value exceeds the balance due from the buyer on the contract price. It has been held that, even where the plaintiff, under applicable state law, has an equitable title in real property which would normally be given effect by a decree of specific performance, the bankruptcy of the vendor and the appointment of a trustee prior to the delivery of the deed will make such plaintiff's right to specific performance subject to the trustee's statutory power to adopt or reject such a contract.[53]

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[49] Hurley v. Atchison, Topeka & Santa Fe Ry., 213 U.S. 126, 134 (1909). This principle is given some recognition in U.C.C. § 2-402 in that a seller's unsecured creditor's right as to goods sold is subject to the buyer's right, under § 2-502 or § 2-716, to specific performance of the contract.

[50] MacLachlan, Bankruptcy 288 (1956); Walsh, Equity 320 (1930).

[51] 30 Stat. 565 (1898), 11 U.S.C. § 110(a) (1964).

[52] 30 Stat. 565 (1898), 11 U.S.C. § 110(b) (1964).

[53] Matter of Phila. Penn Worsted Co., 278 F.2d 661 (3d Cir. 1960).

"The trustee in bankruptcy may abandon burdensome property and reject unprofitable executory contracts in order to further the best interests of the estate." [54] Therefore, should the trustee reject such contract, expressly or by statutory implication where he fails to adopt or reject it,[55] the injured vendee is left with only an action for damages for breach of the contract. It seems clear that, even if insolvency were to be accepted as a sufficient basis for specific performance according to state law, the power of choice residing in the trustee under the federal bankruptcy provisions would prevail over such state law. In effect, then, the adoption by state courts of the position that insolvency of the defendant should alone be a sufficient ground for a decree of specific performance, will not diminish the rights of the trustee in bankruptcy, since the already recognized grounds for such equitable relief are subject to the trustee's statutory powers. Thus, the argument that the granting of specific performance against an insolvent defendant contravenes the spirit of bankruptcy legislation is without merit when it is recognized that specific performance of a contract on any ground will not be given effect when the trustee chooses to reject such a contract. In addition, any transfer of the goods to the buyer, who has reasonable cause to believe the seller is insolvent, within four months prior to the petition in bankruptcy would seem to be voidable under the Bankruptcy Act.[56] Thus, it would seem that a decree of specific performance granted to a buyer from an insolvent seller would also be a preference which could be avoided by the trustee in bankruptcy. But, again, the argument that such a situation should prevent the recognition of insolvency as a ground for specific performance goes too far, since equity regards the equities of all parties and not just those of the plaintiff. In effect, then, such recognition involves no violation of bankruptcy legislation when it is expressly understood as being relegated to the limitations imposed by bankruptcy legislation.

Conclusion

The traditional attitude towards insolvency as not giving rise to such an inadequacy in legal remedy to justify the granting

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[54] Matter of N.Y. Mut. Investors Group, Inc., 143 F. Supp. 51, 54 (S.D.N.Y. 1956).

[55] 30 Stat. 565 (1898), 11 U.S.C. § 110(b) (1964).

[56] A preference is defined by the act as any transfer within four months before filing the petition, made by the debtor while insolvent, which has the effect of enabling his creditor to obtain a greater percentage of his debt than other creditors of the same class. 30 Stat. 562 (1898), 11 U.S.C. § 96(a) (1964). A preference is voidable by the trustee where the creditor benefiting thereby has, at the time the transfer is made, reasonable cause to believe that the debtor is insolvent. 30 Stat. 562 (1898), 11 U.S.C. § 96(b) (1964).

of equitable relief seems, quite clearly, both theoretically and practically untenable. Very simply put, a money judgment for damages which produces, and can produce, no money because of the defendant's insolvency, is an "adequate" remedy only in the most technical and unrealistic understanding of that term. If equity truly looks to substance rather than form, and if its function is to provide a remedy where justice demands that the plaintiff be accorded a remedy, then equity must recognize the insolvency of the defendant as a sufficient ground, in and of itself, for the exercise of equitable jurisdiction. Such exercise, of course, must be consistent with the totality of equitable jurisprudence so that, if recognized, such jurisdiction would still be subject to equity's traditional power of discretionary abstention when the decree would result in undue hardship to third persons such as creditors. It is submitted, further, that the UCC's narrow recognition of insolvency as a basis for specific performance increases, rather than decreases, the need for the general recognition of such a remedy precisely because of the limited applicability of the Code provision. The requirement that the seller become insolvent within ten days from his receipt of the buyer's first payment of the purchase price in order that the buyer might avail himself of his specific performance remedy has its basis in the concern for the possible fraudulent effect of a longer period of retention on seller's other creditors. But, again, it is submitted that if there are no other creditors or if their claims are such that they will not be prejudiced by the relief granted, insolvency of the defendant should be an independent ground for plaintiff's obtaining specific performance and should be so apart from any arbitrary time limit for the onset of defendant's insolvency. The state of the law in this area is such that the courts should at least re-examine the validity of their present positions, instead of merely setting forth the negative position in summary fashion and assuming its validity. It seems probable that, were this re-examination undertaken, the courts would reject the traditional technical basis for excluding insolvency as a basis for equitable jurisdiction and allow relief on that basis in all cases where such relief could be granted in a manner consistent with other applicable equitable considerations.

POTENTIAL LIABILITY OF ACCOUNTANTS TO THIRD PARTIES FOR NEGLIGENCE

A public accountant has a duty to his client to perform the accounting services bargained for with the skill to be expected of a reasonable, prudent man with his knowledge and training.