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Specific Performance and Injunctions

EDWARD YORIO

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To my parents

PREFACE

More than sixty years have passed since the publication in 1926 of the third (and last) edition of Pomeroy's A Treatise on the Specific Performance of Contracts.[1] In the interim, no book has been published on the American law of specific performance.[2] Perhaps Pomeroy's exhaustive and excellent work left little to be said or explored by other writers.[3] More likely, the field remained barren of competition because publication of Pomeroy's last edition took place at a time when legal realism was beginning to gain a secure place in American legal thought.[4] A treatise writer typically sets out to discover general legal principles and to show how those principles govern a multitude, if not all, of the reported cases.[5] The realist is

[1]J. Pomeroy, A Treatise on the Specific Performance of Contracts (3rd ed. 1926).

[2]References to American cases and statutes appear in an excellent book on equitable remedies published fairly recently in Canada. *See generally* R. Sharpe, Injunctions and Specific Performance (1983).

[3]*See* Simpson, The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature, 48 U. Chi. L. Rev. 632, 675 (1981) (intellectual excitement of treatise writing disappears after the first competent treatise). *Cf.* Posner, The Decline of Law as an Autonomous Discipline: 1962-87, 100 Harv. L. Rev. 761, 771-772 (1987) (most imaginative practitioners want to be innovators once a technique has been perfected).

[4]*See* W. Twining, Karl Llewellyn and the Realist Movement 26-83 (1973) (survey of the history of the rise of realism during the period from 1914 to 1931).

[5]T. F. T. Plucknett, Early English Legal Literature 19 (1958).

skeptical about the significance of legal doctrine in the determination of cases and about attempts to distill the law into a set of principles or general rules.[6] As realism began to affect the attitudes of academic lawyers, the result was to undermine the enterprise of treatise writing.[7] Contributing to this trend more recently has been the work of the Critical Legal Studies movement, which may be even more cynical than realism about the importance of legal doctrine in the resolution of cases.[8]

There is a certain irony in the simultaneous and not coincidental rise of legal realism and demise of treatises on equitable remedies for breach of contract. Realism distrusts traditional doctrine or rules as descriptions of what courts are actually doing or as the heavily operative factor in legal decisions.[9] Realism argues that appellate cases are more understandable by grouping the facts in new—and usually narrower—categories.[10] Realism views appellate opinions not as mirroring the process of deciding cases, but rather as lawyers' arguments made by judges after the decision has already been reached.[11] Strong support for these claims can be found in the opinions of judges granting (or denying) equitable relief for breach of contract. The outcome of a case often depends on a narrow—and

[6]*See* Simpson, *supra* note 3, at 677. These statements about legal realism must be understood with the caveat that generalizations about the views of *all* realists are risky. *See* Llewellyn, Some Realism about Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1233-1234, 1254-1256 (1931) (realism is not a single school of thought or creed).

[7]*See* Simpson, *supra* note 3, at 677 (realist movement "appears . . . to have had the greatest negative effect on the treatise-writing tradition in America").

By contrast, treatise writing remains in vogue in England, perhaps because realism had a lesser effect on English legal thought. *See id.* at 633, 663.

[8]For a broad survey of this movement, *see* Critical Legal Studies Symposium, 36 Stan. L. Rev. 1 (1984). For applications of critical legal studies to contract issues, *see* Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997 (1985); Feinman, Promissory Estoppel and Judicial Method, 97 Harv. L. Rev. 678 (1984); Feinman, Critical Approaches to Contract Law, 30 U.C.L.A.L. Rev. 829 (1983); Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Kennedy, Legal Formality, 2 J. Legal Stud. 351 (1973).

[9]Llewellyn, *supra* note 6, at 1237.

[10]*Id.* at 1237, 1240.

[11]*Id.* at 1238-1239.

unlikely to be duplicated—set of facts.[12] Judges unabashedly admit that their decisions are based not on rules, but on the exercise of their own discretion in the facts of the particular case.[13]

In light of the long-term decline in treatise writing by American lawyers, the appearance of a book on one part of contract law almost demands an explanation. In 1980, I began work on a theoretical article designed to rebut criticism of our current mix of legal and equitable remedies for breach of contract.[14] Much of that article appears in slightly revised and updated form as Chapter 23 of this book. Although the article set out in considerable detail the policies that underlie our system of contract remedies, the specific, practical consequences of those policies on litigants in contract cases were barely touched upon. This book is designed in part to fill that gap.

Much has changed since the publication of Pomeroy's last edition. The appearance in the last three decades of a rich literature on the relationship between law and economics enables us to view the subject of contract remedies from a perspective entirely different from that of a lawyer or scholar in the 1920s.[15] Rules governing specific performance have become more liberal in certain areas (output and requirements contracts, for example[16]) and more stringent

[12]*See, e.g.*, §10.2, text at notes 16-23, *infra* (denial of specific performance limited to particular facts of case).

[13]For an extended discussion of the concept of equitable discretion, *see* §1.3 *infra*.

[14]Yorio, In Defense of Money Damages for Breach of Contract, 82 Colum. L. Rev. 1365 (1982).

[15]For a broad overview of law and economics, *see* A.M. Polinsky, An Introduction to Law and Economics (2d ed. 1989); R. Posner, Economic Analysis of Law (3rd ed. 1986). For applications of economic analysis to issues in contract remedies, *see* Barton, The Economic Basis of Damages for Breach of Contract, 1 J. Legal Stud. 277 (1972); Goetz & Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554 (1977); Kronman, Specific Performance, 45 U. Chi. L. Rev. 351 (1978); Perloff, Breach of Contract and the Foreseeability Doctrine of Hadley v. Baxendale, 10 J. Legal Stud. 39 (1981); Polinsky, Risk Sharing Through Breach of Contract Remedies, 12 J. Legal Stud. 427 (1983); Rea, Efficiency Implications of Penalties and Liquidated Damages, 13 J. Legal Stud. 147 (1984); Schwartz, The Case for Specific Performance, 89 Yale L.J. 271 (1979); Yorio, *supra* note 14.

[16]*See* §11.2, text at notes 54-59, *infra*.

in others (real estate contracts[17]). Changes in procedure—including the merger of law and equity in many jurisdictions, the *Erie* doctrine,[18] and expansion (or restriction, depending on the jurisdiction) of the right to a jury trial[19]—have also affected the availability of specific relief.

I had expected originally to limit my analysis to specific performance and injunctions. I determined soon after beginning extensive research that it is impossible to understand the rules governing specific performance without exploring the effect that legal limitations on contract damages have on the availability of equitable relief. And so Chapter 8 was conceived. My research also showed that claims to additional or alternative monetary relief appear in most recent cases in which specific performance or an injunction is sought for breach of contract. The frequency and practical importance of these monetary claims gave rise to Chapter 9. The subject of monetary remedies for breach of contract, including damages and restitution, will be covered in much greater detail in a companion volume.

There are many individuals who deserve thanks for their contributions to this book. Dean John Feerick of Fordham Law School was generous in granting financial support. My colleague Carl Felsenfeld reviewed one chapter of the manuscript and provided useful insights. I also had the benefit of able and dedicated student research assistants, of whom Louis Cammarosano, Joan Campbell, Mardi Merjian, and Peter Vairo merit special mention. Despite increasing proficiency on a word processor, I occasionally needed the help of the dedicated staff of secretaries at Fordham Law School, including Mary Dowdell, Carol DeVito, Marilyn Alexander, Lourdes Ramirez, and Mary Whelan. Of course, none of these individuals had any part in the book's faults, for which I bear sole responsibility.

Edward Yorio

July 1989

[17]*See* §10.3, text at notes 7-9, *infra*.
[18]*See generally* Chapter 22.
[19]*See generally* Chapter 21.

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