THE SPECIFIC PERFORMANCE DAMAGES CONTINUUM: AN HISTORICAL PERSPECTIVE

*J. Berryman**

I. INTRODUCTION

Perception of law reform is prefaced on an understanding of how the current state of the law in any given area has been derived. In the area of contract law a number of common law jurisdictions, both here and abroad, are currently reappraising the availability of contractual remedies.[1] A discernable trend appears to be forming around the liberalization of specific relief vis-à-vis damages.

This article, through an historical perspective, provides a background for current reform proposals. It illustrates the transformation from specific relief to damages when the executory bilateral exchange became the contractual paradigm as a result of the emergence of legal formalism in the nineteenth century. The imposition of contemporary restraints on the availability of specific performance, namely, adequacy of common law remedies, mutuality, problems with supervision and uniqueness, are discussed within this historical context. In particular, it is suggested that chancery's concept of contract was ultimately connected to a title theory of exchange that by the nineteenth century no longer accommodated the then current notions of contracts.

Through this historical perspective the reader will appreciate that current proposals are not as revolutionary as first thought. Secondly, the

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* Assistant Professor, Faculty of Law, University of Windsor. I am indebted to Professor Grant Hammond, now of the Alberta Institute of Law Research and Reform, and Professors Julio Menezes and George Stewart of the Faculty of Law, University of Windsor, for their comments.

[1] *See* ONTARIO LAW REFORM COMMISSION, REPORT ON SALE OF GOODS 433-516 (1979) [hereafter cited as REPORT] and, *e.g.*, UNIFORM LAW CONFERENCE OF CANADA, PROCEEDINGS OF THE SIXTY-FOURTH ANNUAL MEETING 531 (1982). *See also* the remedial statutory scheme created by *Contractual Remedies Act 1979*, N.Z.S. 1979, No. 11. For articles and texts suggesting a reappraisal of contractual remedies, *see* Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); Muris, *The Cost of Freely Granting Specific Performance*, [1982] DUKE L.J. 1053; Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Sharpe, *Specific Relief for Contract Breach*, in STUDIES IN CONTRACT LAW 123, at 126 (B. Reiter & J. Swan eds. 1980); Treitel, *Specific Performance in the Sale of Goods*, [1966] J. BUS. L. 211; Yorio, *In Defence of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365 (1982); F. LAWSON, REMEDIES OF ENGLISH LAW 213 (2d ed. 1980); I. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES 67 (2d ed. 1980); G. TREITEL, AN OUTLINE OF THE LAW OF CONTRACT 360 (2d ed. 1979).

availability of specific relief has historically been connected to a chancery jurisdiction which reflected a paternalistic "reason and conscience" approach rather than the later legal formalistic concept of "equity". Any liberalizing of the remedy, therefore, can be perceived as a return to individualized justice which does not treat all contracts within one laissez-faire contractual paradigm. Thirdly, there is the apocalyptic view that any reform is only of immediate relevance.

This article is divided into two sections. The first describes how chancery's jurisdiction was characterized by adherence to the values of reasonableness, just price and judicial paternalism. These values dominated the eighteenth century and fixed chancery's perceptions of "property" and its concept of what constituted a "contract". In the nineteenth century, as those same values came under attack from the emerging notions of laissez-faire economics, chancery was transfixed. Its concepts of "property" and "contract" became increasingly anachronistic.

In the second section, the triumph of damages as a primary remedy for breach of contract is explained. In a period when law was being regarded as a science, chancery's now anomalous jurisdiction was shrouded in rules which made it conform as an integral but subservient part of a contractual remedial scheme. Chancery adopted the constraints of "equity".

II. CONTRACTUAL PARADIGMS AND CHANCERY

Prior to the eighteenth century it is difficult to discern a contractual paradigm. In essence there was not one. During the medieval period and into the reign of the Stuarts (1603-1714), actions on debts, bonds and other forms of consensual transactions were seen as "grants".[2] An interest or right to the "property" passed immediately and, as best as the common law could, was enforced specifically. Debt, detinue and penal bond are examples. In particular penal bond, the basic contract institution for three centuries,[3,4] gave the greatest impetus for specific performance. Non-performance entitled the innocent party to enforce the penalty by way of an action for debt which, prior to chancery's intervention to provide relief from penalties,[5] could be set at any amount. The exception to this was covenant, which bound the covenantor to performance at some specified date in the future.

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[2] P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 196 (1979).

[3] A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 90 (1975).

[4] Simpson, *The Penal Bond with Conditional Defeasance*, 82 L.Q.R. 392 (1966); J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 270 (2d ed. 1979).

[5] Henderson, *Relief from Bonds in the English Chancery: Mid-Sixteenth Century*, 18 AM. J. LEGAL HIST. 298 (1974); Yale, *Lord Nottingham's Chancery Cases*, 79 SELDEN SOCIETY 9 (1961).

In some ways debt, bonds and other consensual transactions align themselves with executed contracts and covenant with executory contracts. If there was a paradigm to be found in this period, it was the executed or partly executed contract,[6] enforceable in both chancery and common law courts. The damage assessments in the latter were intended to compensate the plaintiff for the full value of the defendant's performance and not merely for the difference in value of each others' respective performance. The plaintiff remained liable to perform his side of the contract. In this sense the common law remedy resembled specific performance as a true substitute for performance rather than damages for mere loss of bargain.[7] This fact may indicate that the difference between common law and equity was slight, although damages would always remain a poor substitute for performance in equity.

The early history of chancery shows that generally, where contractual promises remained to be performed, an order for specific relief would lie: *pacta sunt servanda*. This practice conformed with the paternalistic notions of conscience that were still pervasive in the eighteenth century.[8] Where loss arose from an irrevocable wrong, the most chancery could effect was an order to the common law courts for an assessment of damages.[9] Distinctions between executory and executed contracts were not drawn. Chancery required all promises which had been made for a "serious reason" to be kept because the obligation or duties arose immediately. Thus, at a theoretical level, it is clear that if promises were made dependent upon the performance of each other, in a manner similar to the modern bilateral exchange of promises or the executory contract, then chancery did not have to take many fundamental steps to assume jurisdiction. If chancery was well equipped to assume jurisdiction over executory contracts, the question must be asked why it did not do so when the executory contract became the paradigm during the age of legal formalism. Three developments hindered chancery's assumption of jurisdiction.

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[6] *Supra* note 2, at 141-42.

[7] *Id.* at 200. Today, damages are determined as the difference between the value of the defendant's performance and the cost of the plaintiff's performance, for which the plaintiff is no longer liable. These are true expectation damages. *See also* A SIMPSON, *supra* note 3, at 582-87; Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, at 937 (1974); Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, at 551 (1979).

[8] H. MADDOCK, I A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY IN TWO VOLUMES 286 (1st ed. 1817); J. NEWLAND, A TREATISE ON CONTRACTS WITHIN THE JURISDICTION OF COURTS OF EQUITY 89 (1806); J. POWELL, II ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 10 (1790).

[9] J. POWELL, *supra* note 8, at 136.

A. *Statute of Frauds*

The first inhibiting development was the passing of the *Statute of Frauds*[10] in 1677. Both Simpson[11] and Atiyah[12] theorized that this particular statute was a reactionary legislative attempt to control the development of executory contracts. The policy behind the legislation was to require a degree of formality in contracts which prior to the passing of the Act had become legally enforceable.

The *Statute* covered six types of contractual transactions. Contracts for the sale of an interest in land, promises by personal representatives, contracts of suretyship, marriage contracts and contracts not to be performed within a year were governed by section four. The unifying feature of these contracts was that they became "actionable at common law through the innovatory and not the substitutionary effect of the new action".[13] These contracts had not been enforceable at common law unless formalized by a sealed instrument. Although the *Statute* required only a signature, the overall effect was to "put the clock back". The sixth category was contracts for the sale of goods where the goods were worth more than ten pounds. Interestingly, these contracts were governed by a different provision: section sixteen provided that such contracts were enforceable only when in writing or where an earnest, part performance or acceptance and receipt of part of the goods had taken place. A doctrine of part performance was not similarly enshrined in section four. As a consequence, many of the later chancery judgments under the *Statute* concentrated on the equitable development of part performance.

The *Statute of Frauds* dealt only with the most important contracts. Anybody reviewing the table of contents of the early treatise writers on contracts — Maddock, Newland, Powell and Fonblanque — cannot help but notice their correlation with the contracts covered by section four. Could it be possible that the effect of the *Statute* focused chancery's contractual jurisdiction primarily on those contracts coming within the ambit of the *Statute* to such an extent that later developments went unnoticed? This leads to the second development which inhibited chancery's jurisdiction.

B. *Emerging Concepts of Property*

Horwitz[14] has put forward an argument concerning the transformation of contract law from a system based on inherent justice or fairness of

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[10] *Statute of Frauds*, 29 Car. 2, c. 3 (1677).
[11] *Supra* note 3, at 619.
[12] *Supra* note 2, at 205.
[13] *Supra* note 3, at 610.
[14] Horwitz, *supra* note 7.

exchange to one asserting the will theory of contract. This transformation is alleged to have taken place between 1780 and 1860.[15] Part of the argument concerns what Horwitz terms the "title theory of exchange":

> As a result of the subordination of contract to property, eighteenth century jurists endorsed a title theory of contractual exchange according to which a contract functioned to transfer title to the specific thing contracted for.[16]

Horwitz describes specific performance and restitution as remedies for non-delivery as "property remedies". When courts award expectation damages,

> [i]t is at this point that contract begins to be understood not as transferring the title of particular property, but as creating an expected return. Contract then becomes an instrument for protecting against changes in supply and price in a market economy.[17]

Horwitz then states that the first recognition of expectation damages occurred after 1790 in cases involving speculation in stock.

There is a certain attraction to the title theory of exchange. The development of a passing of property theory in both sale of land and sale of goods contracts was intimately connected with title concepts.[18] The notion that contracts were seen as grants is indicative of a "property" influence governing market exchanges. The theory may gain its greatest support from the equitable developments which treated executory contracts as executed at the time they were entered into[19] (unless another time was appointed for completion) and which concentrated on part performance.

Simpson attacks this aspect of Horwitz's thesis by demonstrating that expectation damages were awarded prior to 1798. The cases surrounding the South Seas Bubble collapse in 1720 are conclusive on this point.[20] He also objects to the treatment of specific performance and expectation damages as being antithetical to one another. To Simpson, specific performance is in fact a vindication of the expectation interest.[21] He gains support for this position from the discussion by Fuller and Perdue[22,23] which provides justification for protecting the expectation interest:

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[15] *But see* Simpson, *supra* note 7.

[16] Horwitz, *supra* note 7, at 920.

[17] *Id.* at 937.

[18] *See* A. SIMPSON, *supra* note 3, at 170, 327-74; Milsom, *Sale of Goods in the Fifteenth Century*, 77 L.Q.R. 257, at 283 (1961).

[19] J. POWELL, *supra* note 8, at 55; H. MADDOCK, *supra* note 8, at 289.

[20] Cud v. Rutter, 24 E.R. 521 (Ch. 1719), more fully reported in 5 VINER'S ABR. 538. *See also* discussion *infra*.

[21] Simpson, *supra* note 7, at 548.

[22] Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936).

[23] Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937).

> The essence of a credit economy lies in the fact that it tends to eliminate the distinction between present and future (promised) goods. Expectations of future values become, for purposes of trade, present values. In a society in which credit has become a significant and pervasive institution, it is inevitable that the expectancy created by an enforceable promise should be regarded as a kind of property, and breach of the promise as an injury to that property. In such a society the breach of a promise works an "actual" diminution of the promisee's assets — "actual" in the sense that it would be so appraised according to modes of thought which enter into the very fiber of our economic system.[24]

Specific performance is a vindication of the expectation interest if the plaintiff voluntarily chooses, or is required by law, to perform fully his own independent obligations. However, what is the position of a party who wishes to regard himself as being discharged, or where a court is not prepared to give an ultimate sanction to the assertion of that plaintiff's particular property interest?

The idea that a plaintiff seller who had proferred goods under a contract, only to have the defendant refuse to accept them, could demand damages for his loss incurred on resale, was new in 1724. Atiyah[25] points to *Wyvil v. Stapleton*,[26] a case concerning the sale of government stock, as an early example of a defendant being "made to pay damages without actually receiving any consideration". As Atiyah states, "the truly executory contract was being born".[27] Fuller and Perdue would describe such damages as the protection of a "property interest". Would a court of equity in 1720 have recognized the same concept? It is submitted that the transformation from a title theory of contract to one recognizing the expectation interest did not necessarily occur when the expectation was fully realized, but rather when equity no longer gave full sanction to the particular property interest asserted. The demarcation line lay along what property rights equity would or would not fully sanction.

As suggested above, the *Statute of Frauds* focused attention on certain types of contracts and consequently on particular modes of property. By and large, those forms of property had been in existence for a long time. The indicia of ownership, possession and the characteristics of tangibility could be understood. However, new forms of property were emerging that defied the pre-existing method of categorization. In particular, by the 1720's the exact nature or attributes of company stock posed problems.

Colt v. Nettervill[28] dealt with such a problem. The plaintiff had entered into an agreement to buy £5000 of York Building Stock at £7 10s. per cent, the contract to be completed in March. By that time the

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[24] *Supra* note 22, at 59.
[25] *Supra* note 2, at 211.
[26] 93 E.R. 735 (K.B. 1724).
[27] *Supra* note 2, at 212.
[28] 24 E.R. 741 (Ch. 1725).

stock had risen in value to £1300 more than the contract price. The defendant failed to complete his obligations under the contract and the plaintiff brought an action for specific performance. The defendant argued that this contract came within the provisions relating to the sale of goods and merchandise contained in the *Statute of Frauds*. The defendant argued that the contract was void within the terms of the *Statute* as the agreement had not be reduced to writing and although an earnest of 6d had been offered, it had not been accepted. Lawyers today would be amazed that such an argument could possibly stand, yet this question caused Lord Chancellor King considerable anguish — so much so that he called upon his colleagues to give him their counsel. Twelve judges were divided on the point. Lord Chancellor King resolved: "[I]t is a point too difficult for me to determine upon demurrer."[29] He then found the 6d to be a true earnest "because the bill says, that the plaintiff did pay 6d as earnest, and the plea only says, that the defendant did not *receive* or *accept* it as earnest".[30] On the other substantive issue of whether specific performance should be decreed, he disallowed the demurrer, adding,

> but this case may at the hearing appear to be attended with such circumstances that may make it just to decree the defendant either to transfer the stock according to his express agreement, or at least to pay the difference; . . . .[31]

The debate was still alive in *Duncuft v. Albrecht*.[32] However, in that case Shadwell V.C. had no doubt that shares could not be classified as goods, wares or merchandise although they were personalty.

The apparent tension between the existing doctrines of chancery based upon just price and fairness and the application of those same criteria to emerging concepts of "property", as exemplified in the treatment of corporate shares, is illustrated in *Cud v. Rutter*.[33]

The defendant had agreed to transfer £1000 of South Seas stock at the rate of £104 per cent. The contract was evidenced by a promissory note acknowledging the payment of two guineas by the plaintiff as part of the consideration. The defendant had incorporated the usual terms in the note, which included the words "to supply the stock *or pay the difference*". The emphasized words had been struck out by the plaintiff before the defendant signed. The plaintiff sought specific performance, refusing to accept the difference which the defendant had proffered. Counsel for the defendant argued that this was an executory contract for stock and thus akin to a contract of wager "on the rise and fall of the stock, therefore paying the difference was a sufficient performance".[34] A contract of stock differed from the sale of land because land could be of

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[29] *Id.* at 742.
[30] *Id.*
[31] *Id.* at 741-42.
[32] 59 E.R. 1104 (V.C. 1841).
[33] *Supra* note 20.
[34] *Supra* note 20, 5 VINER'S ABR. at 538.

particular benefit to the individual, whereas similar stock could be purchased daily in Exchange Alley. The plaintiff should be left to his remedy at law.

Sir Joseph Jekyll, Master of the Rolls, found for the plaintiff. This was a fair and reasonable contract and, as such, there was no valid reason to deny specific performance. Jekyll M.R. saw importance in the fact that the plaintiff had insisted at the time of agreement that he wanted the specific thing and did not want to accept the difference. The Master of the Rolls ordered the defendant to transfer the stock and pay the dividends received from the date the contract was due to be performed. The plaintiff was to pay the contract price plus interest on the money. Interestingly, Jekyll M.R. saw specific performance as being advantageous to the buyer as it enabled him to avoid the trouble and expense of buying stock from another dealer. It should be noted that at this stage no refined concepts of mitigation of loss existed.[35] Jekyll M.R. probably saw nothing extraordinary in this case. It was simply one where specific performance was clearly desirable. As Viner noted, "he saw no reason why the court should not in this case, as well as others, decree specific performance of the contract".[36] Here was a person who promised to transfer property for a fair price. Why should he not be compelled to do that which he promised?

When *Cud v. Rutter*[37] came on appeal, Lord Macclesfield is said to have been "strongly against the plaintiff". The plaintiff had argued that it was common justice for the court to decree specific performance where the agreement was just and reasonable. The fact that the agreement was subject to rises or falls in the market did not alter the matter. By comparison, similar fluctuations occurred in contracts for the sale of merchandise and land and the court had never refused relief in those areas. From the point of sale to the time of the Master of the Rolls' decree, the stock had not risen above £12 per cent. The defendant countered by stating that the stock was presently worth between £90 and £100 per share, that to compel performance would be unreasonable, that the plaintiff was entitled only to the difference on the day and that such payment was good performance of the contract. He also stated that he did not have the stock to sell at the time of contracting, although he was in possession of it at the day fixed for performance. The defendant concluded his argument by suggesting that because a court could only enforce the contract *in toto* and was not able to mitigate damages upon the same circumstances as a jury, it was therefore unreasonable to order specific performance. Lord Macclesfield replied:

> [T]he plaintiff doth not suffer at all by the non-performance of the agreement specifically, if the defendant pays him the difference. These sorts of contracts

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[35] *Supra* note 2, at 425.
[36] *Supra* note 20, 5 VINER'S ABR. at 538.
[37] *Supra* note 20.

> are commonly understood to mean no more than to transfer the stock or pay the difference, and this fully answers the intention of the parties, and the party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement; this differs very much from the case of a contract for lands, some lands being more valuable than others, at least more convenient than others to the purchaser, but there is no difference in stock.[38]

It seems strange to speak of the party's intentions when the plaintiff specifically tried to prevent this possibility from occurring. Lord Macclesfield also stated that it was not in order to decree specific performance of contracts when the party did not have the thing to deliver at the time of contracting. This latter point would certainly cut across commodity contracts and it was from those that he drew his analogies to support the statement.

Lord Macclesfield had two options available. He could enforce the contract by ordering specific performance. Such a decision would protect the purchaser's full expectation that the stock would rise in value. It would in effect constitute a windfall to the purchaser who had not borne any of the risk. In the alternative, he could deny specific performance. In choosing the second option he did allow the purchaser's claim for damages which were assessed as the difference between the value of the stock on the day the contract was to be completed and the stipulated contract price. This claim was allowed "because the defendant had shuffled [delayed] with the plaintiff".[39]

Why did he choose the latter course? Lord Macclesfield was intimately knowledgeable about the value of South Seas stock. He personally held investments and, no doubt, appreciated the speculative nature of the contract. However, to order performance of such a contract, reaffirming the lower court's order, would not have accorded with the established precepts of "equity". Hence, much of the judgment was based on the reasonableness and fairness of the contract. Nor did this type of property fit the typical mold. In an attempt to discriminate between particular property interests and how far those interests would be protected by equity,[40] Lord Macclesfield coupled the distinction between the sale of land and the sale of stock with the statement:

> In contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract and therefore not proper for a court of equity to carry into execution: the decree might be beneficial to the plaintiff one day, and to his prejudice the next. . . .[41]

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[38] *Supra* note 20, 5 VINER'S ABR. at 540.

[39] *Id.* at 541.

[40] Keen v. Stuckely, 25 E.R. 109 (Ch. 1721) provides an inconclusive debate as to how equity then approached the enforcement of "hard bargains".

[41] *Supra* note 20, 5 VINER'S ABR., at 540.

In the eighteenth century chancery was still tied to the notions of "just price" to establish the fairness and reasonableness of the contract.[42] Similarly in the common law courts, while the judges may have been more sympathetic towards the new concepts of economic liberalism and the will theory of contract, the assessment of damages was still exclusively within the jury's control. Presumably plaintiffs sought specific performance because they did not have absolute confidence that a jury would fully compensate their expectations.[43] In other words, the damage remedy at law may have been something less than a full vindication of the expectation interest by way of specific performance in equity. This also suggests a reason why chancery refused to decree specific performance in situations involving new types of property where the only "use value" was that ascribed by the market from day to day[44] and was consequently subject to wild fluctuations. As Lord Macclesfield stated, "the decree might be beneficial to the plaintiff one day, and to his prejudice the next".[45] Thus, enforcement may have violated some of the traditional concepts of chancery's paternalism.

It would appear that chancery's concept of contract was intimately connected with a title theory of contract. The vindication of the expectation interest through the award of specific performance did not occur because such award *alone* brought about that result. Rather it occurred because the expectation interest was a mere incidence of title exchange when considering the particular contracts that chancery would enforce. The initial failure to classify and to come to terms with new forms of property was brought about by the very fact that these forms differed from traditional patterns of property enforceable in chancery. Nor were the problems confined to stocks. The court's treatment of copyright matters evinced similar difficulties.[46] Difficulty was also experienced with the treatment of the naked expectation interest, used in the "property" sense described by Fuller and Perdue, that arose from a bilateral executory contract. When successive chancellors asserted that specific performance did not lie when damages were adequate, they were adopting a policy of non-intervention because the newer developments contradicted their preconceptions of contract law.

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[42] *Supra* note 2, at 147; J. POWELL, *supra* note 8, at 143-44; Horwitz, *supra* note 7, at 919.

[43] *Supra* note 2, at 149; Simpson, *supra* note 7, at 562.

[44] *Supra* note 2, at 104.

[45] *Supra* note 20, 5 VINER'S ABR., at 540.

[46] *Supra* note 2, at 107; B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1-37 (1967).

C. *Legal Formalism*

The third factor which inhibited equity was the rise of legal formalism.[47] As a consequence, equity declined in both a qualitative and quantitative sense. In the nineteenth century, chancery's procedures proved totally inadequate to handle what could be termed a litigation explosion. The dilatory nature with which chancellors discharged their business had been the subject of comment since Lord Bacon's occupancy. However, Lord Eldon brought even greater tardiness to the disposition of business. Charles Dickens' description in *Bleak House* could not have been too far from the truth. It would also have been of some concern to the emerging men of commerce that so much money could be tied up in the litigation process. Money in chancery courts rose from 1.75 million pounds in 1745 to over 39 million pounds in 1825.[48] The new economic theorists, who equated idle capital with an "opportunity cost",[49] would have baulked at such large sums being detained in the courts. Their confidence could not have been restored by the earlier impeachment of Lord Macclesfield for certain defalcations involving suitors' funds being invested in collapsed South Seas stock.

In qualitative terms, the court had moved farther away from its "conscience" side toward an "equity" jurisdiction. The men of science, who had demonstrated the futility of attempting to legislate against the natural laws they had discovered and who had captured the imagination of commercial men, now found company among lawyers. Many of the treatise writers were attracted to the concept that law was a science[50] and thereby brought about a categorization and schematism of the rules of equity. In this scheme, equity was to be objective, apolitical, scientific and, above all, purely legal. Any element of discretion was minimized. The logical progression of this train of events led inevitably to the fusion of law and equity by the *Judicature Acts* of 1873[51] and 1875.[52] Horwitz terms such developments as "[the] complete emasculation of Equity as an independent source of legal standards. The subjection of Equity to formal rules was a prominent article of faith within the orthodox nineteenth century movement to conceive of law as science."[53]

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[47] *Supra* note 2, at 388-97; Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

[48] W. HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 437, note 5 (7th ed. 1956). *See also* J. ATLAY, 1 THE VICTORIAN CHANCELLORS 42, note 2 (1906 Reprint 1972).

[49] *Supra* note 2, at 424.

[50] *Preface* to H. MADDOCK, *supra* note 8, at XX; Horwitz, *supra* note 47, at 363; J. FONBLANQUE, A TREATISE ON EQUITY 1 (5th ed. 1830); J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 1-27 (9th ed. 1866).

[51] *The Supreme Court of Judicature Act, 1873*, 36 & 37 Vict., c. 66.

[52] *The Supreme Court of Judicature Act, 1875*, 38 & 39 Vict., c. 66.

[53] Horwitz, *supra* note 47, at 263. *See also* Holdsworth, *Equity*, 51 L.Q.R. 142 (1935).

The combination of the above three factors inhibited chancery from assuming a greater portion of contract jurisdiction when the executory contract became the contractual paradigm. This is a position from which equity has never recovered.[54] Chancery, which by its earlier initiative in recognizing "promises" had inspired the common law, now bore the hallmark which had given justification to its own early development: certainty. Property, equity's counterfeit of obligation, had become its master.[55]

III. Restraints on Specific Performance

A. *Adequacy of the Common Law Remedy*

It is not surprising that the adequacy of the common law remedy became one of the chief restraints on specific performance. Theoretically, equity had always been considered as supplementing rather than supplanting the common law.[56] Historically, chancery had payed lip service to the idea that it could only hear complaints not remediable at law. For example, Fineux C.J. had rejected the need to go to chancery on a subpoena to enforce a contract for the sale of land because an action lay on the case.[57] Flemming C.J. was far more vociferous: "There are too many causes drawn into chancery to be relieved there, which are more fit to be determined by trial at common law, the same being the most indifferent trial, by a jury of twelve men."[58] Lord Nottingham noted the rule in his Prolegomena,[59] but it was left to later chancellors to give effect to the restriction.

In a period when chancery was called to account for its jurisdiction, there was little choice but to relinquish jurisdiction and acknowledge the supremacy of the common law. Henceforth, where the common law remedy was adequate, chancery had no jurisdiction. However, this may not have been a reluctant choice. The restriction was self-imposed and was not in response to any recognizable demand from the common law courts.

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[54] *See* Denning, *A Need for a New Equity*, 5 Current Legal Prob 1 (1952); Baker, *The Future of Equity*, 93 L.Q.R. 529 (1977).

[55] S. Milsom, Historical Foundations of the Common Law 248 (2d ed. 1981).

[56] Maitland, *The Origin of Equity (II)*, in Equity: A Course of Lectures 12 (A. Chaytor & W. Whittacker eds. 1919) (rev. by J. Bruyante 1936).

[57] A. Simpson, *supra* note 3, at 260.

[58] Gollew v. Bacon, 80 E.R. 809 (K.B. 1611).

[59] Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity, c. III, s. 26, as reprinted in D.E.C. Yale, Lord Nottingham's Two Treaties 193 (1965).

For a time, Lord Hardwicke toyed with the idea that the availability of specific performance should be dependent upon whether the contract concerned realty, where it would be available, and personalty, where it would not.[60] However, previous cases where recovery of chattels had been decreed *in specie* cast doubt upon the idea.[61] It was certainly put to rest in *Adderley v. Dixon*,[62] where Sir John Leach V.C. formulated the rule as known today: "Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy."[63]

The test of adequacy of common law remedies had that element of subservience necessary to show that equity was merely supplemental to the common law. However, as a means to distinguish between cases where specific performance was warranted and ones where it was not, it was inconclusively applied.[64] On this test alone, nobody could explain why a vendor was entitled to specific performance of a contract for the sale of land, or why some sales of shares and chattel contracts were specifically enforceable and others were not. In *Falcke v. Gray*,[65] a case concerning the sale of rare jars of unusual beauty, there was already present some appreciation that everything had a market price and, therefore, the grounds for refusing specific performance necessarily rested upon some other rationale — in that case, hardship. In this climate of ambiguity, it was not surprising to see Lord Westbury unsuccessfully attempt to resurrect a strictly functional test drawing a distinction between contracts dealing with specific property and those dealing with unascertained property.[66] Such a test was based on the fact that property passed immediately to the purchaser upon the formation of a contract for specific property whether or not that property involved realty or personalty.

Any test which has as its foundation a question of "adequacy" is open to subjective opinion. There is sufficient variation in application cited above to demonstrate how "adequacy" was exploited to attain varying results, a practice which continues today. Thus, the questions which are currently being raised as to when specific performance is justified are not new. Questions relating to mitigation, problems

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[60] Buxton v. Lister, 26 E.R. 1020 (Ch. 1746).

[61] Pusey v. Pusey, 23 E.R. 465 (Ch. 1684); Somerset v. Cookson, 24 E.R. 1114 (Ch. 1735).

[62] 57 E.R. 239 (V.C. 1824).

[63] *Id.* at 240. *See also* Falcke v. Gray, 62 E.R. 250 (V.C. 1859); New Brunswick Co. v. Muggeridge, 62 E.R. 263 (V.C. 1859).

[64] Lord Redesdale in Harnett v. Yielding, 2 Schoales & Lefroy's Rep. 549, at 553 (Ch. 1805) believed that "from [s]omething of habit, decrees of this kind have been carried to an extent which has tended to in[j]ustice". He then added that the simple foundation of the relief was that damages would not give the party true compensation.

[65] *Supra* note 63.

[66] Holroyd v. Marshall, 11 E.R. 999 (H.L. 1862) and *see* discussion *infra*.

associated with how to value and calculate loss and speculations concerning what interests merited sanctioning were all being raised during the eighteenth and nineteenth centuries. By and large, lawyers found solutions to those problems, albeit from our perspective rather unsophisticated and unsatisfactory ones. Not surprisingly, the end result was a desire to limit the availability of specific performance. It was all part of the rise of freedom of contract and the emasculation of equity.[67]

It is difficult to define exactly what was the theory of freedom of contract and what were the attributes of legal formalism.[68] However, at one extreme, and considered highly persuasive in America, was the Holmesian theory of contract. It is doubtful whether Holmes would have countenanced specific performance at all. He classified it as an exceptional remedy. For him, "[t]he only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass".[69] As Gilmore has pointed out:

> Specific performance was to be avoided so far as possible. . . . Money damages for breach of contract were to be compensatory never punitive; the contract-breaker's motivation, Holmes explained, makes no legal difference whatever and indeed every man has a right "to break his contract if he chooses" — that is, a right to elect to pay damages instead of performing his contracted obligations.[70]

This view did not find universal support.[71] Pollock had communicated to Holmes the problems in reconciling specific performance,[72] yet Pollock never included any significant discussion of the subject in his own treatise on contract.[73]

Anson, whom Atiyah regards as being one of the most influential writers of the nineteenth century,[74] accorded specific performance circumspect treatment.[75] Anson asserted that "every breach of contract entitles the injured party to *damages* though they may be but nominal; but it is only in the case of certain contracts and under certain circumstances that *specific performance* can be obtained . . . ".[76] He also identified two limitations on the availability of specific performance, namely,

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[67] *Supra* note 2, at 716-26.

[68] *See, id.* at 388-97 for an attempt at the latter.

[69] O.W. HOLMES, THE COMMON LAW 301 (1909).

[70] G. GILMORE, THE DEATH OF CONTRACT 14 (1974). Holmes took comfort in knowing that Coke J. had been of a similar persuasion in Bromage v. Genning, 81 E.R. 540 (K.B. 1617).

[71] *Supra* note 2, at 430.

[72] HOLMES-POLLOCK LETTERS 79, 201, 233 (2d ed. M. Howe 1961).

[73] F. POLLOCK, PRINCIPLES OF CONTRACT (5th ed. 1889). It was not until P.H. Winfield's editorship of the twelfth edition (1946) that a section on remedies was included.

[74] *Supra* note 2, at 683.

[75] W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 308 (2d ed. 1882).

[76] *Id.* at 305.

where the common law remedy is adequate to the loss sustained and where the subject matter of the contract is such that the court cannot supervise its execution.[77] An interesting omission is "mutuality". It is probably fair to say that neither Anson nor Pollock felt any compulsion to cover remedies in their treatises. Mayne[78] and Fry[79] had monopolized the field.

If the theory on contracts was ambivalent towards specific performance, the emerging notions of damages were distinctly antagonistic. In the past, the assessment of damages had been the sole responsibility of juries. In essence they exercised a broad discretion at trial subject only to various limited review procedures, for example, the attaint jury and the court's discretion to set aside a jury's verdict.[80] In theory and in practice, the jury compensated the plaintiff for the real loss that had been sustained. *Nurse v. Barns*[81] is a classic example. On the defendant's breach of a contract to allow the plaintiff to use his iron mills for a consideration of £10, the plaintiff was awarded £500 in damages to compensate for the loss of stock laid in. The award in this case came close to achieving a compensatory goal. Our sudden desire to return to that principle is not new. However, by the nineteenth century that compensatory goal was inconsistent with the new economic philosophy. Such a practice did not provide sufficient disincentive to the plaintiff from "saddling on the defendant the consequences of his own stupidity, laxity, or inertia".[82] This concern had become apparent in the early 1800's when the Court of Exchequer experimented with ideas of remoteness in contract.[83] Interestingly, these ideas emerged from difficulties experienced in assessing speculative profits.[84] The issue, of course, reached a pinnacle in *Hadley v. Baxendale*[85] which exemplifies the final supremacy of an objective "reasonable man" test over a subjective "jury" standard of assessment. Fuller and Perdue, in their celebrated article on reliance damages, said the case stood for two propositions:

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[77] *Id.* at 312.

[78] J. MAYNE, A TREATISE ON THE LAW OF DAMAGES (2d ed. 1872).

[79] E. FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS (1st ed. 1858).

[80] *See* Washington, *Damages in Contract at Common Law*, 47 L.Q.R. 345 (1931) for an early history of damages.

[81] 83 E.R. 43 (K.B. 1664).

[82] Washington, *Damages in Contract at Common Law*, 48 L.Q.R. 90, at 106 (1932), being a continuation of his earlier article at *supra* note 80.

[83] *Id.* at 100.

[84] *See* Startup v. Cortazzi, 150 E.R. 71 (Ex. 1835); Fletcher v. Tayleur, 139 E.R. 973 (C.P. 1855).

[85] 156 E.R. 145 (Ex. 1854). For a detailed background to Hadley v. Baxendale, *see* Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. OF LEGAL STUD. 249 (1975).

> (1) that it is not always wise to make the defaulting promisor pay for all the damage which follows as a consequence of his breach, and
> (2) that specifically the proper test for determining whether particular items of damage should be compensable is to inquire whether they should have been foreseen by the promisor at the time of the contract.[86]

Of those two propositions, the former is the more relevant because it acknowledged the degree to which the compensation goal had been forsaken.

The effect of *Hadley v. Baxendale*[87] was to limit the recoverable consequential losses which flowed from a breach. Henceforth, damages were to be limited to those which were reasonably within the contemplation of the parties at the time of contracting. Nor was any distinction drawn between executory contracts, where obligations remained to be performed and executed contracts, where the breach arose from either an inadequate performance or from a total failure to perform.

Today, we see such allocation of damages as being an apportionment of risks. The defendant is not to become an absolute insurer of the plaintiff unless he is made aware of any special circumstances. Although quickly adopted by the judiciary, in 1854 this was a remarkable proposition which was unsupported by authority.[88] Baron Parke, who was a member of the court which heard *Hadley v. Baxendale*,[89] had stated only six years earlier:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[90]

Where obligations remained to be performed, specific performance would amount to an attractive alternative to protect fully the promisee's subjective expectations. In fact, in many contracts for the supply of goods either on an instalment basis or manufactured to the buyer's specifications,[91] performance would be a desirable remedy. The alternative would be to negotiate the allocation of risks, with the plaintiff informing the defendant of his particular circumstances. This would require a far more sophisticated communication network than was available in 1850. Indeed, this fact was recognized by the Mercantile

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[86] *Supra* note 22, at 84.

[87] *Supra* note 85.

[88] *See* Smeed v. Foord, 120 E.R. 363 (Q.B. 1859).

[89] *Supra* note 85.

[90] Robinson v. Harman, 154 E.R. 363, at 365 (Ex. 1848).

[91] These types of contracts were more numerous in the nineteenth century when most industrial products were made to a particular customer's specifications because the market did not then exist for sustained production runs. *See* Danzig, *supra* note 85, at 259.

Law Commissioners in their reports delivered in 1855[92] and was subsequently incorporated into legislation.[93]

Washington concluded his article with the comment: "The endeavour of the law is to compensate the injured party, as far as it is *politic*, for the losses caused and the benefits prevented by the breach."[94] At the height of freedom to contract, it was politic to restrict damages and encourage mitigation of loss as part of furthering the aims of the new economic philosophy. In the age of legal formalism, such politic aims were achieved by the application of legal principles deduced from precedents or created as part of a logical legal doctrine. No better example of that alchemy was the doctrine of mutuality which will be discussed later in this article.

If it can be accepted that the new rules relating to damage assessment did not aim to achieve full compensation for actual loss and that in many executory contracts specific performance did, then it is justifiable to say the remedies were at times antithetical. If the adequacy test was inconclusively applied, then other restraints were necessary to fully encapsulate a specific performance doctrine. Not only restraints but also explanations were needed to account for both vendor and purchaser readily obtaining specific performance on the sale of a real interest in land. Could it be more than coincidental that the contract in which the common law did the least to protect a purchaser's expectations, namely the sale of land,[95] was the very one where equity most readily awarded specific performance? It was in the area of rationalizing the availability of specific performance for land sales that equity developed the explanation of uniqueness. This concept emerged as a sub-species of the adequacy test for damages.

B. *The Uniqueness Concept*

Today, specific performance is readily available and is usually the primary remedy for contracts involving the conveyance of real property

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[92] GREAT BRITAIN PARLIAMENT HOUSE OF COMMONS SELECT COMMISSION TO INQUIRE AND ASCERTAIN HOW THE MERCANTILE LAWS IN THE DIFFERENT PARTS OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND MAY BE ADVANTAGEOUSLY ASSIMILATED, SECOND REPORT (1855).

[93] *Mercantile Law Amendment Act 1865*, 19 & 20 Vict., c. 97, s. 2, and *see* discussion of this legislation *infra*.

[94] *Supra* note 82, at 107-08 (emphasis added).

[95] *See* the rule in Flureau v. Thornhill, 96 E.R. 635 (C.P. 1775), which protects the promisee's reliance interest rather than his expectation interest. The latter is only protected by awarding specific performance, *see* supra note 2, at 203. *See also* Cohen, *The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry*, 32 U. TORONTO L.J. 31 (1982), where the argument is made that because land in the eighteenth and nineteenth centuries carried with it important political, legal and social rights, in addition to its economic value, land, and these ancilliary rights, could only be effectively exchanged where specific performance was routinely available.

interests. Our blind faith commitment to this availability is based on the notion that land is "unique", that it has a "peculiar value to the purchaser or lessee".[96] Our commitment ignores the reality that choice of property is usually determined by the availability of funds and the need to satisfy certain requirements. For industrial property, zoning, floor space and return on investment are important factors; for residential property, locality and number of bedrooms may be determinative. The market is far more dynamic than is popularly imagined. The reason, then, specific performance is generally available can probably be traced to certain historical roots.[97] The reason it remains so is left unexplored, but one suspects that it may have more to do with protecting a purchaser's expectations in one of the few markets in which most people actively participate.

The uniqueness concept probably had its genesis in the chancery development of the passing of a "use" in land between vendor and purchaser. In Powell[98] and Maddock's day, the rule in equity was expressed as "that what is contracted to be done for a valuable consideration is considered as done and nearly all the consequences follow as if a conveyance had been made at the time to the vendee".[99] Jekyll M.R. described such a rule as "a rule so powerful it is, as to alter the very nature of things; to make money land, and on the contrary, to turn land into money . . . ".[100] Lord Macclesfield may have started, or at least contributed to, the uniqueness argument. In *Cud v. Rutter* he said: "This [sale of shares] differs very much from the case of a contract for lands, some lands being more valuable than others, at least more convenient than others to the purchaser."[101] Lord Hardwicke gave a similar opinion in *Buxton v. Lister*.[102]

However, if the principle adopted by Powell and company was applicable to sales of realty, it should have been equally applicable to sales of ascertained goods. Lord Westbury obviously thought so in *Holroyd v. Marshall*:

> In the language of Lord Hardwicke, the vendor becomes a trustee. . . . And this is true, not only of contracts relating to real property, providing that the latter are such as a Court of Equity would direct to be specifically performed.[103]

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[96] E. SNELL, PRINCIPLES OF EQUITY 570 (28th ed. 1982). *See* H. HANBURY & R. MAUDSLEY, MODERN EQUITY 49 (11th ed. 1981); R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 593 (4th ed. 1975). *See also* Cox, *Specific Performance of Contracts to Sell Land*, 16 KY. L.J. 338 (1928), where he discusses the practice in some American states that grant specific performance regardless of any adequacy test for sale of land contracts.

[97] *See* Cohen, *supra* note 95.

[98] J. POWELL, *supra* note 8, at 55.

[99] H. MADDOCK, *supra* note 8, at 289.

[100] Lechmere v. Carlisle, 24 E.R. 1033, at 1035 (H.C. of Ch. 1733).

[101] *Supra* note 20, 5 VINER'S ABR. at 540.

[102] *Supra* note 60, at 1021.

[103] *Supra* note 66, at 1006.

The example he gave of such a contract was the sale of "five hundred chests of the particular kind of tea which is now in my warehouse at Gloucester".[104] With this explanation Kerly agreed;[105] Fry did not.[106] It was perhaps not surprising to hear Lord Macnaughton expressing some doubt as to the appropriateness and the extent of Lord Westbury's examples.[107] From this point on, the uniqueness of land was stressed to differentiate between realty and personalty.[108]

Why did equity extend its remedy to the suit of a vendor? There were almost as many answers as there were reported decisions. Indeed, there was early evidence that the vendor should not have a right to specific performance. In *Armiger v. Clarke* Lord Mountague C.B. took the view that:

> [I]f a man comes for a specific performance as to the land itself, a court of equity ought to carry it into execution, because there is no remedy at law; but if it is to have a performance in payment of the money, they may have remedy for that at law.[109]

However, more in the mainstream of thought was the application of the equitable maxim "equality is equity".[110] The encouragement of the doctrine was said by Maitland to be "convenient for the spread of its [chancery] jurisdiction",[111] and prompted Spry to suggest that a notion of "affirmative mutuality"[112] may have been operating. This view was supported by Leach V.C. in *Kenny v. Wexham*[113] and *Adderley v. Dixon*.[114] A vendor becomes the natural recipient of such a concept. The alternative view, but achieving much the same result, was that adopted by Fry[115] and ennunciated by Lord Campbell in *Eastern Counties Railway Co. v. Hawkes*:

> Generally speaking pecuniary damages adequate to the pecuniary loss sustained from the breach of the contract would be an indemnity to the vendor; but still damages would not place him in the same situation as if the contract had been performed, for in that case he would have entirely got rid of

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[104] *Id.*

[105] D KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURTS OF CHANCERY 254 (1890).

[106] E. FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 38 (5th ed. W. Rawlins 1911).

[107] Tailby v. Official Receiver, 13 App. Cas. 523, at 547 (H.L. 1888).

[108] Scott v. Alvarez, [1895] 2 Ch. 603, at 615 (C.A.) (Rigby L.J.) and the text writers *supra* note 96. *See also* Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, at 1154 (1970).

[109] 145 E.R. 614 (Ex. Ch. 1722). *See also* Laird v. Pim, 151 E.R. 852 (Ex. 1841).

[110] C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISPRUDENCE 52 (2d ed. 1908).

[111] Maitland, *Specific Performance (XX)*, *supra* note 56, at 302.

[112] I. SPRY, *supra* note 1, at 60.

[113] 56 E.R. 1126 (V.C. 1882).

[114] *Supra* note 62.

[115] *Supra* note 106, at 29.

> his land, and he would have in his pocket the net sum for which he had agreed to sell it; whereas if he is driven to his action at law, he retains the land, and he can only recover the difference between the stipulated price and the price which it would probably fetch if resold, together with incidental expenses, and any special damage which he had suffered.[116]

Fry and Lord Campbell then added that the equitable doctrine of conversion, for example, of land into money, supported the idea of reciprocity of remedies for vendors and purchasers of land.[117]

These explanations may only be variations on a theme, but there is apparent a different nuance in emphasis. "Affirmative mutuality" is expansive, whereas Fry's interpretation[118] is restrictive. The former invites new applications; the latter offers a purely functional explanation. This same divergence occurs in the doctrine of mutuality.

C. *The Doctrine of Mutuality*

> A contract to be specifically enforced by the Court must, as a general rule, be mutual, — that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them.[119]

What did Fry achieve by his flagrant assertion relating to mutuality? The rule itself was hardly supported by authority[120] and, as was later shown by Ames, was riddled with exceptions.[121] No doubt the rule appealed to a man of science like Fry[122] but if applied rigorously, it could have imposed draconian restraints on the general availability of specific performance. As Spry has suggested,[123] would specific relief be refused a plaintff for whom damages would not be an adequate remedy, on the ground that if an action for specific performance had been brought earlier by the defendant, it would have been dismissed on the basis that damages were an adequate remedy to him?

The rationale for the mutuality theory, be it affirmative or negative, can be explained as the desire to protect one of the parties to an action for specific performance. Affirmative mutuality conferred protection on a

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[116] 10 E.R. 928, at 939 (H.L. 1855).

[117] *See also* Lewis v. Lord Lechmere, 88 E.R. 828 (Ch. 1722).

[118] *See* Nives v. Nives, 15 Ch. D. 649 (1880), for Fry's perfunctory treatment of the matter upon his appointment to the judiciary.

[119] *Supra* note 106, at 231.

[120] *See* Cook, *The Present Status of the 'Lack of Mutuality' Rule*, 36 YALE L.J. 897, at 900-01 (1927).

[121] Ames, *Mutuality in Specific Performance*, in LECTURES ON LEGAL HISTORY 370 (1913).

[122] *See* F. Pollock's review of Sir Edward Fry's memoirs, in 38 L.Q.R. 101 (1922), where he describes Fry's qualities as a scholar.

[123] I.SPRY, *supra* note 1, at 84.

vendor by allowing him to bring such an action.[124] This reciprocity was no doubt important for sale of land contracts, particularly parole agreements, where the vendor may have had no remedy either at common law or later under the umbrella of part performance vis-à-vis the *Statute of Frauds*.[125] Negative mutuality protected the defendant against the possible failure by the plaintiff to complete his obligations should specific performance have been sought.

It is reasonable to suggest that in its early history mutuality was simply one matter to be weighed when equity considered whether to exercise its discretion in awarding relief. The earlier cases of *Armiger v. Clarke*,[126] *Bromley v. Jefferies*[127] and *Howell v. George*[128] all raise arguments of uncertainty and hardship, as well as mutuality, when determining the disposition of the matter. This approach was supported by the eminent Cardozo J.:

> What equity exacts to-day as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression to either plaintiff or to defendant. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle.[129]

In a case commentary on this decision, a learned author wrote:

> [T]he New York Court adds its weight to that of a growing line of authorities which are making the doctrine of mutuality achieve justice by looking to the substance, instead of defeating justice by sticking in the form of an absolute rule.[130]

This constitutes a severe indictment of the rule. To Fry, the formulation of a scientific rule probably had more appeal than the exercise of discretion. Discretion was to be reduced to a minimum. Mutuality, even

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[124] *But see* Ames, *supra* note 121, at 380, who has always disputed the idea that the vendor's action depended in any way on mutuality. For him, the sole question revolved around the vendor's lien on the title as security for the payment of the purchase money.

[125] Flight v. Bolland, 38 E.R. 817 (Ch. 1828), where the court noted that a plaintiff who had not signed a memorandum pursuant to the requirement of the *Statute of Frauds* was said to have "by the act of filing the bill . . . made the remedy mutual".

[126] *Supra* note 109.

[127] 23 E.R. 867 (Ch. 1700).

[128] 56 E.R. 1 (V.C. 1815).

[129] Epstein v. Gluckin, 135 N.E. 861, at 862-63 (N.Y. 1922).

[130] *Specific Performance — Defences — Lack of Mutuality in New York*, 36 HARV. L. REV. 229, at 230 (1922).

with its numerous exceptions, helped to portray a legal system which was certain and predictable.[131]

D. *Problems with Supervision*

The development of the principle that "a court will not order specific performance where the decree would require constant supervision by the court"[132] parallels that of the uniqueness concept in land contracts. It has been reasonably suggested that the principle is now part of a wider inquiry involving the adequacy of common law remedies and the notions of determining where the balance of convenience lies.[133] In that format, it bears marked similarities to its early ancestry. Both Lord Cowper in *Allen v. Harding*,[134] and Lord Hardwicke in *City of London v. Nash*,[135] saw nothing to prevent them from decreeing specific performance of building contracts. In the former case, supervision of the contract under the decree was provided for by "each Side to choose two Commissioners, neighbouring gentlemen; and if they cannot agree, then to resort to the Ordinary of the Diocese to settle the Matter between them".[136] This response was echoed as late as 1796 by Loughborough L.C. in *Mosely v. Virgin*,[137] where the Lord Chancellor instructed the Master in Chancery to supervise performance of a building contract.

The general tenor of the decisions during the eighteenth century did not evince any concern with problems associated with the mechanics of supervision, but asked whether the contract was of sufficient certainty to enable the court to make a precise order. What also emerged was a distinction between contracts to repair,[138] which were not subject to specific performance, thereby eliminating a large portion of landlord-

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[131] The issue of the court's discretion to award specific performance does not appear in Fry's first treatise, *supra* note 79, although it is canvassed in the fifth edition, *supra* note 106, at 20, where he states:

> [H]ence the discretion is said to be not arbitrary or capricious, but judicial; hence, also, if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages. The mere hardship of the results will not affect the discretion of the Court.

See also P. ATIYAH, *supra* note 2, at 392; P. ATIYAH, FROM PRINCIPLES TO PRAGMATISM: CHANGES IN THE FUNCTION OF THE JUDICIAL PROCESS AND THE LAW (1978).

[132] H. HANBURY & R. MAUDSLEY, *supra* note 96, at 53. *See also* E. SNELL, *supra* note 96, at 580.

[133] I. SPRY, *supra* note 1, at 87.

[134] 22 E.R. 14 (Ch. 1708).

[135] 26 E.R. 1095 (Ch. 1747). *See also* Buxton v. Lister, *supra* note 60.

[136] Allen v. Harding, *supra* note 134, at 14.

[137] 30 E.R. 959 (Ch. 1796).

[138] *See, e.g.*, Lane v. Newdigate, 32 E.R. 818 (Ch. 1804).

tenant actions, and contracts to build, which were subject to specific performance because they involved the execution of only a single act.

By the nineteenth century, the concept that damages were the norm and provided complete compensation was sacrosanct. Specific performance of building contracts was anomalous but could be explained on the basis that damages in those cases still provided an inadequate remedy. The exceptional nature of building contracts was finally commented upon by Grant M.R. in *Flint v. Brandon*:

> If it is settled, that such contracts [building contracts] should be specifically performed, I should think myself bound to follow that course, without inquiring whether it is strictly consonant to principle. But I am not barred from that inquiry where a contract of another species is for the first time brought into this Court for a specific performance.[139]

Grant M.R. was considering a contract which obliged a lessee to restore the land after gravel had been removed. The plaintiff's action for specific performance was refused.

Railway contracts were treated differently. A series of cases established that where a railway company had negotiated for the purchase of land in return for providing either crossings, bridges or archways to allow access between the divided land, these contracts were subject to specific performance.[140] This was done in spite of any difficulty which may have been encountered in supervising the decree.[141] In fact, the idea that specific performance would be denied because of the court's inability to supervise the work only became apparent in *Ryan v. Mutual Tontine Westminster Chambers Ass'n*.[142] In that case, the Court of Appeal refused specific performance of a lease convenant which obliged the lessor to provide a porter for the duration of the lease. The judgments are at times ambiguous because they fail to distinguish between agreements which necessarily extend over a long period of time, as in allowing some party to use railway track and equipment,[143] and agreements for a single act of performance, as in an act of building

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[139] 32 E.R. 314, at 316 (Ch. 1803).

[140] Wilson v. Northhampton & Banb. Junc. Ry. Co., 9 Ch. App. 279 (1874); Wilson v. Furness Ry. Co., L.R. 9 Eq. 28 (V.C. 1869); Sir Lytton v. Great N. Ry. Co., 69 E.R. 836 (V.C. 1856); Sanderson v. Cockermouth & Work. Ry. Co., 50 E.R. 909 (Rolls Ct. 1849); Storer v. Great W. Ry. Co., 63 E.R. 21 (V.C. 1842).

[141] *See, e.g.*, Wilson v. Furness Ry. Co., *supra* note 140, at 33, where James V.C. noted:

> It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, "This is a sort of thing which the Court finds a difficulty in doing, and will not do". Rather than allow such a gross piece of dishonesty to go unredressed the Court would struggle with any amount of difficulties in order to perform the agreement.

See also Price v. Penzance Corp., 67 E.R. 748 (V.C. 1845).

[142] [1893] 1 Ch. 116.

[143] Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co., L.R. 9 Ch. App. 331 (1872).

construction. Kay L.J. isolated the following principle of law from the existing cases:

> Ordinarily the Court will not enforce specific performance of works, . . . the prosecution of which the Court cannot superintend; not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the inability of the Court to see that the work is carried out.[144]

By determining the case on those grounds, the situations where specific performance has been decreed for building contracts appeared even more anomalous. It was this total state of confusion in the law that the Court of Appeal in *Wolverhampton Corp. v. Emmons*[145] attempted to clarify. Smith M.R. commented that he had "never seen the force"[146] of Kay L.J.'s objection that specific performance of building contracts could not be decreed because the court could not superintend such works. Collins L.J. confessed that he could not understand "the principle upon which the Courts of Equity have acted in sometimes granting orders for specific performance in these cases, and sometimes not".[147] Romer L.J. in a judgment which, but for one case is devoid of any authority, laid down the three currently recognized principles pertaining to building contracts; namely, that the building work is sufficiently defined, that the plaintiff has a substantial interest in its completion and that the defendant has by the contract obtained possession of the land on which the work is to be done.[148]

This area of equity jurisdiction again highlights the inconsistency in, or indifference to, adhering to doctrinal constraints. Yet throughout the eighteenth and nineteenth centuries, the tendency was to confine the availability of the remedy and to explain exceptions with reference to some logical scientific basis. Pound suggested that the conservatism in making decrees for the affirmative performance of anything beyond a single act was due to the attempt by the chancellors to maintain credibility in the jealous eyes of the common law courts by ensuring that what was decreed could in fact be performed.[149] This is a superficial gloss which can perhaps be applied to all of equity's jurisdiction. Mr. Justice Story may have been closer to the point when he suggested that building contracts merited specific performance because,

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[144] *Supra* note 142, at 128.

[145] [1901] 1 Q.B. 515.

[146] *Id.* at 523.

[147] *Id.* at 523-24.

[148] *Id.* at 525. *See also* E. SNELL, *supra* note 96, at 581; H. HANBURY & R. MAUDSLEY, *supra* note 96, at 55; I. SPRY, *supra* note 1, at 105-08. For a collection of the authorities, *see* Officer, *Specific Performance of Building Contracts*, 14 AUST. L.J. 388 (1941).

[149] Pound, *The Progress of the Law — Equity*, 33 HARV. L. REV. 420, at 434 (1920).

> it is by no means clear, that complete and adequate compensation can, in such cases, be obtained at law; for, if the suit is brought before any building or rebuilding by the party claiming the benefit of the convenant, the damage must be quite conjectural, and incapable of being reduced to any absolute certainty; and if the suit is brought afterwards, still the question must be left open, whether more or less than the exact sum required has been expended upon the building, which inquiry must always be at the peril of the plaintiff.[150]

Today the problems associated with escalating building costs have attracted a plethora of clauses in building contracts. There is no reason to suppose that the construction industry in the 1800's was immune to the same problems.[151] Atiyah described the changing nature of negotiating government building contracts.[152] Originally, the parties did not agree on the price before entering into the contract, leaving it up to the contractor's surveyor to establish the customary price, with arbitration or court application available if that price was disputed. Subsequently, a system of executory agreement evolved in which the price was set in advance, obviating argument about customary or fair prices. The justification for such a practice was to allocate the risk of price fluctuation to the builder, which allocation could only be accomplished if specific performance was available to enforce the contract. However, such a burden on a contractor could be alleviated by allowing the builder a *quantum meruit* action for "off the contract" expenses.[153] This schizophrenic quality in the law may account for the number of widely divergent opinions. For example, Wood V.C. thought that all the authorities were opposed to specific performance of building contracts.[154] James V.C., however, stated that the court would struggle with any amount of difficulty in order to uphold performance of a building agreement.[155] The number of opinions were equalled by the number of rationales for excluding specific performance under other heads, be they lack of certainty, adequacy of damages or problems with supervision.

E. *Sale of Goods*

Treitel has suggested that there are numerous situations in which damages "do not in fact put the buyer into the position in which he would have been, had the contract been performed".[156] He may be unable to find a precise or suitable substitute elsewhere; he may suffer consequen-

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[150] J. STORY, *supra* note 50, at 692.

[151] *Id.* at 693-94.

[152] *Supra* note 2, at 421.

[153] *See* Horwitz, *supra* note 7, at 954-55, where he traces the different treatment accorded labour and building contracts.

[154] Key v. Johnson, 71 E.R. 406, at 408 (V.C. 1864).

[155] Wilson v. Furness Ry. Co., *supra* note 140, at 33.

[156] Treitel, *supra* note 1, at 216.

tial loss which cannot be recovered because it is too remote; or there may be problems in calculating damages because they may have been speculative. These problems were probably more apparent in the nineteenth century when markets were less sophisticated than they are today. In any event, the Mercantile Law Commissioners of the day, an assembly of prominent lawyers and merchants, recommended certain changes in the law relating to the sale of goods including the proposition that specific performance should be more readily available.[157] Parliament promptly enacted the *Mercantile Law Amendment Act 1856*.[158] From the record of section 2, one can only suggest that they could have used their time more profitably. The simple fact is that the section was never applied before its repeal in 1893.[159] It was superseded by section 52 of the *Sale of Goods Act 1893*.[160] This section has had an equally negligible impact.

Why did the sections fail? It is certainly arguable that the sections' reception did not reflect legislative intent.[161] Confusion probably arose over what was meant by "specific goods". Lord Cranworth, the Lord Chancellor, when introducing the bill to the House of Lords, understood "specific" to mean identifiable, as in "so many bales of cotton or bushels of wheat" from that particular seller.[162] This definition also satisfied some courts. For example, in *Howell v. Coupland* a contract for the "sale of 200 tons of the particular crop of potatoes which it is expected these sixty-eight acres will produce"[163] was specific, such that it came within the concept of *Taylor v. Caldwell*[164] governing perishable goods. Yet, this was not a widely understood definition in practice.[165]

Atkin L.J. offered some explanation for the narrow interpretation of the provisions:

> It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code.[166]

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[157] *Supra* note 92.

[158] 19 & 20 Vict., c. 97.

[159] Masterson, *Specific Performance of Contracts to Deliver Specific or Ascertained Goods under the English Sale of Goods Act and the American Sales Act*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 439, at 440 (M. Radin & A. Kidd eds. 1935).

[160] *Sale of Goods Act, 1893*, 56 & 57 Vict., c. 71.

[161] *See* REPORT, *supra* note 1, at 37.

[162] 40 PARL. DEB. (3d ser.) 1397 (1856).

[163] L.R. 9 Q.B. 462, at 465 (1874). *But see In re* Wait, [1927] 1 Ch. 606 (C.A.).

[164] 122 E.R. 309 (K.B. 1863).

[165] Note counsel's concession in Fothergill v. Rowland, L.R. 17 Eq. 132 (1873).

[166] *In re* Wait, *supra* note 163, at 635-36. *But see* Treitel, *supra* note 1, at 223, for a criticism of this passage.

This comment apparently concedes that specific performance may have been more readily available in the period prior to the legislative activity, particularly in the years prior to the passing of the *Sale of Goods Act 1893*.[167] It therefore seems strange that an identical provision enacted in 1856 to supposedly expand the circumstances in which specific performance was available, was seen in 1893 as narrowing the purview of the remedy. As the *Mercantile Law Amendment Act 1856*[168] was enacted largely at the suggestion of mercantile groups,[169] any narrowing effect of the provisions must be solely attributed to the activities of courts and lawyers.

Placed in its historical context, the Act came in a period when the courts had just embarked on their control of juries' damage assessments. *Hadley v. Baxendale*[170] had only been decided in 1854. The courts were also developing concepts concerning plaintiffs' obligations to mitigate losses. In sale of goods contracts, this latter development came more readily with the recognition of a market price rule to limit damage recovery.[171]

In contrast to the courts, mercantile groups were always less constrained by philosophical dogma. If a new method or approach was proposed, they were apt to seize upon it if they could see any remunerative benefit. In advocating the adoption of certain facets of Scottish law, itself a derivative of Roman law, as remedies for sale of goods contracts, merchants were acting consistently with this approach. Unfortunately, the common law worked within a far more restrictive philosophical framework, one that was not susceptible to rapid change. To have allowed specific performance in these circumstances, particularly for contracts of commodity goods, would have violated many of the changes then taking place in the law relating to damages. In 1927, McCardie J.[172] declined to order specific performance of a contract for the sale of certain Heppelwhite chairs pursuant to section 52 of the *Sale of Goods Act 1893*[173] because the remedy was only available for *unique* goods. In refusing, he was endorsing a decision which had been taken seventy years earlier.

To summarize, the classical notions of the constraints on specific performance were rather late developments in the history of the remedy. They arose in a climate of legal conceptualism which sought to inhibit many of the attributes of equity jurisprudence.

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[167] 56 & 57 Vict., c. 71.

[168] 19 & 20 Vict., c. 97.

[169] Treitel, *supra* note 1, at 217. *See also* Lord Cranworth's speech when introducing the bill to the House of Lords, *supra* note 156.

[170] *Supra* note 85.

[171] *Supra* note 2, at 425.

[172] Cohn v. Roche, [1927] 1 K.B. 169, at 180-81.

[173] 56 & 57 Vict., c. 71.

The adequacy of the common law remedies test had always been latently present as a qualification on chancery jurisdiction. With the dynamics of the new economic philosophy, that constraint came increasingly to impinge upon equity. Equity's concept of contract had not developed at the same pace as that of the common law. It was still founded essentially on a title theory of exchange and not until a later stage did it comprehend fully the importance of the purely executory agreement. Chancery preserved some of the paternalism which it had earlier nurtured to the extent that its remedies gave relief to a degree no longer thought desirable.[174] The increasing complexity of the litigation system found many procedures wanting.[175] While the common law courts moved rapidly to accommodate litigants, the chancery courts stagnated and became known for their inordinate delays.

Equity did retain control over one important area of contract, that of dispositions of real property. The movement for land law reform was rather slow in attaining results. As late as 1874 the New Domesday Book revealed that eighty percent of the land in Great Britain was owned by fewer than seven thousand people. The idea that there should be free trade in land, subjecting it to market forces, occurred only after the repeal of the Corn Laws in 1846.[176] By and large, the new middle class found other avenues of investment[177] and there was little immediate impact on land. Its investment potential *per se* was realized at a later stage. On a purely legal analysis, contracts of real property never departed from a title theory of exchange. The very nature of the passing of a use maintained a proprietary interest in each party to the contract, albeit one which only a court of equity would recognize.

In a period of increasing legal formalism and the desire to conceptualize law as a science, explanations and further controls on discretion developed to place doctrinal restraints on equity. In specific performance, concepts of mutuality, uniqueness and supervision came to delimit the parameters in which the remedy operated. The application of these parameters was never wholly conclusive but they did operate successfully to give the appearance that specific performance was truly an exceptional remedy and not the norm. A plaintiff would always have to demonstrate special reasons for seeking specific performance.

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[174] *See* Danzig, *supra* note 85, at 264-67, where the author describes a similar tension between legislator and judiciary over the treatment accorded entrepreneurs under the *Common Carriers Act*, 1 Will. 4, c. 68 (1830).

[175] *See* Holdsworth, *supra* note 53, at 158.

[176] Spring, *Landowners, Lawyers, and Land Law Reform in Nineteenth Century England*, 21 AM. J. LEGAL HIST. 40, at 43 (1977). *See also* P. ATIYAH, *supra* note 2, at 400-01; Cohen, *supra* note 95, at 37.

[177] Duman, *A Social and Occupational Analysis of the English Judiciary: 1770-1790 and 1855-1875*, 17 AM. J. LEGAL HIST. 353 (1973).

IV. CONCLUSION

Through this historical perspective the reader must now appreciate that any liberalizing of the availability of specific relief is not new. The predominant contractual paradigm of this century, the bilateral executory contract coupled with the Holmesian philosophy that offered the defendant a choice between performance or breach provided he pay damages, ensured the supremacy of damages. It has now given way to other paradigms.[178] For the law reformer the contractual remedial scheme is once again open to change. Yet, one must end on a cautionary note.

Reform which purports to liberalize the availability of specific performance but does not wish to create specific relief as the presumptive remedy for breach of contract, will fail if it is not accompanied by the realization that a single contractual paradigm is not applicable to all circumstances. For instance, consumer surplus[179] can be protected by a specific performance decree, but what is the extent of the court's desire to protect a consumer's subjective expectations?[180] Similarly, an over-extended use of specific relief can lead to true economic waste, as in ordering compliance with a building contract which necessitates the destruction of part of a partially completed structure.[181] The apocalyptic view of law reform requires that in any era the development of a contractual remedial scheme is inextricably connected to personalities, politics, historical precedent and the multifarious values of society.

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[178] *See generally* G. GILMORE, *supra* note 70; M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977); Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q.R. 193 (1978); Baker, *From Sanctity of Contract to Reasonable Expectation?*, 32 CURRENT LEGAL PROBS. 17 (1979).

[179] *See* Harris, Ogus & Phillips, *Contract Remedies and the Consumer Surplus*, 95 L.Q.R. 581 (1979).

[180] *Compare* the judgments in Tito v. Waddell (No. 1), [1977] Ch. 106, and Radford v. De Froberville, [1977] 1 W.L.R. 1262 (Ch.).

[181] Farnsworth, *supra* note 108, at 1173.