inconsistent with the substitutional statute.[13] However, there is no difficulty with the aforementioned rule in the *Alpha Rho* case. A repeal based on inconsistency cannot be supported where, by reason of the invalidity of the substitutional act, no inconsistency could arise.[14] A law cannot be inconsistent with a nullity.

Thus, if we are correct in our finely-drawn factual distinction between the *Crater* and *Alpha Rho* cases, we cannot fairly say that the latter overrules the former. The authorities unanimously affirm the *Alpha Rho* result, and we believe that, on the basis of its peculiar statutory situation, the *Crater* decision is also proper, except that it might have proceeded to the logical conclusion of passing upon the constitutionality of the laws under consideration. However, failure to do so can be ascribed to the judicial practice of avoiding constitutional decisions where possible.

But once we look behind the *Crater* decision into the general reasoning of the opinion as Justice Heher in his later dissent admits he intended it, we must conclude that it is unsound and unauthoritative, and denied by the *Alpha Rho* decision and opinion. However, controlling law is found not in speculative dicta, but in decisions based upon stated factual situations. Therefore, we conclude that the universal rule that an unconstitutional amendment can have no effect upon the status of a prior valid statute has never been changed and still remains good law in New Jersey.

Specific Performance—Contracts to Lend Money.—C, through an intermediary, X, negotiated a construction loan from D, giving a mortgage as security. The loan was to be advanced in three installments as construction progressed. C received the first installment when due, but not the second, as X, who had received the checks for both installments

13. Chap. 170, P.L. 1937.

14. AMER. & ENG. ENCYC. OF LAW, Vol. 26, p. 716-717; Campau v. Detroit, 14 Mich. 276 (1906).

and cashed them by forgery of C's endorsement, had wrongfully appropriated the proceeds of the second to his own use. X is now insolvent and C brought this bill against D for specific performance of the loan contract. *Held*: X was not C's agent to receive the advances, and D is now ordered to advance the second installment by way of specific performance. *Jacobson v. First National Bank of Bloomingdale,* 129 N.J.Eq. 440, 20 A. 2d 19 (Ch. 1941), *aff'd, per curiam,* 130 N.J.Eq. 604, 23 A. 2d 409 (E. & A. 1942).

Although it is a generally accepted equity principle that specific performance will not be ordered of a contract to lend money,[1] New Jersey has never adopted the rule in any decision that can be considered a binding precedent. Perhaps it is because of this absence of authority that the case under consideration arrives at a result which is at diameters with the weight of authority in other jurisdictions and with the conclusion of the lone New Jersey opinion of the subject.[2]

In following the rule that contracts of this type will not be specifically enforced, courts have usually relied wholly on the adequacy of the legal remedy as grounds for denying relief,[3] and the rule is so

1. The first pronouncement of the rule was in England in 1862 in Sichel v. Mosenthal, 30 Beavan 371, following by three years the decision that in the converse situation the lender could not require specific performance from the borrower (Rogers v. Challis, 27 Beavan 175). The unvarying acceptance of the rule by the English courts is indicated by the observation in 1898, "That specific performance of a contract to loan money cannot be enforced is so well established, and obviously so wholesome a rule, that it would be idle to say a word about it," South African Territories, Ltd. v. Wellington, A.C. 309, 318. American courts accord. See cases cited in 58 C. J. 1055, sec. 298, and 41 A.L.R. 357. *Contra*: Columbus Club v. Simons, 110 Okla. 48, 236 P. 12, 41 A.L.R 350 (1925), which states the general rule, but finds exception to it "when there is no basis on which a jury may estimate damages." This basis for exception seems to be unsound, and was anticipated in the leading English case with the comment, "that is the proper function of the jury." (Sichel v. Mosenthal, *supra,* at page 377.) The dissenting case "apparently stands almost alone in the specific performance of this kind of contracts." Comment, 41 A.L.R. 357. See *infra,* note 7.

2. Conklin v. People's B. & L. Assn., 41 N.J.Eq. 20, 2 A. 615, (Ch. 1886).

3. An additional reason for refusing relief is assigned in the case

expressed by Pomeroy.[4] While, practically, this is sufficient reason for dismissing such actions, the rule gains stature and becomes more compelling in the light of the implications and the very substantial argument contained in the only New Jersey opinion which has treated the subject prior to the present case.[5] Specific performance was there denied, not only because the borrower's legal remedy was adequate, but because this type of contract involves a relationship into which equity will not force an unwilling lender. The lender must be satisfied as to the borrower's character, credit, and security, and to force him into the relationship when any of the elements is defective would be placing him in a position of undue risk. When the rights of a defendant are placed in such jeopardy, it is the policy of equity not to grant relief.[6]

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where the loan is repayable on demand. A leading New York case holds that complainant in that situation has not "sustained any damages by the refusal of another to advance money where the person to whom it is to be advanced is by the agreement under a valid obligation to repay it immediately. Equity at any rate never enforces such an agreement, and in a court of law there must be proof of damages." Bradford, Eldred and Cuba R.R. v. New York, Lake Erie, and Western R.R. Co., 123 N.Y. 316, 327, 25 N.E. 499, 11 L.R.A. 116 (1890).

4. "Since the breach can always be fully compensated by damages, a contract to lend either money or chattels will not be specifically enforced." POMEROY, SPECIFIC PERFORMANCES OF CONTRACTS (3d ed. 1926) 131, sec. 48. As to the measure of damages in the action at law see Holt v. United Security Life Insurance Co., 76 N.J.L. 585, 72 A. 301 (E. & A. 1908), "Losses directly incurred as well as gains prevented may furnish a legitimate basis for compensation to the injured party. And among such immediate losses, expenditures fairly incurred in preparation for performance or in part performance of the agreement, where such expenditures are not otherwise reimbursed, form a proper subject for consideration."

5. "The person who promised to lend is the one who is to be satisfied as to the security, and it would be very inexpedient, to say the least of it, for this court to entertain suit to compel him to lend his money upon security which is unsatisfactory to him," Chancellor Runyon in Conklin v. People's B. & L. Assn., *supra,* note 2.

6. "The complainant in such an action is asking the court to require another to do equity, and it is incumbent upon him to convince the court that the strict performance of the contract will not work a need-

From this view of the situation it becomes unnecessary to decide whether the legal remedy in a given case may not in fact be inadequate. Even if it is inadequate, an application of broad equity principles would prevent specific relief in the case of the loan contract.[7] For it must be remembered that the combination of a legal right with an inadequate legal remedy merely gives the complainant a case of which equity may take cognizance. Law's remedial inadequacy in such a case is the element that brings it within the jurisdiction of equity. It is not a guarantee that equity will grant the requested relief[8] and, when the complainant seeks to have the contract specifically enforced, "the right to its specific performance is not absolute like the right to recover the legal judgment."[9]

Complainant seeks a relief that is discretionary[10] and, even if his

less hardship upon the defendant," 2 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) 367, sec. 988.

7. The adequacy of the legal remedy is a defense which precludes the exercise of equity's jurisdiction, and additional consideration becomes necessary to cover those cases in which courts have based jurisdiction on other grounds. Columbus Club v. Simons, *supra*, note 1, after finding an inability to compute damages, also rested its jurisdiction on the fact that a mortgage given as security for the proposed loan was in fact a defeasible conveyance of land, and that the bill resolved itself into one for the conveyance of an interest in land, which the court would specifically enforce. Influenced by this decision the Supreme Court of Washington in Stewart v. Bounds, 167 Wash. 554, 9 P. 2d 1112 (1932), restates the rule to deny specific performance of "an executory agreement to borrow or lend money." This distinction also appears invalid, since plaintiff's consideration consists in repaying, and not in relying.

8. "In other words, the equity jurisdiction may exist over a case, although it is one in which the doctrines of equity jurisprudence forbid any relief to be given or any right to be maintained. This conclusion is very plain and even commonplace, and yet the 'equity jurisdiction' is constantly confounded with the right of plaintiff . . . to obtain the equitable relief," 1 POMEROY, EQUITY JURISPRUDENCE, (4th ed. 1918), 159, sec. 131.

9. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, (3d ed. 1926) 103, sec. 35.

10. "That is, in addition to the facts which give rise to the certain and absolute *legal* right, there may be *other* facts, circumstances, and

contract is fairly entered into, the mere fact that law cannot adequately protect his legal right will not of itself secure for him equity's remedy when there are sufficient equitable reasons why the relief should not be granted.[11] Where the specific performance of the contract would prevent the enjoyment of the defendant's own rights, the foregoing principle requires that specific performance be denied.[12] In the loan contract the defendant-lender has a right to receive the consideration for which he contracted, viz., the repayment of the loan. Equity cannot give him assurance that repayment will be made, nor would it be sensible for the court to require the complainant to execute his consideration as a condition to a decree, as it does in the case of a vendee of land. For then there would be no loan. Since the defendant cannot here receive the protection which equity normally gives when decreeing specific performance, the only reasonable conclusion is that loan contracts should never be the subject of this remedy.

Nor should the fact that there is a mortgage involved, as in the instant case,[13] provide a basis for excepting to the general rule. The

incidents which determine the existence of the equitable right, modify its application, or, perhaps, entirely prevent its exercise," Idem 116, sec. 37.

11. "The right to it depends upon circumstances, conditions and incidents in addition to the existence of a valid contract, which equity regards as essential to the administration of its peculiar modes of relief." Idem, sec. 38.

12. "The doctrine that he who comes into the court seeking equity—that is, seeking to obtain an equitable remedy—must himself do equity means not only that the complaining party must stand in conscientious relations toward his adversary, and that the transaction—be it contract or not—from which his claim arises, must be fair and just in its terms, but also that the relief itself must not be oppressive or hard upon the defendant, and must be so modified and shaped as to recognize and enforce the latter's rights arising from the same subject-matter, as well as those inhering in the plaintiff. It is by virtue of this principle that the specific performance of a contract will be refused . . . where the specific performance would prevent the enjoyment of [the defendant's] own rights," Idem 120, sec. 40.

13. The court in concluding its opinion said, "The court having jurisdiction because of the existence of the mortgage, which is voidable in part, will grant the appropriate relief," Jacobson v. First National Bank

mortgage may be a ground for invoking the jurisdiction of equity just as is the inadequacy of the legal remedy, but the mere existence of jurisdiction is not a valid reason for granting this type of relief.[14]

The peculiar aspect of the present case is that the borrower is placed in his predicament not by any willful breach on the part of defendant but by the intermediary's forgery of complainant's endorsement. The action going to the heart of the matter would be one for money had and received against the bank which cashed the check, and plaintiff's recovery therein would be certain.[15] Despite this, the borrower has sought a type of relief which the application of sound equitable principles would deny to him, and it seems unfortunate that the decision granting him the relief overlooks the well-reasoned opinion of *Conklin v. People's B. & L. Assn.*, which had indicated New Jersey's approval of a salutary rule of equity.[16]

Witnesses—Neutralization of Party's Own Testimony—Insurer Real Party in Interest.—Suit for personal injuries sustained in automobile accident by plaintiff, who was a passenger in defendant's automobile. Before trial, defendant denied in a written statement that he had been careless and that plaintiff had warned him of the danger and of his carelessness; but on trial he surprised his counsel, while testifying as a witness in his own behalf, by making a statement inconsistent with this prior statement. Said examining counsel offered the prior inconsistent state-

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of Bloomingdale, 129 N.J.Eq. 440, 20 A. 2d 19 (Ch. 1941). Relief denied despite the existence of a mortgage in Kenner v. Slidell Savings & Homestead Assn., 170 La. 547, 128 So. 475 (1930).

14. *Supra*, note 8.

15. Buckley v. Second National Bank of Jersey City, 35 N.J.L. 400 (S. Ct. 1872).

16. Apart from the consideration of specific performance, could not the intermediary be held to be C's agent by estoppel or by implication. Intermediaries in similar situations have been so held. See Cooper v. Headley, 12 N.J.Eq. 48 (Ch. 1858); Rocco v. Geiger, 113 N.J.Eq. 583, 168 A. 44 (Ch. 1933).