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## EQUITY-SPECIFIC PERFORMANCE-RECENT TRENDS IN THE SPECIFIC ENFORCEMENT OF CONTRACTS TO SELL SECURITIES

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EQUITY—SPECIFIC PERFORMANCE—RECENT TRENDS\* IN THE SPECIFIC ENFORCEMENT OF CONTRACTS TO SELL SECURITIES—The rise of the corporation, as a form of business organization, to a dominant position in the modern economic scene has attached increased importance to the ownership of corporate securities. As property interests have become more and more represented by such securities, society has promoted such interests by setting up organized procedures for dealing with and in securities. Stock exchanges have been organized to aid the marketability of corporate stocks. A brokerage profession has evolved to bring buyers and sellers together. Underwriting has been developed to aid in the initial disposal of securities by the issuing corporation. Governments have undertaken to supervise the issuance, and subsequently the transfer, of both stocks and bonds.<sup>1</sup> The individual rights of the stockholder have been increased toward the end of giving him a better opportunity to protect his property interest.<sup>2</sup> Even in bankruptcy the corporation and its stockholders have been given preferential treatment in an effort to preserve such interests as much as possible.<sup>3</sup> In the light of this development, which undoubtedly has not yet reached its zenith, what approach are the courts to take

\* I.e., developments since 1936.

<sup>1</sup> E.g., state blue sky laws; Securities Act of 1933, 48 Stat. L. 74, 15 U.S.C. (1946) §77a; Securities Exchange Act of 1934, 48 Stat. L. 881, 15 U.S.C. (1946) c. 2B, §78a.

<sup>2</sup> E.g., cumulative voting provisions, appraisal rights, special voting rights where interest affected. See Luce, "Trends in Modern Corporation Legislation," 50 MICH. L. REV. 1291 at 1316 (1952).

<sup>3</sup> E.g., reorganization, rather than liquidation, has been the primary aim where feasible, both in equity and under the National Bankruptcy Act (see Chapter X of Act), and stockholders have been given at least an opportunity to retain an interest in the corporation, although often only at the expense of an added contribution.

to enforcement of contracts involving corporate securities? Are they to be treated like ordinary chattel contracts? Or are they to be treated like land contracts as involving a special type of property interest? Or to be more specific, is specific performance to be the extraordinary or the usual remedy for breach?

### I. *The Adequacy Test*

As a general rule, specific performance is contingent on the inadequacy of the legal remedy, a notion which grew up when equity and law were represented by opposing camps in a state of truce. While as a practical matter this requirement has virtually disappeared in the land contract case, specific performance being the normal remedy for the vendee, most courts still give lip service to the requirement while at the same time presuming, quite justifiably, the inadequacy of available legal remedies.<sup>4</sup> In other words, if a requirement at all, it is purely a negative one. On the other hand, an affirmative showing of inadequacy is required to support a request for specific performance in the case of contracts involving personalty.<sup>5</sup> Since corporate securities are classified as personalty, no court has suggested that the adequacy test is not applicable to contracts for the sale of stocks and bonds, nor, indeed, is this admission made in so many words even in land cases. Neither is any presumption of inadequacy indulged in by most courts where corporate securities are involved.<sup>6</sup> It seems worth while to consider the recent decisions on the showing of inadequacy required to support equitable relief. Naturally this involves an initial inquiry into what is meant by "inadequate," which is obviously a word of many shades of meaning. Does it mean the non-existence of any reasonably effective

<sup>4</sup> As a general rule, it can be stated that each piece of land is unique, both in location and topography. Therefore damages are presumably inadequate, since they do not allow the vendee to place himself in a position similar to the one he would have been in if the vendor had performed, this inability having no real money equivalent by way of compensation. Query, whether a court would give specific performance as a matter of course where the vendee could acquire the adjoining lot in a new and perfectly flat subdivision. Also query whether the purpose for which the vendee desired the land should not make some difference. On the general rule see: 2 *CONTRACTS RESTATEMENT* §360 (1932); 5 *WILLISTON, CONTRACTS*, rev. ed., §1419 (1937); *McCLINTOCK, EQUITY* 93 (1936). Cf. *Cox, "Specific Performance of Contracts to Sell Land,"* 16 *Ky. L.J.* 338 (1928), to the effect that specific performance will be granted regardless of the adequacy of the remedy at law.

<sup>5</sup> See 5 *WILLISTON, CONTRACTS*, rev. ed., §1419 (1937); 2 *CONTRACTS RESTATEMENT* §§358, 361 (1932).

<sup>6</sup> Cf. the position of the courts in the United Kingdom, which give specific performance as a matter of course in cases involving contracts for the sale of corporate securities. Cases are collected in 22 *A.L.R.* 1032 at 1036 (1923); 130 *A.L.R.* 920 at 923 (1936). See also 5 *WILLISTON, CONTRACTS*, rev. ed., §1419 (1937).

remedy?<sup>7</sup> Or does it mean the absence of a remedy as effective as the equitable remedy?<sup>8</sup> Or the absence of a remedy which will meet the plaintiff's needs in the situation?<sup>9</sup> The courts are reluctant to commit themselves to a binding choice, preferring to select the definition which fits the case (as they see it) rather than to fit the case into a preconceived definition. In other words, there are several possible definitions, each of them legally correct, with the real question being which of these correct definitions will be applied in the particular case—a choice which is based primarily on the comparative equities of applying one definition rather than another. With this in mind, an inquiry can be made into the merits on which this choice is to be made in the securities contract case.

A. *Securities Unobtainable on the Market.* The plaintiff seeking specific performance of a contract for the sale of securities almost invariably alleges that such securities are not obtainable on the open market (including the over-the-counter market as well as the organized stock exchanges).<sup>10</sup> Two lines of inquiry present themselves in regard to this allegation: (1) is it an essential ingredient of a case capable of equitable cognizance, and (2) is it sufficient, in and of itself, to support an assertion of equitable jurisdiction?

The merits of the first question can more readily be explored by putting it in its converse form: does the fact that the securities are obtainable on the open market preclude the granting of specific performance? At first, the answer would seem to be yes, since the damages awarded for the breach would appear to place the plaintiff in position to purchase identical stock on the market. However, this assumes either that the market is relatively stable or that the plaintiff is financially able to procure identical shares on the market without benefit of the damage money, the damages merely acting as a reimbursement for his added expenditures; otherwise the plaintiff would not be able to obtain the same number of shares he bargained for.

<sup>7</sup> This appears to be the test followed in many of the chattel contract cases, the test being whether the plaintiff can be put in substantially the same position he would have been in by means of the damage remedy.

<sup>8</sup> Apparently this is the normal test in land contract situations. See note 4.

<sup>9</sup> This test appears to be applied in some chattel contract cases, although no distinct categories appear. It is evidenced by an inquiry into the purpose sought to be achieved by the plaintiff in contracting to acquire the property in question.

<sup>10</sup> This element was present and taken into account by the court in at least 90% of the reported cases seeking specific performance of contracts for the sale of securities since 1936. Most of the exceptions involved special situations, e.g., constructive trust.

The question does not appear to have been raised in this country,<sup>11</sup> probably because the vendee in such a case prefers purchase in the market, supplemented by difference money damages, over the slower process of specific performance. Also, the vendor is not so likely to breach the agreement in such a case, since he can always go into the market himself and get the securities with which to perform the contract if he does not want to dispose of his own holdings. The inquiry thus becomes a theoretical one, and on the theoretical plane it would seem that specific performance ought to be available if the plaintiff desires it. The fact that the defendant has breached the contract would make it probable that the market is a rising and consequently unstable one. Should the plaintiff be made to bear the risk of this instability, or should the defendant be made to perform his contract, assuming this risk himself? The contract would seem to indicate that the parties contemplated that the vendor should bear the risk of any rise in value and the vendee the risk of any decline. This purpose is best carried out by requiring specific performance by the vendor, since this not only avoids any problem of an affirmative duty to mitigate the damages, which is a hazardous duty at best, requiring an expert prediction of future stock market fluctuations,<sup>12</sup> but also assures that the plaintiff gets the number of shares he contracted for at the price he agreed to pay. Consequently, the fact that the securities in question are obtainable on the open market should not preclude the granting of the equitable remedy unless the market price of such securities is not subject to fluctuation;<sup>13</sup> however, it must be recognized that as a practical matter the delay involved in specific performance in such a case as compared to self-help plus damages may make specific performance unattractive to the well-advised plaintiff.

The more important question is whether the mere unavailability of the securities in the marketplace is an *a fortiori* case for specific

<sup>11</sup> The old English case of *Cud v. Rutter*, 1 P. Wms. 570, 24 Eng. Rep. 521 (1719), appears to be the only reported case bearing on this point. The chancery there refused specific performance.

<sup>12</sup> While any good faith attempt on the part of the vendee to mitigate damages by purchase in the open market should be accepted as determinative of the measure of damages, regardless of whether hindsight shows that a more advantageous purchase could have been made at some other date, a vendee cannot safely be guaranteed that such will be the case, particularly in view of the vagaries of a jury.

<sup>13</sup> The best example of such a security is the government bond. In England, where specific performance is the general rule as to security contracts, the contract for the purchase of government bonds is expressly exempted from this rule. Other securities, particularly bonds, may also meet this test.

performance. Again initial reactions would probably favor an affirmative response, since in the absence of any showing of a private source from which such securities could readily be obtained at a reasonable price, an award of damages would not enable the plaintiff to put himself in the same position he would have been in if the contract had been fulfilled. But reflection again indicates that the case is not quite so simple. Once unavailability is established, the question becomes one of whether or not the plaintiff's contractual purpose is dependent on acquiring such securities. In other words, may the vendee's ultimate or underlying motive in attempting to acquire the particular securities be served satisfactorily by some substitute measure?<sup>14</sup> This inquiry will be pursued in more detail presently. Suffice it to observe at present that the plaintiff will not ordinarily seek specific performance unless he deems possible substitutes insufficient for his purposes.

B. *Value of Securities Highly Speculative.* Another allegation deserving of mention which creeps into the securities contract case with some frequency is the highly speculative nature of the securities involved.<sup>15</sup> Two situations which give security values a certain speculative quality must first be distinguished as mere ramifications of the previous discussion. One of these is the case of a highly volatile market price, a situation which was considered earlier (with a vote cast in favor of specific performance).<sup>16</sup> The other is the case of no market price at all (i.e., the absence of any sales sufficiently close in time to the valuation date in question to be reliable evidence of value), a factor which makes the determination of damages difficult and uncertain, but not completely unfeasible.<sup>17</sup> This situation is readily identified with that of the unlisted security investigated previously.<sup>18</sup> With these two situations set aside, a third one may now be considered—the case of

<sup>14</sup> While this element is at least taken into consideration by the courts in two out of every three cases reported since 1936, a number of cases seem to ignore it completely, granting specific performance without regard to this possibility.

<sup>15</sup> This factor is mentioned in 50% of the reported securities contracts cases since 1936.

<sup>16</sup> See part I-A, paragraph 2.

<sup>17</sup> Mere difficulty in valuation does not make the legal remedy inadequate, since this is a common characteristic of many damage actions; e.g., injury to reputation, conversion of an heirloom, and a multitude of other actions which merely attempt to compensate the plaintiff rather than allow him to repair the injury. Such difficulty must be differentiated from the situation where repairment of the injury is the announced aim, but valuation of the injury is completely unfeasible either because of its contingent and uncertain nature or because of the presence of intangible factors in the valuation picture. Difficulty of valuation is a factor to be taken into consideration in determining the inadequacy of the legal remedy however. 2 CONTRACTS RESTATEMENT §361 (1932).

<sup>18</sup> See part I-A, paragraph 3. Of course the unlisted security does not present the only situation where lack of recent sales is possible, but it is the most common one.

the securities of a new corporation or of an old corporation under a completely new and untested management. The injection of this element into the picture, assuming the absence of any established market price, renders the value of the securities highly speculative and conjectural, being completely contingent on the success, or degree of success, of future corporate operations, for which there is no reliable predictive guide.<sup>19</sup> Can this valuation difficulty be made an independent ground for asserting equity jurisdiction? Certainly it makes out a strong case, since even substitutes are precluded if the principal performance cannot be measured, unless, of course, the substitute can also be made contingent on the success, or degree of success, of the corporation. This last possibility should not be taken too lightly, though, since it may well be a feasible solution for satisfying certain contractual intents.<sup>20</sup> In fact, doesn't the whole valuation problem presuppose that the plaintiff's purpose is one requiring either the ownership of the securities or their monetary equivalent, ignoring the possibility of any third alternative? This suggests that the vendee's underlying motive becomes a determining factor in this case also.

C. *Securities of Special or Peculiar Value to Vendee.* The possibility of any substitute performance being satisfactory depends on the purpose for which the vendee wishes to acquire the securities. Consequently, the plaintiff seeking specific performance usually attempts to show that the securities involved have a special or peculiar value to him which cannot be adequately compensated for in any other way.<sup>21</sup> The question therefore becomes: what underlying contractual motives establish the need for equitable relief?

1. *Securities desired for investment purposes.* Corporate bonds, and to a slightly lesser extent stocks, are usually purchased as a means of investing surplus funds. From one standpoint, nothing short of the

<sup>19</sup> Ordinarily the past operations of a corporation are a fairly reliable guide to its future operations, taking into consideration general business trends and any other foreseeable future events. Past history is obviously of no avail where the corporation has just been formed or where there has been a radical change in management.

<sup>20</sup> See part I-C *infra*.

<sup>21</sup> The importance of this factor is difficult to determine from the reported cases. While in all but a few cases, such as those involving a constructive trust, facts appear which indicate that the shares in question had a special value to the plaintiff, as often as not the court fails to specify this as one of the determining factors in its decision. Perhaps the courts assume, probably justifiably, that the plaintiff would not be seeking specific performance unless he did attach some special importance to the acquisition of the shares. However this may be, the decisions on their facts seem to support the position that this factor is important, at least in the advocate's eyes if not in those of the court. Cf. 49 HARV. L. REV. 122 (1935) with McCLINTOCK, EQUITY 95 (1936).

shares contracted for can meet the investor's requirements, since each corporation, like each tract of land, is unique. However, in most cases substantially equivalent investments are available, since the same factors which determine market value in one case also operate in the case of other corporations. In other words, the marketplace tends to place equal values on securities having equal rights and risks after a balancing of all the factors, assuming no market manipulation.<sup>22</sup> Therefore damages allowing the purchase of securities of another corporation which are at least as desirable as those contracted for, if not more so, will normally be an adequate remedy for the investor. The only exception arises where the value of the securities is highly speculative, a situation which was discussed previously.<sup>23</sup>

2. *Securities desired for purposes of speculation.* Some persons acquire stocks, or enter into contracts to purchase stock in the future, for the sole purpose of speculating in stock market fluctuations. In such a case damages are clearly an adequate remedy, giving the plaintiff the profit he lost as a result of the vendor's failure to perform the contract.<sup>24</sup>

3. *Securities desired for voting power purposes.* The most common ground<sup>25</sup> for seeking specific performance is that the transaction will allow the vendee to assume control of the corporation. While some courts have in the past held such contracts illegal and hence unenforceable as against public policy,<sup>26</sup> modern courts have taken the opposite view.<sup>27</sup> Therefore, unless the contract would cause a violation of the antitrust laws or some similar legislative policy pronouncement, this possibility can probably be safely discounted. There remains the question of just what effect such a motive has in the specific performance case. Since this factor can arise in a variety of situations, however,

<sup>22</sup> While supply and demand are actually the factors operating to set stock prices, they in turn are based on the general appraisal and business prospects of the corporation by the persons in the market. Of course opportunities are available for market manipulation by virtue of an abnormal supply or demand for the sole purpose of affecting prices, but these situations can be set to one side in determining equivalent investments.

<sup>23</sup> See part I-A, paragraph 2.

<sup>24</sup> Since money was all the vendor expected to obtain as a result of the contract, damages are clearly adequate.

<sup>25</sup> This element can be said to be present in at least 75% of the reported cases since 1936.

<sup>26</sup> See 49 HARV. L. REV. 122 at 127 (1935) for earlier cases. Where the corporation was classifiable as quasi-public in nature the courts were more prone to use the public policy argument.

<sup>27</sup> No court since 1936 appears to have denied specific performance because corporate control would be against public policy. See *Armstrong v. Stiffler*, 189 Md. 630, 56 A. (2d) 808 (1948), for a specific rejection of this argument in the case of a quasi-public corporation.



its operation in each of these situations must be considered separately before their composite is attempted to be reduced to any fundamental principle.<sup>28</sup>

(a) Contract to purchase numerical majority of a corporation's stock. As a general rule, a contract for the sale of a numerical majority of a corporation's voting stock is specifically enforceable. Inherent in such situations is not only a transfer of control from the vendor to the vendee, but also the fact that the total amount of stock to be delivered under the contract cannot be procured except from the vendor. The unique nature of each individual corporation here operates to make any substitute a mere pious dream rather than a realistic possibility. Add to this the fact that the value of corporate control is too speculative for a jury's estimate of damages to be anything more than a haphazard guess, and the result is a decree of specific performance even by the most stringent court.<sup>29</sup> This then is the clearest case for equitable relief.

(b) Contract to purchase a quantity less than a numerical majority of a corporation's stock, but sufficient when combined with the vendee's other stock holdings, to give a majority of the voting stock. Where the vendee has contracted to purchase less than a majority of the stock of a corporation, the element of absolute impossibility of acquiring an identical amount of stock from persons other than the vendor is not present. Consequently, courts have shown more reluctance to grant specific performance in such a situation,<sup>30</sup> even though the vendee would thereby become the holder of a majority of the voting stock of the corporation. However, the courts still recognize that there is no real substitute for control of the corporation; therefore, where it can be shown that identical shares are not obtainable from other sources, the vendor will be required to perform his contract.<sup>31</sup>

(c) Contract to purchase a quantity less than a numerical majority of a corporation's stock, but sufficient, when combined with the

<sup>28</sup> On the significance of corporate control as an element in a case for specific performance, see 49 HARV. L. REV. 122 (1935).

<sup>29</sup> Contract to purchase all outstanding shares: *Boozer v. Blake*, 245 Ala. 389, 17 S. (2d) 152 (1944); *Baruch v. Haggerty, Inc.*, 137 Fla. 799, 188 S. 797 (1939); *Legro v. Kelley*, 311 Mass. 674, 42 N.E. (2d) 836 (1942); *Nigro v. Conti*, 319 Mass. 480, 66 N.E. (2d) 353 (1946); *Trefethen v. Amazeen*, 96 N.H. 160, 71 A. (2d) 741 (1950). Contract to purchase majority, but less than all, of outstanding shares: *In re Rosenthal's Estate*, 335 Pa. 49, 6 A. (2d) 585 (1939); cases listed in 22 A.L.R. 1050 (1923) and 130 A.L.R. 928 (1941).

<sup>30</sup> See 49 HARV. L. REV. 122 at 124 (1935).

<sup>31</sup> See cases listed in notes 33, 36, and 38 *infra*.

vendee's other contracts to purchase, to give him a majority of the voting stock. It occasionally happens that the vendee has made a series of contracts with several independent vendors for the purchase of relatively small numbers of shares, the sum total of which will give the vendee a majority of the outstanding stock. What is the case for specific performance in such a situation against any one vendor?<sup>32</sup> At first the damage remedy would appear to be adequate in the absence of any showing that the same amount of stock cannot be obtained elsewhere without great difficulty. A single repudiation, however, may endanger the whole scheme, for if all of the vendors were to refuse to perform, the vendee would be placed in the position of being unable to secure majority control of the corporation. This potential unavailability, coupled with the vendee's interest in acquiring control of the corporation, would seem to offer ground for specific relief against a single breach. The only court<sup>33</sup> that has been called upon to consider this question has taken this position, fortified by the fact that mass repudiations were in fact taking place.

(d) Contract to purchase less than a numerical majority of a corporation's stock, but which will give the vendee de facto control, or at least an effective voice in the management, of the corporation, although not majority control. It is often possible to obtain de facto control, or at least an effective voice in the management, of a corporation with substantially less than a majority of the voting shares. If this can be shown, is a case made out for equitable relief? Again the courts recognize that there is no real substitute for corporate control. Therefore, the question becomes one of whether identical shares are readily procurable elsewhere, which is essentially a fact question, with a negative response being necessary to establish a case for equitable relief.<sup>34</sup>

4. *Securities desired for employment purposes.* Corporate stock is becoming an increasingly common and important element in corporate managerial compensation schemes. This tendency toward incorporating the partnership incentive system into the corporate structure, whether in the form of an advantageous option to purchase or an outright agreement to transfer as a constituent part of the agreed upon salary, is especially common in the smaller, somewhat closely held,

<sup>32</sup> For a very able discussion see 49 HARV. L. REV. 122 at 126 (1935).

<sup>33</sup> *Armstrong v. Stiffler*, 189 Md. 630, 56 A. (2d) 808 (1948).

<sup>34</sup> See *Hacker v. Price*, 166 Pa. Super. 404, 71 A. (2d) 851 (1950); *Hildinger v. Bishop*, 126 N.J. Eq. 334, 8 A. (2d) 813 (1939); also cases listed in note 36 infra.

corporations, being a convenient way to attract and hold talented personnel. From the employee's standpoint such securities may be desirable either as a means of profit-sharing or as a form of job security; consequently, he may regard damages as an inadequate remedy for breach and request specific performance instead. In such an event, his chances of obtaining the desired equitable relief appear good. Several factors lead to this result. The value of the stock is usually highly speculative and conjectural in such a situation, since in most cases it is directly related to the plaintiff's own managerial skills.<sup>35</sup> Furthermore, voting power may play an important part, particularly where the corporation is being operated essentially as a partnership, the plaintiff's services being equated to the capital contributions of the other stockholders.<sup>36</sup> Moreover, in addition to these factors there is the underlying desire of the courts to protect the employment relationship. Even though a continuance of the relationship may well be a practical impossibility by the time of the trial, the courts seem to feel that a degree of permanence should be encouraged;<sup>37</sup> therefore they appear partial to rewarding the plaintiff's justifiable expectations at the time he accepted the defendant's employment offer by granting specific performance, leaving the parties to work out their further difficulties from more equal bargaining positions.

5. *Securities desired for other purposes.* In a few cases corporate securities have a special significance to the plaintiff apart from any of the above. One such situation is involved in the first-right-to-purchase contract (i.e., a contractual agreement by the holder of the shares not to transfer his shares to anyone else without first offering them to the plaintiff on the same terms). Inherent in such an agreement is a desire to give voting power into friendly, rather than antagonistic, hands, thereby assuring a corporate management free from internal strife. The courts are unanimous in specifically enforcing such agreements.<sup>38</sup>

<sup>35</sup> *Korabek v. Weaver Aircraft Corp.*, 65 Cal. App. (2d) 32, 149 P. (2d) 876 (1944); *McCutcheon v. National Acceptance Corp.*, 143 Fla. 663, 197 S. 475 (1940); *Berkman v. Levy* (Tex. 1939) 129 S.W. (2d) 397; *Tewksbury v. Noyes*, 138 Me. 127, 23 A. (2d) 204 (1941).

<sup>36</sup> *Tewksbury v. Noyes*, 138 Me. 127, 23 A. (2d) 204 (1941); *Griddle v. Vohlken*, 296 Ill. App. 649, 16 N.E. (2d) 606 (1938); *Steinberg v. Kasdin*, 128 N.J. Eq. 503, 17 A. (2d) 284 (1941).

<sup>37</sup> See, e.g., *Aldrich v. Geahry*, 367 Pa. 252, 80 A. (2d) 59 (1951); *McCutcheon v. National Acceptance Corp.*, 143 Fla. 663, 197 S. 475 (1940).

<sup>38</sup> *Oppenheim Collins & Co. v. Beir*, 187 Misc. 428, 64 N.Y.S. (2d) 19 (1946); *Fleischer v. James Drug Stores, Inc.*, 7 N.J. Super. 529, 72 A. (2d) 404 (1950); *New England Trust Co. v. Spaulding*, 310 Mass. 424, 38 N.E. (2d) 672 (1941).

Another situation which may arise is one where special rights attach to the ownership of the securities in question. For example, a recent New York case<sup>39</sup> involved stock in a local water company whose service was available only to the holders of stock certificates. Specific performance was granted in the absence of any showing by the defendant that the plaintiff could have obtained water by drilling a well, which was the only alternative to obtaining water from the company.

## II. *A Practical Approach*

The traditional adequacy test seems to work out to be a double-barrelled 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. Perhaps the real shift has occurred in the burden of proof. The plaintiff makes out a prima facie case by proving the contract, the breach, and the unavailability or highly speculative value of the securities involved. The defendant is then called upon to show either that the securities in question are obtainable from a private source or that the plaintiff's needs can be satisfied in some other manner.<sup>40</sup> The plaintiff may obstruct this latter course of action by alleging his purpose, particularly where voting control or the acquisition of special rights are involved, and the importance of defendant's performance in achieving that purpose as part of his initial case.

Of course, the difficulty of accurately appraising this area of the law is that the plaintiff almost invariably has a strong case before specific performance is sought. The very fact that the equitable remedy is resorted to suggests that the plaintiff regards ownership of the securities in question to be essential. The inexpediency of such a remedy as compared to self-help supplemented by difference money damages rules out almost all cases where adequate alternatives or other sources are available. Therefore, a presumption of inadequacy may perhaps safely be indulged in by the courts, much after the fashion of pre-

<sup>39</sup> *Gecosky v. Flint*, 93 N.Y.S. (2d) 644 (1949).

<sup>40</sup> See, e.g., *Aldrich v. Geahry*, 367 Pa. 252, 80 A. (2d) 59 (1950); *Hoge v. Pollard*, 118 W.Va. 111, 188 S.E. 867 (1937); *Gecosky v. Flint*, 93 N.Y.S. (2d) 644 (1949).

vailing English practice. In fact, with the union of law and equity under modern procedural codes, no reason is apparent why specific performance should not be made available to the plaintiff at his option as an equal alternative to other remedies, a practice which has long been established on the Continent. The American courts seem to be tending in this direction in the securities contract case,<sup>41</sup> although the horizon is still far distant. Any move in this direction deserves to be supported, with the plaintiff's option limited only by the requirement that he be guided by more than nuisance value.

*Allan Neef, S. Ed.*

<sup>41</sup> For a strong indication of this position see *Young v. Cockman*, 182 Md. 246, 34 A. (2d) 428 (1943); implication from *Aldrich v. Geahry*, 367 Pa. 252, 80 A. (2d) 59 (1951).