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CHANGING EMPHASES IN SPECIFIC PERFORMANCE

M. T. VAN HECKE*

Recent judicial and statutory developments indicate an increasing availability of the specific performance of contracts, other than those for the sale of land. Thus, the test of the relative adequacy of specific performance and other remedies is more responsive to the need for specific relief with less emphasis upon the primacy of damages in contracts for the sale of corporate stocks, for the sale of a business and in output and requirements contracts. And problems of practicability are less obstructive of the specific performance of contracts for building and construction, personal services and arbitration.

THE ADEQUACY TEST

Corporate Stocks

A perceptive study¹ in 1953 of "Recent Trends in the Specific Enforcement of Contracts to Sell Securities" concludes, in part, as follows:²

The traditional adequacy test seems to work out to be a double-barreled requirement in the securities contract case: (1) the securities in question must either be unobtainable on the market or of a highly speculative value, and (2) the plaintiff must desire such securities for a special purpose which is not compensable by damages. However, the failure of the courts to place much emphasis on the second requirement suggests that the test of adequacy being applied more closely resembles that followed in the land contract cases than that utilized in the case of a contract for the sale of an ordinary chattel.

In the thirteen cases which have come from the appellate courts since that study was published, the plaintiff's need for the stock in specie has been the principal criterion, at least implicitly. In only

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¹ Comment, 51 MICH. L. REV. 408 (1953).

² *Id.* at 418.

two was specific performance denied. In one,³ the oral promise was to bequeath thirty-five to forty thousand dollars in stocks. No particular stocks were specified. In the other,⁴ the agreement was to transfer a small minority interest in the corporation to an employee, officer and director; in the event of her death, her estate was to sell the stock back to the corporation. She died shortly after and suit was brought for the stock by her executor. It did not appear that the stock was of any special value to the estate. Damages were thought to be adequate in both cases.

Three cases awarded specific performance of contracts to sell all of the outstanding stock in the respective corporations. In two⁵ of them, interest centered in apartment houses owned by the corporations and the stock's non-availability elsewhere was a factor. In the third,⁶ there was no discussion of the grounds for relief.

Two cases were based upon control. In one,⁷ an executive vice president was held entitled to one-half of the common stock and to representation on the board of directors to prevent control by antagonistic interests. In the other,⁸ it was thought essential that a corporation wholly owned by its employees should have specific performance of an employee's contract (incident to a stock purchase plan) to sell the stock back to the corporation upon the employee's resignation in order to prevent stock from getting into the hands of strangers.

Five cases⁹ involved first-right-to-purchase agreements between

³ *Shunney v. Rhode Island Hospital Trust Co.*, 80 R.I. 370, 96 A.2d 828 (1953).

⁴ *Equitable Trust Co. v. Gallagher*, 34 Del. Ch. 249, 102 A.2d 538 (Sup. Ct. 1954).

⁵ *Baltimore Realty Corp. v. Alman*, 282 App. Div. 714, 122 N.Y.S.2d 224 (1953); *Kurth v. Hauser*, 262 Wis. 325, 55 N.W.2d 367 (1952). Cf. *De Righter v. J. & J. Bldg. Co.*, 159 N.E.2d 258 (Ohio Ct. C.P. 1957), *aff'd*, 159 N.E.2d 262 (Ohio Ct. App. 1958), *appeal dismissed*, 168 Ohio St. 350, 154 N.E.2d 821 (1958) (apartment houses had been profitably sold, defendant allowed to substitute payment of value of promised stock).

⁶ *Madison Limestone Co. v. McDonald*, 264 Ala. 295, 87 So. 2d 539 (1956).

⁷ *Fanney v. Virginia Inv. & Mortgage Corp.*, 200 Va. 642, 107 S.E.2d 414 (1959).

⁸ *Martin v. Graybar Elec. Co.*, 285 F.2d 619 (7th Cir. 1961).

⁹ *Palmer v. Chamberlin*, 191 F.2d 532 (5th Cir. 1951); *Hollister v. Fiedler*, 18 N.J. Super. 171, 86 A.2d 809 (Ct. Ch.), *rev'd on another ground*, 22 N.J. Super. 439, 92 A.2d 52 (App. Div. 1952), *further litigation over "book value"*, 30 N.J. Super. 203, 104 A.2d 61 (App. Div. 1954), and 17 N.J. 239, 111 A.2d 57 (1955); *Aron v. Gillman*, 309 N.Y. 157, 128 N.E.2d 284 (1955); *In re Galewitz' Estate*, 3 App. Div. 2d 280, 160 N.Y.S.2d 564 (1957). *Contra*, *Hardin v. Rosenthal*, 213 Ga. 319, 98 S.E.2d 901 (1957).

existing stockholders, in the event of death or decision to sell. In four of them the specific enforceability of the obligation to transfer the stock was either assumed or expressly upheld. Most of the discussion related to the validity of the sale restrictions or of the price formula.

Perhaps it is time to abandon such misleading generalizations as: "Contracts for the sale of shares of stock will not ordinarily be specifically enforced, for the reason that they can be procured in the market, thus making money damages an adequate remedy."¹⁰

A Business

The recent cases seem to be unanimous in granting specific performance of a contract to sell a business.¹¹ Only rarely¹² is this thought of as an exception to the outmoded general rule against specific performance of chattel contracts; even then, the rationale is chiefly that of response to a demonstrated need for this particular business in specie. The cases abound in allegations and findings that this business has a special value to the purchaser, that a duplicate cannot be found in the market, that its value is uncertain and that damages would be an ineffective substitute. Examples are an Army and Navy store,¹³ a drug store,¹⁴ a group of dry-cleaning stores,¹⁵ a restaurant¹⁶ with a liquor license unobtainable (because of a quota system) except from the vendor, and a franchised bottle gas business.¹⁷ Where the contract is one to sell and transfer a bus line and its operating rights, all of the cases¹⁸ save one award relief without

¹⁰ 5 CORBIN, CONTRACTS § 1148, at 463 (1951).

¹¹ For the divisions of opinion in the earlier cases see Annot., 152 A.L.R. 4, 61-65 (1944).

¹² *Hogan v. Norfleet*, 113 So. 2d 437 (Fla. Dist. Ct. App. 1959); *Cochrane v. Szpakowski*, 355 Pa. 357, 49 A.2d 692 (1946).

¹³ *Shapiro v. Cohn*, 14 Misc. 2d 999, 181 N.Y.S.2d 126 (Sup. Ct. 1958).

¹⁴ *Prilik v. Goodman*, 111 N.Y.S.2d 916 (Sup. Ct. 1952).

¹⁵ *Reo Stores, Inc. v. Kent Stores, Inc.*, 118 N.Y.S.2d 281 (Sup. Ct. 1952).

¹⁶ *Cochrane v. Szpakowski*, 355 Pa. 357, 49 A.2d 692 (1946).

¹⁷ *Hogan v. Norfleet*, 113 So. 2d 437 (Fla. App. 1959). Cf. *Frankel v. Tremont Norman Motors Corp.*, 21 Misc. 2d 20, 193 N.Y.S.2d 722 (Sup. Ct. 1959), *aff'd mem.*, 10 App. Div. 2d 680, 197 N.Y.S.2d 576 (1960) (automobile agency).

¹⁸ *Booth v. Barber Transp. Co.*, 256 F.2d 927 (8th Cir. 1958); *Watson Bros. Transp. Co. v. Jaffa*, 143 F.2d 340 (8th Cir. 1944); *Royal Blue Coaches, Inc. v. Delaware River Coach Lines*, 140 N.J. Eq. 19, 52 A.2d 763 (Ct. Ch. 1947), *appeal dismissed*, 2 N.J. 73, 65 A.2d 264 (1949); *Lenon v. Habit*, 216 N.C. 141, 4 S.E.2d 339 (1939). Cf. *McLean v. Keith*, 236 N.C. 59, 72 S.E.2d 44 (1952) (would require new contract).

any consideration of specific performance criteria. That one¹⁹ justifies it as involving "unique goods" under section 2-716 of the Uniform Commercial Code. In most of the bus-line cases, the only serious question related to the role of the Interstate Commerce Commission and its certificate in relation to the equitable decree.

Output and Requirements Contracts

Most of the cases, especially the recent ones, so far as the adequacy test is concerned, have favored the enforcement of output contracts, *i.e.*, contracts to buy and sell all of the commodities which a manufacturer or producer may turn out in his business during a specified period,²⁰ through affirmative specific performance or negative injunction, or both. In these situations, the plaintiff's business was peculiarly dependent upon a prompt and continuing supply of the promised commodity in specie from the defendant and the courts responded to that need. Only some of the older cases have regarded damages as an effective substitute.

Thus, in the area of agricultural products, canneries have obtained specific relief over one or more years against growers for their contracted crops of tomatoes²¹ and peaches.²² A purchaser was awarded specific performance of a grower's contract to sell and deliver a crop of tobacco.²³ Dealers obtained specific performance of growers' contracts for their crops of hops.²⁴ A soup manufacturer would have been granted specific performance and injunc-

¹⁹ McCormick Dray Line, Inc. v. Lovell, 13 Pa. D. & C.2d 464 (C.P. Lycoming County 1957).

²⁰ For the characteristics of these contracts, see 2 WILLISTON, SALES § 464 (a-d) (rev. ed. 1948); Havinghurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1 (1932).

²¹ Campbell Soup Co. v. Diehm, 111 F. Supp. 211 (E.D. Pa. 1952) (injunction); Thompson v. Winterbottom, 154 Md. 581, 141 Atl. 343 (1928) (specific performance and injunction); Curtice Bros. Co. v. Catts, 72 N.J. Eq. 831, 66 Atl. 935 (Ct. Ch. 1907) (specific performance and injunction). *Contra*, Hearn v. Ruark, 148 Md. 354, 129 Atl. 366 (1925) (injunction denied, damages adequate).

²² Hunt Foods, Inc. v. O'Disho, 98 F. Supp. 267 (N.D. Cal. 1951) (specific performance, Sales Act a factor), discussed in Notes, 1 BUFFALO L. REV. 205 (1951); 100 U. PA. L. REV. 769 (1952). And see Fraser v. Cohen, 159 Fla. 253, 31 So. 2d 463 (1947) (specific performance for exported Dominican bananas).

²³ Hughbanks v. Browning, 9 Ohio App. 114 (1917) (specific performance, Sales Act a factor). *Contra*, American Snuff Co. v. Walker, 175 Ky. 149, 193 S.W. 1021 (1917) (injunction denied, damages adequate).

²⁴ Livesley v. Heise, 45 Ore. 148, 76 Pac. 952 (1904); Livesly v. Johnston, 45 Ore. 30, 76 Pac. 946 (1904).

tion for a crop of carrots had the contract not been so unfair to the grower as to be unconscionable.²⁵ A canner of pineapples would have been granted injunction against breach by the grower but for the fact that the pineapples in question were not covered by the contract.²⁶ A beet sugar manufacturer would have had relief against the grower had not the trial court erroneously dismissed the suit for injunction and specific performance with the result that the grower sold the crop elsewhere, forcing the plaintiff to take damages.²⁷

Similarly, where the output contracts were for industrial products, whether for one or several years, most courts have found damages to be a poor substitute for specific performance or injunction or both, because of the need of plaintiff's business for the promised commodities in specie from the defendant. Examples are: natural gas,²⁸ oil,²⁹ ores,³⁰ coal tar,³¹ steel scrap,³² salvaged glass,³³

²⁵ *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948) (Sales Act a factor), discussed in Notes 1949 Wris. L. Rev. 800; 58 YALE L.J. 1161 (1949).

²⁶ *Hawaiian Pineapple Co. v. Saito*, 270 Fed. 749 (9th Cir. 1921).

²⁷ *Michigan Sugar Co. v. Falkenhagen*, 243 Mich. 698, 220 N.W. 760 (1928) (Sales Act a factor). *Contra*, *Sugar Beets Prod. Co. v. Lyons Beet Sugar Ref. Co.*, 161 Fed. 215 (C.C.W.D.N.Y. 1908) (specific performance denied, damages adequate).

Injunction was denied, because of the supposed adequacy of damages, against breach by the grower of sugar cane in *Javierre v. Central Altagracia*, 217 U.S. 502 (1910), and in *Burdon Cent. Sugar Ref. Co. v. Leverich*, 37 Fed. 67 (C.C.E.D. La. 1888), and against breach by the grower of oranges in *Simmons v. Williford*, 60 Fla. 359, 53 So. 452 (1910) (replevin adequate).

²⁸ *Southwest Pipeline Co. v. Empire Natural Gas Co.*, 33 F.2d 248 (8th Cir. 1929) (specific performance and injunction); *American Ref. Co. v. Tidal W. Oil Corp.*, 264 S.W. 335 (Tex. Civ. App. 1924), *writ of error denied*, 114 Tex. 583, 278 S.W. 1114 (1924); *Consumers Gas Util. Co. v. Wright*, 130 W. Va. 508, 44 S.E.2d 584 (1947) (injunction).

²⁹ *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1 (8th Cir. 1912) (injunction and specific performance); *Gray v. Premier Inv. Co.*, 51 F. Supp. 944 (W.D. La. 1943) (injunction); *El Rio Oils v. Pacific Coast Asphalt Co.*, 95 Cal. App. 2d 186, 213 P.2d 1 (Dist. Ct. App. 1950) (specific performance). *Contra*, *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 297 Pac. 73 (Dist. Ct. App. 1931) (injunction denied, damages adequate); *Amsco Pipeline Co. v. Donico Prod. Co.*, 112 S.W.2d 483 (Tex. Civ. App. 1938) (specific performance denied, damages adequate).

³⁰ *American Smelting & Ref. Co. v. Bunker Hill & S. Min. Co.*, 248 Fed. 172 (D. Ore. 1918) (lead silver ores, injunction and specific performance); *Kann v. Wausau Abrasives Co.*, 81 N.H. 535, 129 Atl. 374 (1925) (garnet, specific performance or injunction).

³¹ *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285 (1884) (injunction).

³² *Eastern Rolling Mill Co. v. Michlovitz*, 157 Md. 51, 145 Atl. 378 (1929) (specific performance, Sales Act a factor).

³³ *Bomberger v. McKelvey*, 35 Cal. 2d 607, 220 P.2d 729 (1950) (specific performance, Sales Act a factor).

lumber,³⁴ logs and pulpwood,³⁵ and timber.³⁶ Only a few cases have gone the other way, largely because of factual considerations.^{36a}

Section 68 of the Uniform Sales Act, providing that the court may, if it thinks fit, award specific performance of a seller's contract to deliver specific or ascertained goods, has been a positive factor in these developments. On the whole, in connection with chattel contracts generally, most courts have not given this section of the statute the effect that it was intended to have, namely, of liberalizing the availability of specific performance.³⁷ In connection with output contracts, however, the reverse has been true, notwithstanding the limitations implied by "specific or ascertained goods."

Thus, in the cases of agricultural and industrial products above noted, the statute has facilitated the specific performance of output contracts for peaches, carrots, tobacco, sugar beets, steel scrap, salvaged glass, lumber and timber. In the case of the sugar beets, the act was regarded as an enabling act, authorizing specific performance. In the cases of the carrots, tobacco and steel scrap, the statute weighed strongly in favor of specific performance in the determination of the relative adequacy of specific performance and other remedies. In the cases of the peaches, glass, lumber and timber, the California and Oregon courts responded to the apparent intention of the legislature to liberalize, enlarge and expand the remedy of specific performance for personal property contracts.

These developments will probably be strengthened by section

³⁴ *Neal v. Parker*, 98 Md. 254, 57 Atl. 213 (1904) (specific performance, bond statute sole basis); *Pittinger Equip. Co. v. Timber Structures, Inc.*, 189 Ore. 1, 217 P.2d 770 (1950) (specific performance, Sales Act a factor), discussed in Notes, 64 HARV. L. REV. 512 (1951); 35 MINN. L. REV. 330 (1951).

³⁵ *St. Regis Paper Co. v. Santa Clara Lbr. Co.*, 173 N.Y. 149, 65 N.E. 967 (1903) (injunction or specific performance); *Dells Paper & P. Co. v. Willer River Lbr. Co.*, 170 Wis. 19, 173 N.W. 317 (1919) (specific performance).

³⁶ *Paullus v. Yarbrough*, 219 Ore. 611, 347 P.2d 620 (1959) (injunction and specific performance, Sales Act a factor). *Contra*, *Fox v. Fitzpatrick*, 190 N.Y. 259, 82 N.E. 1103 (1907) (specific performance denied, damages adequate).

^{36a} In addition to the cases referred to as *contra*, in notes 21-36 *supra*, see *N. & L. Fur Co. v. Petkanas*, 252 App. Div. 844, 299 N.Y. Supp. 901 (1937) (agreement by maker of certain type fur coats not obtainable elsewhere to sell retailer entire output for eleven months; breach of express negative after four months. *Held*: Injunction denied, damages adequate. Two judges ably dissented.)

³⁷ See 3 WILLISTON, *op. cit. supra* note 20, at § 601; Annot., 152 A.L.R. 4, 45-50 (1944); Notes, 9 DUKE B.J. 122 (1941); 1946 WIS. L. REV. 461.

2-716 of the new Uniform Commercial Code, now adopted in eight states.³⁸ This provides that: "Specific performance may be decreed where the goods are unique or in other proper circumstances." According to the official comment 1, this "seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale." The new code does not require, as does section 68 of the Uniform Sales Act, that the goods be "specific or ascertained." Nor does the code continue the Sales Act's grant to the court of discretion to award relief "if it thinks fit." Instead, the code establishes a new criterion of uniqueness or other proper circumstances. The official comment 2 elaborates:

In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. . . . The test of uniqueness³⁹ . . . must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particularly or peculiarly available source of market present today the typical commercial specific performance situation. . . . However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover⁴⁰ is strong evidence of "other proper circumstances."

Requirements contracts, *i.e.*, contracts to buy and sell all of a given commodity which the buyer may need or require in his business during a specified period, are today generally enforceable. On the whole, unlike output contracts, most of the enforcement of re-

³⁸ Arkansas, Connecticut, Kentucky, Massachusetts, New Hampshire, Pennsylvania, Rhode Island and Wyoming.

References in this article to the Uniform Commercial Code are to the 1957 official text and comments, as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

³⁹ Applied to contract to sell a bus line and its operating rights in *McCormick Dray Line, Inc. v. Lovell*, 13 Pa. D. & C.2d 464 (C.P. Lycoming County 1957).

⁴⁰ As to "cover," see UNIFORM COMMERCIAL CODE § 2-712; Logan, *A Comparison of the Rights and Remedies of Buyers and Sellers under the Uniform Commercial Code and the Uniform Sales Act*, 49 Ky. L.J. 270, 285 (1960). The enforcement of output and requirements contracts through equitable remedies is further encouraged by UNIFORM COMMERCIAL CODE § 2-306, and the official comments thereon. See text at note 51 *infra*. Note also that § 106(1) calls for a liberal administration of the remedies provided in the code "to the end that the aggrieved party may be put in as good a position as if the other party had performed."

quirements contracts has been sought in damage actions.⁴¹ Where, however, equitable relief has been applied for, negative injunction, mandatory injunction or specific performance has usually been granted without much difficulty over the relative adequacy of other remedies. The subject matter of such requirements contracts thus enforced has been natural gas,⁴² oil and gas for a bus line,⁴³ water,⁴⁴ electric power,⁴⁵ and gypsum.⁴⁶

Where equitable relief has been denied, it has usually been because of frailties in the contract or in the plaintiff's position. Thus, in three cases, the contract was terminable;⁴⁷ in two others, the plaintiff had breached the contract;⁴⁸ in one case, the contract was unconscionable;⁴⁹ only in two cases was an equitable remedy denied primarily because of the supposed adequacy of damages.⁵⁰

⁴¹ See 2 WILLISTON, *op. cit. supra* note 20, at § 464(a-d); Havighurst & Berman, *supra* note 20; Note, *Requirements Contracts under the Uniform Commercial Code*, 102 U. PA. L. REV. 654 (1954). The more recent damage cases are *Locke v. United States*, 283 F.2d 521 (Ct. Cl. 1960) (typewriter repair services); *Brightwater Paper Co. v. Monadnock Paper Mills*, 161 F.2d 869 (1st Cir. 1947) (newsprint); *Ross v. F. W. Dunne Co.*, 119 Cal. App. 2d 690, 260 P.2d 104 (Dist. Ct. App. 1953) (paints); *Hall v. Gruesen*, 22 Ill. App. 465, 161 N.E.2d 345 (1959) (tools); *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W.2d 340 (1955) (cigarettes).

⁴² *Michigan Consol. Gas. Co. v. Panhandle E. Pipe Line Co.*, 83 F. Supp. 34 (E.D. Mich. 1949) (negative injunction), *reversed*, 177 F.2d 942 (6th Cir. 1949) (statute gave exclusive jurisdiction to Federal Power Commission); *Municipal Gas Co. v. Lone Star Gas Co.*, 259 S.W. 684 (Tex. Civ. App. 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928) (specific performance); *Ravencliff Dev. Co. v. Lafferty*, 103 W. Va. 539, 138 S.E. 104 (1927) (negative injunction); *Elk Ref. Co. v. Falling Rock Cannel Coal Co.*, 92 W. Va. 479, 115 S.E. 431 (1922) (specific performance).

⁴³ *Fuchs v. United Motor Stage Co.*, 135 Ohio St. 509, 21 N.E.2d 669 (1939) (negative injunction).

⁴⁴ *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 49 (1889) (mandatory injunction); *Horsky v. Helena Consol. Water Co.*, 13 Mont. 229, 33 Pac. 689 (1893) (negative injunction); *Bay City Irrig. Co. v. Sweeney*, 81 S.W. 545 (Tex. Civ. App. 1904) (mandatory injunction).

⁴⁵ *Central Power & Light Co. v. Purvis*, 67 S.W.2d 1086 (Tex. Civ. App. 1934) (specific performance).

⁴⁶ *Ebsary Fireproofing & Gypsum Co. v. Empire Gypsum Co.*, 110 Misc. 272, 181 N.Y. Supp. 270 (Sup. Ct. 1920) (negative injunction).

⁴⁷ *Gage v. Wilmette*, 315 Ill. 328, 146 N.E. 325 (1925) (water); *Peru Wheel Co. v. Union Coal Co.*, 295 Ill. App. 276, 14 N.E.2d 998 (1938) (coal screenings); *Childs v. Columbia*, 87 S.C. 566, 70 S.E. 296 (1911) (water).

⁴⁸ *Cappetta v. Atlantic Ref. Co.*, 74 F.2d 53 (2d Cir. 1934) (gasoline); *Magnolia Petroleum Co. v. Dudley*, 211 Ark. 469, 200 S.W.2d 793 (1947) (oil and gas).

⁴⁹ *Barnes v. McAllister*, 18 How. Pr. 534 (N.Y. 1860) (patent medicine).

⁵⁰ *Loy v. Madison & H. Gas Co.*, 156 Ind. 332, 58 N.E. 844 (1900) (natural gas for house); *Spielman v. Sigrist*, 72 N.Y.S.2d 861 (Sup. Ct. 1947) (cigarettes).

The enforcement of requirements contracts through specific performance and injunction will probably be encouraged by section 2-306 of the Uniform Commercial Code and the official comments thereon. These emphasize⁵¹

the reading of commercial background and intent into the language of any agreement [and demand] good faith in the performance of that agreement.

[A] contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade. . . .

Other Statutes

In addition to the Uniform Sales Act and the Uniform Commercial Code, two other statutory enactments help to liberalize the remedy of specific performance in fields other than land contracts. One is the Maryland statute,⁵² originally enacted in 1888:

No court shall refuse to specifically enforce a contract on the mere ground that the party seeking its enforcement has an adequate remedy in damages, unless the party resisting its specific enforcement shall show to the court's satisfaction that he has property from which such damages may be made, or shall give bond, with approved security, in a penalty to be fixed by the court, to perform the contract or pay all such costs and damages as may, in any court of competent jurisdiction, be adjudged against him for breach or nonperformance of such contract.

The Maryland court has said of this statute:⁵³

It was doubtless the policy of the Legislature in adopting it to do away with technical defenses to proceedings in equity

⁵¹ UNIFORM COMMERCIAL CODE § 2-306, comments 1 & 2. See Note, *Requirements Contracts under the Uniform Commercial Code*, 102 U. PA. L. REV. 654 (1954).

⁵² MD. CODE ANN. art. 16, § 169 (1957). A similar provision, for injunction and mandamus cases, also enacted in 1888, is MD. CODE ANN. art. 16, § 98 (1957).

⁵³ *Neal v. Parker*, 98 Md. 254, 270, 57 Atl. 213, 214 (1904).

instituted to compel parties to live up to their undertakings, and it was designed to preclude individuals who had entered into binding contracts from repudiating them at pleasure by merely electing to pay such damages for their breach as a jury in an action at law might assess.

Accordingly, the Maryland court has given the statute a sympathetic interpretation, with the result that the effect of a defense of an adequate remedy at law has been minimized and specific performance has been made more readily available in contracts for the sale of lumber,⁵⁴ corporate stock,⁵⁵ a business,⁵⁶ patent rights,⁵⁷ and a contract to complete the construction of a residence on plaintiff's land.⁵⁸

Another helpful statute is the Massachusetts Act of 1954.⁵⁹

The fact that the plaintiff has a remedy at law for damages shall not bar a suit in equity for specific performance of a contract, other than one for purely personal services, if the court finds that no other existing remedy, or the damages recoverable thereby, is in fact the equivalent of the performance promised by the contract relied on by the plaintiff, and the court may order specific performance if it finds such remedy to be practicable. If performance is not decreed, damages may be determined in the proceeding, and if the defendant claims a jury on that issue, the issue shall be framed and referred for jury trial.

The enactment of this statute was recommended by the Massachusetts Judicial Council.⁶⁰ In part, the Council said:⁶¹

For some years we have been living in a controlled economy and in this situation which seems likely to continue, money damages do not seem "equivalent" to performance. The

⁵⁴ *Ibid.*

⁵⁵ *Pattison v. Brydon*, 150 Md. 575, 133 Atl. 328 (1926); *Baltimore Process Co. v. My-Coca Co.*, 144 Md. 439, 125 Atl. 179 (1924).

⁵⁶ *Wolbert v. Rief*, 194 Md. 642, 71 A.2d 761 (1950).

⁵⁷ *Teschner v. Falkenwalde*, 135 Md. 114, 108 Atl. 467 (1919).

⁵⁸ *Laurel Realty Co. v. Himelfarb*, 191 Md. 462, 62 A.2d 263 (1948); *Edison Realty Co. v. Bauernschub*, 191 Md. 451, 62 A.2d 354 (1948). See *infra* at note 74.

⁵⁹ MASS. ANN. LAWS. ch. 214, § 1A (1955).

⁶⁰ *Twenty-Seventh Report of the Judicial Council of Massachusetts for 1951*, 36 MASS. L.Q., No. 4, 9-13 (1951).

⁶¹ *Id.* at 11.

goods sold are becoming as important to the purchaser as land is in land contract. The right to specific performance seems likely to increase in importance as the complexities of modern business increase.

We see no reason why the rather obviously theoretical notion that money damages are the "equivalent" of performance or the historical tradition about an "adequate remedy at law" should continue to prevent the administration of justice in cases to which these phrases do not adequately describe the facts.

One commentator⁶² has likened this statute to section 2-716 of the Uniform Commercial Code, "since it verbally exchanges the test of adequacy of remedy at law in terms of legally equivalent money damages for a test of the existing remedy's equivalence in fact to the performance promised by the contract."

The statute has not been judicially construed. Perhaps, however, a clue may be found in *Sanford v. Boston Edison Co.*,⁶³ in which a union was awarded specific performance of an employer's agreement to "check-off" union dues. The court said,⁶⁴ in part: "There is a growing tendency to give the promisee the actual performance for which he bargained, if he prefers it, instead of a substitute in damages, where the damages are not the equivalent of the performance."

A third legislative development, but of less fortunate consequences, is the abolition of the statutory adequacy test in the federal courts. This test, embodied in the first Federal Judiciary Act of 1789,⁶⁵ provided that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." By its jurisdictional emphasis upon the primacy of common law and statutory remedies, this statutory test has long had the effect of restricting the growth of equitable remedies in the federal courts. However, it was thought to have become obsolete and superseded in 1938 by Rules 1 and 2 of the Federal Rules of Civil Procedure, uniting the law and

⁶² Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety*, 38 B.U.L. REV. 571, 592 (1958).

⁶³ 316 Mass. 631, 56 N.E.2d 1 (1944).

⁶⁴ *Id.* at 634, 56 N.E.2d at 3.

⁶⁵ REV. STAT. § 723 (1875). See Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 96 (1923).

equity practice and providing for the one form of civil action, and to have been repealed by the Revised Judicial Code of 1948, insofar as it dealt with procedural matters.⁶⁶

It might be expected that these results of the rules and of the code would lead to a weakening in the federal courts of the historic objection to equitable relief that the plaintiff has an adequate remedy at law. And one district court, in denying a motion to dismiss a suit for specific performance of a contract for patent rights and corporate stock, has so held.⁶⁷ The court said,⁶⁸ in part: "The third and fifth reasons seem to relate to the objection that the Plaintiff has an adequate remedy at law. This objection is no longer proper under the New Rules of Civil Procedure. . . ."^{68a}

Doubt was cast upon the validity of this expectation, however, by a 1947 dictum of Mr. Justice Black, dissenting, on a *forum non conveniens* issue in a negligence case under the Federal Employers Liability Act, when he said, in part:⁶⁹

Although the distinction between actions at law and suits in equity in federal courts has been abolished by the adoption of the single form of civil action, Rule 2, F. R. C. P., see 1 Moore, Federal Practice (1938) c. 2, there remains to federal courts the same discretion, no more and no less, in the exercise of special equitable remedies as existed before the adoption of the federal rules.

That doubt ripened into a significant obstruction in *Beacon Theatres, Inc. v. Westover*,⁷⁰ decided in 1959. In the majority opinion in a five to four award of a jury trial on the damage issue raised in a counterclaim to a declaratory judgment and injunction complaint in an anti-trust case, Mr. Justice Black ignored the present legislative status of the statutory adequacy test. Instead, he relied upon section 267 of the Judicial Code of 1912, containing the exact language of the original statutory adequacy test, as expressing today a continuing and current policy of protecting jury trial in common law and statutory cases against the encroachment of equitable remedies. With the Declaratory Judgment Act and modern joinder

⁶⁶ 2 MOORE, FEDERAL PRACTICE §§ 2.01 -.02 (2d ed. 1948, Supp. 1960).

⁶⁷ *Berger v. McHugh*, 26 F. Supp. 107 (M.D. Pa. 1939).

⁶⁸ *Id.* at 109.

^{68a} Citing *Catanzaritti v. Bianco*, 25 F. Supp. 457 (M.D. Pa. 1938).

⁶⁹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 514 n.2 (1947).

⁷⁰ 359 U.S. 500 (1959).

provisions in the rules regarded as expanded legal remedies, that policy threatens to curtail the scope of equity.⁷¹

Neither of the last two cases referred to involved the specific performance of contracts. The basic notions enunciated, however, are pervasive.

Professor Corbin has observed:⁷²

A reading of many modern cases will make clear the fact that the question of adequacy of other remedies is very frequently not even referred to in the opinion of the appellate court. They do not take the trouble to explain why such remedies are not adequate for complete justice, even though their inadequacy does not clearly appear from the reported facts. Sometimes this may mean that the issue has not been raised by the parties, both of them, and the court also, assuming that the court has jurisdiction to grant the remedy sought; in other cases, it may mean that the issue has been determined previously and is no longer open. But the impression plainly left by the sum-total of reported cases is that the remedy of specific enforcement is as available as are other remedies, now that in almost all jurisdictions all remedies are to be sought in a single system of courts and no longer in separate and mutually suspicious courts of common law and courts of chancery. Objections on the ground of inadequacy of money damages are less often made than formerly and are given less consideration by the judges. Of course, a defendant who wishes a jury trial will be more insistent on the adequacy of the common law remedy.

PRACTICABILITY

Building and Construction Contracts

Specific performance of building and construction contracts has been denied in most cases because, *inter alia*, of the feared difficulties of supervision and the supposed adequacy of damages, especially

⁷¹ See *id.* at 507, and 509 nn.9 & 13, discussed in Notes, 47 CAL. L. REV. 760 (1959); 108 U. PA. L. REV. 125 (1959). Cf. *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952) (jury trial required on issue of fraud raised in a state F.E.L.A. case by a reply to an answer of release), discussed in Notes, 37 CORNELL L.Q. 799 (1952); 22 TENN. L. REV. 581 (1952); 31 TEX. L. REV. 218 (1952).

⁷² 5 CORBIN, CONTRACTS § 1142, at 636 (1951).

where the work was to be done on plaintiff's land and he could thus be compensated for added costs in employing another contractor.⁷³ Relief has been awarded, however, where plaintiff's need⁷⁴ or the public interest⁷⁵ has outweighed the administrative burden imposed upon the court. And Corbin,⁷⁶ Williston⁷⁷ and the *Restatement*⁷⁸ have found an increasing tendency to grant specific performance, with decreasing hesitation on the score of difficulty of enforcement.

The high-water mark in this development is *Matter of Grayson-Robinson Stores, Inc. & Iris Constr. Corp.*,⁷⁹ in which the New York Court of Appeals, in a four to three decision, affirmed the action of the lower courts in confirming an arbitration award of specific performance of a contract to erect on the defendant's land a five million dollar building according to certain plans and specifications, to be leased to plaintiff for twenty-five years for a department store as part of a large shopping center.

Of course, this decision is a product of the arbitration process under statutory policies and not of the equitable remedy of specific performance. The parties' contract called for arbitration of all disputes, in accordance with the rules of the American Arbitration Association, one of which authorized an award of specific performance. The majority implied that the court was probably without discretion to refuse to confirm the award on this record. Moreover,

⁷³ *Levene v. Enchanted Lake Homes, Inc.*, 115 So. 2d 89 (Fla. Dist. Ct. App. 1959) (new house); *London Bucket Co. v. Stewart*, 314 Ky. 832, 237 S.W.2d 509 (1951) (motel heating plant repairs); *Lester's Home Furnishers, Inc. v. Modern Furniture Co.*, 1 N.J. Super. 365, 61 A.2d 743 (Super. Ct. 1948) (alterations and improvements of building); *Warnasch v. Wagner*, 291 S.W.2d 389 (Tex. Civ. App. 1956) (cattle guards). See generally Annot., 164 A.L.R. 802 (1946).

⁷⁴ *Laurel Realty Co. v. Himelfarb*, 191 Md. 462, 62 A.2d 263 (1948); *Edison Realty Co. v. Bauernschub*, 191 Md. 451, 62 A.2d 354 (1948); *Brummel v. Clifton Realty Co.*, 146 Md. 56, 125 Atl. 905 (1924) (unfinished house), discussed in Notes, 10 CORNELL L.Q. 69 (1924); 25 COLUM. L. REV. 348 (1925); *Strauss v. Estates of Long Beach*, 187 App. Div. 876, 176 N.Y. Supp. 447 (1919) (unfinished sewer).

⁷⁵ *Virginian Ry. v. System Fed'n*, 300 U.S. 515, 549-53 (1937) (arguendo); *Commissioners of Mattamuskeet Drainage Dist. v. Wills*, 236 Fed. 362 (E.D.N.C. 1916) (engineering works); *New River Lbr. Co. v. Tennessee Ry.*, 136 Tenn. 661, 191 S.W. 334 (1916) (railroad extension).

⁷⁶ 5 CORBIN, *op. cit. supra* note 72, at § 1172.

⁷⁷ 5 WILLISTON, *CONTRACTS* § 1423 (rev. ed. 1937).

⁷⁸ 2 RESTATEMENT, *CONTRACTS* § 371, comment a (1932).

⁷⁹ 8 N.Y. 2d 133, 168 N.E.2d 377 (1960), discussed in Notes, 61 COLUM. L. REV. 296 (1961); 49 GEO. L.J. 629 (1961); 35 ST. JOHNS L. REV. 363 (1961); 109 U. PA. L. REV. 744 (1961).

it felt that it was faced with

a motion made as of right to confirm a completely valid arbitration award conforming in all respects to the express conferral of authority on the arbitrators and meeting all statutory requirements for confirmation.⁸⁰

It would be quite remarkable if . . . the courts would, contrary to the command of article 84 of the Civil Practice Act, frustrate the whole arbitration process by refusing to confirm the award.⁸¹

Arbitration is by consent and those who agree to arbitrate should be made to keep their solemn, written promises.⁸²

Nevertheless, the case suggests a significant liberalization of the equitable remedy of specific performance of building and construction contracts. The adequacy test, *i.e.*, the possibility that damages might be so adequate to the plaintiff's need as to preclude specific performance, was not mentioned. The difficulty of supervision as an objection to the court's enforcement of specific performance was rejected.

The only ground suggested for such a refusal [to confirm the award] is that confirmation would involve the court in supervision of a complex and extended construction contract. We hold that this apprehension or speculation is no deterrent to confirmation by the courts.⁸³

Recognizing the old tradition or approach according to which equity courts have been reluctant to enforce building and construction contracts because of the difficulty of supervision, the majority of the court in the instant case said:

Modern writers think that the "difficulty of enforcement" idea is exaggerated and that the trend is toward specific performance.⁸⁴ Clearly there is no binding rule that deprives equity of jurisdiction to order specific performance of a building contract. At most there is discretion in the court to refuse such a decree. . . .

[I]t remains that such discretion, if any, was exercised

⁸⁰ 8 N.Y. 2d at 138, 168 N.E.2d at 379.

⁸¹ *Id.* at 137, 168 N.E.2d at 378.

⁸² *Id.* at 138, 168 N.E.2d at 379.

⁸³ *Id.* at 137, 168 N.E.2d at 379.

⁸⁴ Citing CORBIN, WILLISTON and the RESTATEMENT, *op. cit. supra* notes 76-78.

the other way in this case, and unanimously affirmed by the Appellate Division. That exercise of discretion was justified on the facts. There is nothing extraordinary about this ordinary building contract.⁸⁵

Perhaps arbitration will now be resorted to as a means of bypassing the traditional inhibitions upon equitable specific performance in building and construction contracts.⁸⁶ Doubtless, however, such a tendency will be checked by more restrictive arbitration agreements.

Personal Services

Aside from Chancellor Walworth's somewhat facetious dictum,⁸⁷ in a *ne exeat* proceeding against a *primo basso*, that "it must be conceded that the complainant is entitled to a specific performance of this contract; as the law appears to have been long since settled that a bird that can sing and will not sing must be made to sing (old adage)," no court has asserted its willingness affirmatively to compel the specific performance of a contract to render personal services. The reasons given⁸⁸ relate to involuntary servitude, the impracticability of judicial supervision and the futility of compulsion in a relationship dependent upon cooperation.

Something may be indirectly accomplished in some situations by a declaratory judgment as to the defendant's obligation to perform the services. In making such relief available against a motion picture director, the California court said:⁸⁹ "The fact that the oral contract may be one of employment, involving personal services and hence not specifically enforceable . . . does not necessarily render declaratory relief improper or unnecessary."

Another indirect remedy, where the employee's qualifications are sufficiently unique or extraordinary to render damages inadequate, is injunction against breach of an express or implied undertaking by the employee that he will not work for any other employer during

⁸⁵ *Matter of Grayson-Robinson Stores, Inc. & Iris Constr. Corp.*, 8 N.Y. 2d 133, 138, 168 N.E.2d 377, 379 (1960).

⁸⁶ See Oleck, *Specific Performance of Contracts through Arbitration*, 6 ARB. J. (n.s.) 163 (1951); Oleck, *Specific Performance of Builders' Contracts*, 21 FORDHAM L. REV. 156 (1952).

⁸⁷ *De Rivafinoli v. Corsetti*, 4 Paige 264, 270 (N.Y. 1833).

⁸⁸ 5 CORBIN, *op. cit. supra* note 72, at § 1204.

⁸⁹ *Columbia Pictures Corp. v. De Toth*, 26 Cal. 2d 753, 760, 161 P.2d 217, 221 (1945). This was on the pleadings. After trial, a declaratory judgment for the employer was sustained. 87 Cal. App. 2d 620, 197 P.2d 580 (Dist. Ct. App. 1948).

the life of the contract.⁹⁰ Justified in cases where because of the employer's competitive situation⁹¹ the enforcement of the employee's negative promise has a significance separate from that of the enforcement of the employee's affirmative promise to work for the plaintiff, this use of the injunction has been severely criticised⁹² when that element was lacking and the injunction was granted merely as an indirect compulsion of personal service for the plaintiff, *i.e.*, "negative specific performance," imposing involuntary servitude.

Against this background the California statutes are interesting. Section 2855 of the Labor Code provides that a contract to render unique or extraordinary personal services, having peculiar value, the loss of which cannot be adequately compensated in damages, may be enforced against the person contracting to render such services for seven years.⁹³ Section 3390 of the Civil Code forbids specific performance of obligations to render personal services. As exceptions⁹⁴ thereto, however, section 3423(5) the Civil Code and section 526(5) of the Code of Civil Procedure authorize injunction to prevent breach of a written contract for unique or extraordinary personal services at a minimum compensation of six thousand dollars a year, where the services have a peculiar value, making damages for their loss inadequate, and where their performance would not be specifically enforced.

It will be noted that it is breach of the affirmative promise to work for the plaintiff which is to be enjoined, not breach of a negative promise not to work for others. This is statutory negative specific performance.⁹⁵ Injunction against breach of the negative promise would probably be justified in the motion picture industry

⁹⁰ *Shubert Theatrical Co. v. Rath*, 271 Fed. 827 (2d Cir. 1921) (acrobats); *Warner Bros. Pictures, Inc. v. Nelson* [1937] 1 K.B. 209 (motion picture actress Bette Davis), discussed in Note, 10 So. CAL. L. REV. 347 (1937).

⁹¹ This element was notably absent in *Winnipeg Rugby Football Club, Ltd. v. Freeman*, 140 F. Supp. 365 (N.D. Ohio 1955) (injunction against professional football player playing with Cleveland after contract to play for Winnipeg exclusively; teams in different leagues).

⁹² See Stevens, *Involuntary Servitude and Injunction*, 6 CORNELL L.Q. 235, 251 (1921).

⁹³ See *Warner Bros. Pictures, Inc. v. Brodel*, 31 Cal. 2d 766, 192 P.2d 949 (1948); *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 153 P.2d 983 (Dist. Ct. App. 1949).

⁹⁴ See *Paramount Pictures Corp. v. Holden*, 166 F. Supp. 684 (S.D. Cal. 1958).

⁹⁵ See Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CAL. L. REV. 18, 26-27 (1954); Youngman, *Negotiation of Personal Contracts*, 42 CAL. L. REV. 2, 8-10 (1954).

by the competition for talent that gives separate significance to the enforcement of the elaborate express negatives customarily inserted in all employment contracts. But the statute is not so limited. On its face, it raises the specter of involuntary servitude.

When the situation is reversed and the individual employee is suing the employer for specific performance of the employment contract, most courts refuse relief whether the plaintiff is an executive⁹⁶ or a production worker⁹⁷ on the broad ground that equity does not enforce personal service contracts. "No man may be compelled to work for another or to continue another in his employment."⁹⁸ Here, however, involuntary servitude is not a factor, for the employee is willing, indeed anxious, to work. Moreover, the difficulty of supervision of the employer is minimal as compared with controlling an employee-defendant exercising unique and extraordinary skills. But there is still the question of the effect of compulsion upon a close working relationship, especially at an executive level, after deterioration has begun. If it be said in criticism of equity's rejection of production workers' suits for a reinstatement under collective-bargaining contracts that such relief has become commonplace in the administrative orders of federal and state labor boards, it should be noted that it is explicitly authorized by the reform legislation⁹⁹ setting up these specialized tribunals and that they are dealing with groups of workers engaged in impersonal, routine, industrial operations, under national labor relations policies.

Consider now *Matter of Staklinski & Pyramid Elec. Co.*,¹⁰⁰ in

⁹⁶ *Robinson v. Sax*, 115 So. 2d 438 (Fla. Dist. Ct. App. 1959); *Fanney v. Virginia Inv. & Mortgage Corp.*, 200 Va. 642, 107 S.E.2d 414 (1959) (but declaratory judgment awarded that contract not be terminated). Cf. *Malkenson v. Journal-News Corp.*, 296 N.Y. 10, 68 N.E.2d 853 (1946); see CORBIN, *op. cit. supra* note 72, at § 1204 n.21.

⁹⁷ *Richardson v. Ozark Airlines, Inc.*, 270 S.W.2d 8 (Mo. 1954); *Miller v. Kansas City Power & Light Co.*, 332 S.W.2d 18 (Mo. K.C. Ct. App. 1960); *Masetta v. National Bronze & Alum. Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953), discussed in Note, 39 CORNELL L.Q. 344 (1954).

⁹⁸ Pound, J., dissenting in *Matter of Buffalo & Erie Ry.*, 250 N.Y. 275, 281, 165 N.E. 291, 293 (1929) (labor arbitration).

⁹⁹ By the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 146 (1947), 29 U.S.C. § 160(c) (1958), the National Labor Relations Board is directed "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187-89 (1941).

¹⁰⁰ 6 N.Y. 2d 159, 160 N.E.2d 78 (1959), discussed in Notes, 48 CAL. L. REV. 140 (1960); 45 CORNELL L.Q. 580 (1960); 28 FORDHAM L. REV. 809 (1960); 73 HARV. L. REV. 776 (1960); 55 NW. U.L. REV. 615 (1960); 7 U.C.L.A.L. REV. 507 (1960). For the contempt proceedings, see 12 App. Div. 593, 208 N.Y.S.2d 486 (1960).

which the New York Court of Appeals in 1959, by a divided vote (one judge concurring, two dissenting, and one not participating), affirmed the action of the lower courts in confirming an arbitration award of specific performance of an electric utility's contract to employ the petitioner for eleven years as manager in charge of production and engineering at a large salary plus a percentage of net profits. The contract provided that if the manager should be declared permanently disabled, he would receive reduced compensation for the next three years and then the contract would end. The contract provided also that any controversy arising out of it should be settled by arbitration in accordance with the rules of the American Arbitration Association, one of which authorized an award of specific performance. After the contract had been in effect for two years, the corporation's directors determined that the manager was permanently disabled and that his services should be terminated. The manager disputed the finding of permanent disability and took the matter to arbitration. The arbitrators held in favor of the manager on the issue and ordered his reinstatement.

This case was decided by the same court which a year later, in *Matter of Grayson-Robinson Stores, Inc. & Iris Constr. Corp.*,¹⁰¹ was to confirm an arbitration award of specific performance of a contract to erect a five million dollar department store building. As in that case, the decision in *Staklinski* is a product of the arbitration process under statutory policies and not of the equitable remedy of specific performance.

It is now asserted, however, that it is against public policy to compel a corporation to continue the services of an officer whose services are unsatisfactory to the directors. But we must remember that this corporation made a valid long-term contract with this man and agreed that any disputes would go to arbitrators who would be empowered to order specific performance. Since the contract was indisputably valid, so is the arbitration award.¹⁰²

Whether a court of equity could issue a specific performance decree in a case like this¹⁰³ . . . is beside the point.¹⁰⁴

¹⁰¹ 8 N.Y. 2d 133, 168 N.E.2d 377 (1960), discussed herein at note 79 *supra*.

¹⁰² *Matter of Staklinski & Pyramid Elec. Co.*, 6 N.Y. 2d 159, 163, 160 N.E.2d 78, 79 (1959).

¹⁰³ Citing *Matter of Buffalo & Erie Ry.*, 250 N.Y. 275, 280-81, 165 N.E. 291, 292-93 (1929).

¹⁰⁴ *Matter of Staklinski & Pyramid Elec. Co.*, 6 N.Y. 2d 159, 163-64, 160

Unlike *Grayson-Robinson*, however, *Staklinski* does not portend an enlarged scope for the equitable remedy of specific performance independently of arbitration. But the effects of *Staklinski* as a precedent in arbitration proceedings can be controlled by more restricted arbitration agreements.

Labor Arbitration

The most creative development in the availability of specific performance of contracts is that marked by the 1957 decision of the Supreme Court of the United States in *Textile Workers Union v. Lincoln Mills*.¹⁰⁵ By a divided vote, two Justices concurring, one dissenting (Mr. Justice Frankfurter) and one not participating, the Court in an opinion by Mr. Justice Douglas held that a union was entitled to specific performance by the employer of the grievance arbitration provisions of the collective bargaining agreement, under section 301(a) of the Labor Management Relations Act of 1947.¹⁰⁶ A glimpse at the background may help to point up the significance of the decision.

Prior to 1925 the federal courts did not grant specific performance of executory agreements to arbitrate any kind of dispute. The reasons were: feared difficulties of enforcement, a supposed public policy against ousting the courts of jurisdiction by compelling resort to a private tribunal empowered to make final awards, and the revocability at common law of agreements to arbitrate prior to the coming down of the award.¹⁰⁷ This attitude had been shared generally by the state and English courts. To correct it, legislation

N.E.2d 78, 80 (1959), paraphrased with approval in *Exercycle Corp. v. Marrata*, 9 N.Y. 2d 329, 174 N.E.2d 463 (1961), affirming a denial of a motion for a stay of arbitration arising out of a contract of employment of a corporate executive for life or until he voluntarily quit.

¹⁰⁵ 353 U.S. 448 (1957). See Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Bunn, *Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreement*, 43 VA. L. REV. 1247 (1957); Note, 36 N.C.L. REV. 215 (1958).

¹⁰⁶ 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

¹⁰⁷ *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1923); *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S.D.N.Y. 1915). See Gregory & Orlikoff, *Enforcement of Labor Arbitration Agreement*, 17 U. CHI. L. REV. 233 (1950); Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. REV. 160 (1934).

was necessary specifically making executory agreements to arbitrate present and future disputes valid, irrevocable and enforceable and spelling out the procedures in detail.

That came for the federal courts in the United States Arbitration Act of 1925.¹⁰⁸ Applicable to arbitration agreements in any maritime transaction or contract or transaction involving commerce, the act, however, was made inapplicable to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This exclusion was inserted to placate certain labor leaders who were afraid that without it the federal courts would bring about the compulsory arbitration of disputes over new contract terms. Grievance arbitration, *i.e.*, the determination of the interpretation and application of the provisions of an existing contract, was then relatively unknown; it was to be given impetus toward its present prevalence through the work of the National War Labor Board in World War II.

Unfortunately, the significance of the exclusion clause is ambiguous. Does it make the Arbitration Act unavailable for the specific performance in the federal courts of agreements for grievance arbitrations under collective bargaining contracts? Most of the litigation has arisen indirectly under section 3 of the act, which provides for a stay pending arbitration in "any suit . . . brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration. . . ." thus facilitating a defensive use of the arbitration agreement. The lower federal courts divided¹⁰⁹ over the issue and no Supreme Court decision has settled the matter.

The statute upon which *Lincoln Mills* is predicated, section 301(a) of the Labor Act, does not explicitly make arbitration agreements valid, irrevocable or specifically enforceable. Indeed, it does not mention either arbitration or specific performance. The legislative history is mainly concerned with damage actions for breach of contract; only incidentally and generally does it refer to other appropriate remedial proceedings, legal or equitable. Yet

¹⁰⁸ 9 U.S.C. §§ 1-14 (1958). See Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591 (1954); Sturges & Murphy, *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 LAW & CONTEMP. PROB. 580 (1952); Note, 28 N.C.L. REV. 225 (1950).

¹⁰⁹ These cases are discussed in the materials listed in note 108 *supra*.

the Court found a clear legislative intention to place sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule, discussed in *Red Cross Line v. Atlantic Fruit Co.*,¹¹⁰ . . . against enforcement of executory agreements to arbitrate. . . . The question then is, what is the substantive law to be applied in suits under sec. 301(a)? We conclude that the substantive law to apply in suits under sec. 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.¹¹¹

That intention was derived from passages in the legislative history which indicated a concern with making collective bargaining contracts valid, binding and enforceable in the courts, an interest in promoting collective bargaining that ended with agreements not to strike, and a belief that an agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike.

Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.¹¹²

Having gone that far, the Court was not to be deterred by the constitutional status of section 301(a) as a grant of federal-question jurisdiction to the federal courts, by the restrictions of the Norris-La Guardia Act, or by the equivocal position of grievance arbitrations under the Arbitration Act.

Whatever the effect of *Lincoln Mills* upon labor relations,¹¹³ its significance for our purposes lies in the discernment and inventiveness with which the Court took responsibility for the development of the remedy of specific performance of contracts in this troubled area.

¹¹⁰ 264 U.S. 109 (1924).

¹¹¹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

¹¹² *Id.* at 455.

¹¹³ See Aaron, *On First Looking into the Lincoln Mills Decisions*, in *ARBITRATION AND THE LAW 1* (McKelvey ed. 1959); Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, in *id.* at 24; Snyder, *What Has the Supreme Court Done to Arbitration?*, 12 *LAB. L.J.* 93 (1961).