



University
of Glasgow

<https://theses.gla.ac.uk/>

Theses Digitisation:

<https://www.gla.ac.uk/myglasgow/research/enlighten/theses/digitisation/>

This is a digitised version of the original print thesis.

Copyright and moral rights for this work are retained by the author

A copy can be downloaded for personal non-commercial research or study,
without prior permission or charge

This work cannot be reproduced or quoted extensively from without first
obtaining permission in writing from the author

The content must not be changed in any way or sold commercially in any
format or medium without the formal permission of the author

When referring to this work, full bibliographic details including the author,
title, awarding institution and date of the thesis must be given

Enlighten: Theses

<https://theses.gla.ac.uk/>
research-enlighten@glasgow.ac.uk

**AN EVALUATION OF SPECIFIC IMPLEMENT AS A REMEDY FOR
BREACH OF CONTRACT FOR THE SALE OF GOODS IN SCOTS
LAW AND IRAQI CIVIL LAW, COMPARATIVE STUDY, WITH
ADDITIONAL REFERENCE TO THE ENGLISH LAW.**

**A THESIS SUBMITTED FOR
THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY**

BY

**YASEEN MOHAMMAD K. AL-JUBOORI
LL.B. & LL.M. BAGHDAD UNIVERSITY**

**THE SCHOOL OF LAW
THE DEPARTMENT OF PRIVATE LAW
THE UNIVERSITY OF GLASGOW
FEBRUARY 1992**

© YASEEN M. AL-JUBOORI 1992

ProQuest Number: 10987068

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



ProQuest 10987068

Published by ProQuest LLC (2018). Copyright of the Dissertation is held by the Author.

All rights reserved.

This work is protected against unauthorized copying under Title 17, United States Code
Microform Edition © ProQuest LLC.

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

II

FOR
MY FAMILY AND COUNTRY WHOSE
LOVE, INSPIRING STANCE AND
SUPPORT MADE IT ALL POSSIBLE,
AND
FOR MY BROTHER "IBRAHIM" IN
AFFECTIONATE REMEMBRANCE. ***

III

ACKNOWLEDGEMENTS

My heartfelt thanks are due to Professor David G. Powles for his comments on the drafts of this work without whose patience, understanding and continuing assistance this thesis would assuredly not have been completed.

My deep gratitude to Dr. P.M.L. Lucie, Dr. T.D.Fergus, Dr. Gordon Anderson, Dr. Ahmad Ajaj, and Mrs. Flick Jackson, for their help and assistance.

Further, my thanks are due to the staff of the faculty of law, the staff of the library and in particular, the staff of the fourth floor and of the inter-library loan office for their help in tracing books and references relevant to my thesis.

Also, I would like to thank my family for their support and patience which gave me the courage and the enthusiasm to fulfil my ambitions through the completion of this work.

Finally, I should express my deep gratitude and appreciation to the "The Ministry of High Education" in Iraq who financed this study.

ABBREVIATIONS

A.C.....	Appeal Cases.
All ER.....	All England Law Reports.
App. Cas.....	Law Reports, Appeal Cases.
Atk.	Atkinson's Chancery Reports.
B & S.	Best & Smith's Queen's New Reports.
Beav.....	Beaven's Rolls court Reports.
Brown's Sup.....	Brown's Supplement to Morrison's Dictionary of decisions, Session Cases (Scots).
C.L.R.	Common Law Reports.
Ch. D.....	Chancery Division.
Com. Cas.	Commercial Cases.
D.	Dunlop, Bell, & Murray's Reports
D. G & J.....	De Gex & Ellis' Queen's Benech Reports.
D. G. M. & G.....	De Gex, Macnaghten & Gordon's Chancery Reports.
Drew.	Drewery's Chancery Reports.
E. & E.....	Ellis & Ellis' Queen's Benech Reports.
ER.....	English Reports.
F.	Frazer, Session Cases.
G.W.D.	Green Weekly Digest (Scot).
Giff.	Giffard's Chancery Reports
H.L.....	The House of Lords.
Hem & M.	Hemming & Miller's Chancery Reports
J. Bus. Law.....	Journal Business Law.
K.B.	Law Reports, King's Bench.
L.J. Ex.....	Law Journal Reports, Exchequer, New Series.
L.J. Q.B.	Law Journal Reports, Queen's Benech.
L.R. Eq.	Law Reports, Equity Cases.
L.R. Ex.....	Law Reports Exchequer.

L.R.....	Law Reports.
L.T.R.	Law Times Reports.
Lloyd's Rep.....	Lloyd's Law Reports.
LJ. Ch.....	Law Journal Reports, Chancery, New Series.
M. & W.	Meeson & Welsby's Exchequer Reports.
M.	Macpherson's Session Cases.
Macq.	Macqueen's Scotch Appeal Cases.
McL & Rob.	McLean & Robinson's Scotch Appeal Cases.
Michigan L. Rev.	Michigan Law Review.
My & K.....	Mylne & Keen's Chancery Reports.
North Carolina L. Rev.....	North Carolina Law Review.
NZLR.	Newzeland Law Reports Reporter.
O.C.R.	Ordinary Cases Rules.
Q.B.....	Law Reports, Queen's Bench.
R.	Rettie's Session Cases.
S. & S.....	Simon & Stuart's Vice-Chancellor's Reports.
S. R. (N. S. W.).....	New South Wales State Reports.
S.....	Shaw's House of Lords, Appeal Cases (Scots)
S.....	Shaw's Session Cases.
S.C. (H.L.).....	Session Cases, House of Lords.
S.C.	Court of Session.
S.L.R.....	Scottish Law Reporter.
S.L.T.	Scots Law Times.
Sch & Lef.	Schoales & Lfroy's Irish Chancery Reports.
Sched.	Shedule
Sh. ct. Rep.....	Sheriff Court Reports.
Sim & St.	Simon & Stuart's Vice Chancellor's Reports.

SW.....	Southwestern.
The Yale L. J.	The Yale Law Journal.
V.R.....	Vermont Reports.
Vern.....	Vernon's Chancery Reports.
Ves.....	Vesey Junior's Chancery Reports.
W. & S.....	Wilson & Show's Appeal Cases.
W.L.R.	Weekly Law Report.
WR.....	Weekly Reporter.

SUMMARY

Specific implement as a remedy for breach of contract for the sale of goods is based on specific and certain grounds. For instance, the goods must be specific or ascertained, and the aggrieved party must apply for the remedy. These grounds are elemental in its nature as being an ordinary legal remedy.

Specific implement represents a general rule which can be applied in each case which carries similar requirements. It may become the criterion of solving the disputed contract whether it is for sale of goods or other categories of contract.

Grounds such as impossibility of performance of the obligation, exceptional hardship, i.e. "performance is too onerous for the debtor to perform", undue difficulty, and breach of contract by the pursuer, are considered the major restriction on the remedy in Scots and Iraqi systems. These grounds must be examined under the court discretion. However, such examination of these circumstances does not alter or change the nature of the remedy.

The aggrieved party must be willing to perform his obligation before specific implement can be granted.

Restricting the remedy of specific implement in Scots law to the purchaser and depriving the seller of it, is contrary to the true concept of the remedy. It seems that it is not an ordinary remedy at least for the aggrieved seller, who performs the contract he has undertaken, but has no opportunity to compel the purchaser, who wrongfully refused to take delivery of the goods.

Damages may be granted in addition to specific implement, when granting specific implement alone is not sufficient to indemnify the aggrieved party. Further, damages may be granted as an alternative to specific implement, in Scots law, when the obligation is not for delivery of specific or ascertained goods.. Further, if the obligation is of a negative character damages, not specific implement, should be granted concurrently with the remedy of interdict, which is based on two major factors, the

wrong and the court's discretionary power.

In Iraqi civil law specific performance is granted whenever there is a breach of obligation of any nature, and certain grounds must exist before it can be ordered.

The action of specific implement is usually amenable to the court's jurisdiction unless stipulated otherwise whether by the nature of the jurisdiction or the defender's circumstances, or the contract circumstances.

In raising the action of specific implement certain procedural steps must be followed. A summons or a petition is required, the substantial part of which is the crave which should be framed unambiguously and definitely in a way which lets the court know exactly and precisely what the pursuer, "plaintiff", asks for, otherwise the action may be rejected and the remedy, refused. This is vital, as granting a decree of specific implement on ambiguous and vague crave may lead to the imprisonment of the defaulting party.

After a decree of specific implement is pronounced may be affected by certain circumstances, especially when enforcement is rendered impossible. The court may either recall or amend the decree, otherwise such a decree will not be fulfilled.

Enforceability of the decree of specific implement in Scots law may be affected by the nature of the defender, as decree of specific implement is combined with imprisonment, and a party who cannot be imprisoned may avoid performance of the decree of specific implement. In Iraq the court may enforce the decree by ordering the refusing party to pay penalties regardless of his nature.

TABLE OF CONTENTS

Dedication.....	ii
Acknowledgment.....	iii
Abbreviation.....	iv
Summary.....	vii
Introduction.....	1
Foot-notes.....	7
Chapter one: Efficacy of specific implement as a remedy for breach of contract for the sale of goods	8
Introduction.....	8
Section One: Definition of specific implement as a remedy for breach of contract for the sale of goods.....	8
Sub-section 1: Definition of the remedy of specific implement in Scots law.....	9
1-In general contracts other than the sale of goods contract.....	9
2-In the sale of goods contract	10
2.1-Contempt of the court and imprisonment of the seller	12
2.2-Specific or ascertained goods	15
2. 2.1-Specific goods	15
2.2.2-Ascertained goods	18
Sub-section 2: Definition of specific performance in Iraqi civil law.....	24
General Background.....	24
1-In general contracts other than sale of goods contract.....	27
2-In the sale of goods contract	29
2.1-Imprisonment of the refusing party.....	32
2.2-Goods specifically identified, or described as specie, but become specific by individualisation.....	34
2.2.1-Goods specifically identified	34
2.2.2-Goods become specific by individualisation	35
Comment	37
Section two: The nature of specific implement as a remedy for breach of contract for the sale of goods.....	38
Sub-section 1: The nature of the remedy of specific implemet in Scots law.....	38

1-Specific implement is an ordinary legal remedy.....	39
2-Specific implement is not an equitable remedy.....	40
3-Specific implemenet is not a discretionary remedy.....	41
Sub-section: 2-The nature of the remedy of specific performance	
in Iraqi civil law	44
1-Specific performance is an ordinary legal remedy.....	44
2-Specific performance is not an equitable remedy.....	45
3-Specific performance is not a discretionary remedy.....	47
Comment	48
Conclusion	49
Foot-notes	51
Chapter Two: Grounds for granting and regusing	
the remedy ofspecific implement	63
Introduction	63
Section one: grounds for granting the remedy of specific implement.....	63
Sub-section 1: Grounds for granting specific implement in Scots law.....	63
A- <i>Pretium affectionis</i>	65
B- Uniqueness test	68
1-Specific or ascertained goods	71
2-The purchaser's application for specific implement.....	73
Sub-section 2: Grounds for granting specific performance in Iraqi civil law.....	77
-Pretium affectionis and uniqueness	77
1-goods must be specifically identified	79
2-Goods are discribed as specie, but become	
specific by individualisation	81
3-The creditor's application for specific performance.....	83
Comment	83
Section two: Grounds for refusing the remedy of specific implemet.....	84
Sub-section 1:Impossibility of performance of the obligation	84
1-Impossibility of performance of the obligation in Scots law.....	85
-Time of Impossibility.....	85
-Basis of Impossibility.....	86
-Ambiguity and vagueness of the crave or the decree itself.....	87
-The court's discretion.....	88

2-Impossibility of performance of the obligation in Iraqi law.....	89
-Basis of Impossibility.....	89
-Time of Impossibility.....	90
-The court's discretion.....	92
-Ambiguity and vagueness of the crave or the decree itself.....	92
Comment	94
Sub-section 2:Exceptional hardship	94
1-Exceptional Hardship in Scots law	95
-The concept of exceptional hardship.....	95
-The court's discretion.....	96
-Financial hardship.....	99
-Time of exceptional hardship.....	99
2-Performance too onerous for the debtor in Iraqi civil law.....	100
-The concept of performance "too onerous"	101
-The court's discretion and Financial hardship.....	102
-Time of exceptional hardship.....	104
Comment	105
Sub-section 3: Breach of contract of sale of goods by the purchaser	106
1- Breach of contract by the purchaser in Scots law	106
1.1- The duty of the purchaser to pay the price	108
1.2- The duty of the purchaser to take delivery of the goods.....	110
2- Breach of the contract by the purchaser in Iraqi civil law.....	111
2.1- payment of the price	112
2.2- Taking delivery of the goods	114
Comment	115
Sub-section 4: Breach of contract of sale of goods by the seller	116
1- Breach of contract of sale by the seller in Scots law	116
2- Breach of contract of sale by the seller in Iraqi civil law	117
2.1- Transference of ownership of the goods sold	118
2.2- Delivery of the goods sold	119
2.3- Warranty against disturbance and dispossession.....	120
2.3.1-Warranty against disturbance of the buyer in his enjoyment.	120
2.3.1.1:Disturbance by the seller himself.....	120
2.3.1.2:Disturbance by a third party.....	120

2.3.2- Warranty against dispossession.....	121
2.4- Warranty against defects.....	123
Comment	124
Conclusion.....	124
Foot-notes.....	125
Chapter Three: By or against whom specific implement as a remedy	
for breach of contract for sale of goods, is granted.....	145
Introduction.....	145
Section one: Granting specific implement by or against the purchaser.....	145
Sub-section 1: The purchaser in Scots law.....	145
Sub-section 2: The purchaser in Iraqi civil law.....	149
Comment.....	152
Section two: Granting specific implement by or against the seller.....	154
Sub-section 1: The seller in Scots law.....	154
Sub-section 2: The seller in Iraqi civil law.....	157
First: Legal Constraints.....	158
Second: Physical Constraints.....	159
1-Force Majeur.....	159
2-Impossibility of performing the obligation.....	160
Comment	161
Section three: Bankruptcy and Insolvency.....	162
Sub-section 1: Bankruptcy in Scots law.....	163
1.1- The bankrupt.....	163
1.2- The liquidator.....	166
1.3- The reciever.....	167
Sub-section 2: Insolvency in Iraqi civil law.....	169
2.1- The insolvent.....	169
1-The Custodian.....	170
1-The Custodian is the debtor himself.....	170
2-The Custodian is either a creditor	
or a stranger to the contract.....	171
2.2-The liquidator.....	172
Comment.....	173
Section four: Assigation, "Assignment"	175

Sub-section 1: Assignment in Scots law.....	175
Sub-section 2: Assignment in Iraqi civil law.....	179
Comment.....	181
Conclusion.....	181
Foot-notes.....	183
Chapter Four: Distinction between specific implement , damages and interdict, i.e., "specific performance as a remedy for breach of an obligation to refrain from doing something"	193
Introduction.....	193
Section one: Damages.....	193
Sub-section 1: Effect of adequacy of damages on the remedy of specific implement.....	194
1- Adequacy of damages in general.....	194
2- Influence of adequacy of damages on specific implement.....	201
2.1- Influence of adequacy test on specific implement on Scots law.....	201
2.2- Effect of adequacy of damages on specific performance in Iraqi civil law.....	205
Comment.....	206
Sub-section 2: Damages in addition to or in substitution for specific implement.....	207
1- Damages in addition to the remedy of specific implement	207
1.1-Damages in addition to the remedy of specific implement in Scots law.....	207
1.2- Damages in addition to the remedy of specific performance in Iraqi civil law.....	209
Comment	212
2- Damages in substitution for the remedy of specific implement	212
2.1- Damages in substitution for specific implement in Scots law	212
2.2- Damages in substitution for specific performance in Iraqi civil law.....	217
Comment	218

Section two: The remedy of Interdict and specific performance for breach of an obligation to refrain from doing something.....	219
sub-section 1:The nature of the remedy of interdict and specific performance for breach of an obligation to refrain from doing something...	219
1-The nature of the remedy of interdict in Scots law.....	220
2-The nature of specific performance for breach of an obligation to refrain from doing something in Iraqi civil law...	222
Comment.....	226
Sub-section 2:Grounds for granting and refusing the remedy of interdict and specific performance for breach of an obligation to refrain from doing something.....	227
1-Grounds for granting and refusing interdict in Scots law.....	228
2-Grounds for granting and refusing specific performance for breach of an obligation to refrain from doing something in Iraqi civil law.....	232
Comment	235
Conclusion	235
Foot-notes	237
Chapter Five: Jurisdiction and Procedures.....	246
Introduction.....	246
Section one: Jurisdiction.....	246
Sub-section 1: The Court of First Instance.....	246
1-The Sheriff Court in Scotland	246
2-The Court of First Instance in Iraq.....	252
Comment.....	255
Sub-section 2: The High Court.....	256
1-The Court of Session in Scotland.....	257
2-The Court of Appeal in Iraq.....	260
Comment.....	262
Section Two: Procedures.....	263
Sub-section 1: Proceedings of the action of specific implement.....	264
1-Proceedings of the action of specific implement in Scots law.....	264
1-Action for specific implement as an ordinary cause.....	265

-The Crave:.....	266
-The Condescence:.....	270
-Plea-in-law:.....	272
-Defence:.....	272
2-Action for specific implement as a summary cause.....	273
2-Proceedings of the action of specific performance	
In Iraqi civil law.....	275
Comment.....	280
Sub-section: 2-The judgment, "decree", of specific implement.....	281
1-The decree of specific implement in Scots law.....	281
2-The judgment, "the decree", of specific performance	
in Iraqi civil law.....	286
Comment.....	289
Sub-section: 3-Enforcement of the decree of specific implement.....	290
1-Enforcement of the decree of specific implement in Scots law...	290
2-Enforcement of the decree of specific performance	
in Iraqi civil law.....	295
Comment.....	299
Conclusion.....	300
Foot-notes.....	302
Final conclusion.....	317
Table of cases.....	328
Table of Egyptian and Iraqi Cases.....	336
Bibliography.....	341
Table of Articles.....	345
Table of Statutes.....	347

INTRODUCTION

Specific implement as a remedy for breach of a contract for the sale of goods is an order requiring the refusing party to perform his undertaking. It is called specific performance in Iraqi civil law and in English law. A party to a contract may request the court to order the party in breach to perform his undertakings.⁽¹⁾ Scots law favours specific implement compared with English law, which favours a claim of damages.⁽²⁾ It has been suggested "A contract which cannot be enforced by specific implement, in so far as regards its form and substance, is no contract at all, and cannot form the ground of an action of damages. There are cases of contracts which give ground for actions of damages, though not of implement, but that is not from defect of form but from considerations outside of the written instrument. For example the court will not decree implement of a contract which the party cannot possibly perform because that would be to condemn the party to perpetual imprisonment,....".⁽³⁾

It is an enforcement of the contracting party's undertaking of his obligation to perform precisely and accurately.⁽⁴⁾ It is the natural way of terminating any obligation which is open to every party to any obligation against any party in breach.⁽⁵⁾ Thus the buyer has the remedy as of right.⁽⁶⁾

Specific implement, however may be defeated for many reasons such as *Pretium affectionis* and the uniqueness test.⁽⁷⁾ *Pretium affectionis* means, "some reason for demanding the particular articles sold, rather than other articles of the same kind and value".⁽⁸⁾ So, can the remedy survive when such circumstances are introduced to it?

If the remedy of specific implement is an ordinary legal remedy,⁽⁹⁾ it should be based on certain legal conditions,⁽¹⁰⁾ where by the remedy might become a remedy for breach not only of a sale of goods contract, but of other contracts in general. Specific implement may be defeated by the operation of certain grounds.⁽¹¹⁾ These grounds may be either equitable,⁽¹²⁾ or legal.⁽¹³⁾ Damages, may be granted in lieu.⁽¹⁴⁾

Although specific implement in Scots law is an ordinary legal remedy, it is

restricted to one party in the sale of goods contract and to one obligation,⁽¹⁵⁾ i.e., "the purchaser, and the obligation of delivery of specific or ascertained goods". While in Iraqi civil law specific performance is open to every party to the contract and to every obligation.⁽¹⁶⁾

It is a decree issued by the court against the refusing party to perform what he has undertaken to do in Scots law, to do or not to do in Iraqi civil law. Therefore, the two systems differ.. To obtain a decree of specific implement, the pursuer should apply for the remedy clearly and unambiguously,⁽¹⁷⁾ for if the crave is ambiguous, the decree will not be pronounced, and even if pronounced will not be enforceable against the defaulting party.⁽¹⁸⁾

Specific implement is the most direct and just remedy for breach of a contract for the sale of goods. It is granted at the request of the aggrieved party to obtain what he has contracted for. Is not specific performance the natural end of any obligation against the refusing party?

The importance of the remedy arises from the fact that it is an ordinary legal remedy, and it is granted to the aggrieved party as a matter of right.⁽¹⁹⁾ Further, it is not an exceptional remedy. If specific implement is treated as an exceptional remedy, certain questions arise, namely:

1-Will the remedy be rendered a discretionary remedy? And, does it become an equitable remedy?

2-Will the court's discretionary power be increased?

3-Is there any risk of denying the right of the aggrieved party, because there is no rule or principle by which the court can examine whether the party is entitled to the remedy of specific implement?

4-Would involving the considerations of *pretium affectionis* and uniqueness in granting or refusing the remedy of specific implement require the use of the court's discretionary power?

5-May the importance of the remedy of specific implement be indicated by the

combination between the remedy and the sanction of imprisonment of the refusing party, bearing in mind imprisonment is a discretionary matter?

The remedy of specific implement as a case for study is subject to the following questions:

1-As specific implement in Scots law is considered an ordinary remedy and it is granted to the aggrieved party as a matter of right, why is it restricted only to the aggrieved purchaser in the sale of goods contract?

2-The fact that specific implement can only be ordered against the seller of goods in Scots law, raises contradiction and conflict in the concept and the nature of the remedy.

3-Is specific implement affected by the principle of "where complete justice cannot be achieved by damages, specific performance shall be granted, and vice-versa"?

Specific implement is an ordinary remedy, however, it is coupled with damages whether additionally or alternatively.

The purpose of this work is to define the circumstances under which the remedy of specific implement should be granted and refused, to draw line between a remedy of an ordinary legal nature, which is granted to the aggrieved party as a matter of right, and that of equitable, exceptional and discretionary nature, and to show that specific implement is not dominated by the court's discretion or by certain exceptional circumstances which may destroy the concept of the remedy.

The study proceeds by examining the case of the remedy of specific implement from different angles, such as the nature of the remedy, the definition, upon which grounds the remedy shall be granted or refused, by or against whom the remedy shall be granted or refused, the relationship between the remedy and other remedies, and procedures of the action of specific implement.

The study of the remedy of specific implement will be examined in five chapters. They are as follows:

Chapter One: The efficacy of specific implement as a remedy for breach of the contract for sale of goods. In this chapter, the definition of specific implement is considered.

The concept of specific implement sometimes gives the impression that it is not a remedy. It is performance of the obligation accurately and precisely. Nevertheless, it is a decree against the refusing party to perform what he has undertaken to do in Scots law, to do or not to do in Iraqi civil law.⁽²⁰⁾ The nature of the remedy is also examined. It is an ordinary remedy, which is granted as a matter of legal right to the aggrieved party. It is not discretionary or equitable remedy.

In Chapter Two, the grounds for granting or refusing the remedy of specific implement are considered. The remedy it is said, is based on certain legal grounds rather than discretionary conditions.

The grounds for refusing the remedy are dealt with exhaustively. These grounds are impossibility, exceptional hardship, breach of the contract by the buyer, and breach of the contract by the seller.

In Chapter Three, the case of who is entitled to the remedy of specific implement as a remedy for breach of the contract for sale of goods, or who is subject to perform his obligation specifically, is considered.

Four classes of persons are dealt with, namely: The purchaser, the seller, the insolvent, and the assignee or assignor. Each case is examined to show whether specific implement is an appropriate remedy, bearing in mind, the seller in Scots law is deprived of the right of specific implement against the refusing purchaser, no matter what sort of breach the purchaser has committed.

In Chapter Four, the distinction between specific implement, damages and the remedy of Interdict in Scots law is considered.

The question of damages, whether they are adequate or inadequate and to what extent this principle affects the remedy of specific implement, is also considered, as is the question, whether damages are granted in addition to or in substitution for the remedy of specific implement.

The remedies of interdict, and specific performance are examined. Interdict is essentially different from specific performance, that is an exceptional, discretionary and

equitable remedy. The granting of interdict is based on different grounds from that of specific implement in Scotland. While the remedy of specific performance for breach of an obligation to refrain from doing something is specific performance in Iraqi civil law.

In Chapter Five, Jurisdiction and Procedural aspects, are examined.

Procedures of the action of specific implement are considered in three steps; First raising the action and other proceedings of the action, where by the remedy of specific implement may be granted or refused, in accordance with the state of the summons, initial writ , or a petition

Secondly; the case of a decree "judgment" of specific implement which should be pronounced clearly and should specify precisely what should be done by the other party. The court should bear in mind the consequences of such a decree, for failing to perform the decree may expose the defaulter party to imprisonment. The court's discretion towards granting the decree, and its power if new circumstances have arisen after pronouncing the decree, are examined.

Finally, the case of enforcement of the decree of specific implement and the surrounding circumstances are examined.

The defaulting party, sometimes cannot be imprisoned because of its special nature, therefore the decree cannot be enforced against such a party. There are also cases where the court may either recall or amend the decree to suite the new situation.

Specific implement as a remedy for breach of a contract for the sale of goods is examined in both Scots and Iraqi laws comparatively under the following Chapter headings:

Chapter one: Efficacy of the remedy of specific implement in the contract for the sale of goods.

Chapter Two: The grounds for granting and refusing the remedy of specific implement

Chapter Three: By or against whom specific implement is granted.

Chapter Four: Distinction between specific implement, damages, and interdict.

Chapter Five: Jurisdiction and Procedures.

Conclusion.

FOOT-NOTES

- 1-D.M.Walker, The law of Civil Remedies in Scotland , 1st ed., Edinburgh, West Green & Son Ltd. 1974, at p.276.
- 2-Stewart v. Kennedy (1890) 17R. (H.L.) 1, 5, 9, 11.
- 3-Mc Arthur v. Lawson (1877) 4R. 1134, 1136, per Lord President Inglis.
- 4-Al-bakri, Abdul baqi, Commentary on Iraqi Civil Law, Performance of the obligation , vol, 3, Baghdad, 1979, at p.33.
- 5-Abdul baqi, Abdul fattah, Lessons in the principles of the obligation , Nahdhat Mussur Press, at pp.38-39; Article, (246/1) of Iraqi Civil Code, No, 149, of 1951.
- 6-Seaforth's Trs. v. Macaulay (1844) 7D. 180; Stewart v. Kennedy, supra, per Lord Watson, at pp.9-10; compare, J.J.Gow, The Mercantile and Industrial law of Scotland, 1st ed.Edinburgh, W.green & Son Ltd. 1964, pp.219.
- 7-Gloag, The Law of Contract , 2nd ed., W. Green & Son Ltd., Edinburgh, 1929, at p.657.
- 8-Ibid.
- 9-Stewart v. Kennedy, supra.
- 10-Sec.52 of the Sale of Goods Act 1979; compare, Stewart v.Kennedy, supra; J.J.Gow, Mercantile and Industrial law, supra, at pp.42-43
- 11-J.J.Gow, supra, at p.43; Mac Arthur v. Lawson, supra: see also, Sinclair v. Caithnes Flagstone Co. (1898) 25R. 703;; Gloag, contract, supra, at pp.657-660.
- 12-Such as, impossibility to perform, exceptional hardship, and undue difficulty.
- 13-Breach of the contract by the party who claims the remedy of specific implement.
- 14-Bell, Commentaries on the law of Scotland , 7th ed. 1870, at p. 478; Kyle v. Simm (1925) S.C. 425; J.J.Gow, Mercantile and Industrial law, op.cit.p219.
- 15-Sec.52 of the Sale of goods Act, 1979; J.J.Gow, Mercantile and Industrial law, supra, at p.218.
- 16-Article 246 (1) of Iraqi Civil Code.
- 17-Middleton v. Leslie (1892) 19R. 801; M'Kellar v. Dallas's Ltd.(1928) S.C. 503.; Hendry v. Marshall (1878) 5R. 687; Gloag, contract, supra, at p.661; D.M.Walker, Civil Remedies, supra at p.269.
- 18-D.M.Walker, Civil Remedies, supra, at pp.269-270.
- 19-Stair, The Institution of the law of Scotland , the University presses of Edinburgh and Glasgow, Western Printing Services Ltd., Bristol 1981,17, 16; Bell, principles of the law of Scotland, 4th ed. 1839, § 29. Stewart v. Kennedy, supra, per Lord Watson, at p.9.;J.J.Gow, Mercantile and Industrial law, supra, at p.219; Gloag, contract, op.cit. at p.655.
- 20-Article 252 of the Iraqi Civil Code.

CHAPTER ONE
EFFICACY OF THE REMEDY OF SPECIFIC IMPLEMENT IN
THE SALE OF GOODS CONTRACT

Introduction

Specific implement is a remedy granted against a refusing party to a contract, ordering him to perform precisely what he has undertaken to do, or to refrain from doing what he has undertaken not to do.⁽¹⁾

Such a concept may make one think that specific implement is not a remedy in the technical sense, for it reflects the concept of the performance of the obligation. It is the natural end of any obligation against the refusing party. Above all it is the duty of the contracting party to perform precisely what he has undertaken to do,⁽²⁾ or to refrain from doing what he has undertaken not to do. Specific implement is based on certain legal grounds. The concept of specific implement in Scots law must be considered in the light of conflicting principles which may cast doubt on its nature as an ordinary legal remedy. Two issues will each be examined as follows:

Section One: Definition of specific implement.

Section Two: The nature of specific implement

Section One:- Definition of Specific implement

Specific implement as an order against the party in breach of contract for the sale of goods may be considered as a remedy despite it is regarded as a natural end and as performance of the obligation. It is the ordinary legal right for the aggrieved party to have and to obtain what he has contracted for. It is his right to have his contract specifically performed, although it is not always possible for the other party to do so.

The definition of specific implement may raise the question of whether it is as an ordinary legal right resulting from the obligation between the contracting parties.

Specific implement carries the character of a remedy not only due to breach of contract for sale of goods, but also due to breach of other contracts other than the sale

of goods contract. Thus, the definition of specific implement will be considered in Scots and Iraqi systems respectively as follows:

Sub-section 1: Definition of the remedy of specific implement in

Scots law

To define specific implement as a remedy for breach of contract, two categories of contracts should be considered, namely:

1-In general contracts other than the sale of goods contract

Specific implement in Scotland is of a different nature from that of specific performance in English law.⁽³⁾ It is open to the creditor of the obligation as a matter of right.⁽⁴⁾ It is a judicial order against the refusing party to enforce him to perform the obligation, which he has undertaken.⁽⁵⁾ It was stated,⁽⁶⁾ "is frequently open to a party to a contract to request the court to ordain the other party specifically to implement his contract and to perform what he undertook to do, to obtain, that is a decree *ad factum praestandum*".

Is specific implement a remedy, or, is it just an order by the court against one of the contracting parties to perform his undertaking towards the other party?

The position of specific implement in Scots law is a little vague. The following arguments suggest it is not a remedy.

1-The natural end of any obligation is to perform what the contracting party has undertaken to do.⁽⁷⁾ Thus, ordering the party to fulfil his undertaking precisely is not a remedy given to the aggrieved party. It is performance of the obligation against the contracting party who has refused to perform his undertaking.

2-The court may order specific implement when no loss or damage has resulted to the pursuer from the defender's breach.⁽⁸⁾ It is performance of the obligation. Furthermore, there is an assumption that an obligation is enforceable by such a decree unless there is an equitable ground for refusing it.⁽⁹⁾ This indicates that specific implement is the way that the obligation should be terminated against the refusing party, for it was laid down,⁽¹⁰⁾ that a contract is not a contract at all if it cannot be enforced by specific implement.

3-Specific implement will be regarded as an appropriate remedy if the defender refuses to comply with the contract, and damages in addition to, will be decreed.⁽¹¹⁾ The grant of specific implement is not to compensate the party for loss or damages he has suffered, but it is to enable him to obtain what he has contracted for.⁽¹²⁾ It is to achieve his satisfaction.

Specific implement is open to the contracting party as a matter of right.⁽¹³⁾ Thus he can apply to the court to obtain a decree *ad factum praestandum*, "rather than merely compensation for non-implement".⁽¹⁴⁾

The principle is that specific implement is granted to the aggrieved party as an ordinary legal right,⁽¹⁵⁾ and, as Lord Ingilis observed, that "A contract which cannot be enforced by specific implement, in so far as regards its form and substance, is no contract at all, and cannot form the ground of an action of damages",⁽¹⁶⁾ indicate that specific implement is a general rule applicable to any obligation carries the basic elements for granting the remedy, unless there are certain circumstances of law or certain equitable grounds stand against granting it.⁽¹⁷⁾

Considering whether specific implement is a remedy or is a legal right is not of great practical importance, because, "both categories are equally legal rights there being correlative duties imposed on other persons, and sanctions for non-implement. A buyer has a legal right to have delivery of the goods sold to him, and he also has a legal right, failing delivery, to have specific implement of the contract or to recover damages for non-delivery".⁽¹⁸⁾ Remedies in general are not distinct from rights, but kinds of legal rights.⁽¹⁹⁾ Specific implement is granted as a matter of legal right to the aggrieved party. Consequently, it is a remedy against the party in breach to fulfil his obligation, and to achieve the pursuer's satisfaction from his contract.

2-In the Sale of Goods Contract

The general rule of Scots law is, that, a party who has contracted to obtain a particular article is entitled to have it and receive the aid of the court, by assuring that,

by a decree *ad factum praestandum* that article should be handed over to him.⁽²⁰⁾ Furthermore, it has been stated as a general rule of contract,⁽²¹⁾ that a contract, which, "cannot be enforced by specific implementis not contract at all". Thus, unless there are equitable grounds or grounds in law, specific implement cannot be refused.⁽²²⁾

Consequently it seems that any obligation, especially, a sale of goods contract, is enforceable by such a decree.

The primary right of the creditor, (the buyer in the case of the sale of goods), in a contractual obligation is, to have his contract specifically performed, for Scots law has conferred such a right only on the buyer,⁽²³⁾ although, Scots law allows claim for specific implement generally,⁽²⁴⁾ rather than money damages. Moreover, in respect of contracts for moveables, specific implement is competent when the obligation is to deliver a specific article (goods).⁽²⁵⁾

It is submitted, that since specific implement as a remedy in Scotland is one of the ordinary remedies, ⁽²⁶⁾ and it is considered by Lord President Inglis as a criterion in considering whether a contract exists or not,⁽²⁷⁾ and as long as it is open to the buyer, in the contract of sale of goods. The same principles govern specific implement as a remedy for breach of any obligation "contract", whether it is sale of goods or land...etc. All are governed by the same rules and affected by the circumstances which stand as a bar against the remedy being granted. Such concurrence and similarity between specific implement as a remedy for breach of contract of sale of goods, or as a remedy for breach of other contracts, appears from the following principles:

1- The subject-matter of the obligation, whatsoever its nature, should be and must be specific⁽²⁸⁾ in order to grant specific implement, for if it is neither specific nor ascertained, no specific implement can be granted.

2- The crave,⁽²⁹⁾ should be precise, definite and unambiguous, as it would be impossible to crave specific implement unambiguously and indefinitely when the subject-matter of the obligation is not specific. Further, indefinite and vague crave

leads to a decree in a vague terms or indefinite, which cannot be enforced thereafter.⁽³⁰⁾ In addition, it has been pointed out,⁽³¹⁾ that, "if the contract itself is vague or indefinite it may become void, or at least not have indicated the defender's duty of implement with such precision as to make it reasonable to make an order against him that he implemented it". Moreover, "it must be clear what he should have done before the court will order him to do it".⁽³²⁾

3-The grounds and circumstances, for refusing to grant specific implement as a remedy for breach of the contract for the sale of goods apply to breaches of other obligations. Such grounds include, impossibility of performing specifically,⁽³³⁾ exceptional hardship,⁽³⁴⁾ unenforceability of the decree itself.⁽³⁵⁾ Therefore, specific implement can be defined as follows:

A decree issued under certain circumstances ordering the refusing party, who may be imprisoned if he refuses, to fulfil what he has undertaken to do precisely, where the obligation is of specific or ascertained subject-matter.

The above definition, it is believed, covers the whole area of the remedy whether it arises under the sale of goods contract or in other contracts, because specific implement is subject to the same rules and principles and is affected by the same circumstances wherever it operates.⁽³⁶⁾

The definition of specific implement leads to a consideration of three essential matters, namely:

- 1-**The circumstances of granting and refusing the remedy of specific implement.
- 2-** Contempt of court and imprisonment of the refusing seller.
- 3-** Specific or ascertained subject-matter.

The circumstances under which the decree is granted or refused will be fully, considered in chapter two of this work.⁽³⁷⁾

2.1-Contempt of court and imprisonment of the refusing seller

Specific implement as has already been stated, is an order issued by the court to compel a defender (the seller), to fulfil his obligation precisely. If he has refused to

comply with such an order he is considered to have committed a contempt of court. The other contracting party, (the buyer), may insist on him implementing his obligation specifically.⁽³⁸⁾

The court has jurisdiction to imprison the refusing party for up to six months, if it is satisfied that the contracting party against whom the decree was granted is wilfully refusing to comply with it.⁽³⁹⁾ The Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 in Sec.1, provides; that, "1-No person shall be apprehended or imprisoned on account of his failure to comply with a decree *ad factum praestandum* except in accordance with the following provisions:

(i):On an application by the person in right of such a decree,....., to the court by which the decree was granted, the court may if it is satisfied that the person against whom such a decree was granted,....., is wilfully refusing to comply with the decree, grant warrant for his imprisonment for any period not exceeding six months".

The onus, it was stated, in such a case is, "on the creditor to show wilful refusal and it is, presumably, necessary that a charge should have expired without implement of the decree".⁽⁴⁰⁾ The contemnor will be imprisoned if he disobeys the court's decree wilfully. It is questionable whether the party in breach can be imprisoned, when unable to perform such order.

Imprisonment is considered as an appropriate way of enforcing the contract only where a party refuses to comply with the decree, when able to fulfil it.⁽⁴¹⁾ Therefore, such imprisonment is an appropriate way of ordering the performance of the obligation, for it was laid down in Stark's Trustees v. Duncan,⁽⁴²⁾ that, "a person is not entitled to disobey an order made by the court, and then to claim to show that the court ought not to have made the order". If the party cannot comply with the decree of specific implement by reason of either, that performance of the obligation has become impossible, or new circumstances have arisen, by which the remedy is rendered either exceptionally hard on him to perform, or even unduly difficult,⁽⁴³⁾ the refusing party, it is believed, cannot be condemned as a contemnor and he is not subject to

imprisonment, in accordance with the spirit and the meaning of the provisions of Sec. 1, of the Act, which states, "1-.....is wilfully refusing to comply with the decree.....". It is of course, subject to the satisfaction of the court which considers the intention of the party in doing so and the surrounding circumstances. The court, in case of contempt should exercise discretion, and when determining whether any conduct forms contempt must exclude from its consideration all matters which might prejudice or be thought to prejudice its judgment.⁽⁴⁴⁾ Furthermore, "there is no point in ordering him to perform and thus an order that can only be enforced on the person of the defaulter will not be issued when he cannot be enforced to comply".⁽⁴⁵⁾ A decree *ad factum praestandum* is regarded as unenforceable,⁽⁴⁶⁾ if compliance with it is impossible, even if the impossibility due to the refusing party's own fault.⁽⁴⁷⁾

Imprisonment of the defaulter is not a penalty.⁽⁴⁸⁾ It is an "invocation of the power inherent in every civil court to ordain performance of acts within its jurisdiction, and in default to commit the defaulter to prison".⁽⁴⁹⁾ It is a primary sanction for non-implementation of the court's order "*ad factum praestandum*", which has been disobeyed by one party who will be imprisoned until he convinces the court of his readiness to fulfil the decree.⁽⁵⁰⁾

If a contracting party is a corporate body, no imprisonment can be pronounced against it although it can carry out the obligation.⁽⁵¹⁾ Imprisonment of all the members is out of the question.⁽⁵²⁾ Where the defender is a foreigner, subject to the jurisdiction of the Scots Courts only on some exceptional grounds, these Courts, as they have no power to enforce a *decree ad factum praestandum* by his imprisonment, will not pronounce a decree which would be futile.⁽⁵³⁾

It has already been noticed that the purpose of imprisonment is the performance of the obligation by the defaulting party. However, what if the defaulting party still insists on not performing his obligation even after having been imprisoned?

The contemnor cannot be imprisoned for more than six months.⁽⁵⁴⁾ He must be freed thereafter. So, if after he has been freed he still refuses to comply with the

decree, the court must order him to pay damages. Nevertheless, according to Sec. 1(1) of Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, "where the decree is for delivery of corporeal movables, the court may grant a warrant to officers of court to search any premises in the occupation of the respondent". "or the court will consider the case and order damages" as appears to the court to be just and equitable in the circumstances".⁽⁵⁵⁾ Damages are not, always, the most valuable remedy to the aggrieved party. He may wish to have what he has contracted for. It seems, that, there is no way to enforce the refusing party to comply with the decree after having him imprisoned, even if he still has the goods in his possession somewhere unknown. Therefore, it is suggested, that the best way to order the contemnor to comply with the decree is, to order him to pay a penalty beside his imprisonment. This task can be done by the court within its discretionary power.

2.2-Specific or ascertained goods

Goods, which contribute to form the definition and the concept of specific implement, fall into two categories. They are either specific or ascertained. Therefore, they will be examined as follows:

2.2.1-Specific goods

To have specific implement ordered as a remedy for breach of contract of sale of goods according to Sec. 52 (1) of the Sale of Goods Act 1979 there must be delivery of specific or ascertained goods.

Specific goods are defined as, goods which are identified and agreed upon at the time of making the sale contract.⁽⁵⁶⁾ Thus, according to another argument,⁽⁵⁷⁾ unless they are specific at the time of making the contract, they cannot become so in a later stage. Furthermore, it has been stated,⁽⁵⁸⁾ that, "specific goods are by the agreement of the parties designated as unique goods which can be delivered by the seller in performance of his obligation, their individuality is established, so that there is no room for further selection or substitution".

It is clearly enough, that, goods might be "identified and agreed upon" in order to become specific by either party describing them precisely and specifying them accurately. For instance, the white car in the garage in my house, the black cow in my farm, provided that, there is no other car or cow identical to them in the referred places.⁽⁵⁹⁾

Specific implement where the goods are non-existent, or future:

It was stated,⁽⁶⁰⁾ that the question of whether goods must be in existence at the time of making the contract, has not been determined. Nevertheless, the definition of specific goods, is not conditional on the goods existing when the contract is made.⁽⁶¹⁾ That may raise a conflict with the definition of specific goods, which is "goods are identified and agreed upon at the time of making the sale contract".⁽⁶²⁾ The goods may be described definitely, particularly and specifically although they are non-existent. The contracting parties will agree upon their nature and specification at the time of making the contract. For instance, the 100 cars of Toyota to be produced in my factory in the coming year, or as in the case of, Reardon Smith line Ltd. v. Yngvar Hansen Tangen,⁽⁶³⁾ the vessel to be built, although it was identified only by serial construction number. The individuality of specific goods must be established, so that the seller can deliver them in performance of his obligation,⁽⁶⁴⁾ without any room for further selection or substitution.⁽⁶⁵⁾ Thus, non-existent goods are specific, provided that they are identified and agreed upon by the contracting parties at the time of making the contract. The opinion of Lord Atkin,⁽⁶⁶⁾ to the contrary, that the Act is clearly and plain enough in identifying the meaning of the specific goods, and must be applied in the same sense. Furthermore, non-existent goods are not excluded by the provision of Sec. 61(1) of the Sale of Goods Act 1979.

The same arguments may be applied to future goods. Treitel suggests there is no linguistic difficulty or logical reason, as regards, identifying and agreeing on such goods as specific goods, as the subject-matter is identified and agreed upon even if it does not exist at the time the contract is made.⁽⁶⁷⁾ In Howell v. Coupland,⁽⁶⁸⁾ it was

stated, that the authorities on such a matter are confused, but, Benjamin,⁽⁶⁹⁾ pointed out that, "there is nothing which requires us to read in to the definition of "specific goods" a condition that they should presently exist". Others,⁽⁷⁰⁾ have doubted whether future goods can ever be specific. However it was stated,⁽⁷¹⁾ that "it is not true that all future goods automatically fall into that category", (unascertained goods), for in Varley v. Whipp,⁽⁷²⁾ the court considered a reaping machine to be specific goods, when the contract was for the sale of a specific second-hand reaping machine which at the time of making the contract, the seller did not possess and had still to acquire. It is submitted, therefore, that future goods can be a subject-matter of specific implement, so long as, they are identified and agreed upon by the parties, and they can be considered as a specific goods when they are sufficiently identified.

It seems, that the main basis for considering the goods as specific, is the agreement of the contracting parties in respect of the goods, specifying them in a way leads to no misleading, ambiguity or vagueness about their nature, quality or quantity, no matter whether they presently exist or not, or whether they have been produced or will be produced in the future.

As regards the distinction between future and non-existent goods, and to what extent such distinction affects the grant of the remedy, it appears that there is in fact no distinction between these two categories of goods. The remedy can be granted whenever the goods are agreed upon by the contracting parties, they become the subject-matter of the remedy.

Despite all the above arguments and discussion concerning the concept of specific goods, and despite the definition in the Sale of Goods Act 1979, Sec. 61, uncertainty and doubt remains concerning the concept of specific goods in Scots law.

It is not clear, whether Scots law adopts English law's view or it has his own view. For instance, in Sutherland v Montrose Shipbuilding Co.,⁽⁷³⁾ it was laid down by Lord Cowan, that, "it is vain to say, in such a case, where specific vessel had been contracted for and built, and was ready to be delivered, delivery of it should have been

refused". Furthermore, Bell,⁽⁷⁴⁾ stated, that "In relation to the subject, sale may be:

1- of a certain specific thing, clearly distinguished in description or set apart for the buyer....". Further, it was stated,⁽⁷⁵⁾ that, "of every such specific article bought, delivery may be legally enforced from the seller...". Also the subject according to Bell,⁽⁷⁶⁾ can be "of a commodity or thing to be prepared or provided for delivery at some future time".

Again, "of a thing to be made or provided by the seller the same thing to be furnished, it will be at the buyer's risk".⁽⁷⁷⁾ The seller may be obliged to deliver a specific article, "*a fortiori* is this principle true in the case of a ship, contracted to be built".⁽⁷⁸⁾ So, "it cannot be thought doubtful that the vessel contracted for, when finished and ready to be launched, although after the period stipulated by the contract, might have been claimed by the pursuer, and delivery compelled by the action".⁽⁷⁹⁾

Thus, Scots law regards non-existent and future goods, as specific, avoiding the discussions and the arguments, in relation to the concept of specific goods, which have taken place in English law, by relying on the definition of specific goods, under Sec. 61 (1) of the Sale of Goods Act 1979

Scots law considers that future goods may be specific and may become thereafter the subject-matter of a decree of specific implement. Thus it was stated that, "there is nothing to prevent the parties dispensing with appropriation, and the seller, who has induced a buyer to rely on his assertion of an immediate passing of the property cannot be heard to deny that he has not appropriated the goods to the contract".⁽⁸⁰⁾

2.2.2: Ascertained goods

The Sale of Goods Act 1979 contains no precise definition of ascertained goods. Sec.61 provides that "where there is a contract for sale of unascertained goods no property ...is transferred to the buyer unless and until the goods are ascertained". The Act does not tell how such goods are ascertained. Furthermore, Sec.17 (1) provides that, " where there is a contract for the sale of specific or ascertained goods the property in them is transferred..". Sec. 52 (1) also refers to ascertained goods. The word

"ascertained" is not defined by the Act.⁽⁸¹⁾ However, it was stated,⁽⁸²⁾ that ascertained goods are " goods which at the time the contract was made were not identified and agreed upon but which since its inception have become so". Further, Benjamin suggested a definition based on the definition of specific goods in that specific goods by Sec. 61(1) mean: "goods identified and agreed on at the time a contract of sale is made, and "unascertained goods" means "goods are not identified and agreed on at that time".⁽⁸³⁾ Conversely, ascertained goods are goods identified and agreed on at the time of making the contract.⁽⁸⁴⁾

Although Sec.16 of the Sale of Goods Act 1979, refers to unascertained goods become ascertained, the Act does not define unascertained goods. Nevertheless, it was pointed out ⁽⁸⁵⁾ that ascertained goods mean, "goods originally unascertained, which are identified in accordance with the parties agreement after the contract of sale is made". Thus, ascertained in Sec. 52 of the Sale of Goods Act 1979, means the same thing as specific.⁽⁸⁶⁾ In the leading case of Re Wait,⁽⁸⁷⁾ Lord Atkin expressed the opinion that, ascertained goods meant, goods, which were identified according to the agreement of the contracting parties after the obligation was entered into. Conversely Sankey J., in Thames Sack & Bag Co. v. Knowles & Co. Ltd.,⁽⁸⁸⁾ stated that ascertained goods mean, "that the individuality of the goods must in some way be found out and when it is, then the goods have been ascertained". In addition, goods can be regarded as an identified and ascertained goods if they are specific and in a certain, specific place.⁽⁸⁹⁾ Nevertheless, an unappropriated part of ascertained bulk cannot be considered as ascertained goods for the purpose of Sec. 52 in order to grant specific performance.⁽⁹⁰⁾

In Wait & James v. Midland Bank,⁽⁹¹⁾ it was stated, by Roche J. that, "ascertainment, might take place by any method which is satisfactory to the parties concerned". Moreover, a part of the goods purchased from a bulk which is specified, may become ascertained by process of exhaustion, which, it was said to be "the only effective way of ascertaining the goods which are in bulk".⁽⁹²⁾

In the above case,⁽⁹³⁾ W & J sold 250,750 and 250 quarter of wheat by three separate contracts. The buyer took delivery of 400 quarter only of the total amount sold to them. The remaining 850 quarter being left in the warehouse. It was held, "that what remained in the warehouse alone, become by process of exhaustion ascertained goods within Sec. 16 of the Sale of Goods Act...".⁽⁹⁴⁾ If the specified bulk is sold by more than one contract when the goods of one purchaser are separated from the bulk, these goods will be ascertained, "notwithstanding that the bulk has been allocated distinctly to the several contracts".⁽⁹⁵⁾ In addition the goods are considered ascertained even if all these contracts are made with a single buyer.⁽⁹⁶⁾

The more accepted view, considering the concept and the definition of ascertained goods is, Lord Atkin's view, in the leading case of Re Wait.⁽⁹⁷⁾ Wait bought 1000 tons of western white wheat. he later sold 500 tons to a sub-purchaser, who paid by cheque before receiving the goods. Wait paid the cheque into his bank. He then become bankrupt. The sub-purchaser having recieved no goods, claimed specific performance. His claim was rejected on the ground that the 500 tons of wheat were neither specific nor ascertained, "as they had never been appropriated to the contract" of sale.

In examining Atkin's L.J.'s view,⁽⁹⁸⁾ Sankey J.'s view,⁽⁹⁹⁾ and Roche J.'s view,⁽¹⁰⁰⁾ it appears, that each opinion complements the other. Nevertheless, there is a difference between Atkin L.J.'s view and Sankey J.'s view,⁽¹⁰¹⁾ for Atkin L.J.'s opinion requires the identification in accordance with the agreement after the formation of the obligation. Whereas Sankey J.'s view,⁽¹⁰²⁾ requires only that, "any process of identification will do even if the agreement contained no provision to that end, and, even if the process of identification was not in accordance with such provision on the matter as the agreement did contain".

Again, Roche J's opinion is, that, ascertainment can be achieved by any method which satisfies the contracting parties.⁽¹⁰³⁾ Therefore, it seems, that any subsequent identification will constitute ascertainment of the goods.⁽¹⁰⁴⁾

In Karlshamns Oliefabriker v. Eastport Navigation Corporation, The Elafi, (105) by four identical contracts, the claimants bought from East Asiatic Co.Ltd. 6000 tonnes of fair merchantable copra c.i.f. Karlshamn, 5 per cent. more or less in seller's option. The contracts provided inter alia that the weight deviated between 95 per cent. and 102 per cent. of the mean contract quantity was to be settled at contract price, that the weight delivered in excess of 102 per cent. was to be accepted at market price or the contract price whichever was the lower. In June or July 1975 the respondent owners' vessel Elafi loaded a cargo of 22000 tonnes for the ICEC. Part of the cargo was covered by 12 bills of lading each acknowledging the receipt of 500 tonnes and stating the destination as Karlshamn. The remainder of the cargo was to be delivered at Rotterdam and Hamburg. While the vessel en route to Europe ICEC negotiated the bills to E.A.Ltd. who forwarded them endorsed in bank to the claimants. On August 13, ICEC sold to Frank Fehr and Co. Ltd. 500 tonnes of cargo and on the same day Frank Fehr resold the goods to the claimants. On August 24, the vessel arrived at Karlshamn and commenced discharge. During the night of August 26/27, water entered hold 4 resulting in damages to about 825 tonnes. The whole cargo was delivered ex ship to the claimants in a single lot without separation of the portions covered by the bill of lading or the Frank Fehr contract. The claimants claimed damages from the respondents. They claimed a right of suit in tort as the owners of the goods, on the ground that they were the persons to whom the property in the goods passed.

It was held, "that (1):if the entire cargo had been sold to the claimants under a single contract,....., it was very probable that the property would have passed to the claimants.

(2):if half of the cargo was sold to each of two buyers no property would pass until the goods had been discharged and physical separation effected between the goods delivered under each contract and there could be no claim in tort in the absence of any ascertainment...

(3):.....; where there were multiple contracts of sale in the hands of different buyers

in relation to undivided bulk, the property did not pass until the goods were not only physically separated but separated in a way enabled an individual buyer to say that a particular portion had become his property under his contract of sale.

(7):on the of bills of lading claim, if there had been no sale of the surplus to....., the claimants on representation of the bills of lading could not have insisted on delivery to them of the entire quantity remaining on board; and bills of lading which had become, by process of exhaustion the only remaining documents of the title in respect of an undifferentated bulk did not become documents of the title for the whole of the bulk."

In recent case, Re London Wine Co. (Shippers),⁽¹⁰⁶⁾ L.W.C. ran a scheme whereby persons could purchase wine for investment. The buyer bought wine from LWC which, under the terms of the contract of sale, would remain in the warehouse in bulk. All wine bought from LWC remained in bulk storage and was not divided up or allocated to any particular purchaser prior to delivery. The purchaser was provided with document of title confirming him to be the owner of the wine that he had bought. The company's bank borrowings were secured by a floating charge over its assets. In August 1974, the bank appointed a receiver who sought directions from the court with respect to three consignments of wines held for purchasers by L.W.C. In each of the categories no appropriation had taken place and it was impossible to specify which particular quantity of wine comprised in the bulk stored in the warehouse were attributable to any one contract of sale. It was held, that, in each case, the wine remained the company's property.

"The cases of wine for each particular purchaser were unascertained". "It was not possible to ascertain which cases belonged to which purchaser".

The concept of ascertained goods, in Scots law has not been considered in depth, by either the judiciary or the jurisprudence.

It was said once, by T.G.Wright,⁽¹⁰⁷⁾ that, "In Scotland, the right to compel delivery is competent to a buyer although the goods are not specific, if it be in the power of the seller to make them so and deliver them. If, for instance, the sale be of

part of a whole, the seller may be compelled to separate and deliver without having the option of paying damages for breach of contract and retaining the goods". Therefore, it would be reasonable to think that ascertained goods in Scotland are goods, which become specific after the formation of the contract, or, where it is in the seller's power to specify and identify by separating them from a bulk, they are so identified.

In Hayman & Son. v. M'Lintock,⁽¹⁰⁸⁾ a flour merchant owned large quantity of bags of flour deposited in a warehouse. He contracted to sell some of the bags. He handed the purchaser an order for delivery addressed to the warehouse. The custodier acknowledged that the sacks were held on the purchaser's account. It was held: "that, as the goods sold were unascertained, no property in them had passed to the purchaser...". It was laid down by the Lord President,⁽¹⁰⁹⁾ that "these flour bags were not separately marked and although, doubtless, if the buyer here had gone to storekeeper and had got him to put aside the sacks or mark them, or put them into another room, that would have passed the property".

In Pochin & Co. v. Robinows & Marjoribanks,⁽¹¹⁰⁾ Lord President Inglis stated that, constructive delivery cannot be effected, since the goods remain "unascertained portion of their general stock".

The goods should be specific in the sense that, they may be capable of being identified either as one total undivided quantity stored in a certain place or a particular warehouse, or, at least, a specified quantity as a part of a specified whole.⁽¹¹¹⁾ Again, "to permit of an act of appropriation the goods must be individualised as a distinct entity".⁽¹¹²⁾

It seems, that Scots law concurs with the English law, for the following reasons:

1-There is no special definition of the concept of "ascertained goods" in Scots law which differs from English law.

2-Ascertained goods, according to many scholars, have the same concept and definition in both systems, for Scots scholars rely heavily on the English authorities. It was stated, that ⁽¹¹³⁾ "specific implement is a remedy open only to the buyer where the

sale is of a specific article or of ascertained goods, i.e. probably goods made specific after the contract of sale, subsequently manufactured, acquired or appropriated to the contract, or such that their individuality has been found out".

The above statement of a Scots scholar, relied heavily on the cases such as, Re Wait,⁽¹¹⁴⁾ Thames Sack Co. v. Knowles.⁽¹¹⁵⁾

Special reference is made to the cases of Laurie & Morewood v. Dudian,⁽¹¹⁶⁾ and, to Wait & James v. Midland Bank,⁽¹¹⁷⁾ in the work of another Scots scholar,⁽¹¹⁸⁾ concerning the concept and the definition of ascertained goods.

3-It was stated that, ascertained goods,⁽¹¹⁹⁾ mean, "goods which at the time the contract was made were not identified and agreed upon but which since its inception has become so". Furthermore, in the case of Hayman v. M'Lintock,⁽¹²⁰⁾ the goods must be separated and marked in order to be identified and specified from the other goods. Arguably, therefore the definition of ascertained goods in the case of Re Wait,⁽¹²¹⁾ is followed by Scots law.

Sub-Section 2: Definition of the remedy of specific performance in

Iraqi civil law

General Background

In its wider sense, Iraqi civil law is the most important branch of law regulating the private relationship of individuals in society. It is the basic source of private law. For instance, law of contract, commercial law, the law of civil remedies, law of persons, law of property, Agricultural law, private international law, are parts of civil law.

The most fundamental legislation put in the statute books in Iraq is the Civil Code No 40 of 1951. Until 1951 it was the Ottoman Civil Code which was the basic authority for the civil law of Iraq.

The chairman of the drafting committee was the late professor Abdul razzaq Al-sanhoori of Egypt. He held the view that the Iraqi Civil Code could be the same as the Egyptian Civil Code No.131 of 1948, which was influenced by the French Civil Code. Al-sanhoori tried to persuade the Iraqi committee to adopt the Egyptian Civil Code

without much modification. The Iraqi members of the drafting committee objected to copying the Egyptian Civil Code on the grounds that they wished to take account the judicial views of all schools of Islamic law and jurisprudence, and adopt the view which they would find most suitable to the Iraqi nationals in modern setting.

The committee made a compromise which was to use the Islamic method of presentation as in the Egyptian Civil Code, but with the provision that the Iraqi Civil Code must be drawn in order of priority, from the various schools of Islamic law and jurisprudence, and the Egyptian Civil Code should be consulted and drawn upon only as secondary source in comparison to the Islamic jurisprudence. As a result to this compromise the Iraqi Civil Code includes a great many more provisions derived from Islamic law and Jurisprudence than does the Egyptian Civil Code.

The Iraqi Civil Code, is distinct from the Syrian Civil Code of 1949 and the Libyan Civil Code of 1953, for these two codes are based substantially on the Egyptian Civil Code.

As regards remedies in Iraqi Civil Code, they fall into two categories. (1) self-help remedies, (2) Judicial remedies. Remedies of self-help are four categories, namely:

1-Right to avoid the contract because an option.

2-Right to withhold the payment under the doctrine of mutuality (If on party is in breach to his contract the other party is entitled to withhold performance of the contract). this is called in the Iraqi Civil Code as "haq-al-habis" (right to withhold).

3-Right to set-off. If a contracting party commits a breach to his contract, the other party (the aggrieved party) can seek redress, by way of set-off in specified circumstances.

The judicial remedies also include many categories, namely:

1-Rescission: This remedy is developed under Islamic legal concept of various "options" which allows the contracting party to withdraw from the contract under certain circumstances.

2-Award of damages: This category is based on the principle of "La-zarar-wla-

ziraar" (No losses should be inflicted)

3-Specific performance: A remedy entitles the aggrieved party to require performance of the obligation by the debtor. It is based on the Islamic principle of "ufu-bil-uhud" (fulfil your contract).

Specific performance has a very wide concept in islamic jurisprudence. It is a remedy can cover all the contracts.

Interestingly the Iraqi civil law jurisprudence and scholars in general have shown no sign of concern towards the influence of the islamic jurisprudence on specific performance, despite the principle of "ufu-bil-uqud" (fulfil your contracts) covers every contract.

This study will avoid considering specific performance under Islamic law and jurisprudence, for the following reasons:

1-The principle "ufu-bil-uqud" (fulfil your contracts) is a very wide principle and covers the contracts in general.

2-It has been pointed out,⁽¹²²⁾ that "Islamic jurists never addressed themselves to an Islamic general theory of contract applicable to all types of contracts. As it can be observed from all traditional text on Islamic law, the manual on law of contract contain rules governing a number of individual kinds of contracts but not a general concept of contract." Thus it is hard to follow the rules and principles of specific performance in the Islamic jurisprudence.

3-The Qur'anic verse of "ufu-bil-uqud" (fulfil your contract) covers all possible contracts however different they may be.⁽¹²³⁾

4-Lack of materials and references may be another ostacle to achieve comparative study with the Islamic law and jurisprudence.

To define specific performance in Iraqi civil law, two categories of contracts will be considered, namely:

1-In general contracts other than sale of goods contract

Specific performance is, the performance of the obligation by the debtor precisely

and accurately within the terms of the contract. It is an enforcement of the debtor's performance of what he has undertaken to do or not to do.⁽¹²⁴⁾ It is the natural way of terminating any obligation against any party in breach to that obligation.⁽¹²⁵⁾ It is open to every creditor in any contract.⁽¹²⁶⁾

The debtor cannot be compelled to perform, unless the creditor applies for specific performance.⁽¹²⁷⁾ Specific performance is considered as a natural end of the obligation against the refusing party. Thus, it may be asked why it cannot take place without the court's order? This in turn questions the definition of specific performance; whether it is a remedy to compensate the aggrieved party against the failure of the debtor, or merely an order to perform the obligation against the party in breach.

Specific performance may be divided into voluntary specific performance, and obligatory specific performance. Performing the obligation voluntarily does not concern the court and raises no problem against either contracting party.⁽¹²⁸⁾

The question of whether specific performance as a remedy or as a performance of the obligation, has been fully considered in Iraqi civil law more than in Scots law.

Specific performance, it is said, is the most important way, if not the only way to perform the obligation.⁽¹²⁹⁾ Furthermore, the debtor will not be held liable when the creditor applies for specific performance, provided that, performance is still possible.⁽¹³⁰⁾ Whereas, if performance of the obligation has become impossible by reason of the debtor's fault, he is held liable to the creditor, unless the impossibility arose beyond his control.⁽¹³¹⁾

If granting specific performance is possible and it has been demanded by the creditor, the court will order it, and so far, the debtor is not liable, i.e. "his contractual liability will not arise".⁽¹³²⁾

It is questionable whether the function of specific performance to compensate the aggrieved party, or, is it merely a mean of giving the aggrieved party his right to have what he has contracted for.

Every party to a contract should perform what he has undertaken to do. Refusing to do so may expose the debtor to the court's order, which can be enforced by an order

of the Execution Administration Office.⁽¹³³⁾ For instance, when the obligation can be performed by way of taking the specific goods from the debtor or by building a house by another builder instead of the refusing party, such performance cannot be regarded as a compensation for the creditor, although, it is performance of the obligation. Furthermore, if a breach of a contract has taken place by one of the contracting parties, compensation is given in lieu of performance, and such compensation, it was stated,⁽¹³⁴⁾ cannot be regarded as a specific performance. Therefore, it is submitted, that the essence of principle of specific performance in Iraqi civil law, is not as a remedy for breach of contract, but as an order by the court to compel the refusing party to perform his undertaking specifically for the following reasons:

1-The remedy for breach of contract, such as damages or "compensation in lieu" cannot be regarded as a performance of the obligation. It has been pointed out,⁽¹³⁵⁾ that, it is as a financial sanction against the refusing party as a consequence of his refusal to perform his obligation.

2-Damages may be granted in addition to specific performance for any loss or delay, by reason of, the debtor's fault.⁽¹³⁶⁾ Thus the aggrieved party may be deemed to have been compensated by obtaining damages.

3-Monetary remedies, especially damages, are usually granted against the debtor for his wilful non-performance. Where performance of the obligation is possible and the aggrieved party has not suffered any loss, there is no need for damages.

4-Monetary remedies are always sought, when performance is impossible, exceptionally hard or unduly difficult, as well as other circumstances.⁽¹³⁷⁾

Thus, the principles of Iraqi civil law indicate that specific performance is not a remedy. It is an order against the refusing party whether to perform what he has undertaken to do, or to refrain from doing what he has undertaken not to do. Nevertheless, such an order, it is believed, carries the aim and the purpose of any other remedy. If, for instance, the contracting party has refused performance while he is still able to do so, the court will order him to perform his undertaking. It is an order to

achieve complete satisfaction for the aggrieved party. It is the creditor's satisfaction which is latent in having what he has contracted for.

2-In the sale of goods contract

The general principle in Iraqi civil law, is that a party to a contract for sale of goods is entitled to have his contract specifically performed.⁽¹³⁸⁾ An order of specific performance may be granted, so long as, performance of the contract is possible and can be enforced against the party in breach.⁽¹³⁹⁾ If specific performance has become impossible, whether it by reason of the debtor's fault, or by any reason beyond his control, specific performance cannot be enforced against him,⁽¹⁴⁰⁾ and damages is the only remedy.⁽¹⁴¹⁾

Specific performance is the primary right of the contracting parties in a sale of goods, and it is granted as a matter of right to the aggrieved party, whether seller or buyer. Therefore, the debtor is not entitled to pay damages instead of performing his obligation specifically if such performance is possible.⁽¹⁴²⁾

Specific performance in Iraqi civil law represents a general rule, which can be applied to all types of contract, whether sale of goods contract, land, agency, hirepurchase.....etc, because, Article 246(1) of Civil Code provides, that, "A debtor shall be compelled to perform his obligation specifically if such performance is possible".

The above provision indicates that, the debtor may be any party to the contract. The seller is a debtor and as a creditor at the sametime and as is the buyer, according to Article 246(1) of Iraqi Civil Code.

Article 177 (1) of Iraqi Civil Code provides, "In bilateral contracts if one of the parties does not perform his obligation, the other party may after serving a formal summons on the debtor, demand performance of the contract...". Thus the seller and the buyer are treated as debtor or creditor and they may be subject to the order of specific performance. Further, according to Aricle 247 of Iraqi Civil Code, subject to

the rule with regard to transcription, an obligation to transfer ownership or any other real right, transfers *ipso facto* that right, if the object of the obligation is specifically identified and is owned by the debtor. Transfer of ownership is therefore the natural outcome of the contract and may be enforced, as soon as, the contract is concluded. If, for instance, the object of the contract of sale is a car which is specifically identified and owned by the seller, the ownership of that car is transferred as soon as the contract is concluded and without the need of any incidental procedures, such as delivery.⁽¹⁴³⁾ Thus, ordering the seller to deliver the thing sold to the buyer is the proper way to end the obligation.⁽¹⁴⁴⁾ Where the object of the contract is not specifically identified, this will be a bar against transferring the property and thus against specific performance of the obligation, unless the object, which is described only as species, becomes specific by individualisation.⁽¹⁴⁵⁾

Generally, if the obligation is to do something,⁽¹⁴⁶⁾ such as, the obligation of the seller to deliver goods to the buyer in a certain place and at a fixed time such an obligation must be performed by delivering these goods to the buyer. If he refuses to do so, he shall be compelled by the Execution Administration Office, which will put the court's order in force, by taking these goods from him and deliver them to the buyer.⁽¹⁴⁷⁾

Specific performance whether it is a remedy for breach of contract for the sale of goods, or as a remedy for breach of other contracts, may be in one of two forms, to do, (to give something) and, not to do something. These two forms of specific performance are subject to the same conditions and to the same circumstances. It means, that (ordering the seller, to deliver goods to the buyer, and ordering him to refrain from disturbing the buyer in his enjoyment are of the same nature and concept). The seller is bound to take every necessary step to transfer the title of the thing sold to the purchaser, and to abstain from doing any act which might render that transfer impossible or exceptionally hard.⁽¹⁴⁸⁾ He will be held liable and will be enforced to comply with his obligation within the circumstances of the case.

Thus if the seller, warrants the buyer against disturbance of his enjoyment of the

thing sold, either totally or partially, whether such disturbance is caused by his act, or that of a third party,⁽¹⁴⁹⁾ he is held liable and he will be ordered to fulfil what he has undertaken to do or not to do. It is an order for specific performance.

Ordering the seller or the buyer to refrain from doing something is considered as specific performance in Iraqi civil law with the slight difference that it obliges the debtor to respect his obligation by not doing what he has undertaken not to do.⁽¹⁵⁰⁾

Ordering the debtor to perform his obligation specifically, whether it is in the sale of goods contract or in other contracts, and whether it is to do something or to refrain from doing something, may be subject to circumstances and conditions, such as, impossibility,⁽¹⁵¹⁾ exceptional hardship or difficulty that the debtor may suffer if he is enforced to perform,⁽¹⁵²⁾ and the form and the nature of the creditor's application to the court to decree such order.⁽¹⁵³⁾ Thus, the question of granting or refusing specific performance depends very much on the circumstances surrounding each case, although, it is submitted, that, the main factor in achieving the result and the consequence of any obligation is the possibility of performing the obligation. Therefore, specific performance can be defined as follows:

A decree issued by the court under certain circumstances and conditions, ordering the debtor, who may be imprisoned in the case of the refusal, to do or not to do what he has undertaken precisely, where the object is either specifically identified or becomes specific by individualisation.

Three essential elements arise from the above definition, namely:

- 1-The circumstances and conditions of granting and refusing specific performance.
- 2-Imprisonment of the refusing party and contempt of the court.
- 3-The identification of the object.

The grounds under which specific performance is granted or refused, will be fully considered in Chapter Two of this work.⁽¹⁵⁴⁾

2.1-Imprisonment of the party in breach.⁽¹⁵⁵⁾

Specific performance is an order against the party in breach to force him to perform his obligation. The Execution Administration Office adopts the court's order to compel such performance.⁽¹⁵⁶⁾

It is questionable whether performance can be achieved where the debtor still refuses to perform the obligation.

Imprisoning the refusing debtor is a very effective way to compel him to perform, although the Iraqi Civil Code does not contain any provision as regards imprisoning the refusing debtor in order to enforce him to perform what he has undertaken.

Imprisonment of the debtor is provided for by the Execution Code,⁽¹⁵⁷⁾ in Articles 40, 49, which regulates imprisonment of the refusing party under certain conditions. They are as follows:

1-According to Article 40 of the Execution Code; unless there is request by the creditor, and judgment by the court acting as executor,⁽¹⁵⁸⁾ the debtor cannot be imprisoned.

2-If the executor is not a judge, the case is examined by the judge of the Court of First Instance to decide whether the debtor should be imprisoned or whether imprisonment is inappropriate in the circumstances of the case.

3-If the executor is satisfied that the debtor is able to perform his obligation, totally or partially, without offering appropriate settlement and has no property which may be confiscated and has refused any settlement offered by the executor, he may order the debtor to be imprisoned.⁽¹⁵⁹⁾ Nevertheless, the executor is not entitled to imprison the debtor before asking the creditor about any settlement offered by the debtor, for imprisoning the debtor is unjustified and invalid when he is unable to comply with the decree, unless he refuses to comply with the decree wilfully.⁽¹⁶⁰⁾

All the above factors are subject to the court's discretionary power to examine whether they are applicable. In a case,⁽¹⁶¹⁾ the Court of Cassation, reversed the decision of the Execution Administration's headquarters, when it ordered the debtor to pay the debt in instalments of fifty Dinars per month with a guarantor according to the

request of the agent of the creditor. The debtor then failed to comply with the order because of his poor financial situation. The debtor asked the creditor to prove that he was in a good enough financial situation to pay. The Administration of Execution Office decided that this settlement by the debtor was out of proportion to the whole debt. Therefore he should be imprisoned for six months. The debtor challenged that decision in the Court of Cassation, which reversed it, for the following reasons:

1-The debtor's new settlement was not shown to the creditor to ascertain whether it was accepted or rejected.

2-The imprisonment was not requested by the creditor.

As the debtor was in a poor financial situation, he had no intention of refusing to comply with the decree of specific performance. A refusing party who wilfully fails to comply with the court's decree may be imprisoned, for Article 42 (1) of the execution code provides that, "A debtor who agreed to offer a settlement for paying his debt, but he has discontinued to do so, he is subject to imprisonment".

Where a party is unable or is prevented from performing his obligation, no imprisonment can be ordered against him, for it was said, unless there is unjustifiable attitude by the debtor towards performance of the obligation, his imprisonment is invalid. Further, under Article 41(1) of the Execution Code, imprisonment of the debtor is not allowed in the following circumstances:

-If he is an insolvent debtor, imprisonment in such a case is pointless.⁽¹⁶²⁾

-Imprisonment of the debtor is not allowed in the case of child as Article 48 of the Execution Code states "...imprisonment is invalid when non-delivery is beyond the debtor's control or who is liable to fulfil the court's judgment".

The debtor may not be imprisoned twice for one debt, if it is proved that he cannot pay his debt,⁽¹⁶³⁾ for there is no point in imprisoning him again if he cannot perform. Thus, imprisonment will not be ordered, unless the court is satisfied that it is effective in compelling the refusing party to comply with the decree of specific performance.

Imprisonment of the refusing party should not be for more than four months.⁽¹⁶⁴⁾
If the debtor still refuses to comply with the decree, the Execution Administration

Office enforces compliance with the decree by either taking the object from the debtor, if it is specifically identified, or by ordering him to identify the subject-matter as regards its individuality, as imprisonment does not extinguish the debt.⁽¹⁶⁵⁾

If the subject-matter is not with the debtor and it cannot be found after searching the debtor's premises, the court if it is convinced that the thing is still with the debtor, it may order him to pay a penalty if he refrains to comply with the decree of the court.⁽¹⁶⁶⁾

Sometimes imprisonment cannot be ordered against the contracting party in breach, not because it is unduly difficult to perform or it is impossible or there is exceptional hardship on the party to perform his obligation and to fulfil the court's decree, but because, the contracting party is a corporate body. The corporate body may then subject to special treatment.⁽¹⁶⁷⁾

2.2-Goods specifically identified and goods only are described as specie, but become specific by individualisation

There are two discriptions of goods which may constitute the subject-matter of the sale contract by which specific performance may be ordered, namely:

- Goods specifically identified.
- Goods which become specific by individualisation.

2.2.1-Goods specifically identified

According to Article 247 of Iraqi Civil Code; "...an obligation to transfer ownership or any other real right transfers *ipso facto* that right, if the object of the obligation is specifically identified and is owned by the debtor".

When the thing sold is specifically identified, the ownership of such a thing is transferred, as soon as, the contract of sale is made,⁽¹⁶⁸⁾ provided that the thing sold is owned by the seller.⁽¹⁶⁹⁾

What are goods specifically identified?

The meaning and the concept of these goods is clear in Iraqi civil law, for the term clearly expresses the meaning. Goods may be specifically identified, such as a particular car, a black horse, a portrait, or a golden watch of a certain type,...etc. Thus, if a particular horse or a portrait which is owned by a seller A has been sold to a purchaser B, the ownership of that article will be transferred to B as soon as they conclude the contract. Furthermore, Iraqi civil law jurisprudence, considering the meaning and the concept of goods which are specifically identified, does not further analyse and explain the meaning of the said term.

Goods specifically identified mean, goods which are agreed upon at the time of making the contract.

2.2.2-Goods which become specific by individualisation

Article 248 (1) of Iraqi Civil Code provided "when an obligation to transfer ownership or any other real right, has for its object a thing which is described only as regards its species, the right is not transferred, unless the object is specifically identified".

No title can be transferred where the object is not specifically identified. Further, an object which described as regards its species can be identified and specified by way of individualisation.⁽¹⁷⁰⁾ The concept of a process of individualisation must therefore be considered.

Individualisation, is a process of separating a quantity of generic goods from its bulk by any method, by which the thing sold, "the generic goods" becomes specifically identified.⁽¹⁷¹⁾ It occurs by any method which suits the nature of the goods. Thus goods may be individualised by measuring, weighting, marking, counting, or any other method, which renders them specifically identified.⁽¹⁷²⁾ Individualisation, may take place at the time of delivery or before delivery, but it is impossible to individualise the goods after delivery.⁽¹⁷³⁾

In cases where the seller refuses to individualise the goods, Article 248 (2) of Civil

Code provides, that "if, however, the debtor does not perform his obligation, the creditor may, upon an order of the court, or in case of urgency even without such an order, acquire at the expense of the debtor, an article of the same kind; he may also claim the value of the articles without prejudice to his rights to damages, in either case". Thus, the purchaser is entitled either to buy goods of the same kind "upon an order of the court", and then require the seller to pay the cost,⁽¹⁷⁴⁾ or, to ask for the value of the goods, for he may not be interested in having them any more after the dispute has arose between himself and the seller, without prejudice to his right to claim damages.⁽¹⁷⁵⁾

Buying an article of the same kind at the expense of the seller may be regarded, as if the buyer was granted damages to buy the article himself. That is undoubtedly, not specific performance, because, specific performance is to order the debtor to perform what he has undertaken to do or not to do precisely and accurately. He has not undertaken to pay expenses or damages. Surely, then, the buyer, who insists on having the same thing that he has contracted for, but he has failed to have it, cannot be satisfied with the alternative remedy of damages.⁽¹⁷⁶⁾

The goods do not always exist at the time the contract is made. The parties to the contract may agree to sell and to buy goods which do not exist at the time of making the contract, so long as they will exist in the future. The contract can be concluded even if the goods do not exist at the time the contract is made.⁽¹⁷⁷⁾ Article 514 (2) of Iraqi Civil Code provides, that, " The sale of future rights and things is valid if they are identified sufficiently to prevent the contracting parties from being ignorant and misrepresented as regards the object individuality.

Future and non-existent goods in Iraqi civil law, form an object to the contract of sale, since, the contracting parties are fully aware and sure as regards their individuality and existence in the future.⁽¹⁷⁸⁾ The concept of future goods follows that of a category of moveables which is identified as regards its species, because they need to be identified and specified and their title is not transferred to the buyer at the moment the contract is made, but at the moment the goods exist,⁽¹⁷⁹⁾ and identified

specifically.⁽¹⁸⁰⁾ For example, a producer of cars has contracted with 1000 buyers separately to sell them 1000 cars. At the time the contract is made, there is no car available. He has to produce them in a later stage. The title of each car is transferred to the buyer as soon as the car is produced, but each car should be identified and specified to each buyer. After such identification each buyer becomes the owner of a certain and specific car.

As long as future and non-existent goods are able to be identified specifically, and not of the category which is prohibited by the law, therefore, it is believed, that these goods form a subject-matter for decree of specific performance in the sale of goods contract, in accordance with Article 129 (1) of Iraqi Civil Code, which provides that, "things those take place in the future may form an object to the obligation even if they do not exist at the time the contract is made, provided that they are identified and specified sufficiently in a way prevents any misrepresentation or misleading to their identity, individuality and nature."⁽¹⁸¹⁾ Thereupon, specific performance can be ordered when such goods form the subject-matter of the contract.

Comment

1-Specific implement is an order of the court to compel performance of the contract. It is not to compensate the party for loss he has suffered, but to let him obtains the goods he has contracted for. Nevertheless, it is considered a remedy for the aggrieved party, because it achieves his satisfaction in enforcing the refusing party to comply with the contract.

2-Ordering the refusing party to perform his contract specifically is combined with imprisonment. However, imprisonment of the refusing party is subject to the court discretionary power. Furthermore the court's discretionary power plays role in examining the refusing party's intention toward the decree of specific implement and whether his refusal is wilfully or not.

3-Specific performance in Iraqi civil law is to order the refusing party to do or to

refrain from doing something. While in Scots law specific implement is an order of the court to enforce the refusing party to do something. Whereas ordering him to refrain from doing something is a different remedy called "interdict".

4-Imprisonment of the refusing party in both systems is not a penalty, but a civil method of compelling him to perform the decree of specific implement.

5-Scots and Iraqi law are concurred as regards the concept of specific goods, i.e., "goods specifically identified", for in both systems the goods should be agreed upon at the time the contract is made.

6-Ascertained goods in Scots law, and goods become specific by individualisation in Iraqi civil law carry the same concept and the same meaning, for ascertainment and individualisation of the goods include that goods must be identified and specified by any method suits their nature.

Section Two: The nature of specific implement as a remedy for breach of contract for the sale of goods

Specific implement as a remedy for breach of contract for the sale of goods is the right of the aggrieved party to obtain what he has contracted for. It is an ordinary legal remedy and not equitable one. It is doubtful whether granting or refusing the remedy is affected by the court's discretionary power.

The nature of the remedy will be considered in two sub-sections as follows:

Sub-section 1: The nature of the remedy of specific implement in Scots Law

Three important issues will be considered, namely:

- 1-Specific implement is an ordinary legal remedy.
- 2-Specific implement is not equitable remedy.
- 3-Specific implement is not discretionary remedy.

1-Specific implement is an ordinary legal remedy

The general rule of Scots law is, that the aggrieved party to the contract is given a legal right to compel the refusing party to perform his obligation,⁽¹⁸²⁾ and "although, he may elect to do so, he cannot be compelled to the alternative of an action of damages".⁽¹⁸³⁾ Furthermore, specific implement is defined as one of the remedies to which a party to a contract is entitled where the other party to it refuses to implement the obligation which he has undertaken.⁽¹⁸⁴⁾ Therefore specific implement is the primary and the normal remedy, and as it was stated,⁽¹⁸⁵⁾ "I do not think it is too much to say that our (Scots) law differing from the Law of England".

The concept of the remedy of specific implement as an ordinary legal remedy relies on the following circumstances and facts, namely:

1-Specific implement confers on the aggrieved party, (the buyer in the sale of goods), the right to have what he has contracted for, because, as it was stated,⁽¹⁸⁶⁾ that "it is frequently open to the party to a contract to request the court to ordain the other party specifically to implement his contract and to perform what he has undertaken".

2-The only way for the aggrieved party to resort to the alternative remedy of damages, is, when implement of the contract either rendered impossible,⁽¹⁸⁷⁾ or exceptionally hard for the defender (the seller) to perform,⁽¹⁸⁸⁾ or when the refusing party claims that the pursuer is in breach of his obligation.⁽¹⁸⁹⁾

3-The difference between specific implement in English and Scots Law, appears clear, for in many cases, specific performance in England has been given to a purchaser by Court of Equity, which, it was stated,⁽¹⁹⁰⁾ "is unknown to the law of Scotland". Thus Scots law, "is not unfavourable to demand for specific performance, in this respect differing from the law of England, which favours an award of damages".⁽¹⁹¹⁾

4-It is believed, that the grant of specific implement is not based on equitable grounds, although, refusing it is based on the court's discretionary power, for when granting it, the court must consider certain legal grounds, such as the pursuer's application and the goods, must be specific or ascertained.⁽¹⁹²⁾ On the contrary, the court may refuse to order specific implement either because it is impossible or because

other equitable grounds exist.⁽¹⁹³⁾

5-In Mc Arthur v. Lawson,⁽¹⁹⁴⁾ Lord Inglis observed that, "A contract which cannot be enforced by specific implement, in so far as regards its form and substance, is no contract at all, and cannot form the ground of an action of damages". Thus Scots law is favourable to grant specific implement rather than damages.

2-Specific implement is not equitable remedy

Should the remedy of specific implement, despite being an ordinary and legal remedy, be considered as an equitable remedy.

In Stewart v. Kennedy,⁽¹⁹⁵⁾ Lord Watson, defined the concept and the nature of specific implement in Scots law when he stated that, "I do not think that upon this matter any assistance can be derived from English decisions; because the laws of the two countries regard the right to specific performance from different stand points. In England the only legal right arising from a breach of contract is a claim of damages; Specific performance is not a matter of legal right, but a purely equitable remedy, which the court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland the breach of a contract of the sale of a specific subject such as landed estate given the party aggrieved the legal right to sue for implement".

The above dictum of Lord Watson is a clear indication that specific implement is not an equitable remedy. Further, it was stated by Lord Macnaghten ⁽¹⁹⁶⁾ that, "specific performance is part of the ordinary jurisdiction of the court", and "the superior court having equitable jurisdiction, must also have a discretion, in certain exceptional cases".⁽¹⁹⁷⁾ In addition, "the law of Scotland does not compel parties to form their contracts upon equitable principles",⁽¹⁹⁸⁾ and, specific implement is granted when certain grounds are available.⁽¹⁹⁹⁾

The court will not order specific implement where there are grounds against granting it. It means, that the court must examine the situation of the party who should perform but he faces circumstances,⁽²⁰⁰⁾ which render performance, either impossible,

unduely difficult, or exceptionally hard. Thus ordering the refusing party to perform without considering these circumstances, would be regarded inequitable order, and "that would condemn the party to perpetual imprisonment".⁽²⁰¹⁾

The principle of "where complete justice cannot be done by damages, specific performance is granted and vice-versa",⁽²⁰²⁾ cannot be applied to specific implement in Scots law if it is meant by this principle to alter the concept and the nature of specific implement as an ordinary and legal remedy. Whereas, if the grant of damages instead of specific implement is to acheive more justice, as in the case of impossibility, hardship and undue difficulty, damages are considered the alternative remedy to specific implement.

The equitable remedy will not be ordered, "if to grant it would give rise to hardship to the defendant",⁽²⁰³⁾ Further it is considered " the most accurate method of achieving the compensation goal of contract remedies".⁽²⁰⁴⁾ It seems that to let the buyer obtains the particular chattel achieves more justice than to give him damages as an alternative remedy.

The above argument are applied to the remedy of specific implement as a legal remedy not as an equitable remedy, within the court's discretionary power.⁽²⁰⁵⁾ The court considers the cirumstances surrounding the remedy of specific implement and will order it when it is satisfied, not because specific implement is an equitable remedy and it achieves justice more than damages, but because it is an ordinary legal right for the aggrieved party. Thus the court, "has inherent power to refuse" the remedy,⁽²⁰⁶⁾ "upon equitable grounds".⁽²⁰⁷⁾

3-Specific implement is not a discretionary remedy

The court's discretion is involved in refusing the remedy of specific implement. This may cast doubt, that the remedy is a discretionary remedy, despite being an ordinary and legal remedy.

A contracting party, who wishes to enforce his contractual right against the other

party, must apply to the court. Nevertheless, "the court will not support an attempt to enforce them in an unreasonable way".⁽²⁰⁸⁾ Because too much uncertainty will occur and the court in such a case will not be sure, whether it is equitable or reasonable to allow the party to carry out his right of the contract.⁽²⁰⁹⁾ further, where a party's "claim satisfies the requirements, he is entitled to his remedy and the court has no discretion to grant or withhold or qualify it".⁽²¹⁰⁾ In Grahame v. Kirkcaldy Magistrates,⁽²¹¹⁾ it was observed that, "a superior court having equitable jurisdiction, must also have a discretion in certain exceptional cases, to withhold from parties applying for that remedy which in ordinary circumstances, they would be entitled as a matter of course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights". The court has no power to refuse specific implement if it is an appropriate remedy and there are no equitable grounds against granting it,⁽²¹²⁾ for, the remedy is not one for the court to grant it if it thinks fit,⁽²¹³⁾ it must grant it if it is clear that what would be ordered to be done could be done reasonably.⁽²¹⁴⁾ Nevertheless, the Lord President,⁽²¹⁵⁾ stated, that "in the circumstances.....it is within the discretion of the court to say which of these remedies the pursuers would be entitled to". Thus, he thought that the appropriate remedy was damages. Lord Shand pointed out,⁽²¹⁶⁾ "it must always be in the discretion of the court to say whether the remedy of specific implement or one of damages is the proper and suitable remedy in the circumstances".

In accordance with the above argument, it is submitted, that in Scots law, the court has discretion to order the refusing party (the seller) to perform the contract, for the following reasons:

1-The court's main task is to order the refusing party to perform his contract specifically. Further, the court will not consider the equitable grounds when granting it. Whereas, the conditions,⁽²¹⁷⁾ for granting the remedy, such as the pursuer's application, and the object is specific or ascertained, should be considered. However, the grounds for rejecting the remedy,⁽²¹⁸⁾ practically associate with the action of

specific implement by the refusing party in any legal case to claim the remedy.

2-The court cannot refuse specific implement, where the remedy is appropriate provided that, there are no grounds against granting it,⁽²¹⁹⁾ for in the law of Scotland, if the obligation is prestable in face of any one, it might be enforced by granting a decree of specific implement, when the reason for refusing such a remedy upon equitable grounds are absent,⁽²²⁰⁾ i.e., "performance of the obligation is not impossible or exceptionally hard, or unduly difficult".

3-Specific performance, "in England is a matter of discretion, and defences are admitted, which are inadmissible according to the doctrines and practice of the court's of Scotland, where specific performance is part of ordinary jurisdiction of the court".⁽²²¹⁾ This indicates, that specific implement in Scots law is not a discretionary remedy if there are no defences against it by the party in breach. This, in practice, may indicate that there is always exception to the general rules, for the court has discretionary power towards specific implement especially when the court refuses the remedy upon equitable grounds. When it is said that specific implement is not discretionary remedy, this should be put in a sense where there are no defences against the remedy. If there is a single defence, whether a claim of difficulty, hardship or impossibility the remedy is rendered under the court's discretion.

The refusing party will not submit to and accept the pursuer's claim without raising any counterclaim. So, raising any claim against the pursuer means that the court's discretionary power will be involved, and the remedy of specific implement is subject to its discretion, but still as an ordinary remedy, because, when the claim, which stands against it, is proved wrong or insufficient, the court has no power to refuse the remedy.

4-Involving the court's discretionary power in considering whether specific implement is an appropriate or inappropriate remedy does not change its nature, for the court main concern is to consider whether the equitable grounds and the other grounds exist or not and to examine these grounds, and their influence on granting the remedy.

Sub-Section 2: The nature of specific performance in Iraqi civil Law

Three issues will be considered, namely:

- 1-Specific performance is an ordinary, legal remedy.
- 2-Specific performance is not equitable remedy.
- 3-Specific performance is not discretionary remedy.

1-Specific performance is an ordinary legal remedy

In Iraqi civil law specific performance arises from a court order to compel the debtor (seller or purchaser) to perform precisely what he has undertaken to do or not to do.⁽²²²⁾ The aggrieved party, according to Article 246 (1) of Civil Code, is entitled to have the right of specific performance. It provides, that "A debtor shall be compelled to perform his obligation specifically if such performance is possible". Thus, specific performance is considered the primary remedy for breach of the obligation and the normal way to achieve performance of the contract.⁽²²³⁾ It is the legal way of obliging the refusing party to perform his obligation. Nevertheless, compelling the debtor to perform his obligation specifically sometimes requires the debtor personal interference.⁽²²⁴⁾ Such a case, however, may not take place in the contract of sale of goods, because performance of the obligation specifically can be ordered against the seller by enforcing him to deliver the goods, or by taking the goods from him and deliver them to the buyer,⁽²²⁵⁾ or, by ordering the buyer to pay the price.

As a general rule specific performance cannot be substituted by damages.⁽²²⁶⁾ However, the aggrieved party may resort to damages as an alternative remedy, when granting specific performance is impossible,⁽²²⁷⁾ or exceptionally hard for the debtor to do so,⁽²²⁸⁾ or when the aggrieved party seeks for damages instead of specific performance.⁽²²⁹⁾

Specific performance will not be ordered, unless certain conditions exist,⁽²³⁰⁾ and there are no grounds or circumstances stand against granting it.⁽²³¹⁾

When the seller refuses to deliver goods to the buyer, the court must grant decree of specific performance, ordering the seller to comply with his obligation, if it is

possible.⁽²³²⁾ When the debtor offers to perform his obligation specifically, but the creditor has applied for damages, the court will not refuse specific performance and order damages.⁽²³³⁾

It seems, that the possibility of performance of the contract specifically, deprives the court of the power to refuse the remedy of specific performance. Also, because it is a legal remedy, it is not subject to the court's discretionary power when it is applicable.

2-Specific performance is not an equitable remedy

Specific performance is a legal right for the aggrieved party to compel the refusing party to perform his obligation. However, doubts remain whether refusing the remedy upon equitable grounds does not change the nature of the remedy, and whether involving the court's discretionary power has such effect.

The grounds and circumstances which are considered equitable, such as, impossibility, exceptional hardship, i.e., "performing specifically is too onerous for the debtor", or undue difficulty,....etc, affect the grant of specific performance, and the remedy may be refused for equitable reasons.

Article 1 (2) of Iraqi Civil Code, provides; "In the absence of provision of law which is applicable, the court shall decide according to the custom and in the absence of custom in accordance with the principles of Islamic law without being restricted to a certain school of Jurisprudence. The principles of equity shall be applied by the court, if the principles of Islamic law are absent."

Thus, equity is one of the sources of Iraqi civil law, ⁽²³⁴⁾ which should be followed by the court where the other sources are absent, in order to achieve justice.⁽²³⁵⁾

Moreover, Islamic law as it is known "Al-shari'-ah" (the right path) is a major world legal system distinct from both the franco-german civil law and Anglo-American common law systems. Islamic law is not an independent branch of Scholarship, but only one of facets of the Islamic faith itself. It is on the basis of divine revelations that Muslim Jurists and theologians have pronounced the rules governing the relations

among men, and between man and God.⁽²³⁶⁾ In this sense Islam is essentially a religion of law regulating and directing every aspect of human experience.

Theoretically, Islamic law corresponds to the natural school of law and contains the two concepts of an ethical quality in law and capacity of human reason to discern it.⁽²³⁷⁾ It should be noted that the basic principles of Islamic law, as contained in the Qur'an and the Sunnah (the prophet's practice and the tradition of the early Muslims), are pervasive—that is, they exist independently of man. So far as the treatment of Islamic law is concerned, Iraqi civil law has taken the middle path between the two extremes of:

- (1)—Regulating it in its entirety, and,
- (2)—Going for radical reform and abandoning islam.⁽²³⁸⁾

Furthermore, when specific performance is too onerous for the debtor, it may be substituted by damages, provided that this way of performance does not seriously prejudice the creditor.⁽²³⁹⁾ Also, when as a result of exceptional and unpredictable circumstances of general character, performance of the obligation becomes excessively onerous, in such way as to threaten the debtor with exorbitant loss, the court may, according to the circumstances and after taking into consideration the interest of both parties, reduce to reasonable limits, the obligation that has become excessive, in accordance with, the principles of equity.⁽²⁴⁰⁾

In addition, the Law Reform of the Legal System Code,⁽²⁴¹⁾ has emphasised on the balance between contractual rights and obligations. It permits the alteration of the contract by the court to achieve the balance between the debtor and the creditor in order to achieve justice and to prevent arbitration and unjust consequences.

It seems, that the principles of equity play essential role in refusing specific performance. When it is impossible to order the refusing party to perform, he will be ordered to pay damages, unless he claims that, impossibility of performance arose by reason beyond his control.⁽²⁴²⁾ Subsequently, neither specific performance nor damages will be decreed, because, ordering damages or specific performance in such

circumstances would be considered inequitable.

When performance of the obligation specifically is too onerous for the debtor, he will not be compelled to do so, provided that non-performance will not seriously prejudice the creditor.

If performance seriously prejudices the creditor, the court will order specific performance, unless the benefit that the creditor obtains from performance of the contract specifically is less than damages and losses the debtor may suffer.⁽²⁴³⁾

It is submitted, that specific performance is not an equitable remedy, despite the effect by the principles of equity, for the following reasons:

1-Every debtor is obliged to perform his contract specifically, and he has no alternative choice when such performance is possible.⁽²⁴⁴⁾

2-Before granting specific performance, the court must make sure that certain grounds of law are exist,⁽²⁴⁵⁾ i.e., "the grounds for granting the remedy of specific performance".

3-Refusing specific performance is based on equitable grounds, such as impossibility, or performance is too onerous for the debtor, in addition to other grounds of law. However, even if the remedy is refused upon equitable grounds, it remains legal and ordinary remedy, for it is not to achieve justice better than damages, but to let the aggrieved party obtains what he has contracted for. Therefore, the principle of, "where complete justice cannot be done by damages, specific performance is granted and vice-versa", cannot be applied to specific performance because damages are not the alternative remedy to specific performance in the ordinary circumstances.⁽²⁴⁶⁾

3-Specific performance is not a discretionary remedy

The court has discretionary power to examine the circumstances surrounding the grant of the remedy of specific performance. It is questionable whether the remedy is a discretionary remedy, despite being ordinary, legal and not equitable remedy. Specific performance is not an equitable remedy in Iraqi civil law, although refusing it

sometimes is subject to equitable grounds.⁽²⁴⁷⁾

The court's discretionary power appears heavily in examining the equitable grounds for refusing the remedy, such as impossibility, or exceptional hardship, or undue difficulty. The Iraqi Civil Code does not define the term of "too onerous for the debtor". Thus, the court must consider the above term in every disputed case.⁽²⁴⁸⁾ If performance became impossible because of either reason the court will examine such impossibility and its effect on the parties and their obligations. The court is restricted by the proofs and evidence which are brought by the contracting parties.⁽²⁴⁹⁾ Thus the court's discretionary power will be involved in refusing the remedy.

The court examines the effect of such a ground on the balance between the rights and the obligations of the contracting parties. Thus, it was stated,⁽²⁵⁰⁾ that the court should take the ordinary debtor's case as a standard,⁽²⁵¹⁾ to measure and to compare other cases.

It is submitted, therefore, that the court generally has no discretionary power to grant specific performance or to refuse it, where the refusing party raises no claim against the aggrieved party, or where no equitable circumstances stand against granting it. However this is immaterial, for the action will not be raised by the aggrieved party unless there is refusal to perform by the party in breach. It appears that refusing the remedy by the court under its discretionary power does not change the nature and the concept of the remedy. Where any claim by the refusing party is proved wrong, the court must grant specific performance.

Comment

1-Specific implement in Iraq and Scotland is an ordinary legal remedy. Granting it, depends on certain grounds of Law, where there are no defences by the refusing party, and no equitable circumstances stand as a bar against granting it.

2-The possibility of performance of the contract specifically by the debtor, and the absence of any ground for refusing the remedy, in both laws, deprives the court of any discretionary power to refuse granting the remedy.

3-In Scotland and Iraq, specific implement is not equitable remedy despite the role of the grounds and circumstances in refusing it, and despite the achievement for the aggrieved party in ordering the debtor to perform specifically. In addition, specific implement in both Laws is not affected by the principle of "where complete justice cannot be done by damages, specific implement is granted and vice-versa".

4-The remedy of specific implement in Scots and Iraqi systems is not discretionary remedy, where no defenses are raised by the refusing party against specific implement.

5-The court's discretion appears heavily in refusing the remedy, because examining the exceptional grounds requires the court's discretion.

CONCLUSION

1- Specific implement represents a general rule which can be applied to every obligation whether it is contract for sale of goods or lease or hire-purchase,...etc. The availability of certain grounds of law and the absence of certain equitable grounds encourages granting the remedy.

2- Specific implement is a remedy as well as an order against the refusing party. It is granted to the aggrieved party as a matter of ordinary legal right. It is to enable him obtaining what he has contracted for. It is an achievement of the party's satisfaction and need.

3- Imprisonment of the refusing party to enforce him to perform his obligation specifically is not a natural consequence to his refusal, for specific implement is not automatically combined with imprisonment. It should be considered and examined by the court within its discretionary power. It reflects the necessity and importance of the remedy of specific implement.

4-The remedy of specific implement is subject to the court's discretionary power, but the court does not have discretionary power to grant specific implement when the legal conditions are available, provided that, there are no equitable grounds or defences against granting it, or these grounds are proved wrong or they have no effect on the

refusing party ability to perform his obligation.

5-The involvement of these exceptional circumstances does not change or alter the nature and the concept of the remedy of specific implement, even if it is refused as consequence of their effect.

FOOT-NOOTES .

1-Obliging the debtor to refrain from doing something in Iraqi civil law is called specific performance, while in Scots law is called Interdict.

2-D.M.Walker, The Law of Contracts and related Obligations in Scotland , 2nd ed., London, Butterworth, 1985, at p.490.

3-Post, at pp.39-44; see also *Stewart v. Kennedy* (1890) 17R. (H.L.) 1, 5, 9-11.

4-*Stewart v. Kennedy* (1890) 17R. (H.L.) 1, per Lord Watson at p.9-10; D.M.Walker, *Civil Remedies*, supra, at p.276; concerning the English law, see, Gareth, Jones & William, Goodhart, Specific performance, 1st ed. London, Butterworth, 1986, at p.1.

5-D.M.Walker, *Civil Remedies*, supra, at p.269.

6-Supra, at p.276.

7-D.M.Walker, *Contract*, supra, at p.490; W.J.Lewis, *Sheriff Court Practice*, 8th ed., 1939, at p.219.

8-*Stewart v. Kennedy*, supra, per Lord Watson at p. 10; compare, *Mc Arthur v. Lawson* (1877) 4R. 1134, 1136; *Beardmore v. Barry* (1928) S.C. 101, 108; *Stair, Institution*, supra 17, 16; Bell, *Principles*, supra, §.29, p.17; *Seaforth Trs. v. Macaulay* (1844) 7D. 180; *White & Carter (councils) Ltd. v. Mc Gregor* (1962) S.C. (H.L.) 1, 20.

9-*White & Carter (councils) Ltd. v. Mc Gregor*, supra; *Seaforth Trs. v. Macaulay*, supra; *Rollo's Trs. v. Rollo* (1940) S.C. 578; *Beardmore v. Barry*, supra, 103; D.M.Walker, *Civil Remedies*, op.cit. p.113; Gloag, *Contract*, supra, at p.592.

10-*Mc Arthur v. Lawson* (1877) 4R. 1134, 1136.

11-Post, at pp.207-209.

12-D.M.Walker, *Contract*, op.cit. p.540 refering to *Mc Arthur v. Lawson*, supra; *Stewart v. Kennedy*, supra, 5, 9, 11; see also, Gloag, *Contract*, supra, at p.655.

13-*Stewart v. Kennedy*, supra, per Lord Watson at p. 9.

14-D.M.Walker, *Civil Remedies*, op.cit. p.276.

15-*Stewart v. Kennedy*, supra.

16-*Mc Arthur v. Lawson*, supra.

17-post, at pp.71-76; 84-89; 95-100; 106-111; 116-115.

18-D.M.Walker, *Civil Remedies*, supra, at p.7.

19-Ibid.

20-Gloag, *Contract*, op.cit. pp.655, 592; see also, *Beardmore v. Barry*, supra, at pp. 108, 113; *Seaforth Trs. v. Macaulay*, supra.

21-*Mc Arthur v. Lawson*, supra, at p.1136, per Lord president Inglis.

22-Post, at pp. 71-76; 84-89; 95-100; 106-111; 116-115; see also, D.M.Walker, *Contract*, supra, at p.542; D.M.Walker, *Civil Remedies*, op.cit. pp.280-281; Gloag, *Contract*, op.cit. pp.657-660.

23-Post at pp.145-149.

24-Stewart v. Kennedy , supra at pp., 5, 9, 11.

25-Sec. 52(1) of the Sale of Goods Act 1979; D.M.Walker, Civil Remedies, op.cit. p.660; Behnke v. Bedeshipping Co. (1927) 1K.B. 649; Sutherland v. Montrose Shipbuilding Co. (1860) 22D. 665, 671; Munro v. Balnagowan Estate Co. (1949) S.C. 49; Aurdal v. Estrella (1916) S.C. 882; Purves v. Brock (1867) 5M. 1003.

26-Stewart v. Kennedy, supra; see also, post, pp.39-41.

27-McArthur v. Lawson, supra, at p.1136.

28-Sec. 52 of the Sale of Goods Act 1979; Sutherland v. Montrose Shipbuilding Co., supra.

29-Middleton v. Leslie (1892) 19R. 801; Robertson v. Cockburn (1875) 3R. 21; post, at pp.266-270; compare, Hendry v. Marshall (1878) 5R. 687, 690; D.M.Walker, Civil Remedies, supra, at p.277.

30-Robertson v. Cockburn, supra; Hendry v. Marshall, supra; Gloag, Contract, op.cit. p.661.

31-D.M.Walker, Civil Remedies, op.cit. p.277.

32-Ibid.

33-Petrie v. Forsyth (1874) 2R. 214; Mc Arthur v. Lawson , supra; Waterson v. Stewart (1881) 9R. 155; Mc Kellar v. Dallas's Ltd. (1928) S.C. 503.

34-Grahame v. Kirkcaldy Magistrates (1882) 9R. (H.L.) 91; Wilson v. Pottinger (1908) S.C. 580.

35-Gall v. Loyal Glenbogie Lodge of Oddfelleow (1900) 2F. 1187.

36-Ante, at p. at pp.9-10.

37-Post at pp.71-76; 84-89; 95-100; 106-111; 116-117.

38-Gloag & Henderson, Introduction to the law of Scotland , 9th ed., Edinburgh, W. green & Son Ltd., 1987, at p.142.

39-Sec.1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

40-WM.Jordine Dobie, Sheriff Court practice , Edinburgh, 1986, at p.284.

41-Lawson, F.H., Remedies of English Law , 2nd ed. London, Butterworths, 1980, at p.10.

42-(1906) 8F. 499.

43-Post at pp.95-100.

44-Milburn (1946) S.C. 301, per Lord Normand at p.315.

45-Lawson F.H. Remedies of English law, supra, at p.10.

46-Post. at p.86.

47-Mc Arthur v. Lawson, supra, per Lord President Inglis at p.1136; Rudman v. Jay (1908) S.C. 552; Bell Bros. (H.P.) Ltd. v. Reynolds (1945) S.C. 213.

48-D.M.Walker, Civil Remedies, op.cit. p.270.

49-Wilson v. Mac Kellar (1896) 24R. 254.

50-D.M.Walker, Civil Remedies, supra, at p.270.

51-Gall v. Loyal Glenbogie lodge, supra; contrast: Collins v. Barrowfield Oddfellow (1915)

S.C. 190; Ponder v. Ponder (1932) S.C. 232; see also, Gloag & Henderson, Introduction to the law of Scotland, op.cit. at p.143.

52-Post, at pp. 292-293.

53-Gloag & Henderson, Introduction to the law of Scotland, supra, at pp.143; Note however, Ford v. Bell Chandler (1977) S.L.T (Sh.Ct) 90.

54-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (1).

55-Ibid.

56-Sec. 62 (1) of the Sale of Goods Act 1979; see also, J.J.Gow, The Mercantile & Industrial law, supra, at p.123.

57-Benjamin, Sale of goods, 3rd ed., London, Sweet & Maxwell, 1987, at p.83.

58-Benjamin, Sale of goods, supra, at p.83.

59-Ibid.

60-Ibid.

61-Ibid.

62-Sec. 61 (1) of the Sale of Goods Act, 1979; Benjamin, Sale of goods, supra pp.83,88

63-(1976) 1W.L.R. 989.

64-Benjamin, Sale of goods, supra at p.83.

65-Ibid.

66-ReWait (1927) 1Ch. 606 per Lord P. Atkin at p.630.

67-Treitel, G.H. "Specific performance in the sale of goods", J.Bus.Law, 1966, at p.218.

68-Howell v. Coupland (1879) 1Q.B. 258; Taylor v. Caldwell (1863) 3B&S. at p.833; Fothergill v. Rowland (1873) L.R. 17Eq. 132; see also, Treitel G.H. supra, at p.218.

69-Benjamin, Sale of goods, op.cit. op.cit. p.83; Treitel G.H. supra, at p.218.

70-Atiyah, P.S., The sale of goods, 6th ed. 1985, p.36; Chalmers, Sale of Goods Act 1893, 17th ed., London, Butterworth, 1975, p.285.

71-A.P.Dobson, Sale of goods Act and consumer credit, 3rd ed. London, Sweet & Maxwell, 1984, at p.21.

72-(1900) 1Q.B. 513.

73-(1860) 22D. 665, at p.671, per Lord Cowan.

74-Bell, Principles, supra, §.90, p.44.

75-Sutherland v. Montrose Shipbuilding Co., supra, at p.671 per Lord Cowan.

76-Bell, principles, § 90, p.44.

77-Bell, supra. §. 91, at pp.44-45.

78-Sutherland v. Montrose Shipbuilding, supra, at p.671.

79-Ibid.

80-J.J.Gow, The Mercantile & Industrial law, op.cit. pp.81-82.

81-"The word first occurs in the comment to §. (54) of Chalmer's book on the sale of goods. This section did not reproduce Sec. 2, of the 1856 Act. The section of this book formed the

basis of the Sale of Goods Act, but § 54 of the book was, of course, considerably altered before it became Sec. 52 of the Sale of Goods Act. Nonetheless, the first edition of Chalmers, Commentary on sale of goods Act still says that Sec. 52 reproduces S.2 of the 1856 Act;.... The present writer has been unable to discover why the word "ascertained" was added to section 52." Treitel G.H. supra, at p.221, foot-note; Also Lord Atkin Mentioned the difficulty of finding out the reason behind adding the word of ascertained, see ReWait (1927) 1Ch. 606 at p.630 per Lord Atkin.

82-J.J.Gow, supra, at p.123 referring to Sec. 17 (1) of Sale of Goods Act.

83-Benjamin, Sale of goods, supra. at p.83.

84-R.Brown, Notes and Commentaries on the Sale of Goods Act 1893 , 1st ed. Edinburgh, William Green & Son 1895, at p.79; A.P.Dobson, op.cit. p.20.

85-Benjamin, sale of goods, op.cit. p.84; ReWait, supra, at p.630 per Lord Atkin.

86-Treitel G.H., Specific performance in the sale of goods, op.cit. p.221; Benjamin, Sale of goods, supra, at p.84.

87-ReWait, supra.

88-Thames Sack & Bags Co. v. Knowles & Co. Ltd. (1918) 88K.B. 585, 588; Laurie & Morewood v.Dudin & Son (1926) 1K.B. 223; Gillett v. Hill (1834) L.J. EX. 145, 147.

89-ReWait, supra, at p.630.

90-Benjamin, Sale of goods, op.cit. at p.879.

91-Wait & James v. Midland Bank (1926) 31Com. Cas. 172, at p.170 Roche J.

92-Wait & James v. Midland Bank, supra at p.179 Roche J.

93-Wait & James v. Midland Bank, supra at p.172.

94-Ibid.

95-Wait & James v. Midland Bank, supra; Benjamin, Sale of goods, op.cit. p.201.

96-Wait & James v. Midland Bank, supra; Karlshamns Oliefabriker v. East Port Navigation Cpn. (1981) 2Lloyd's Rep. 679; Benjamin, Sale of goods, op.cit.p.213.

97-ReWait, supra, at p.630 per Lord Atkin.

98-Ibid.

99-Thames Sack & Bags Co. v. Knowels & Co. , supra, at p.588.

100-Wait & James v. Midland, supra, at pp.178-179.

101-Treitel G.H. specific performance. supra, at p.221.

102-Ibid.

103-Wait & James v. Midland Bank, supra, atp.179.

104-Compare, Treitel G.H. supra.

105- Karlshamns Oliefabriker v. Eastport Navigation Corporation, The Elafi, supra.

106-(1986) Scottish Current Law Year Book, para.3016.

107-T.G.Wright, "Lecture on sale" (1872) Journal of Jurisprudence xvi, p.405.

108-(1907) S.C. 936; see also, Laurie & Morewood v. Dudin (1926) 1K.B. 223.

- 109-Hayman & Son v. M' Lintock, *supra*, at p.951 per Lord President.
- 110-(1896) 7M. 622, at p.628.
- 111-Hayman & Son v. M' Lintock, *supra*, at p.946 per Lord Ordinary opinion.
- 112-J.J.Gow, *The Mercantile & Industrial law*, *op.cit.* p.130.
- 113-D.M.Walker, *Civil Remedies*, *op.cit.* p.660.
- 114-ReWait, *supra*.
- 115-Thames Sack & Bag Co. v. Knowles & Co., *supra*.
- 116-Laurie & Morewood v. Dudian, *supra*.
- 117-Wair & James v. Middland Bank, *supra*.
- 118-J.J.Gow, *The Mercantile and Industrial Law*, *supra*, at p.70.
- 119-J.J.Gow, *The Mercantile & Industrial law*, *supra*, at p.123.
- 120-Hayman v. M' Lintock, *supra*; see also, *Pochine & Co. v. Robinows & Majoribanks* (1869) 7M. 662 at p.628.
- 121-ReWait, *supra*.
- 122-Amin, S.H., Middle East Legal System , Royston Ltd., 1985, at p.180.
- 123-Ibid.
- 124-Al-bakri, Abdul baqi, *Commentary on the Iraqi civil law*, *supra*, at pp.33-34.
- 125-Abdul baqi, Abdul fattah, *Lessons in the principles of the obligation*, *supra*, at pp.38-39.
- 126-Article 246 (1) of Iraqi Civil Code, No:149, of 1951.
- 127-Al-bakri, Abdul baqi, *Commentary on civil law*, *op.cit.* p.34.
- 128-The case of performing the obligation voluntarily will not be considered in this work; see for more details, Al-bakri, Abdul baqi, *Commentary on civil law*, *supra* at pp.12-32.
- 129-Abdul, baki Abdul fattah, *Lessons in the principles of the obligation*, pp.38-39; compare civil cassation, on 12/june/ 1952, Cassation Collection, No.187 the 3rd year, at p. 1187.
- 130-Al-jundi, Bushra, "The features of the debtor's contractual liability", *The governmental affairs administration Journal*, 1st issue, the14th year, March, 1970 at p.37.
- 131-Article 168 of Iraqi Civil Code; see also for more details, *post*, at pp. 89-94.
- 132-Al-shalqani, Ahmad Abdul fattah, "Rules of Remedies of breach in English, American and Egyptian laws", *The governmental affairs administration Journal*, 3rd issue, the14th year, July, September, 1970, at pp.589-590; Al-jundi, Bushra, the feature of the debtor's liability, *supra*, at p.37; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, the general theory of obligation , 1959, at p.794.
- 133-Al-bakri, Abdul baqi, *Commentary*, *supra*, at pp.43-46; compare Article 210 of Egyptian Civil Code, No.131 of 1948; Mubarak Sa'eed Abdul kareem, principles of Execution law, 3rd ed. Baghdad, 1978, at pp.28-32. *Post* at pp. 295-296.
- 134-Abdul baqi, Abdul fattah, *Lessons in the principles of the obligation*, *supra*, at pp.37 foot-note (3), 39.

135-Abdul baqi, Abdul fattah, *supra*. at p.37 foot-note (3),38-39.

136-Post, at pp. 209-211.

137-Al-hakeem, Abdul majid, Commentary on civil law, principles of obligation , vol:2, 3rd ed. 1977, at pp.9-11,,15 foot-note (10).

138-Al-windawi, Kamal Tharwat, Commentary on the principles of the contract of sale , 1st ed. Baghdad, 1973, at pp.166-168, 325-326; Taha, Ghani Hassoun, Commentary on the specific contract, the contract of sale , vol, 1, Baghdad, 1970, at pp.255-256; 357-358.

139-Article 246 (1) of Iraqi Civil Code; compare also, Article 536 of Civil Code.

140-Article 168 of Civil Code; compare, Article 246 (1) of Civil Code.

141-Post, at p. 217.

142-Post, at pp. 44-45; Ante, at pp. 27-28.

143-Al-sanhoori, Abdul razzaq, *Commentary on civil law*, vol:2, *op.cit*, at p.771; Murqus, Sulayman, Commentary on civil law, in Obligations , 1964, at p.556; compare Article 531 of iraqi Civil Code.

144-Al-hakeem, Abdul majid, *Commentary on civil Law*, vol:2, *op.cit*. p.11.

145-Murqus, Sulayman, *Commentary on civil Law*, *op.cit* p.565; Al-bakri, Abdul baqi, *Commentary on Iraqi civil law*, *op.cit*. pp.17-18; see also, Article 248 (1) of Civil Code; Compare, Al-hakeem, Abdul majid, *Commentary on civil law*, *supra*, at p.11., he has criticised the provision of Article 248 (1) of Civil Code; Al-sanhoori, Abdul razzaq, *Commentary on civil law*, vol.2, *op.cit*. pp.774-778.

146-Compare Article 249 of Civil Code.

147-Al-bakri, Abdul baqi, *Commentary on civil law*, *supra*, at pp.43-46,51; Al-hakeem, Abdul majid, *Commentary on civil law*, vol, 2, *op.cit*. p.11.

148-Article 535 of Iraqi Civil Code; compare Article 252 of Civil Code

149-Article 549 (1) of Civil Code; post. at pp. 120-121.

150-Article 252 of Civil Code; post, at pp. 222-226; Al-hakeem, Abdul majid, *Commentary on civil law*, vol:2, *supra*, at p.14.

151-Article 246 (1) of Civil Code; Al-sanhoori, Abdul razzaq, *Commentary*, vol:2, *op.cit*. pp.760-761; Al-bakri, Abdul baqi, *Commentary on Iraqi civil law*, *supra*, pp.35-36.

152-Article 246 (2) of Civil Code; Abdul baqi, Abdul fattah, *Lessons in the principles of the obligation*, *op.cit*. pp.41-42.

153-Al-sanhoori, Abdul razzaq, *Commentary on civil Law*, vol, 2, *op.cit*. p.761; see also, Egyptian Court of Cassation decisions, civil cassation, 12th june, of 1952, cassation judgments collection 3, No. 187, p.1187; civil cassation, 16th December of 1948, in Omar's collection 5, No. 352, at p.682; see also, Al-bakri, Abdul baqi, *Commentary civil law*, *supra*, at p.38; Sullttan, Anwar, The principles of the obligation , Beirut,1980, para.39.

154-Post, at pp. 79-84; 89-94; 100-105; 111-115; 117-123.

155-Post, at pp. 295-296.

156-See for more details as regards the writ of execution, Hafidh, Ali Mudhafar, Commentary on execution law, Baghdad, Al-a'ni press, 1962, at p.17-35; Al-naddawi, Adam W. & Mubarak, Sa'eed Abdul kareem, Commentary on the principles of the execution law, 1st ed., Mousil, 1984, at pp. 27-55; Mubarak, Sa'eed Abdul kareem, The principles of the execution law, 3rd ed., Baghdad, 1978, at pp.68-99.

157-Execution Code, No: 45, of 1980.

158-The Judge sometimes acts as an executor to enforce the decree of the court against the refusing party. Thus, he may order the imprisonment of that debtor if he refrains from complying with the decree of specific performance.

159-Article 42 of Execution Code.

160-Al-naddawi, Adam W. & Mubarak Sa'eed Abdul kareem, Commentary on the principles of the execution Law, supra, at p.98.

161-The Iraqi Court of Cassation decision, No. 822/Execution/1961, on 28/11/1961.

162-Mubarak, Sa'eed Abdul kareem, supra, at p.393; see also, The Court of Cassation decision, No.118/Execution/1963, on 19/3/1963, Judiciary of the Court of Cassation, vol.1, of 1966, at p.246; see also, Al-naddawi, Adam, W. & Mubarak, Sa'eed Abdul kareem, Commentary on the principles of law of execution, op.cit. p.99.

163-Mubarak, Sa'eed Abdul kareem, the principles of the law of execution, supra, at p.393; the Court of Cassation decision, No. 84/Execution/1974, on 9/4/ 1974; compare also, the Court of Cassation judgment, No. 868/Execution/ 960, on 31/12/1960, cited by Mubarak, Sa'eed Abdul kareem, the principles of execution law, supra at p.393; see also, Hafidh Ali Mudhafar, Commentary on execution law, supra, at p.272; the Court of Cassation decision, No.578/Execution/1961, on 13/8/1961, cited by Hafidh, Ali Mudhafar, supra, at p.272.

164-Article 43 of Execution Code.

165-Al-bakri, Abdul baqi, Commentary on Iraqi civil law, supra, at pp.66-67; Article 45 of Execution Code; Wali Fat'hai, Obligatory execution "performance" in Kuwaiti Law, Kuwait, 1978, at p.368; Al-jeelawi, Ali, "The Penalty or the Financial threat", The legal and political science Journal, Issued by, faculty of law and politics, Baghdad University, vol, 5, 1st & 2nd issue, 1986, at p.372.

166-Al-jeelawi, Ali, The penalty or the financial threat, supra, at pp.379-385.

167-Post, at pp. 296-298.

168-Articles 247, 531, 1126 of Iraqi Civil Code; Al-amiri, Sa'doun, Commentary on the sale and lease contracts, 3rd ed. Baghdad, 1974, at pp.94-95; the Iraqi Court of Cassation decision, No.623/civil/1970, on 27/5/1970, Judicial Publication, 2nd issue, the 1st year, 1971, at p.107; decision No.100/civil/ 1969, on 24/2/1970, Judicial Publication, 2nd issue, the 1st year, 1971, at p.106; decision No.567/civil/1970, on 30/5/1970, Judicial publication, 2nd issue, the 1st year, 1971, at p.107.

169-Al-windawi, Kamal Tharwat, Commentary on the sale contract, supra, at p.109-111; Al-

amiri, Sa'doun, Commentary on sale and the lease contracts, supra, at p.94; Mubarak, Sa'eed Abdul kareem, "the right of the creditor to choose the debtor's property for performance", The Legal and Political Sciences journal, issued by the Faculty of Law and Politics, Baghdad University, vol.2, the 2nd issue, of 1979, at pp.52-55; when the thing sold is owned by another person, the contract is deemed suspended. see for more details about the suspended contract, Taha, Ghani Hassoun, the theory of obligation, sources of obligation, Baghdad, 1971, at pp.302-307; Al-hakeem, Abdul majid, Commentary on civil law, vol.1, sources of obligation, 5th ed. baghdad, 1977, at pp. 305-314; Abdul bir, Mohammad Zaki, "The Suspended Contract, in the Islamic Jurisprudence & Iraqi civil law", The Law & Economic Journal, Part One, at pp.109-197; compare Article 1061 of Iraqi Civil Code; also, the Court of Cassation decision, No.346/Execution/1958, on 18/6/1958, cited by Al-kalili, Baqir, Applications of execution law, 1963, at p.103.

170-Article 531 of Civil Code.

171-Taha, Ghani Hassoun, Commentary on the specific contracts, vol.1, Sale contract, Baghdad, 1969-1970, at pp.215-216; Al-bakri, Abdul baqi, Commentary on the Iraqi civil law, op.cit. at pp.17-18; Al-amiri, Sa'doun, Commentary on sale and lease contracts, op.cit. pp.99-100.

172-Al-windawi, Kamal Tharwat, Commentary on the sale contract, supra, at p.108; Al-amiri, Sa'doun, Commentary on the sale and lease contracts. op.cit. pp.74-75.

173-Taha, Ghani Hassoun, Commentary on the specific contract, the Sale contract, supra, at p.215; Compare, Al-dhanoon, Hasan Ali, Commentary on the specific contracts, Sale contract, Baghdad, 1953, para,145; Al-amiri, Sa'doun, supra, at p.76; Al-sarraf, Abbas Hasan, Commentary on the sale and lease contracts in Iraqi civil law, Baghdad, 1956, para.314.

174-Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.49-50; Al-windawi, Kamal Tharwat, Commentary on the sale contract. supra, at p.109; Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, supra. at pp.215-216.

175-Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.49-50; Al-amiri, Sa'doun, op.cit. pp.99-100.

176-Post at p. 218.

177-Al-windawi, Kamal Tharwat, Commentary on the sale contract. supra, at pp.78-79; Al-dhanoon, Hasan Ali, Commentary on the specific contracts, the contract of sale, op.cit. pp.55; Al-amiri, Sa'doun, Commentary on the sale and lease contracts, op.cit. pp.71-74, 100.

178-Al-windawi, Kamal Tharwat, supra, at pp.79, 80 foot-note (1); Tanagho, Sameer Abdul sa'ied, the sale contract, Al-exanderia, 1973, pp.72-74.

179-Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit p.216-217; Tanagho, sameer abdul sa'ied, the sale contract. op.cit. pp.70-74.

180-Taha, Ghani Hassoun Commentary on the specific contracts, supra, at pp.207-210.

181-There is one exception to the possibility of transferring the ownership of the future

things (goods), which is the agreement with regard to the succession of a living person. It is provided for by Article 129 (2) of Civil Code, that, "An agreement with regard to the succession of a living person is void".

182-Stewart v. Kennedy supra, at p.10 per Lord Watson; Moore v. Paterson (1891) 9R. 337, at p.351 per Lord Shand.

183-Stewart v. Kennedy, supra.

184-Ante, at pp. 10-12

185-Scots law differs from English law because in English law specific performance can not be decreed where justice can be achieved by damages. Also the principles of adequacy of damages play a very substantial role in granting or refusing specific performance. see for more details, post, at pp. 194-200; 201-205.

186-D.M.Walker, Civil Remedies, supra, at p.276.

187-Stewart v. Kennedy, supra, at p.10; see also, post, at pp.84-89; see also, Waterson v. Stewart, supra; Sinclair v. Caithness Flagstone Co. (1898) 25R. 703 at p.706 per Lord Kinnear.

188-Davidson v. Macpherson (1889) 30S.L.R. 2 per Lord Young; Winans v. Mackenzie (1883) 10R. 941; see also, Wilson v. Pottinger (1908) S.C. 580.

189-Post, at pp. 111-115.

190-Stewart v. Kennedy, supra, at p.10; see also, G.Jones & W.Goodhart, specific performance, supra, at p.1.

191-Beardmore & Co. v. Barry, per Lord Justice-Clerk, at p.103.

192-Sec.52 of the Sale of Goods Act 1979; see for more details, Ante, at pp.15-24; post, at pp.71-76

193-Beardmore & Co. v. Barry, supra, at p.113 per Lord Armidle.

194-(1877) 4R. 1134, 1136.

195-(1890) 17R. 1 at p.10.

196-Ibid. at p.11.

197-Grahame v. Krikcaldy Magistrates (1882) 9R. (H.L.) 91, 92, per Lord watson.

198-Gloag, contract, op.cit. at p.407.

199-Sale of Goods Act 1979, Sec. 52.

200-Post, at pp. 84-89; 95-100; 106-111.

201-Mc Arthur v. Lawson, supra, per Lord President, at p.1136.

202-Post, at p. 200; see also, G.Jones & W.Goodhart, specific performance, op.cit. pp.2, 18.

203-Spry, Equitable Remedies, 3rd ed. Sweet & Maxwell, 1948, at p.4.

204-Schwartz Alan, "Specific performance", The Yale L.J. 89, 1979, at p.274.

205-Moore v. Paterson, supra, at p.351 per Lord Shand; Stewart v. Kennedy, supra, at p.10 per Lord Watson.

206-Stewart v. Kennedy, supra.

207-Ibid.

208-White & Carter (councils) Ltd. v. Mc Gregor (1962) S.C. 1, at p.14 per Lord Reid.

209-Ibid.

210-D.M.Walker, Civil Remedies, op.cit. p.16.

211-(1882) 9R. (H.L.) 91, 92, per Lord Watson; see also, Macnair v. Cathcart (1795) Mor. 12832; Sanderson v. Geddes (1874) 1R. 1198; Begg v. Jack (1876) 3R. 35.

212-Compare, Stewart v. Kennedy, supra, at p.10 per Lord Watson.

213-J.J.Gow, Mercantile & Industrial, supra, at p.219.

214-Moore v. Paterson, supra.

215-Moore v. Paterson, supra, at p.348.

216-Ibid, at p.351.

217-Sec.52 of the Sale of Goods Act 1979.

218-Post, at pp. 84-89; 95-100; 106-111; see also Stewart v. Kennedy, supra, at p.10, per Lord Watson.

219-Compare, Stewart v. Kennedy, supra, at p.10 per Lord Watson.

220-Beardmore & Co. v. Barry, supra, at p.115 per Lord Hunter; Gardiners (1908) S.C. 985, at p.989; Stewart v. Kennedy, supra.

221-Stewart v. Kennedy, supra, at p.11 per Lord Macnaghten; compare, G.Jones, & W.Goodhart, specific performance, op.cit. p.1.

222-Ante, at pp. 27-31; compare Article 246 (1) of Iraqi Civil Code; compare Taha Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.255-256.

223-Abdul baqi, Abdul fattah, Lessons in the principles of the obligation, op.cit. pp.38-39.

224-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. p.8; see also, Article 249 of Iraqi Civil Code; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, supra, at pp.793-794.

225-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.325-326; Tanagho, Sameer Abdul sa'ied, the contract of sale, op.cit. pp.243-244; Damages may be granted in addition to the remedy of specific performance, see the Egyptian Court of Cassation decision, cassation, on 23/4/1953, the rules are decided by the Court of Cassation, vol.1, at p.355, para, 67, cited by Tanagho, Sameer Abdul sa'ied, supra.at p.343

226-Post, at pp. 217-218.

227-See Article 246 (2), 252, 168 of Iraqi Civil Code; post at pp. 89-94; 217

228-See Article 246 (2) of Civil Code ; Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.36-37; Sulltan, Anwar, principles of the obligation , Beirut 1980, at pp.46-47. at p.52; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, op.cit. pp.764-766; Amir, Hussen, the Civil Liability , 1st ed. 1956, pp.530-532.

229-Al-sanhoori, Abdul razzaq, Commentary, vol. 2, supra at p.761-764; See contrast, the

Egyptian Court of Cassation decision, civil cassation, 12/June/1952, cassation judgments collection, vol.3, No. 187, the 3rd year, at p.1187; The Court of Cassation decision, civil cassation, 16/December/1948, Omar Collection, 5, No.352 at p.682.

230-Articles 246 (1), 247, 248 of Iraqi Civil Code; see also, Al-bakri, Abdul baqi, Commentary on civil Law, op.cit. pp.43-38; Al-sanhoori; Abdul razzaq, Commentary on civil law, vol. 2, supra, at pp.760-765; Abdul baqi Abdul fattah, Lessons in the principles of the obligation, supra, at pp.40-43.

231-Post, at pp. 89-94; 100-105; 111-115; 117-123.

232-Taha, Ghani Hassoun, Commentary on specific contracts, Sale Contract, supra, at p.255; Article 246 (1) of Civil Code; Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.35-36; Al-sanhoori, Abdul razzaq, supra, at pp.760-761; Al-amiri, Sa'doun, Commentary on sale and lease contracts, supra, at pp.122-123, 131-132

233-Al-bakri, Abdul baqi, op.cit. p.38; Al-sanhoori, Abdul razzaq, Commentary on Civil law, vol.2 supra, at pp.761-763.

234-Al-bakri, Abdul baqi, "Principles of Equity", The Journal of Legal & Political Sciences, issued by Faculty of law and politics, Baghdad University, April, 1984, at p.83.

235-Ibid, at pp.84-85.

236-Amin S.H. Middle east legal system, supra, at p.222.

237-Ibid.

238-Ibid.

239-Article 246 (2) of Iraqi Civil Code. see also Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, p.764 foot-note (2).

240-Article 146 (2) of Iraqi Civil Code; Naji, Ghazi Abdul rahman, The Economical Balance of the Contract during its performance, Baghdad, 1986, at pp.59-118; Taha, Ghani hassoun, The General Theory of Obligation, Sources of Obligation, supra, at pp.357-364; al-hakeem, abdul majid, Commentary on civil law, vol,1, sources of obligation, supra, at pp.392-401.

241-No. 35, of 1977; compare also, Hasan, Nabil Abdul rahman, "The role of the judge in achieving the balance between right and obligations in contracts". Justice Journal, issued by the Ministry of Justice, the 2nd issue, the 5th year, Baghdad, Iraq, at p.500.

242-Article 168 of Civil Code; compare, Articles 425, 179, of Iraqi Civil Code; Al-hakeem, abdul majid, Commentary on civil law, vol.1 supra, at pp.518-521.

243-Al-bakri, Abdul baqi, Commentary on civil law, supra, at p.37; Abdul baqi Abdul fattah, lessons in the principles of the obligation, supra at pp.41-43.

244-Article 246 (1) of Civil Code.

245-Sullttan, Anwar, the principles of the obligation, op.cit. p.52-55; compare also, Articles 210, 211 of Egyptian Civil Code; Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.36-37; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol:2, op.cit. pp.764-766.

246-Post, at pp. 217-218; ante, at p. 40.

247-Post, at pp. 89-94; 100-105.

248-Naji, Ghazi Abdul rahman, the economical balance of the contract, op.cit. supra, at pp.101-113; the Iraqi Court of Cassation decision, No.7/civil/1972, on 23/3/1972, Judicial Publication, 1st issue, the 3rd year at p.72.; decision No.452/civil/1975, on 27/1/1970. Al-ahkam Al-adliyah, 1st issue, the 7th year, at p.39.; decision No.923/civil/1966, on 24/11/1966, the Court of Cassation Judiciary, vol.4, at pp.127-128.; decision, 772/civil/1969, on 25/9/1971, cited by Naji, Ghazi Abdul rahman, the economical balance of the contract, supra at p.109.; decision No.109/civil/1974, on 11/9/1974. Judicial Publication, 3rd issue, the 5th year, at p.48.

249-Hasan, Nabil Abdul rahman, the role of the judge in achieving balance, supra, at p.503.

250-Naji, Ghazi Abdul rahman, the economical balance of the contract, supra, at pp.103-104.

251-An ordinary debtor case, means that the case of the debtor who is not poor or rich but his financial situation is normal. see Naji, Ghazi Abdul rahman, supra.

CHAPTER TWO.
GROUND FOR GRANTING AND REFUSING THE
REMEDY OF SPECIFIC IMPLEMENT

Introduction

Specific implement is granted, where certain grounds, i.e., (the goods are specific or ascertained, and the pursuer has applied for the remedy), exist. Nevertheless, specific implement may be opposed by the defender, claiming one of several defences, for instance, impossibility, exceptional hardship, or undue difficulty, or breach of contract by other party. Thus, where valid defences are raised, the remedy fails under the court's discretion, and it may be refused. It is not however a discretionary remedy, because of its essentially legal rather than equitable nature.

The issue of granting and refusing the remedy of specific implement will be considered in two sections.

Section One: Grounds for granting specific implement

Granting the remedy of specific implement is based on specific grounds of law. They will be considered in two Sub-sections, namely:

Sub-Section 1:-Granting specific implement in Scots law

It is submitted that the buyer, even in the sale of goods contract has the remedy as a matter of right.⁽¹⁾ In addition, in a contract for movables, specific implement will be granted if the contract is for a specific article.

In Stewart v. Kennedy,⁽²⁾ it was laid down, that specific implement is a primary and distinctive remedy of Scots law of voluntary obligation, and the aggrieved party is entitled to it as of right by means of decree *ad factum praestandum*. Consequently it is open to the buyer in the sale of goods contract to apply to the court to compel the seller to fulfil his contract specifically.⁽³⁾

The first question to consider is whether any specific implement may be granted

over any specific or ascertained goods, or whether they should be of a special, or unique nature. Secondly, must "*pretium affectionis*" be averred by the pursuer?⁽⁴⁾, i.e. (the goods have special value to him).

In Union Electric Co. Ltd v. Halman & Co.,⁽⁵⁾ Lord President Dunedin affirmed the relevance of "*pretium affectionis*" in Scots law by saying "It is argued that this is an action *ad factum praestandum* and the subjects arrested cannot satisfy the judgment in such an action. Now it seems to me that when a person asks for delivery of specific article of which there is a *pretium affectionis*, the decree that he wants is the true decree for specific performance; but when he says to the other person, "we have a contract; under that contract you are bound to deliver; you have not delivered; deliver or else pay damages", he is not asking for a decree *ad factum praestandum* in the proper sense at all". According to that dictum the criterion of whether the remedy of specific implement or damages is applicable, is whether the article represents *pretium affectionis*. If the goods do not represent any *pretium affectionis*, albeit they are specific, it is questionable whether specific implement will be granted or refused.

Although Lord President Dunedin did not answer that case clearly, it can be concluded from his dictum, that, specific implement would not be granted. This is doubtful. It is entirely against and inconsistent with the concept and the nature of specific implement in Scotland.⁽⁶⁾ Furthermore, in Sutherland v. Montrose Shipbuilding Co.,⁽⁷⁾ Lord Cowan relied on Addison's text book, which reflects English law, by stating, "whenever the object of sale is such that is an uncertainty whether the purchaser can procure another chattel of the same kind and value, or the possession of it is desirable for certain purposes, which no other chattel of the same kind will answer...", which casts further doubt on Lord Cowan statement. It thus seems that there is confusion in the Scots judiciary towards the case of "*pretium affectionis*" and the case of "uniqueness". Thus, the circumstances of *pretium affectionis* and uniqueness should not be considered as bars against granting or for refusing specific implement. They are inapplicable in Scots law, by virtue of the

following reasons and facts:

1-Specific implement is an ordinary legal remedy,⁽⁸⁾ and it is not an equitable,⁽⁹⁾ or discretionary remedy, even if it is opposed by the refusing party claiming impossibility or exceptional hardship or undue difficulty ...etc.⁽¹⁰⁾ It is granted a matter of legal right to the aggrieved party. If the matter were otherwise, i.e. " the matters of *pretium affectionis* and uniqueness are applicable in Scots law of specific implement", its nature would be turned up-side down.

The two considerations, i.e. (*pretium affectionis*) and the uniqueness should be dealt with separately in greater depth as follows:

A-*Pretium affectionis*

Pretium affectionis is a value accorded to the goods which the buyer has contracted for. The goods may have a special value to the purchaser. As Gloag pointed out,⁽¹¹⁾ there must be some reasons for demanding the particular article sold rather than other articles of the same kind and value. Obviously it is not an easy task to conclude that the goods represent "*pretium affectionis*". The test of why a purchaser prefers or has an imaginary value towards a particular type or kind of goods, is obscure. No one can conclude or confirm the reason behind everybody's desire and wish, or why he prefers such an article. The buyer himself sometimes does not know why he prefers particular goods. The court must therefore ascertain subjective grounds whether there are sufficient reasons for the purchaser to insist on delivery of particular goods. It becomes concerned with the buyer subjective values regarding such goods. Consequently, specific implement shall depend on the court's discretion to find out whether the buyer has, "some special reasons for demanding and having the particular goods".⁽¹²⁾

Above all, an application of *pretium affectionis* would render the remedy of specific implement discretionary, where as specific implement must be granted under certain legal conditions, and not as the court thinks fit.⁽¹³⁾

Specific implement will be refused where grounds in law or equitable grounds stand against it.⁽¹⁴⁾ It is questionable whether *pretium affectionis* can be regarded as

one of these equitable grounds.

There is no clear answer as to whether *pretium affectionis* is an equitable ground. Neither case law nor jurisprudence provide a clear conclusion. Nevertheless, it is thought that a *pretium affectionis* is not an equitable ground as it is just a subjective desire or wish, or, as it was said,⁽¹⁵⁾ it is "some special reason for demanding or having the particular goods". Therefore, it is illogical to consider failure of a buyer to prove that he has some special reasons for having the goods, as an equitable ground for refusing performance by the seller. Furthermore, *pretium affectionis* cannot be compared with the equitable grounds such as, impossibility, exceptional hardship or undue difficulty....etc, because these grounds affect the ability of the contracting party to perform his contract.⁽¹⁶⁾

If a consideration of *pretium affectionis* is involved in granting or refusing specific implement, that would render the remedy equitable instead of legal. This is accepted in English law where the remedy has always been regarded as equitable and therefore discretionary. Also, specific performance in English law "is not granted, unless justice cannot be achieved by damages".⁽¹⁷⁾ Where as Scots law has never accepted the said principle. Once *pretium affectionis* is introduced to the concept of specific implement, a conflicting consequence will arise, and damages will be regarded adequate remedy for breach of the sale contract and, as Lord Young suggested,⁽¹⁸⁾ that "where complete justice would be done to the other party by damages" they will be granted as an alternative to specific implement.

The principle that a purchaser should be denied specific performance merely because he cannot prove *pretium affectionis*, in turn reflects the legal nature of the remedy in the English law system, especially it "was not a remedy to which a party was entitled at Common law".⁽¹⁹⁾ Moreover, a party who wished to obtain specific performance "was compelled to resort to the separate jurisdiction of the Court of Chancery, which at times refused its assistance, even where a legal right was established, leaving the party who invoked it to his ordinary remedies".⁽²⁰⁾ Again

specific performance in English law "is not a matter of legal right, but a purely equitable remedy",⁽²¹⁾ and "the only legal remedy arising from breach of contract is a claim of damages".⁽²²⁾ Furthermore, "In England the remedy of specific performance is an extraordinary remedy....., where specific performance is part of the ordinary jurisdiction of the court", of Scotland.⁽²³⁾

A Scots Court also has discretionary power to refuse the remedy on equitable grounds,⁽²⁴⁾ but *pretium affectionis*,⁽²⁵⁾ is not one of these equitable grounds. Therefore, *pretium affectionis* has no role to play in granting or refusing specific implement. Above all, even if, *pretium affectionis* were an equitable ground, that would not alter the nature and the concept of the remedy of specific implement to that of an equitable or discretionary remedy.

The principle of *pretium affectionis* gives rise to another substantial matter, namely, that the remedy may become exceptional rather than ordinary legal remedy, for howmany kinds of goods represent subjective value to the buyer, and the buyer can aver *pretium affectionis*? Also, howmany buyers will fail to prove *pretium affectionis*?

Undoubtedly, the majority of sale contracts are for sale of normal or ordinary commodities. The goods, which are special and which the buyer can aver some special reasons to have, being far less numerous. Specific implement, then will be refused in the majority of the sale contracts on the ground that the goods do not represent any *pretium affectionis*, because they are ordinary goods, and they are easily obtained in the market. Specific implement, then becomes a very restricted remedy and does not cover the whole area of sale of goods contract. It becomes exceptional remedy, only for a certain category of goods and purchasers.

It is submitted that in Scotland a party who seeks specific implement of a contract for the sale of goods, does not need to show or to aver *pretium affectionis*, as long as the article is specific or ascertained, for the consideration of *pretium affectionis* is not an equitable or legal ground for refusing the remedy of specific implement. In addition,

refusing the remedy of specific implement and granting damages alternatively on the ground that the article (the goods) does not represent any *pretium affectionis* to the purchaser, conflicts with the general rules of specific implement in Scots law, and it does not satisfy the concept and the nature of the remedy.

Damages cannot be granted in substitution for the remedy of specific implement merely because the contracting party fails to show or aver *pretium affectionis* for the following reasons:

1-"If he elects to do so, he cannot be compelled to the alternative of an action of damages, unless implement is shown to be impossible" (26), not because he (the party) cannot aver *pretium affectionis*.

2-By saying that, "if it is a particular article.....to which a peculiar and special value attaches, and where complete justice cannot be done by damages.....the court will order specific performance", (27) the remedy will be rendered exceptional and extraordinary. It is not granted, unless justice would not be done by damages. (28) Thus, specific implement will become discretionary and equitable remedy.

It seems that all this confusion and inconsistency arises because the principle of *pretium affectionis* has been adopted haphazardly from specific performance in English law.

B-Uniqueness test

To what extent does the uniqueness consideration affect the right of the aggrieved party to obtain specific implement?

In Sutherland v. Montrose Shipbuliding Co., (29) Lord Cowan said "It may be, that in a sale of goods or commodities generally, where delivery is not made at the time specified by the contract, the remedy of the purchaser is to claim damages calculated on such principles, as with due regard to the market price at the time, and place of delivery, will secure complete indemnity to the purchaser. Specific performance in such a case, may not be claimed, and is not necessary to enable the buyer to place himself in the position he would have been in had delivery been made in terms of the

contract. It is different where the contract relates to some specific things or articles; for then the obligation to deliver will be enforced". Then he stated, "It is vain to say, in such a case where specific vessel had been contracted for and built, and was ready to be delivered, delivery of it could have been refused".

He added again that, "This could not be recognised in the sale of a specific article or thing, as a particular horse, or some specific article of furniture, or of house".⁽³⁰⁾ It should be noticed that the above dictum may lead to a conclusion of two different concepts, namely:

First:- Lord Cowan considered a specific thing or article as an article which was agreed upon by the contracting parties. Thus the remedy of specific implement would be granted, whether the article is unique or it is easily obtainable. This concept complies and is consistent with the concept and the nature of specific implement.

Secondly:- A specific article means only that which represents uniqueness. This concept, unfortunately represents the idea of Lord Cowan towards specific goods and specific implement. He considers specific thing means a particular horse not just any horse, or some specific article of furniture or of a house. This concept, it is believed, is inconsistent with the Scots law of specific implement, because it conflicts with its nature as a legal ordinary remedy, and turns it to be an exceptional discretionary remedy. Furthermore, as has already been shown,⁽³¹⁾ that the concept of specific goods does not require that the article must be of a unique nature for granting specific implement. In addition, the concept of uniqueness is entirely an English law principle,⁽³²⁾ and, even in English law, which considers specific performance as equitable, exceptional and discretionary, it was said,⁽³³⁾ "it is hard to see why specific relief was granted in respect of an Adam-style door, but refused in respect of a set of Hoeppel white chairs". It was also contended,⁽³⁴⁾ that "the equitable relief is reserved in the law only for contracts involving unique goods, is not correct. Specific performance has been applied by the courts to numerous circumstances in which "uniqueness" of the goods or services is not obvious". Thus, even at Common law

there is support for granting specific performance regardless of the uniqueness consideration. Why then Scots law is keen to adopt this troublesome principle and its consequences of under or over compensation.⁽³⁵⁾

The above analysis may lead to the conclusion that uniqueness is not one of the principles which play a role,⁽³⁶⁾ in granting or refusing specific implement in Scotland. For, the goods to be specific or ascertained within the legal meaning of that term, it is submitted, is sufficient for specific implement to be decreed.

2- It may be emphasised the irrelevance of *pretium affectionis* in Scots law by stating,⁽³⁷⁾ that "The requirement of *pretium affectionis* has, as Gloag concedes, no actual decision to justify it. It is based on a conjectural obiter dictum of Lord Cowan in Sutherland v. Montrose Shipbuilding co., relying upon an English text book writer, apparently unaware that the remedy was unknown to Common law, only resorted to exceptionally by Courts of Equity, and even under Statute wholly within the discretion of the court". It seems that the circumstance of *pretium affectionis* has been denied strongly to be a principle of Scots law of specific implement, as a restriction on granting or refusing the remedy, for Scots law and English law are entirely different considering the nature and the concept of that remedy. Moreover, the consideration of *pretium affectionis* complies with a remedy of a discretionary, exceptional, and equitable nature, which is the nature of specific performance in English law. Furthermore, Gloag pointed out,⁽³⁸⁾ that, "It is probably the law, though there is no actual decision that the party who asks for a decree *ad factum praestandum* in implement of a contract of sale must aver a *pretium affectionis*". Again, there is doubt for this consideration to be accepted as a principle of specific implement in Scots law. If, however, the circumstances of *pretium affectionis* and uniqueness have to be applied on the case of goods and specific implement in Scots law, it is reluctantly believed, that specific implement in Scots law runs after the English law of specific performance without too much choice, and consequently, the remedy will be no longer considered ordinary legal remedy, but it is equitable, exceptional and discretionary

remedy.

Granting specific implement in Scotland, is based on certain legal grounds. They are as follows:

1-Specific (39) or ascertained goods.(40)

2-Application for such a remedy by the purchaser.(41)

1-Specific or ascertained goods

Where the goods are specific or ascertained within the concept which has already been considered,(42) specific implement should be ordered. It has been argued,(43) that, "In Scotland the right to compel delivery is competent to a buyer, although the goods purchased are not specific, if it be in the power of the seller to make them so and deliver them. If, for instance the sale be part of a whole, the seller may be compelled to separate and deliver without having the option of paying damages for breach of contract and retaining the goods". Thus, "if it is in the power of the seller to make the goods, or even part there of, specific and delivers them the buyer has the right to compel delivery".(44) Thus, it is "scarcely arguable that in Scots law a seller can evade specific implement by refusing to appropriate the goods".(45)

In Sutherland v. Montrose Shipbuilding Co.,⁽⁴⁶⁾ Lord Cowan considered the concept of specific goods and the extent to which specific implement relies on it by saying, "it cannot be thought doubtful that the vessel contracted for, when finished and ready to be launched, although after the period stipulated by the contract, might have been claimed by the pursuer, and delivery compelled by action". "it is vain to say, in such a case, where a specific vessel had been contracted for and built, and was ready to be delivered, delivery of it could have been refused".⁽⁴⁷⁾ Further, " of every such specific article bought, delivery may be legally enforced from the seller; and he cannot by disregarding his obligation to deliver at the particular time stipulated, retain the subject and convert the purchaser's claim into damages".⁽⁴⁸⁾ "He (the purchaser) is entitled to have the specific subject he has bought delivered to him.....".⁽⁴⁹⁾

In Munro v. Liquidator of Balnagown Estate Co.,⁽⁵⁰⁾ Lord Blades pointed out, that " Failure on the part of the buyer to remove timber from the seller's land by a

specific date may sound in damages for the failure to remove, but,it confers on the seller no right to prevent the buyer from removing timber which he has severed from the land". Lord President Cooper,⁽⁵¹⁾ rejected the above opinion, by stating, "it is impossible.....to pronounce any decree *ad factum praestandum* which is not absolutely precise in every particular, both as to time and as to place, and we are not yet in a position to give such particularly to any order in this case".

Scots courts have jurisdiction to order specific implement, i.e. "the delivery of specific or ascertained goods". Furthermore, to secure granting specific implement by Scots courts in the case of breach of a contract for the sale of goods, where the goods are specific or ascertained, all the circumstances related to granting the remedy of specific performance in English law, such as the goods are of "unusual beauty, rarity and distinction",⁽⁵²⁾ or *pretium affectionis* could not be estimated and measured in damages,⁽⁵³⁾ or "the equitable as well as the statutory, discretion to order performance of a contract for the sale of goods will be exercised only if an award of damages would be an inadequate remedy",⁽⁵⁴⁾ or specific performance will be refused if the sale contract relates to goods which are "an ordinary article of commerce",⁽⁵⁵⁾ should be ignored.

The Scots Courts must avoid these circumstances, in order to give the remedy of specific implement the real and true face of being a legal and ordinary remedy, and to isolate it from the influence of English law. As Lord Herschell,⁽⁵⁶⁾ said once, "I do not think it would be of any advantage to devote time to an analysis of the English decisions, or to inquire whether a Court of Equity in England would require a decree for specific performance under the circumstances which are alleged to exist in the present case. For I think if that proposition could be established it would afford no guide to the conclusion which ought to be arrived at where a decree of specific implement is sought in the courts of Scotland".

Again, Lord Watson,⁽⁵⁷⁾ emphasised the idea of avoiding the circumstances and the restrictions of the remedy in the English, by saying "In England the only legal right

arising from a breach of contract is a claim of damages, specific performance is not a matter of legal right,... But in Scotland the breach of a contract for the sale of a specific subject gives the party aggrieved the legal right to sue for implement". Furthermore, Lord Macnaghten,⁽⁵⁸⁾ suggested that Scots courts cannot and should not take the risk of accepting the circumstances which surround the remedy in English law, by saying, "In England the remedy of specific performance is an extraordinary remedy. It is always a matter of discretion, and defences are admitted in a suite for specific performance which are inadmissible according to the doctrine and practice of Scots courts, where specific performance is part of the Scots ordinary jurisdiction of the court".

Therefore it is competent in Scots law to grant specific implement where the goods are specific or ascertained regardless of considerations of uniqueness or *pretium affectionis*.⁽⁵⁹⁾ Nevertheless, this view has not been universally accepted by Scots scholars opinions stating that, ⁽⁶⁰⁾ "It is not normally appropriate for generic goods where other goods can be obtained from an alternative supplier and damages for non-delivery is normally an adequate remedy". Gloag,⁽⁶¹⁾ was not sure whether *pretium affectionis* is a Scots law's principle. Alternatively, it was stated,⁽⁶²⁾ that the circumstance of *pretium affectionis* is an English law principle despite being referred to in a Scots case which relied on "an English text book writer".⁽⁶³⁾ It seems that specific implement is granted where the goods are specific or ascertained regardless of whether these goods are unique or ordinary, or whether the purchaser can aver *pretium affectionis*.

2-The purchaser's application for specific implement

Specific implement cannot be decreed without being requested by the pursuer, for Sec. 52 of Sale of Goods Act 1979, provides that, "1-In any action for breach of contract to deliver specific or ascertained goods the court mayon the plaintiff's (the pursuer's) application, by its judgment or decree direct that the contract shall be

performed specifically, without giving the defendant (the defender) the option of retaining the goods on payment of damages.

2-The plaintiff's (the pursuer's) application may be made at any time before judgment or decree".

The above provision shows the importance of the pursuer's application for granting of specific implement. Nevertheless, specific implement will not be decreed unless the time of performance has arrived, even though there has been a prior refusal to implement.⁽⁶⁴⁾ Also, "if it is too soon to require the contract to be performed, it is too soon to find that the defender is in default".⁽⁶⁵⁾ Consequently, the pursuer should not expect to have the contract specifically performed. However, a contracting party, for instance the buyer, may commence proceedings for specific performance if the other contracting party (the seller) has intentionally and deliberately declared that, he no longer intends to perform the contract.⁽⁶⁶⁾

A contracting party may request the court to ordain the other contracting party to perform specifically what he undertook to do.⁽⁶⁷⁾ Thus, to request and demand specific implement, and for such a decree to be competent, it is essential that a claim for specific implement should be precisely framed and should specify exactly what the defender must do to comply with the order of specific implement,⁽⁶⁸⁾ for, such a claim is the basis of the court's decree, and the court, "In pronouncing decree *ad factum praestandum*.....has to bear in mind the consequences and sanctions of such a decree".⁽⁶⁹⁾

Granting a decree of specific implement without the pursuer's application could lead to unpleasant consequences, such as ambiguity or vagueness, bearing in mind, the "Failure to implement such a decree exposes a defender to the penalty of imprisonment which it is in the power of the pursuer to put in force".⁽⁷⁰⁾ Further, how can the court express the decree of specific implement without being applied for, clearly, specifically, and definitely?

The court cannot do so without a clear, unambiguous and specific crave, for Lord President again expressed his fear of the consequences by saying, "I therefore think

that in the case of decrees which may be thus enforced, or which expose a defender to penal consequences, it is right that the court should so express the decree that the defender shall be in no doubt regarding the obligation he has to discharge".⁽⁷¹⁾ Furthermore, a decree of the court, "ordering performance of some specified act.....can be obeyed by some specific act done on the part of the defender".⁽⁷²⁾ Thus, a decree which is indefinite in its terms, cannot be enforced against the defender.⁽⁷³⁾

So far, it seems that granting specific implement relies very much on a definite, specific and unambiguous crave. An ambiguous and vague crave leads to the refusal of the remedy of specific implement.⁽⁷⁴⁾

The court cannot grant specific implement in favour of the purchaser without an application from him.⁽⁷⁵⁾

The choice of applying for either specific implement or for damages depends on the circumstances of each case. For instance, if the buyer applies for damages but the seller has already delivered the goods, i.e. "performed his obligation specifically", is the purchaser entitled to refuse specific implement and to insist on his application for damages?

Performing the obligation voluntarily, i.e., discharging the obligation, should be respected at any time, because it is the natural end of the obligation. To say that the buyer is entitled to his application for damages instead of accepting performance of the obligation by the seller is unacceptable, for the buyer has contracted with the seller to obtain the goods not to obtain damages. The purchaser is liable for not taking delivery of the goods within a reasonable time, when the seller is ready and willing to deliver and he requests him to take delivery,⁽⁷⁶⁾ provided that, there is no fault by the seller. If both parties are in default as to delivering and taking delivery of the goods, neither the seller nor the buyer can claim damages.⁽⁷⁷⁾

If the purchaser applied for damages, but he changes his mind and asks for specific implement before performance of the contract by the seller, then as long as, the defender (the seller) has not performed his obligation specifically, the buyer may ask

for damages. If the seller has performed his obligation specifically, the buyer has no option to ask for damages. As long as the decree has not been made yet, the purchaser is able to ask for specific implement instead of damages. Sale of Goods Act 1979, in Sec.52 (2) provides, that "The plaintiff's (the pursuer's) application may be made at any time before judgment or decree". There upon, the purchaser may apply for damages instead of specific implement and the seller may offer to pay damages instead of performing specifically. It should be emphasised however that this arises as a matter of agreement and not of right.

The agreement between the contracting parties to have damages instead of specific implement is legal and it flows from the principle and doctrine of freedom to contract,⁽⁷⁸⁾ because "the party who enters into a contract having well-known incidents will be held bound to fulfil the obligations which the law implies as resulting from an agreement to inter that contract, irrespective of the question whether he knew of those obligations, or intend to subject himself to them".⁽⁷⁹⁾ Again, by provision of Sec. 55 (1) of Sale of Goods Act 1979, "where a right, duty, or liability would arise under a contract of sale of goods by implication of law, it may,....., be negatived or varied by express agreement, or by course of dealing between the parties,..". Furthermore, to agree on damages instead of specific implement could be "a contractual obligation (which) must have as its basis the agreement of the parties, express in words, writing or conduct".⁽⁸⁰⁾

The two parties may agree to conclude a new contract or to rescind a contract was previously concluded.⁽⁸¹⁾ In addition, if the sale of goods contract contains a stipulation for a remedy in the event of breach of a certain kind or in certain circumstances, then the stipulated remedy may be invoked if a breach of the stated kind takes place,⁽⁸²⁾ and no specific implement will be granted. Parties may make express provision for payment of a stated sum, or a sum calculated in a stated way, by a party in breach, or in breach in particular ways, of the contract.⁽⁸³⁾ Thus, a stated sum is subject to the rules of liquidated damages.

Sub-section 2: Grounds for granting specific performance in Iraqi

civil law

Under the Iraqi Civil Code in Article 246 (1) "A debtor shall be compelled to perform his obligation specifically if such performance is possible". Thus, specific performance is ordered against the party in breach if such performance is possible. However, granting the remedy is based on specific legal grounds without them the creditor is not entitled to have his contract specifically performed.

It is questionable whether granting the remedy in Iraqi civil law is affected by the considerations of *pretium affectionis* and uniqueness.

Before considering the ground for granting the remedy *pretium affectionis* and uniqueness will be examined:

-Pretium affectionis and Uniqueness

In Iraqi civil law, specific performance is unaffected by the considerations of *pretium affectionis* and uniqueness, and neither the Civil Code nor the jurisprudence or even the judiciary have paid any attention to them and no consideration has been taken at all, by virtue of the following grounds:

1-According to Article 246 (1) of Civil Code specific performance is granted whenever it is possible. It provides, that "A debtor shall be compelled to perform his obligation specifically, if such performance is possible". This provision may lead to the conclusion, that there is no way to substitute specific performance by damages, if performing the obligation is possible. Further, under the above Article there is no hint to the above considerations. It means, that specific performance is granted with or without the considerations of "*pretium affectionis* and uniqueness"

2-Even when specific performance is refused, the grounds for refusing it are obvious and clear,⁽⁸⁴⁾ and the considerations of *pretium affectionis* and uniqueness do not constitute any part of these grounds.

3-Although, damages are not an alternative remedy to specific performance,⁽⁸⁵⁾

they might be ordered sometimes due to certain exceptional grounds,⁽⁸⁶⁾ but not because they achieve justice more than specific performance, or because the buyer cannot aver *pretium affectionis* or the goods are not unique.

4- The seller has the right of specific performance against the purchaser. He cannot be asked to aver *pretium affectionis* or uniqueness, where he applies for specific performance against the purchaser who refuses to pay the price. Surely, there is no way to consider *pretium affectionis* or uniqueness in such a case.

5-The debtor should perform specifically his obligation, as long as, it is possible.⁽⁸⁷⁾ There is no escape from this result by claiming that goods are easily obtainable or ordinary commodities. This argument is not found in Iraqi civil law and jurisprudence, and it has not been taken into consideration by the judiciary too.⁽⁸⁸⁾

Granting specific performance is based on certain legal grounds. To obtain a useful comparison with Scots law, these grounds are dealt with in a different way from that which is followed by the Iraqi civil law jurisprudence, because under jurisprudence there are three grounds for granting specific performance.⁽⁸⁹⁾ These are, 1st; the possibility of performance of the obligation specifically by the debtor,⁽⁹⁰⁾ 2nd; granting specific performance should not be too onerous for the debtor,⁽⁹¹⁾ and 3rd; the creditor should apply for such a remedy.⁽⁹²⁾ Where as it was stated that there are five grounds to grant specific performance.⁽⁹³⁾ Nevertheless, it is submitted that, considering the main grounds, which relate to the goods in the sale contract and the applicant are more important and essential than the surrounding circumstances. The case of grounds for granting the remedy, which are dealt with by the jurisprudence in Iraqi civil law as conditions on which the remedy is based, is a matter subject to the court's discretion especially where performance of the obligation is impossible, or where it is too onerous for the debtor to perform. Thus, examining whether specific performance is possible, and whether it is too onerous for the debtor to perform his obligation specifically, should be treated as grounds for refusing not for granting the remedy of specific performance.⁽⁹⁴⁾

The grounds for granting specific performance are as follows:

- 1- Goods must be specifically identified.
- 2- Goods are described as specie, then identified by way of individualisation.
- 3- The creditor's application for specific performance.

1-Goods must be specifically identified.⁽⁹⁵⁾

According to Article 247 of Iraqi Civil Code, "...an obligation to transfer ownership or any other real right transfers *ipso facto* that right if the object of the obligation is specifically identified and is owned by the debtor". If the object of the contract is movable specifically identified, the debtor is obliged to deliver it to the creditor (the buyer). If, for instance, the debtor (the seller) has refrained from delivering the goods to the creditor, (the purchaser), and he still possesses them, the purchaser is entitled to ask the court to order the seller to deliver them.⁽⁹⁶⁾ Nevertheless, when the goods are no longer available, whether because they are hidden, or they are destroyed and they no longer exist, specific performance becomes impossible, and damages become the alternative remedy to specific performance.⁽⁹⁷⁾

The buyer has the right to insist on having the goods delivered to him, when the seller refuses to do so. However, does the seller need to be summoned before the buyer's application for specific performance?

Generally, the Civil Code in the case of specific performance does not require a formal summons to be served on the debtor.⁽⁹⁸⁾ However, Article 177 (1) of Civil Code provides, "In bilateral contracts if one of the parties does not perform his obligation, the other party may after serving a formal summons on the debtor, demand the rescission of the contract with damages if they due...". Thus, according to the above Article, the summons is important to inform the seller that he has committed a breach to his obligation, and to notify him that he may be subject to the court's order to perform his obligation specifically. In addition, summons may help to prove that the seller is in breach of his obligation.⁽⁹⁹⁾ Nevertheless, the provision of Article 177 (1) of Civil Code does not seem to require serving a formal summons on the refusing seller

before ordering him to perform specifically. It says, "after serving a formal summons on the debtor..". There is no indication that a summons is required to inform the failing party before enforcing him to perform what he has undertaken to do or not to do. However, serving a summons on the refusing debtor has been considered fundamentally important by Iraqi civil law jurisprudence in the case of breach of contract and remedies. Therefore, the refusing debtor should be informed before ordering him to perform specifically.⁽¹⁰⁰⁾ The reason behind this is, that Iraqi jurisprudence relies on Egyptian civil law jurisprudence,⁽¹⁰¹⁾ and on Egyptian Civil Code in Article 157 which provides, "In bilateral contracts if one of the parties does not perform his obligation, the other party may after serving a formal summons on the debtor, demand the performance of the contract or its rescission, with damages....".

Serving of a summons on the debtor cannot find support in Iraqi Civil Code, especially in Article 177 (1) or in Articles (246-251) of the Code, which are devoted to the remedy of specific performance, for the Iraqi Civil Code makes no provision for serving of a summons claiming specific performance.⁽¹⁰²⁾ In addition, Article 256 of Iraqi Civil Code provides, that "Damages, unless otherwise provided in Law, are not due before the debtor has been formally summoned". Thus, why has the Civil Code failed to provide clearly and expressly for the serving of a summons on the refusing debtor in the case of specific performance if it is fundamentally important and so necessary to obtain specific performance against him? where as the serving of a summons has been provided for, in the case of damages.⁽¹⁰³⁾ Furthermore, Article 258 of Iraqi Civil Code provides that, "A formal summons on the debtor will not be necessary in the following cases:

(a)-if specific performance of the obligation has become impossible due to the debtor's fault.....".

It seems that the case of serving summons on the debtor to obtain specific performance does not represent a major factor in such a case. Furthermore, relying on Egyptian civil law jurisprudence while Iraqi Civil Code is silent towards such a case leads to either difficulty or injustice or may open the door widely to the court's

discretionary power. However, serving a formal summons on the debtor would be considered a useful procedure for both parties.

2-The goods are described as specie but become specific by individualisation.⁽¹⁰⁴⁾

According to Article 248 (1) of Iraqi Civil Code, goods of the above description do not assist transferring their ownership, unless they are identified specifically. It provides; "when an obligation to transfer ownership or any other real right, has for its object a thing which is described only as regards its specie, the right is not transferred, unless the object is specifically identified". Thus, if the object of an obligation is to deliver fungibles, for instance, wheat, or rice, and the debtor has refused to deliver the goods,⁽¹⁰⁵⁾ the creditor, (the purchaser) is entitled to oblige the debtor to specify the goods,⁽¹⁰⁶⁾ for the debtor's refusal to identify the goods, gives the creditor the right to raise a claim of specific performance against him, i.e., "to enforce the debtor to specify the goods".⁽¹⁰⁷⁾ Specification of the goods can take place either by the creditor himself under the court's permission, or by an expert.⁽¹⁰⁸⁾

Before identifying the goods specifically, whether by individualisation,⁽¹⁰⁹⁾ or any other method suits their nature, the title of the goods cannot be transferred to the purchaser,⁽¹¹⁰⁾ and thereupon, no specific performance can be ordered as the seller may have other movables of the same kind.

If the debtor (the seller) does not have movables of the same kind, the creditor (the purchaser) may upon an order of the court, or in case of urgency even without such an order acquire at the expense of the debtor, an article of the same kind. He may also claim the value of the articles without prejudice to damages in either case.⁽¹¹¹⁾

The creditor is entitled to obtain an article equivalent to the article which he has contracted for, at the debtor's expense. It is questionable, whether buying goods of the same kind as the contractual goods at the debtor's (the seller) expense, by the buyer, is or is not considered specific performance. It is agreed by scholars and by

jurisprudence, that the above case is specific performance, and no arguments have been put to the contrary.⁽¹¹²⁾ However, it is thought, that the above case is not specific performance, but amounts to the seller paying damages to the purchaser, so he may buy similar goods by himself. This is supported by the following arguments:

1-Specific performance is defined as: ordering the debtor to perform what he has undertaken to do or not to do, precisely and accurately.⁽¹¹³⁾ Thus, how can ordering the debtor to pay damages "expense" to the purchaser be considered an accurate and precise performance? Surely, it is not specific performance, but an order to grant damages.

2-According to Article 246 (1) of Civil Code, "the debtor shall be compelled to perform his obligation specifically if such performance is possible". Thus, both within the definition of the remedy and under the provision of Article 246 (1) of Civil Code, the debtor cannot be ordered to pay damages if it is possible to perform specifically. Subsequently allowing the buyer to buy goods at the expense of the seller, means that the seller cannot perform his obligation specifically, for there is no way to allow the buyer to buy articles of the same kind of the contract's object if the seller is able to perform specifically, i.e. "to deliver the goods, which he has agreed to deliver".

3- There is no difference between ordering the seller to pay damages for the purchaser instead of delivery, and allowing the purchaser to buy article at the seller expense, for the buyer can buy the article of the same kind with damages. Furthermore, ordering damages in substitution for specific performance regardless of the circumstances and grounds of refusing the remedy,⁽¹¹⁴⁾ is not the policy of Iraqi civil law. Nevertheless, the Iraqi Civil Code has provided, surprisingly, for the buyer to buy articles at the expense of the refusing seller. Unfortunately, this case is inconsistent with the nature and principles of specific performance. If performing specifically by the seller becomes impossible or too onerous, damages would be the alternative, otherwise the seller must be compelled to perform his obligation specifically.⁽¹¹⁵⁾

4-There are two ways that the creditor (the purchaser) can obtain his right, either ordering the debtor to perform specifically, or ordering him to pay damages.⁽¹¹⁶⁾ In the above case, delivery of the goods to the purchaser by the seller may become impossible or exceptionally hard or unduly difficult. The court then permits the purchaser to buy goods of the same kind at the cost of the seller.⁽¹¹⁷⁾ This is a sort of damages granted to the purchaser. He is not obtaining the same thing that he has contracted for, but another thing of the same kind.

3-The creditor's application for specific performance.⁽¹¹⁸⁾

Specific performance cannot be granted, unless it is applied for by the creditor. Furthermore, if the creditor does not apply for specific performance, but for damages instead, and the debtor has fulfilled what he has undertaken to do, he (the creditor) cannot refrain from performance, and cannot insist on having damages.⁽¹¹⁹⁾ However, before performance by the debtor, the creditor may change his mind and ask for specific performance instead of damages,⁽¹²⁰⁾ provided that, the application for specific performance is made before the court's judgment in the disputed case.⁽¹²¹⁾ If the creditor applies for damages, and the debtor does not show any readiness to perform specifically, the court should award damages.⁽¹²²⁾

Where the debtor refuses to perform his obligation the creditor must fulfil two conditions before specific performance will be granted, namely:

1-The debtor's refusal to perform his obligation specifically or even his delay in doing so, should not occur by reason of the creditor's non-performance of his obligation towards the debtor. If so, the debtor is entitled to refuse or to delay his performance.⁽¹²³⁾ The debtor's refusal in such a case is deemed to be legal, especially in the case of bilateral contracts,⁽¹²⁴⁾ according to the principle of "*Exceptio Non Adimpleti Contractus*".

2-The time for performance has passed.

Comment

1-specific implement in Scotland is granted in respect of specific or ascertained

goods whenever it is possible. The same is true of the Iraqi civil law of specific performance, for the grounds such as specific or ascertained goods form the corner stone of granting the remedy in both systems.

2-The considerations of *pretium affectionis* and uniqueness do not affect the remedy. Although, the picture is very clear in Iraqi civil law, in Scots law a confusion surrounds the influence of these two factors on specific implement. Nevertheless, the overall impression is, these two factors should not influence the remedy of specific implement.

3-The existence of the legal grounds is sufficient to grant the remedy in both systems regardless of the considerations of uniqueness or *pretium affectiornis*.

Section Two: Grounds for refusing specific implement

Specific implement is not always granted. It may be refused where certain grounds are available. These grounds subject to the court's discretion, which takes into account the ability of the contracting party to perform, and to what extent performance of the contract can be achieved. The refusing party may claim impossibility, or exceptional hardship, i.e., (performance too onerous for the debtor), or breach of the contract. These circumstances should be examined, for they affect performance of the contract and *afortiori*, specific implement thereafter. They will be dealt with as follows:

- 1-Impossibility of performance.
- 2-Exceptional hardship.
- 3-Breach of contract by the seller.
- 4-Breach of contract by the buyer.

Sub-Section 1:Impossibility of performance of the obligation

The contract may be rendered impossible for reasons, which constitute a ground for refusing the remedy of specific implement. Such issues as, who should be held liable for impossibility of performance, the time at which the impossibility can be considered effective, and other fundamental matters which play a role in the case of impossibility in

Scots and Iraqi systems respectively as follows:

1-Impossibility of performance of the obligation in Scots Law

The general rule of the Scots law is, that a decree *ad factum praestandum* shall not be granted, when it is impossible for the contracting party (the seller) to perform his obligation,⁽¹²⁵⁾ for the purpose of such a decree is, to enable the pursuer, (the purchaser), to secure his right under the contract, not to punish the defender.

Impossibility of performance cannot be considered in detail in this work, and is fully considered in the undernoted works.⁽¹²⁶⁾

The issues such as, on which basis impossibility is regarded as a ground for refusing specific implement, when should impossibility take place to have such influence on specific implement, to what extent the court has discretionary power towards impossibility, and where the crave or the decree itself is ambiguous and vague to some extent, are substantial in considering impossibility as a ground for refusing specific implement.

Time of impossibility

Impossibility of performance of the obligation may occur either by the defender's or by the pursuer's default. The question of who is entitled to have his contract specifically performed, should be considered. In addition, where there is a contract for the sale of a specific thing and without the fault of either party, the thing perishes before the time for delivery, the contract is void, and the purchaser is not entitled to implement or even to damages.⁽¹²⁷⁾

It may be discovered after the contract was made, that performance was impossible at the time the contract was made. If so, the contract is void.⁽¹²⁸⁾ What is possible or impossible depends very much on the circumstances in each case. If, for instance, A has contracted with B to transfer a property to him (B) but A has transferred that property to another person C, A, is in breach of contract towards B. It, however, B cannot obtain specific implement but damages instead.⁽¹²⁹⁾

The rights and obligations of the parties may vary according to whether impossibility arises before or after the contract is concluded.

If a contract was concluded and the goods were destroyed before the risk has passed to the buyer, the contract is avoided.⁽¹³⁰⁾ However, if the property in those goods has passed to the purchaser he bears the risk, unless the contracting parties agree otherwise. So, the purchaser in this case, is not relieved from paying the sale price but the seller is relieved from his obligation to deliver.⁽¹³¹⁾ In certain circumstances, the risk may remain with the seller, although the property in the goods may have passed to the purchaser. Such liability may be inferred from the terms of the contract.⁽¹³²⁾

Nevertheless, the fact that performance of the contract has become less profitable and more difficult is not sufficient ground for refusing specific implement.⁽¹³³⁾ Whatever the ground of the impossibility, the effect on the decree is the same.

Basis of impossibility

If performance of the contract becomes impossible by the fault of either party, this does not affect or alter the consequence. A decree *ad factum praestandum* will not and should not be pronounced.⁽¹³⁴⁾ for the following reasons:

1-It is impossible for the decree of specific implement to be executed if it is pronounced in such circumstances.⁽¹³⁵⁾

2-It is impossible for the defender (the seller) to comply with the decree, and this may otherwise invoke unjust consequences, such as imprisonment.⁽¹³⁶⁾

In Mac Arther v. Lawson,⁽¹³⁷⁾ the pursuer of an action for damages for breach of contract sets forth a letter of employment which, after an obligation by the defender to pay a certain salary for the first two years, proceeded... "At the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased". The pursuer averred that at the end of the two years, the defender refused to implement the remainder of the contract. It was held, that "the action was irrelevant, in respect that there were in the letter no *termini habiles* out of which a contract of copartnery could have been

formed".

Lord President Inglis observed,⁽¹³⁸⁾ "The court will not decree implement of a contract which the party cannot possibly perform, because that would be to condemn the party to perpetual imprisonment". Furthermore, the impossibility may terminate the obligation, so, there would be no specific implement granted, "where neither of the parties is responsible for the event which precludes performance, the result, if it affects the contract at all, is not to render it avoidable at the instance of one or other party, but automatically to avoid it so that neither party remains under any obligation".⁽¹³⁹⁾ In addition, a contract is terminated by what is known as frustration.⁽¹⁴⁰⁾ Consequently, a contract will be discharged and the contracting parties will be released from performing their future obligations according to the principles of restitution.⁽¹⁴¹⁾ A decree of specific implement, if it is pronounced while the obligation is impossible to perform, could not possibly be respected and obeyed.

If the loss is due to the fault of the seller, he is liable for such loss.⁽¹⁴²⁾ If delivery is delayed by either party, the goods are at the risk of the defaulting party.⁽¹⁴³⁾

Thus, where impossibility of performing the obligation occurs, specific implement will not be ordered, as the decree cannot be implemented.⁽¹⁴⁴⁾

Ambiguity and vagueness of the decree or the crave

Basically, impossibility as a ground for refusing specific implement relates to the contract itself and the surrounding circumstances, however, impossibility may relate to the decree *ad factum praestandum* itself. If, such a decree lacks some of the conditions which should be included, it becomes impossible to perform.⁽¹⁴⁵⁾ A decree *ad factum praestandum* must be specific, clear, and precise as Lord President Robertson,⁽¹⁴⁶⁾ pointed out, that "In pronouncing decree *ad factum praestandum* the court has to bear in mind the consequences and sanctions of such a decree. Failure to implement such a decree exposes the defender to the penalty of imprisonment which is in the power of the pursuer to put in force". Therefore, "the court should so express

the decree that the defender shall be in no doubt regarding the obligation he has to discharge".⁽¹⁴⁷⁾

Further, "The court will not pronounce a decree *ad factum praestandum* except in terms of such precision as will leave the defenders in no doubt as the exact obligation to be discharged by them. The same principle, of course, applies to a declarator preliminary to a decree of specific performance".⁽¹⁴⁸⁾

In Munro v. Balnagowan Estates Co. Liquidator,⁽¹⁴⁹⁾ Lord President Cooper said "It is impossible for us with propriety to pronounce any decree *ad factum praestandum* which is not absolutely precise in every particular, both as to time and as to place.....".

Thus, a decree *ad factum praestandum* could be regarded unenforceable when it is unclear, indefinite and vague. In such a case specific implement cannot be discharged, because the defender does not know what to do. It is suggested, however that the above statement is a theoretical concept more than practical one, for the court will not grant an ambiguous or vague decree against the defender who is expected to perform and respect such an order.

Equally, a vague, and ambiguous crave will not be accepted.⁽¹⁵⁰⁾ For a decree of specific implement to be competent, it is essential that the claim for the decree be precisely framed and specifies exactly what the defender must do to comply with the decree.⁽¹⁵¹⁾ Thus, the pursuer should state precisely, clearly, and unambiguously what should be done by the defender.⁽¹⁵²⁾ The party who is subject to a decree *ad factum praestandum*, which carries the penalty of imprisonment for non-compliance "is entitled to know exactly what he is ordained to do, and therefore decree will not be granted on conclusions couched in vague and indefinite terms".⁽¹⁵³⁾

The court's discretion

The court's discretionary power to examine whether there is impossibility surrounding the performance plays a substantial role.

Specific implement will not be decreed, if it is impossible to perform or to be enforced.⁽¹⁵⁴⁾ Therefore, if the case of impossibility is disclosed clearly or is obvious to the court and to the pursuer, that the defender cannot perform the obligation because it is impossible for whatever reason, the court will refrain from compelling the debtor to perform specifically, and consider the reason why performance is impossible, in order to grant damages instead if they are due, or other relevant remedy. The court will also consider the time the impossibility arose. Consequently, the court has a very wide discretionary power to consider impossibility and its circumstances. Nevertheless, that does not prevent the remedy from being an ordinary legal remedy as a matter of right to the aggrieved party, as the court will find that the remedy can be granted if the refusing party is able to perform his obligation specifically. If the court has found that possibility, it has no other choice but to compel the party to perform.

2-Impossibility of performance in Iraqi civil law

It is established as a general rule that if performance of the obligation becomes impossible, the obligation is extinguished and the debtor is not obliged to perform,⁽¹⁵⁵⁾ for there is no ground of law for performing an impossible obligation.⁽¹⁵⁶⁾

The issues such as, on which grounds impossibility is considered as a ground for refusing specific performance, at which time should impossibility arise to have an effect on specific performance, to what extent, the court has discretion toward impossibility, and where the petition for specific performance or the decree itself is to some extent vague or ambiguous, are important issues in considering impossibility as a ground for refusing the remedy of specific performance.

Basis of impossibility

Impossibility, occurs either by the debtor's fault or by the creditor's fault or by the fault of neither. A decree of specific performance will not be granted where any of these causes operates. This is based on Article 246 (1) of Civil Code which provides,

"A debtor shall be compelled to perform his obligation specifically if such performance is possible". Thus, if such performance is impossible, specific performance will not be granted. If impossibility occurs beyond the debtor's control, the creditor will obtain nothing.⁽¹⁵⁷⁾

The goods may perish either partially or entirely by an "Act of God". In the case of partial deterioration the buyer has the option either to rescind the contract or to uphold the sale at a reduced price.⁽¹⁵⁸⁾ No damages can be obtained in such a case because the deterioration of the goods has not occurred by the seller's fault.⁽¹⁵⁹⁾

Where the goods perish entirely before delivery, the seller is held liable.⁽¹⁶⁰⁾ As performance of the obligation has become impossible, the contract is rescinded without any option to either party.⁽¹⁶¹⁾ Subsequently, specific performance will not be granted, for the subject-matter is no longer available and ordering the debtor to perform his obligation in such a case, means ordering him to do something impossible.

Impossibility is considered a ground by which specific implement is refused, for no one can do or achieve or perform something impossible.

According to Article 425 of Civil Code, "an obligation is extinguished if the debtor has established that its performance has become impossible by causes beyond his control". Thus, the obligation will be extinguished and no duties or rights can be concluded thereafter within the meaning of Article 425. It is inconceivable to compel the party in breach to specific performance in such circumstances.

Time of impossibility

If impossibility has occurred before the contract is made, no obligation is concluded and the debtor, therefore is not obliged to perform.⁽¹⁶²⁾

If the goods sold have perished before delivery, the seller is liable, as delivery of the goods is one of his obligations under the contract.⁽¹⁶³⁾

If the goods perish by reason of the buyer's fault before delivery, he is liable to pay the price to the seller.⁽¹⁶⁴⁾ The buyer's obligation to pay the price, cannot be rendered

impossible,⁽¹⁶⁵⁾ under Article 547 (2), which provides, "....if the sold thing has perished or the value has diminished before delivery by reason of the buyer's act, he must pay the whole price....". It is, in Iraqi civil law, specific performance against the buyer to pay the price of the perished goods.

If the goods have perished by reason of the seller's act,⁽¹⁶⁶⁾ but before delivery, he is liable to pay damages and to refund the price if it has been paid. Article 547 (2) of Civil Code states;"....if the reason is by the seller's act, he must pay damages".

Goods may, also perish before delivery by cause beyond the seller's control. This case has already been considered.⁽¹⁶⁷⁾

Impossibility of performance must occur after the contract is concluded,⁽¹⁶⁸⁾ in order to be considered as a ground for refusing specific performance. If it takes place before the contract is made, there is no contract, and no obligation can be concluded thereafter.⁽¹⁶⁹⁾

Generally, the buyer is not liable for any loss or risk before delivery of the goods. However, he will be held liable for such events before delivery in certain circumstances, namely, where there is an agreement between the seller and the buyer, by which the buyer he who bears liability and risk at the time of making the contract,⁽¹⁷⁰⁾ where the seller has served formal summons on the buyer for taking delivery of the goods, but the buyer has refused to do so,⁽¹⁷¹⁾ where the buyer has taken possession of the thing sold without paying the price and without the seller's permission,⁽¹⁷²⁾ and where the buyer refuses to pay the price, the seller has a right of retention.⁽¹⁷³⁾

If impossibility has occurred after delivery, the buyer is liable for such impossibility whatever the cause, whether because of his own fault, or *force majeure*, or exceptional and unpredictable events,⁽¹⁷⁴⁾ for liability lies with the delivery of the goods not with passing of property.⁽¹⁷⁵⁾ Nevertheless, if destruction of the goods has resulted from the seller's fault even after delivery, he is liable for the loss.⁽¹⁷⁶⁾

The court's discretion

The court has discretion in refusing specific performance where impossibility has resulted from the fault of either party. Where impossibility results from a cause independent of the parties, the contract is automatically rescinded,⁽¹⁷⁷⁾ and the court has little power to interfere, except to adjudicate on whether the cause has given rise to impossibility or not. All these considerations need to be examined by the court within its discretion. Nevertheless, the court may interfere, where there is dispute where the impossibility results from a cause independent of the contracting parties.⁽¹⁷⁸⁾ Impossibility as a ground for refusing specific performance must be absolute.⁽¹⁷⁹⁾ not only unduely difficult or exceptionally hard or unprofitable,⁽¹⁸⁰⁾ before specific performance can be refused.

Where there is temporary impossibility, it is the task of the court to examine the surrounding circumstances and to postpone or delay performance of the obligation until the expiration of these circumstances,⁽¹⁸¹⁾ unless such delay conflicts with the nature of the contract.⁽¹⁸²⁾

Furthermore, if the subject-matter of the contract is an article which is described only as specie, the debtor (the seller) will not be discharged from performing his obligation specifically even if the goods have perished by reason beyond his control. This rule is not absolute, however only relative. It cannot be applied in every case, such as, for example the goods of that kind are the last remaining quantity of what the seller possesses.⁽¹⁸³⁾ Thus, the case is a matter of discretion, which should be examined by the court.

Ambiguity and vagueness of the crave or the decree itself

Impossibility of performance of the contract must be distinguished from impossibility within the decree itself. It may arise within the decree itself whether before or after pronouncing it.

Unfortunately, Iraqi civil law scholars, and Iraqi jurisprudence, have not paid any attention to the question of impossibility which arises within the decree itself. The

reason may be, that Article 10 of Iraqi Civil Procedure Code has explained that, if there is ambiguity or vagueness in the court's decree, whether it is total or partial, which makes it difficult or impossible for the Office of Administration of Execution to understand the real intention of the court, the executor, is able to inquire and to ask the court for interpretation of its ambiguous judgment. The litigants have to attend the court's hearing for interpretation and clarification of the vague decree.⁽¹⁸⁴⁾ Also, the court acting on its own motion, or according to the application of one of the litigants, may amend or reconsider what has already been determined in case of clerical or incidental errors.⁽¹⁸⁵⁾

The judgment should be granted clearly and unambiguously in order to make it easy for the defendant to perform, and for the Execution Administration Office to take charge of ordering and watching the debtor in his performance of the judgment. If such a decree is vague or ambiguous, the Office of Administration of Execution cannot enforce the debtor to fulfil it. Thus such a decree is impossible to perform even temporarily, for the debtor does not know how to comply with it.

Specific performance may not be granted as a result of a vague or ambiguous crave or petition. Although this case is more theoretical than practical, it does sometimes occur.

The subject-matter of a petition forms an essential part in deciding and determining any case, and therefore that subject-matter should be specified and identified in a manner which enables the court to solve the disputed case clearly and decisively. Thus, the court will not accept any ambiguous or vague petition, or vague crave, because the court, as a general rule, cannot determine something unknown or ambiguous.⁽¹⁸⁶⁾ This would clearly lead to unjust and unfair consequences

The court is restricted to what the plaintiff has applied for and cannot exceed it or grant him something different. Therefore the plaintiff should, where necessary, be asked to clarify and to identify his crave and the subject-matter, when he applies for the remedy of specific performance.

Comment

1-The impossibility of performing the obligation is a ground for refusing the remedy of specific implement in both jurisdictions, whenever it takes place and whatever the reason is.

2-The reason for treating impossibility as a ground for refusing specific implement is the same in both systems, i.e. the unfair consequences and illogical results of compelling performance. Further, such an order would not be respected by the party against whom it is made.

3-Iraqi civil law differs from Scots law as regards the buyer's obligation to pay the price. This obligation cannot be rendered impossible at all in Iraqi civil law, and the buyer is always subject to perform such an obligation specifically. Whereas, in Scots law an action for the price is not regarded as an action for specific implement.

4-The defaulting party is always liable for causing impossibility, and a party who brings about impossibility through his own conduct cannot claim specific implement against the other party to the contract.

5-Impossibility of the decree itself is similar in both systems, although it is clearer and more enlarged in Scots law than in Iraqi civil law.

The case of ambiguous decree which leads to an ambiguous and vague decree has been dealt with, more fully, by Scots law than by Iraqi civil law. It is a theoretical matter rather than practical.

Sub-Section 2: Exceptional hardship

Specific implement in Scots and Iraqi laws may be refused upon the ground of exceptional hardship, i.e., "performance too onerous for the debtor". The concept of this ground is not clear and may vary according to the circumstances of the disputed case and the court's discretion. Exceptional hardship, does not include more difficult or less profitable performance for the aggrieved party. It will be considered as follows.

1-Exceptional hardship in Scots Law.

2-Performance is too onerous for the debtor in Iraqi civil law.

1-Exceptional Hardship in Scots law

Specific implement of a contract may be refused on the ground that performance of the obligation would cause undue difficulty and exceptional hardship for the defender. This raises questions of the grounds on which exceptional hardship is to be considered, whether the debtor's or the creditor's financial situation affects the decision of the court, and at what time exceptional hardship should be considered as a ground for refusing specific implement?

The concept of exceptional hardship

The concept of hardship, it has been said, to be difficult to define,⁽¹⁸⁷⁾ and "relief ought not to be granted to a party simply because the bargain proves to be more onerous or less advantageous than expected".⁽¹⁸⁸⁾ However, it has been suggested that, "hardship may be taken to refer to any case in which the consequences to the defendant of enforcement would require him to bear an unreasonably or unexpectedly heavy burden".⁽¹⁸⁹⁾ It has further been stated that,⁽¹⁹⁰⁾ "In exceptional cases a *decree ad factum prestandum* may be refused, in circumstances where it would generally be competent, on the ground that the hardship to the defender involved in compliance would be out of all proportion to the benefit to be obtained by the pursuer". Furthermore, "It has been recognized that in some cases the burden of enforcing the contract is so unexpected or unreasonable as to be unjust, and that relief against hardship may be given without denying reasonable expectations and thereby subverting the fundamental goals of contract".⁽¹⁹¹⁾

Specific performance is not refused merely because performance is inconvenient or difficult for the defendant.⁽¹⁹²⁾ Specific performance is denied if the hardship suffered by the defendant would be so much greater than the detriment than the plaintiff would suffer if he is restricted to damages, that it would be unreasonable to order relief.⁽¹⁹³⁾ Thus specific performance may be denied due to hardship if, on the balance of all the material circumstances, it appears that confining the plaintiff to damages would be

just.⁽¹⁹⁴⁾ In some cases, specific performance has been refused where the disbursement of a large sum of money would be required by performing in specie, so as to cause considerable detriment to the defendant's financial situation.⁽¹⁹⁵⁾ Thus it can be suggested that, exceptional hardship must be judged on the circumstances of each case rather than by reference to any exhaustive legal definition, as Lord Langdale,⁽¹⁹⁶⁾ stated, "though you cannot define what may be considered unreasonable, by way of general rule", for its concept is flexible and involves the court's discretion within the circumstances of every case.

The court's discretion

The case of exceptional hardship is a purely discretionary matter, for "the court,....., must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance.....".⁽¹⁹⁷⁾ Spry has pointed out,⁽¹⁹⁸⁾ that where "an applicant for specific performance were to proceed instead for damages the extent of inconvenience or injury suffered by him would be relatively small, but that if performance were ordered in specie, the consequences to the defendant would be ruinous or at least extremely harsh". The court must examine all the surrounding circumstances to determine whether they disclose a reason for refusing or granting specific implement. The ultimate decision is a matter for the court's discretion. The courts will take into consideration the possibility of minimizing the parties' injuries or any other material inconvenience.⁽¹⁹⁹⁾ as in many cases, for example, specific performance has been ordered conditionally.⁽²⁰⁰⁾

In Davidson v. Macpherson,⁽²⁰¹⁾ a tenant bound himself to reclaim certain waste lands during the currency of the lease. The tenant refused to proceed with his reclamation after having implemented his obligation partially. The landlord brought an action to have the tenant doing so. He pleaded that to bring it into cultivation would involve his financial ruin. It was held, that this defence was irrelevant.

Lord Young pointed out,⁽²⁰²⁾ that "Frequently the court will not order specific performance. Indeed, as a rule it will not order specific performance where that would be hard on the party who is required to perform..". Again, in Moore v. Paterson,⁽²⁰³⁾ A contracted with B to form a street through ground belonging to a third party C, who subsequently refused to sell the ground except at an exorbitant price. In an action claiming that A should be ordered to perform his obligation by forming the road in terms of his obligation. It was held, that the pursuer had no title to sue. Opinions were expressed,⁽²⁰⁴⁾ that "assuming the pursuer had had a title to sue, it was in the discretion of the court, in such a case to determine whether it would ordain specific implement or give decree for damages only, and that in the present case the later would have been the appropriate remedy". Lord Shand,⁽²⁰⁵⁾ also stated that, "it must always be in the discretion of the court to say whether the remedy of specific performance or one of damages is the proper and suitable remedy in the circumstances".

Lord Watson, in Grahame v. Magistrate of Kirkcaldy,⁽²⁰⁶⁾ laid down that, "a Superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course". So, "to justify the exercise of such discretionary power there must be very cogent reason for depriving litigants of the ordinary means of enforcing their legal right".⁽²⁰⁷⁾ Further, Lord Gifford in Begg v. Jack.⁽²⁰⁸⁾ stated, "there is an equitable power vested in the court in virtue of which, when the exact restoration of thing to their previous conditions is either impossible or would be attended with unreasonable loss and expense quite disproportionate to the advantage it would give to the successful party, the court can award an equivalent".

Since hardship itself is not a ground for rescinding a contract, a court normally refuses specific performance and grants decree for damages if the consequences resulting from such a decree are of the same degree to the defendant,⁽²⁰⁹⁾ i.e "the decree for damages causes hardship to the defendant". Furthermore, hardship to the

defendant as a result of performing the contract should be balanced against that of the plaintiff if the order is refused.⁽²¹⁰⁾ However, hardship will not constitute a ground for refusing specific performance if it is brought about by the defendant upon himself.⁽²¹¹⁾

In Wilson v. Pottinger,⁽²¹²⁾ A arranged with B to build a house in which he used the gable of a house belonging to B. A made the wall thicker, in order to comply with the Dean of Guild's requirement, but without obtaining the express consent of B. In an action by B to remove the gable in so far as it constituted an encroachment, it was held that in any event, the only remedy was a claim of damages, and that he was not entitled to a decree requiring the gable to be demolished.

The reason for refusing specific implement in the above case was, that the defender would be involved in undue hardship such as unreasonable loss and expense if he was ordered to demolish the gable rather than pay damages.

In Mackay v. Campbell,⁽²¹³⁾ a purchaser raised an action against a seller for implement of missives of sale of heritable subjects. The seller pleaded that a decree of specific implement should not be pronounced as it would result in special hardship to him. He averred that the ownership of the subject had an incalculable sentimental value for him. It was held that the seller's averments were irrelevant. Lord Justice-Clerk Grant stated,⁽²¹⁴⁾ that, "the defender's plea in law in regard to "hardship" seems to me to be more hopeless". The court did not accept the claim of the hardship in the above case.

It seems that the court enjoys a wide discretionary power to examine the claim of exceptional hardship arising from performing specifically, taking into account, the balance between the two contracting parties in ordering or refusing specific implement. It is Guided by equitable grounds. The court takes the responsibility of inquiring into the surrounding circumstances of the hardship, for it was once said,⁽²¹⁵⁾ that, "the Court of Session has inherent power to refuse the legal remedy upon equitable grounds". Also, "it is quite conceivable that circumstances might occur which would make it inconvenient and unjust to enforce specific performance of contract of

sale....".⁽²¹⁶⁾

Financial hardship

The grounds of exceptional hardship are varied.⁽²¹⁷⁾ Each ground is a matter subject to the court's discretion, for each case of exceptional hardship has its own circumstances. The court, in examining any claim raised by a contracting party concerning the hardship, applies its discretionary power.

Regarding the contracting party's financial situation effect on the result of refusing specific implement on the ground of exceptional hardship. Unfortunately, the court has not paid any attention to this issue. It might be inferred that the financial situation of the contracting party is taken into consideration by the court in examining the case of exceptional hardship. Although there is no authority to support this assumption, support may be found in the court's discretionary power, to refuse specific implement by reason of exceptional hardship, and in the principles of equity whereby poor and wealthy contracting parties are not treated equally in the case of hardship.

Time of exceptional hardship

In English law, the contracting party may suffer exceptional hardship at any time whether at the time of entering into a contract whilst the contract is executory, or at the time the contract is executed. It has been said, generally that hardship should be judged of at the time of entry into the obligation and not at the time of performance,⁽²¹⁸⁾ but the above statement is not supported by the authorities.⁽²¹⁹⁾ Thus, it has been said,⁽²²⁰⁾ that, "it very often happens that an agreement is made fairly and that no questions of hardship arise at that stage but that subsequently events take place from which it is seen that one party has obtained a better bargain than the other". Nevertheless, it was held that a change for the worse in the financial situation of the defendant, will not be taken into consideration as a hardship, if it takes place after the contract.⁽²²¹⁾ Also, if after the date of the contract, the price of the subject-matter

has increased substantially, the vendor is not entitled to refuse specific performance by claiming hardship.⁽²²²⁾ That has been criticised,⁽²²³⁾ that, "there is no reason in principle why a source of hardship should be ignored merely because it did not exist at the time when the material contract was entered into". Specific performance has been rejected on several occasions on ground of hardship which arose from subsequent events.⁽²²⁴⁾

Unfortunately, Scots authorities have not paid any attention to this issue. The reason, it is submitted, that the court has a very wide power to consider the case of hardship and the whole surrounding circumstances. Thus, Lord Watson did not mention the time of occurrence of such circumstances, but he left the case wide open when he said,⁽²²⁵⁾ "It is quite conceivable that circumstances might occur which would make it inconvenient and unjust to enforce specific performance of a contract of sale". The Lord President, also,⁽²²⁶⁾ has pointed out that "in the circumstances of this case, I think it is within the discretion of the court to say which of these remedies the pursuer would be entitled to; and it appears to me that the appropriate remedy in the present case would be not a decree *ad factum praestandum* but a decree for damages only". Furthermore, "it must always be in the discretion of the court to say whether the remedy of specific implement or one of damages is the proper and suitable remedy in the circumstances".⁽²²⁷⁾ Again, "In Scotland the legal and equitable jurisdiction have always been united, and the natural result of that union is that strict legal rights ought not to be enforced without regard to the discretion which, from the nature of the subject-matter, and the interests of all those concerned in it, ought to be exercised by a Court of Equity".⁽²²⁸⁾ It seems, that in Scots law the court has wide discretionary powers to consider at what time the exceptional hardship should be regarded as an effective factor in refusing the remedy of specific implement. Furthermore, it has wide discretion to consider the financial hardship and its effect on specific implement.

2-Performance "too onerous" in Iraqi civil law

Article 246 (2) of Iraqi Civil Code provides, "when specific performance is too onerous for the debtor, he may limit performance to payment of a sum of money as indemnity provided that this method of performance does not seriously prejudice the creditor". Thus specific performance may be refused on the ground that performance is too onerous.

The case of "too onerous for the debtor to perform" should be considered and analysed under four heads, namely; what is meant by "too onerous for the debtor"? who must prove that performance is too onerous for the debtor, on which grounds can this be proved? and at what time should the application of the case of too onerous be considered?

The concept of performance "too onerous" for the debtor

The definition of "too onerous" is substantially the same as that of exceptional hardship,⁽²²⁹⁾ but it is a little vague and ambiguous, for the Civil Code does not define the term "too onerous". Thus, it may be the task of the jurisprudence to define the term "too onerous".

The meaning of "too onerous to perform" envisages, that the contracting party should suffer cost and expenses excessively. They must reach the limit which is too onerous for the debtor to perform, and which is unfair and unjust to enforce against him without mitigation.⁽²³⁰⁾ Any increase of cost not amounting to this will not be sufficient.

It is when the difference becomes wide between what shall the contracting party give, on one hand, and what shall he obtain, on the other.⁽²³¹⁾ However a gross loss does not mean that the debtor should be ruined economically.⁽²³²⁾ It includes the fact that the debtor should suffer loss grossly, not just difficulty of performance or unprofitable consequences.⁽²³³⁾

The concept of too onerous is flexible and changes with the circumstances of each case. Thus, what is too onerous for one debtor may not be so for another.⁽²³⁴⁾ Also, it is judged in relation to the particular bargain by which the contract was concluded.

Thus, if the debtor has suffered loss in his bargain or in performing his obligation which is much more than a reasonable loss, it is considered to be too onerous to perform even if such loss represents a little importance in comparison with the debtor's wealth.⁽²³⁵⁾

The court's discretion and financial hardship

The question of whether performance is too onerous, is to be judged by the court in each case with reference to the particular circumstances.

In deciding whether performance of the obligation is too onerous, the court should examine the case under an objective criterion which reflects the influence of the circumstances on the contract itself.⁽²³⁶⁾

The contracting parties have agreed under the contract to conclude obligations, upon each other, which are equal and balanced to a certain extent at the time the contract is made. For some reasons these obligations may become unbalanced, and it may be then too onerous for the debtor to perform. Therefore, the case should be considered and examined separately, regardless of the state of wealth or poverty that the debtor enjoys.⁽²³⁷⁾ Article 246 (2) of Civil Code,⁽²³⁸⁾ appears to impose an objective test, by virtue of the following reasons:

1-The above Article of Civil Code does not refer to the case of financial situation of the debtor.

2-It concentrates on the obligation of the debtor which has become too onerous for him to perform. This leaves the question of how great a loss must be before the contract becomes too onerous to perform.

This is done by examining the difference between the value of the goods within the contract before or after occurrence of the incident which renders performance of the obligation too onerous, always bearing in mind market fluctuation.

The court may, also, rely on a subjective test in certain circumstances,⁽²³⁹⁾ because:

1-The concept of whether performance too onerous, is a flexible concept, (240) and it changes with the circumstances. Thus, which is too onerous for a certain debtor may not be so for another, or may not be so for the same debtor in different circumstances.(241)

2-The financial situation of the debtor should play a major role, for what is too onerous for the poor is not so for a wealthy debtor.(242) Thus, it is unfair to equalize between who is well off and who is poor.

3-Relying on one test to solve the problem may produce unpleasant consequences, because, the objective test is, as it has been established, flexible,(243) and it depends on the circumstances of each case, so it may be misleading sometimes.

4-Relying on the two criteria, i.e. "the objective and subjective tests" may minimize the risk of using one test, especially "the objective test", and may achieve more just consequences,(244) for depriving the court of relying on the subjective test besides the objective test may lead to equalization between the rich and the poor debtor.

If performing specifically is too onerous for the debtor, but giving damages to the creditor causes him to suffer greater injuries and losses, the creditor, is in a favourable position to obtain specific performance rather than damages,(245) for the following reasons:

1-The creditor does not abuse his right.

2-Damages are not the alternative remedy to specific performance, unless there are exceptional circumstances to prefer them. Thus, if the circumstances of granting specific performance and those of granting damages, i.e. "circumstances of granting and refusing specific performance", are equal, the court, will usually, grant specific performance, because it is the right of the aggrieved party to have what he has contracted for.

3-The courts, usually balance between the two conflicting interests, namely; "the interests of the creditor and that of the debtor". Damages then will be granted if they are due, to avoid the debtor's suffering when performing specifically is too onerous.

Where as, the creditor's negligible loss as a result of non-performance, when it is too onerous, will be ignored.⁽²⁴⁶⁾

The debtor's right according to Article 246 (2) of Iraqi Civil Code, is a relative matter, but it is restricted by the creditor's interest which should not be exposed to a serious and excessive loss and injuries. Thus, the law has taken the debtor into consideration, and has given him the opportunity to avoid specific performance, but the creditor's interest is not entirely abandoned.⁽²⁴⁷⁾

The court may give the debtor additional time, to perform specifically, instead of ordering him to pay damages as an alternative remedy, when specific performance is too onerous for him.

The court has inherent discretion to decide, whether giving additional time is substantial for performing the obligation. Thus the court may think that circumstance of too onerous to perform is merely temporary and it may be removed by giving the debtor such a period after which the obligation may be performed easily and without hardship, provided, this does not prejudice the creditor's right, and causes him no further damages or injuries.⁽²⁴⁸⁾ The reason, it is submitted, that if the debtor is entitled to refrain from performance, when it is too onerous, *a fortiori*, the court has the power to give him additional time for performance.

The legal base on which the debtor is entitled to refuse specific performance and to give damages instead, are:

1-It was said,⁽²⁴⁹⁾ that one abusement of right by the plaintiff, i.e., whether the plaintiff insistence on performance will reap little benefit compare with the loss suffered by the defendant.⁽²⁵⁰⁾

2-The basis for refusing specific performance when it is too onerous to do so, is the principle of equity and justice, which is used by the court to balance between the two conflicting interests.

Time of exceptional hardship

Specific performance may become too onerous for the debtor at any time. It may

become so whether at the time of making the obligation or whilst the contract is executory, or at the time of executing the obligation. The contracting party who has suffered hardship must at any time be able to minimize the loss.

The time at which specific performance becomes too onerous, is not considered by the Iraqi Civil Code. However, the problem has been considered by jurisprudence,⁽²⁵¹⁾ which has pointed out that the time at which specific performance becomes too onerous for the debtor, is the time of the occurrence of the events and circumstances which render specific performance too onerous.⁽²⁵²⁾ Thus, if there is a future obligation, and the debtor has suffered gross loss, he is entitled to ask the court to minimize his loss to a reasonable limit, provided that he has not performed the obligation yet.⁽²⁵³⁾ Whereas in the case of continuing contracts such as, the contract to supply goods, the contracting party whose obligation becomes too onerous, may seek removal of the hardship at the time of its occurrence, in respect of what has not been performed.⁽²⁵⁴⁾ If the obligation has been performed before occurrence of the exceptional hardship, the contracting party cannot seek to reduce the loss that he has suffered, for what had been performed before such events, it is deemed to have been performed in a normal circumstances.⁽²⁵⁵⁾ However, it has been suggested, that the contracting party may seek to reduce his loss even after performing his obligation, for the following reasons:

1-Reducing a loss which results from performing specifically, when it is too onerous, is based on the principles of equity and justice. It is inequitable and unjust to refuse relief to the innocent party whilst allowing it to the party in breach.⁽²⁵⁶⁾

2-The Iraqi Civil Code gives the court discretionary power to reduce loss to a reasonable limit, when performing specifically is too onerous for the debtor. Doing so should be possible at any time whether during performance of the obligation or even after the obligation is fulfilled.⁽²⁵⁷⁾

Comment

1-Exceptional hardship is a flexible concept in both systems. It relies, on two

circumstances; 1- the disputed case and, 2- the discretionary power of the court and its satisfaction towards the state of hardship.

2-The court's discretionary power in Scots law towards exceptional hardship is wide and dominant. To consider whether there is exceptional hardship, the court takes into account all circumstances, such as, the financial situation of the contracting party and the time when the hardship occurs.

3-The court's discretionary power in Iraqi civil law is also wide. However, it is guided by the suggestion of the jurisprudence to rely on two tests which are objective and subjective tests to examine the case.

4-The time, at which exceptional hardship should be considered in Scots law is subject to the court discretion. While in Iraqi civil law the case has not been settled yet, and it would be wise if that case was left to the court discretion.

5-Scots Courts concur with Iraqi Courts in examining the case of exceptional hardship and the case of whether specific performance is too onerous for the debtor, under different tests. Scots and Iraqi courts refuse specific implement on the ground of hardship under the court's discretion.

Sub-section 3: Breach of contract by the purchaser

A sale of goods contract gives rise to many obligations between the contracting parties. If the purchaser has breached one of these obligations, the other party may sue him for breach of the obligation and may insist on him performing his contract. He is held liable towards the seller in such circumstances. Breach of contract by the purchaser will be considered as follows:

1-Breach of contract by the purchaser in Scots law.

2-Breach of contract by the purchaser in Iraqi civil law.

1-Breach of the contract by the purchaser in Scots law

Breach of contract occurs when either contracting party refuses or fails to perform

any of the things which he is required to perform by virtue of the contract.⁽²⁵⁸⁾ The other party may seek damages and may be entitled to treat the contract as discharged.⁽²⁵⁹⁾ There upon, "No party in mutual contract, where the obligation on the parties are the causes of one an other, can demand performance from the other, if he himself either cannot or will not perform the counterpart, for the mutual obligation are considered as conditional".⁽²⁶⁰⁾

In Barclay v. Anderson Foundry Co.,⁽²⁶¹⁾ Lord Cowan stated that, "where there is a clear failure by one of the parties to a mutual contract to fulfil, in an essential respect, his part of it, I cannot hold that notice is necessary by the other party ere he can regard himself free of his obligation under it, and entitled to act on that footing. There may, indeed, be room for saying, that when the neglect or failure to perform is but trifling in extent, or has arisen from inadvertence, or permits of satisfactory explanation, the contract cannot, in such a state of matters, be held to have become void". Furthermore, in Turnbull v. M'lean & Co.,⁽²⁶²⁾ A contracted with B to supply him with a quantity of coals in monthly instalments, the price to be paid monthly. B, "the purchaser", having refused to pay for the coal of a past month, or even to make a payment to account, until certain counter claims of far less amount were settled, but involving a principle, found to be unsound, which would have been applicable to the remainder of the contract. It was held that rescission of the contract by the seller A was justified.

Lord Justice-Clerk Moncrief,⁽²⁶³⁾ explained the principle by stating, "1st, that the stipulations on either side are the counterparts and the consideration given for each other; 2nd, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance; and, 3rd, that where one party has refused or failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether, except so far as it has been performed". The well established rule in Scots law is that the obligations undertaken by one party are the counterparts of, and therefore dependant upon the other contracting party's

obligations.⁽²⁶⁴⁾ The above statement explains the general rule of Scots law. Thus, performance by one party of his obligations, is dependant on the other party's performance.⁽²⁶⁵⁾ It was said once, that "both are bound or neither".⁽²⁶⁶⁾

In order to apply the above rules on the case of the seller and the buyer, where the buyer is in breach of his obligation, but he still insists on having his contract specifically performed, two questions arise, namely; in which circumstances is the buyer regarded in breach of his obligation, and if the purchaser is in breach, is he entitled to have specific implement against the seller?

The buyer is obliged according to the sale of goods contract, to perform substantial obligations, namely;

- To pay the price.
- Taking delivery of the goods

1.1-The duty of the buyer to pay the price

It is the buyer's duty to pay for the goods he has bought and, "the cardinal rule applicable to payment of the price as an obligation of the buyer is that it is a condition suspensive of the seller's obligation to surrender to him possession of the goods".⁽²⁶⁷⁾ Therefore, unless there is an agreement to the contrary, the buyer is not entitled to take possession of the goods, if he has not paid the price in accordance with the contract.⁽²⁶⁸⁾ So far, it seems that the buyer, who refuses to pay the price without any legal excuse or an agreement, is not entitled to seek specific implement against the seller, because "the law of Scotland in regard to a mutual contracts,, first, that the stipulations on either side are the counterparts and the consideration given for each other; second, that a failure to perform any material or substantial part of the contract of one will prevent him from suing the other for performance; and third that where one party has refused or failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach,.....".⁽²⁶⁹⁾ However, what if the buyer has delayed paying the price? Can he insist on having the goods delivered to him?

If no provision is made by the contracting parties for a time to perform their obligations, it is inferred that each contracting party will perform his part of the contract within a period of time which is reasonable in all the circumstances of the case.⁽²⁷⁰⁾ Thus unless a different intention appears, time of payment of the price is not a material term of the contract.⁽²⁷¹⁾ Nevertheless, a mere failure by the purchaser to pay at the time agreed upon by the contracting parties does not mean that the seller is entitled to treat the contract as repudiated and immediately, resell the goods,⁽²⁷²⁾ for, Lord Cowan,⁽²⁷³⁾ said once "there may, indeed be room for saying, that when the neglect or failure to perform is but trifling in extent, or has arisen from inadvertence, or permits of satisfactory explanation, the contract cannot, in such a state of matters, be held to have become void". The seller is not obliged to perform his obligation by delivering the goods,⁽²⁷⁴⁾ for he still has the right to retain the goods sold. Moreover, if the purchaser does not pay the money price, the seller is entitled to money damages for delay.⁽²⁷⁵⁾ Further, under Sec. 28 of Sale of Goods Act 1979, "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods".

Consequently, it seems that specific implement cannot be ordered against the seller, where the buyer has delayed in paying the price, because the seller has the right to insist that the buyer performs his obligation. Nevertheless, in Linn v. Shields,⁽²⁷⁶⁾ twelve stacks of corn were sold to be delivered as required, without any express provision as to time of payment. It was held, that the buyer's obligation was to pay the price on delivery of each stack, but his failure to do so was not a breach of contract of sale to justify the seller in repudiating his obligation to deliver the remainder of the stacks of corn. Thus, the seller cannot repudiate the contract in such circumstances, but, on the other hand, he cannot be enforced to deliver the goods. He may refrain from delivering the goods until payment, for there is no ground or justification behind ordering the

seller to perform specifically, while the buyer refrains from fulfilling his part of the obligation. The matter is entirely different when a buyer is not prepared to pay the price at a fixed time. The seller, in such a case, is not bound to wait for him indefinitely.⁽²⁷⁷⁾ Therefore, the buyer is not entitled to claim specific implement. In a case, where a dispute regarding a contract for the sale of a number of pieces of cloth, by which the purchaser should have three months to pay for what he has received, the purchaser cannot claim delivery of what remained, without tendering payment.⁽²⁷⁸⁾

Payment of the price could be agreed in either cash or by bill of exchange or other negotiable instrument.⁽²⁷⁹⁾ It has been said that, "Action is only completed if the price as money debt is presently due and payable under the contract".⁽²⁸⁰⁾ In such a case the buyer cannot claim specific implement because he is under the obligation to pay and to perform his part of the contract. However, the seller is deemed to have been paid between the time of taking the instrument and the time of its dishonour, unless he makes its acceptance further conditional upon its being met.⁽²⁸¹⁾ Also, if the buyer makes proper tender which the seller wrongfully refuses, the seller is no longer unpaid.⁽²⁸²⁾ and cannot refuse specific implement.

2-The duty of the purchaser to take delivery of the goods

The buyer is obliged to take delivery of the goods sold.⁽²⁸³⁾ If he refuses he is liable to the seller for loss occasioned by his refusal. He is, also, liable for a reasonable charge for the custody of the goods, without prejudice to the right of the seller where the neglect or refusal to take delivery amounts to a repudiation of the contract.⁽²⁸⁴⁾

Thus, "if the goods are conform to contract, theoretically, whatever he does in fact the buyer is bound to accept them".⁽²⁸⁵⁾

There are two obligations on the buyer towards the goods, namely; the duty to take delivery,⁽²⁸⁶⁾ and the duty to accept them.⁽²⁸⁷⁾ Any unjustified breach of one of these obligations by the buyer deprives him of the right to reject the goods.⁽²⁸⁸⁾ The same effect results if the purchaser has intimated rejection continues using the goods sold. It was established in Electric Construction Co. v. Hurry & Young,⁽²⁸⁹⁾ that the

buyer lost not only the right of rejection but the right to claim damages as well. Further, if the buyer has already accepted the goods, in such a case he cannot reject them.⁽²⁹⁰⁾ Rejection of the goods should occur within a reasonable time,⁽²⁹¹⁾ which is a question of fact,⁽²⁹²⁾ otherwise the right to reject the goods is lost.⁽²⁹³⁾ The buyer within all the above cases, or who has otherwise acted in a way to give the seller any claim against him, is not entitled to insist on specific implement, because as has already been mentioned,⁽²⁹⁴⁾ each party should perform his side of the contract, to insist on having the contract performed. Also, where there is a refusal to perform, by one party, the other contracting party is entitled to consider the contract as repudiated, although he is entitled to claim damages.⁽²⁹⁵⁾ It has been established by many English authorities that the plaintiff who claims specific performance must show that he has fulfilled all his contractual obligations to the date of claim and is ready to fulfil his future obligations under the contract.⁽²⁹⁶⁾

2-Breach of contract by the purchaser in Iraqi civil law

Sale of goods contract is a bilateral contract. Therefore the obligations of such contract are mutual, i.e. "there is strong connection between them".⁽²⁹⁷⁾ Thus, if one contracting party refuses to perform, he cannot compel the other party to perform his obligation.⁽²⁹⁸⁾ Nevertheless, if one of the contracting parties to a bilateral obligation has failed to perform what he has undertaken to do, the other party can either insist on having specific performance or damages, and may ask for the contract to be rescinded.⁽²⁹⁹⁾ He may claim damages as well as rescinding the contract.⁽³⁰⁰⁾

Article 177 of Civil Code, has established the above rules by providing that, "In bilateral contracts if one of the contracting parties does not perform what he has undertaken by virtue of contract, the other party may after serving a formal summons demand rescission with damages if due".

Rescission may arise from defective performance or even partial performance, but the court has discretionary power in such a case to consider the contract as rescinded or

to give the debtor additional time for performance.⁽³⁰¹⁾

The innocent party must show he is willing to perform his side of the bargain before rescission will be granted.⁽³⁰²⁾ If he fails to do so, he will be deemed to be in breach, and both parties will be treated equally.

Where the buyer is in breach, the seller may have the right to require performance of the following obligations:

- Payment of the price.
- Taking delivery of the goods.

2.1-Payment of the price

The purchaser's obligation to pay the price of the goods sold is one of the substantial obligations by virtue of the contract.⁽³⁰³⁾ Payment of the price is governed by Article 571 (1) of Iraqi Civil Code which provides; "The purchaser is obliged to pay the price agreed upon according to the conditions those are concluded by the contract, and he who bears the expenses of payment".

The seller's right to obtain the price of the goods sold is secured by two means; first; the seller has right to obtain specific performance against the refusing buyer,⁽³⁰⁴⁾ secondly; he has the right of retention of the goods.⁽³⁰⁵⁾ The main issue however, is, that the buyer will lose his right of specific performance against the seller, and the seller may claim specific performance against him. The seller, may apply to exercise his right of retention,⁽³⁰⁶⁾ as the purchaser becomes the owner of the goods sold after the contract is concluded, and thereupon, the law has conferred the seller a privilege on these goods, according to Article 1376 (1) of Civil Code, which provides, "Sums due to the seller of movables for price and accessories are secured by a privilege over the movables sold. This privilege is enforceable, as long as the movable sold preserves its identity, subject to the rights acquired in good faith by third parties and subject to the special provisions applicable in commercial matters". Therefore, the seller is entitled to hold the goods sold temporarily if the purchaser has refrained from paying the price immediately.⁽³⁰⁷⁾ Nevertheless, the seller's right of retention may be prevented if the

price of the goods is not presently due, unless the purchaser has weakened the securities, which he already has offered to guarantee payment of the price,⁽³⁰⁸⁾ or has become insolvent,⁽³⁰⁹⁾ or he died bankrupt.⁽³¹⁰⁾

The seller's right of retention will be lost if the seller waives his right,⁽³¹¹⁾ or if the buyer pays the price for the goods plus their interest.⁽³¹²⁾ In such cases, the seller cannot refrain from delivering the goods to the buyer. The buyer, therefore is *prima facie* entitled to obtain specific performance. The purchaser's right of specific performance is refused while the seller has the right of retention against the goods sold, by virtue of the following reasons:

1-It is illogical to say that, at the same time, the seller has the right of retention and the buyer has the right to insist on delivery of the goods sold, because raising and applying for one right, prevents the other from being raised and applied for.

2-In bilateral contracts, mutual obligations must be performed. Therefore, either party to the contract may abstain from performance, if the other party to it does not comply with his obligation.⁽³¹³⁾

Despite the purchaser's obligation to pay the price, he has the right of retention of such a price, in accordance with Article 576 of Iraqi Civil Code, where the purchaser's reasonable apprehension that the goods sold are dispossessed or his enjoyment in the goods will be disturbed.⁽³¹⁴⁾ If the buyer discovers that the goods sold are defective, he may claim either rescission of the contract or a reduction in the price.⁽³¹⁵⁾

If the purchaser legally retains the price, the question arises whether he may insist on specific performance by the seller.⁽³¹⁶⁾ It is suggested that he may insist on specific performance for the following reasons:

1-So long as, the purchaser is willing to perform his obligation he is entitled to require the seller to perform his obligation specifically. He has the right of either specific performance or rescission of the contract with damages if due.⁽³¹⁷⁾

2-This case falls within the court's discretionary power, either to grant the relief sought or to give the seller additional time for performance,⁽³¹⁸⁾ unless, the contract is regarded as rescinded automatically.⁽³¹⁹⁾

3- The seller cannot apply the rule of "*Exceptio non adimpleti contractus*",⁽³²⁰⁾ because, the purchaser holds the price legally and he intends to perform his obligation.

The purchaser's obligation to pay the price arise at the time agreed upon by the contracting parties.

It is questionable whether the purchaser's right to specific performance remains against the seller, if he delays paying the price.

Unless the contracting parties agree otherwise, delay in payment permits the seller to retain the goods and to claim that the purchaser is in breach of his contract which entitles him either to rescind the contract or to insist on having specific performance.⁽³²¹⁾ The case also, falls within the court's discretionary power to examine the surrounding circumstances.⁽³²²⁾ If the delay is not based on any legal ground, specific performance will be refused.

2.2-Taking delivery of the goods sold

The purchaser is obliged to take delivery of the goods sold at the time and in the place agreed upon by the contracting parties.⁽³²³⁾ If the purchaser refuses to take delivery, he is deemed to have committed a breach to his contract. Therefore, the seller is entitled in such a case to require the buyer to take delivery of the goods or to rescind the contract and claims damages.⁽³²⁴⁾ Thus, where a purchaser is in breach, right of specific performance occurs to the seller according to the general rule of bilateral obligations.⁽³²⁵⁾ The seller may seek to require the buyer to take delivery of goods and he is entitled to ask for a penalty, i.e. (threatened penalty), for each day that the buyer delays in taking delivery, in order to compel him to fulfil his obligation.⁽³²⁶⁾ The seller is also, entitled to deposit the goods sold in another place other than his warehouse or store, on the purchaser's liability and at his expense.⁽³²⁷⁾

If the goods are of perishable, or keeping them is unduly expensive, the seller on the order of the court may sell the goods and deposit the price for the buyer in the court.⁽³²⁸⁾

It is inconceivable, that the purchaser has the right to insist on having the goods delivered to him in the above cases, because he is in breach of his obligation.

When the purchaser has taken delivery of the item sold, he must ascertain its condition as soon as he is able to do so, to see that it conforms with the contract.⁽³²⁹⁾ If he discovers a defect for which the seller is liable, he must give notice to the seller as soon as possible,⁽³³⁰⁾ failing which he will be deemed to have accepted the thing sold.⁽³³¹⁾ If the purchaser has informed the seller of the defect within a reasonable time, he is entitled either to reject the goods and to treat the contract as discharged, or to accept the goods at the contract price, according to Article 558 of Iraqi Civil Code.⁽³³²⁾ However, if he delays informing the seller of the defect, or fails to inform the seller at all, he is not entitled to specific performance, in the form of ordering the seller to repair the defect if it is repairable or to change the defective thing for a new one at the seller's expense. In addition, the buyer is not entitled to reject the goods and ask for specific performance in many cases, such as, if the defect has taken place after the purchaser has taken delivery of the goods,⁽³³³⁾ or if the buyer has disposed of the goods sold before knowing that there is defect.⁽³³⁴⁾

Comment

1-The seller is entitled, in Scots law and in Iraqi civil law, to rescind the contract with damages where there is a breach of contract for sale of goods by the purchaser. However if the breach of the contract is but trifling within the circumstances of the case and in accordance with the court discretion, the contract may not be repudiated, and the remedy for such a breach is either specific implement or damages.

2-The seller in Iraqi civil law is entitled to insist on having specific performance against the failure purchaser who has breached his obligation, whereas the seller in Scotland is deprived of this remedy.

3-If the buyer has committed a breach to his obligation of payment or taking delivery, his right of specific implement will be refused, and the seller then may have

the opportunity to claim specific implement. Although, in Scotland the seller does not have such an opportunity, he is entitled to have an action against the purchaser for the price under Sec. 49 (1) of Sale of Goods Act 1979, but this is not a remedy of specific implement.

4-Both Scots and Iraqi systems concur, that breach of the obligation of payment by the buyer, gives the seller the right of retention, and subsequently the buyer's right of the remedy of specific implement will be denied.

5-Both systems concur that refusal or failure by the buyer to perform his part of the sale contract prevents him from insisting on the seller to perform, by virtue of the principle of, "*Exceptio non adimpleti contractus*".

Sub-Section 4: Breach of contract by the seller

Breach of contract by the seller in Scots law does not affect specific implement, as he does not have the remedy in any case, on the contrary to the seller in Iraqi civil law. The problem will be considered under both systems, viz:

1-Breach of contract of sale by the seller in scots law.

2-Breach of contract of sale by the seller in Iraqi civil law.

1-Breach of the contract by the seller in Scots Law

"A contract for the sale of goods contemplates its consummation and extinction upon the performance by each party of all his obligations thereunder".⁽³³⁵⁾ Thus, any refusal to perform will lead to breach of contract. The obligations are to confer a good title to the buyer,⁽³³⁶⁾ and to deliver the goods sold.⁽³³⁷⁾ and to perform the contract according to its terms. According to Sec. 11 (2) of the Sale of Goods Act 1979, "In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to claim for compensation or damages".

Refusing the remedy of specific implement on the ground of the seller breach to his

obligation, has no legal basis in Scots law, for the seller is not entitled to have the remedy. In addition, breach of his obligations may give the purchaser the right to insist on having specific performance, especially in the case of refusal to deliver the goods sold.⁽³³⁸⁾ However, the seller cannot insist on the buyer taking delivery of the goods sold,⁽³³⁹⁾ or performing specifically any other obligation. The seller may not insist on the buyer to perform specifically not because of he is in breach of his obligations, but because his action is a sum of money, which cannot be ordered by a decree of specific implement.⁽³⁴⁰⁾

2- Breach of contract by the seller in Iraqi civil law

Any breach of obligation by the seller will deprive him of his right to specific performance, and give the buyer the right to seek specific performance, and rescind the contract with damages. Considering whether the seller's right of specific performance is refused requires to follow his performance to the obligations he has undertaken; namely:

- Transfer of ownership of the thing sold.
- Delivery of the thing sold to the purchaser in accordance with the contract conditions.
- Warranty against dispossession and disturbance of the buyer in his enjoyment.
- Warranty against defects in the goods sold.

Studying every obligation in detail is beyond the scope of this work. However, the study will concentrate on the breach of these obligations in so far as they affect specific performance.

2.1-Transfer of ownership of the goods sold

Transference of ownership can only occur, where the thing is specifically identified,⁽³⁴¹⁾ or is described only as specie but becomes specific by individualisation.⁽³⁴²⁾

First:-If the thing sold is specifically identified, its ownership is transferred as

soon as the contract is concluded, by virtue of the law, in Articles 247, 531, 1126 (1) of Iraqi Civil Code, (providing the thing is owned by the seller).⁽³⁴³⁾ If the thing is not owned by the seller at the time of making the contract, no contract is concluded, but it is regarded suspended, until it is ratified by the owner of the thing sold.⁽³⁴⁴⁾ If the owner of the thing sold does not ratify the sale, there is no contract of sale at all, and the parties are subject to the rule of "*restitutio in integrum*".⁽³⁴⁵⁾ In such a case the only thing which can be done, is to grant the aggrieved buyer damages if they are due.⁽³⁴⁶⁾ Furthermore, the seller must refrain from doing any thing which may render transference of ownership impossible or difficult, for Article 535 of Iraqi Civil Code provides, that "The seller is bound to perform every thing necessary to transfer ownership of the thing sold to the buyer and to abstain from all acts those might render transference impossible or difficult".⁽³⁴⁷⁾

The seller's right of specific performance is dependant on fulfilling his obligation in transferring the title of the thing sold to the buyer even if the contracting parties agreed to postpone delivery or to delay payment of the price.⁽³⁴⁸⁾ Also, the transfer of ownership is subject to the terms of the contract.⁽³⁴⁹⁾

Secondly:-If the thing sold is described as specie its ownership is not transferred, unless the object is identified by individualisation,⁽³⁵⁰⁾ (for the thing sold before individualisation is not identified specifically and therefore its ownership is not transferred in accordance with Article 531 of Iraqi Civil Code). When the seller refuses to fulfil his obligation, in identifying the goods, he is deemed to have breached his contract and he is regarded as refusing to transfer ownership.⁽³⁵¹⁾ Such a breach leads to the following consequences:

1-It deprives the seller of specific performance, namely, "the purchaser will not be compelled to fulfil his obligations".

2-It gives the purchaser two choices,⁽³⁵²⁾ either to buy movables of the same kind at the seller's expense, or to ask the seller to repay the price if it has already been paid, when the buyer thinks that there is no point or justification to buy other goods.

3-The buyer is entitled to damages if he has suffered loss.⁽³⁵³⁾

2.2-Delivery of the goods sold

The seller's other substantial obligation is to deliver the goods sold to the purchaser.⁽³⁵⁴⁾ A breach of this obligation will render the seller liable to performance, and deprive him of his right of specific performance against the purchaser. This will follow whether the delivery is actual or constructive,⁽³⁵⁵⁾ or symbolic,⁽³⁵⁶⁾ or, if the seller has intended to deliver the goods in a different place from which the contracting parties agreed upon,⁽³⁵⁷⁾ otherwise the goods should be delivered in the place where they exist at the time of making the contract.⁽³⁵⁸⁾ Furthermore, when the seller delays delivery of the goods, unless otherwise agree, he is deemed to have committed a breach to his obligation.⁽³⁵⁹⁾ In addition, if he has delivered goods in a different condition from which they were at the time of making the contract,⁽³⁶⁰⁾ the seller is in breach of his obligation. Therefore, the buyer after serving a formal summons on the seller, is entitled either to insist on having specific performance in addition to damages, or he may apply for rescission of the contract with damages, if he has suffered loss.⁽³⁶¹⁾

The seller in such a case cannot seek specific performance for the following reasons:

1-The rule of "*Exceptio non adimpleti contractus*" stands against granting him specific performance as long as, the buyer is ready and willing to perform his part of the contract.⁽³⁶²⁾

2-To give the seller in breach the right of specific performance against the party who has performed his obligation, or who is willing to do so, is unjust. It is a general rule of bilateral obligations only to allow a party to have specific performance if he has performed what he undertook to do.

3-Although, there is no specific provision in the Civil Code, it is submitted that, such a case is subject to the general rule of the theory of obligation, and it is supported by Articles 177, 246 of Iraqi Civil Code.

2.3-Warranty against disturbance and dispossession

The seller undertakes:

- 1-to a warrant against disturbance of the buyer in his enjoyment of the thing sold.
- 2-to a warrant against dispossession.

2.3.1-Warranty against disturbance of the buyer in his enjoyment

Such a disturbance may take place either by the seller himself or by a third party:

2.3.1.1-Disturbance of the buyer by the seller himself

Disturbance,⁽³⁶³⁾ may be material,⁽³⁶⁴⁾ or legal,⁽³⁶⁵⁾ direct or indirect.⁽³⁶⁶⁾

To be liable to the purchaser, disturbance must cause loss to him.⁽³⁶⁷⁾ Disturbance alone is not sufficient. Where damage ensues, the purchaser may obtain an order against the seller to stop the disturbance, or claim damages.⁽³⁶⁸⁾ The purchaser, also, may ask for rescission of the contract with damages.⁽³⁶⁹⁾ The seller's right to specific performance is subject to number of considerations.

The seller cannot insist on having specific performance against the buyer, where the buyer has not paid the price, or has not taken delivery of the goods, (although he is willing and ready to do so, or there is stipulation concerning the time of payment and taking delivery at a later stage).

2.3.1.2-Disturbance by a third party

The buyer's right against disturbance by a third party may be found as follows:

- 1-The third party has a legal right which is enforceable against the purchaser.

This refers to a legal right arising from the purchaser's default.⁽³⁷⁰⁾ Disturbance does not include illegal acts such as theft or criminal damage,⁽³⁷¹⁾ as the purchaser is given a legal remedy against the perpetrator of such acts.⁽³⁷²⁾

- 2-Actual occurrence of the disturbance:⁽³⁷³⁾

A mere fear of disturbance is not sufficient,⁽³⁷⁴⁾ nor is the mere existence of a right which is not exercised.⁽³⁷⁵⁾

- 3-The right must exist at the time the contract is made,⁽³⁷⁶⁾ according to Article 549 (1) of the Iraqi Civil Code. The purchaser who has been disturbed, is entitled to

the remedy of specific performance.

Is the seller's right of specific performance refused or granted under the above circumstances?

First of all, one should presume, that the purchaser's refusal to pay the price or to take delivery of the goods is not a breach of obligation, but as is done under the condition of the contract, for if the buyer has fulfilled all his obligations, there is nothing for the seller to insist on him "the purchaser" to perform specifically. The purchaser who has been disturbed, has the right to retain the price, and thus the seller cannot oblige him to pay it. This is supported by the general rules of the theory of obligation in Articles 246 (1, 2), 177 of Iraqi Civil Code. Further, under the principle of "*Exceptio non adimpleti contractus*" cannot insist on having specific performance against the buyer, as long as, he is in breach of one of his obligations. The seller who should perform that obligation specifically by standing against the third party's claim. If the seller's warranty is broken and the thing sold has been dispossessed whether partially or totally thereafter, he must pay damages to the buyer for loss caused. Obtaining a decree confirming the right of the third party over the thing sold makes performance of the seller to his obligation impossible. Damages then will be granted as an alternative remedy.⁽³⁷⁷⁾

2.3.2-Warranty against dispossession

If the purchaser is disturbed by a third party under a legal right, he is deemed to have been deprived of his right of possession, for the thing is considered to have been possessed.⁽³⁷⁸⁾ Dispossession of the thing sold can be partial,⁽³⁷⁹⁾ or total,⁽³⁸⁰⁾ whether the seller is *bona fides*,⁽³⁸¹⁾ or *mala fides*.⁽³⁸²⁾ Where dispossession is total, and the seller is *bona fides*, he is obliged to refund the price to the purchaser, regardless of the value of the thing at the time of dispossession.⁽³⁸³⁾ The purchaser may also claim the profits which would accrued to him from the goods but for the dispossession,⁽³⁸⁴⁾ Also, any sums spent by the purchaser to enhance the value of the

goods,⁽³⁸⁵⁾ may be claimed. If the seller is *mala fides*, the buyer is entitled to claim any increase in the value of the thing sold,⁽³⁸⁶⁾ He may claim compensation for loss sustained and profit missed as a result of the dispossession.⁽³⁸⁷⁾

If dispossession is partial, or the thing is encumbered with a charge without the purchaser's knowledge at the time of the contract, the purchaser is entitled to rescind the contract.⁽³⁸⁸⁾ However, if the purchaser has chosen to keep the thing sold, he is entitled to claim damages in respect of loss he has sustained as a result of dispossession.⁽³⁸⁹⁾

It is questionable whether specific performance can be granted, if the seller has committed a breach to his obligation of warranty against dispossession. The seller has no right to raise any claim against the aggrieved purchaser. On the contrary, it is the purchaser who has the right to claim against the seller for breach of warranty,⁽³⁹⁰⁾ or to oppose the third party in his claim to the thing sold.⁽³⁹¹⁾ The seller is bound to take action to oppose the third party's claim and if he fails he will be deemed to be in breach of contract to the purchaser, who is entitled either to rescind the contract,⁽³⁹²⁾ or to keep the remaining of the goods and claim damages.⁽³⁹³⁾

The seller has no right to insist that the buyer performs his obligations, by virtue of the concept of the principle of "*Exceptio non adimpleti contractus*".

There are cases of dispossession to which the warranty does not apply. For instance, where the seller is not informed by the buyer that there is action of dispossession against the goods sold by a third party,⁽³⁹⁴⁾ or where the buyer has delivered the goods sold to the third party without raising any action of dispossession against him,⁽³⁹⁵⁾ or dispossession has been proved by recognition of the buyer himself,⁽³⁹⁶⁾ or, when the seller manages to prove, that dispossession of the thing sold by reason of the buyer's recognition, is invalid, even if the seller has been informed by the buyer to stand with him in his action,⁽³⁹⁷⁾ or if the seller has proved that dispossession of the thing sold by a third party has taken place as a result of the buyer's gross default, or fraudulent misrepresentation.⁽³⁹⁸⁾

In such cases the seller retains the full right of specific performance against the

purchaser.

2.4-Warranty against defects

To pursue a claim for a defect in the goods the purchaser must inform the seller of the defect within a reasonable time of inspecting the goods.⁽³⁹⁹⁾ The purchaser may then seek rescission, or retain the goods and claim damages in accordance with Article 558 (1) of the Iraqi Civil Code.⁽⁴⁰⁰⁾

Further questions may arise, First; is the purchaser entitled, to require the seller to repair the defective goods, and where he refuses to do so repair or change them at the seller's expenses? Secondly; is the seller entitled to the remedy of specific performance, where he has delivered defective goods?

On the first issue, the opinion of Iraqi scholars differ. On the one hand, the purchaser is entitled to do so according to the general rules of the theory of obligation.⁽⁴⁰¹⁾ On the other hand, the purchaser cannot oblige the seller to repair or to change the defective part at his expense.⁽⁴⁰²⁾

Nevertheless, it is thought, that the buyer is entitled to order the seller to repair or to change the defective part of the thing sold for the following reasons:

1-According to the general rule of specific performance in Article 246 (1) of Iraqi Civil Code, the seller must perform his obligation specifically if such performance is possible. Thus, if repairing or changing the defective part is possible, the seller must do so.

2-If the seller refuses to perform such an obligation, Article 250 of Iraqi Civil Code, permits the buyer to do so at the seller's expenses, with or without the court's permission.

3-To say that the seller is not obliged to do so, conflicts with the general rule of Iraqi civil law, which considers performing the obligation specifically by the debtor is the main and primary remedy.

On the second issue, the seller is deprived of his right to the remedy if he has

delivered defective goods, as he is in breach of his obligation.

Comment

1-The seller has no right to specific performance in Iraqi civil law if he commits a breach to one of his obligations. He may be obliged to perform specifically.

2-The seller in Iraqi civil law may face the rule of "*Exceptio non impleti contractus*" if he breaches his obligation, and claims specific performance thereafter. He cannot obtain specific performance in such a case against the purchaser.

3-In Scots law, the seller is not entitled to the remedy of specific implement, in any case, even if the buyer's refusal to take delivery of the goods sold is not legally justified.

CONCLUSION

1-Granting specific implement in both systems is a legal remedy subject to certain conditions. The remedy is granted by virtue of law, therefore, the circumstances of *pretium affectionis* and uniqueness should not play any role in Scots law and, *afortiori*, in Iraqi civil law. These two matters must be ignored, as they are alien to the nature and the concept of specific implement in Scots law.

2-Refusing the remedy of specific implement in both systems depends on the court's discretion towards examining the defenses and the equitable grounds as well as the grounds in law. Thus, to refuse the remedy of specific implement the court must examine, by using its wide discretionary power, the surrounding circumstances of impossibility, hardship, breach of contract by the contracting party, and unenforceability of a decree of specific implement in every single case.

3-Breach of contract by one contracting party is a bar to specific implement in both systems. Furthermore, breach by one party gives the other party the right to insist on the remedy, except the case of the seller in Scots law, for whom the remedy does not exist.

FOOT-NOTES

- 1-Seaforth's Trs. v. Macaulay (1944) 7D.189; Stewart v. Kennedy, supra, per Lord Watson at p. 9-10.
- 2-Stewart v. Kennedy, supra, per Lord Watson at p. 9-10.
- 3-D.M.Walker, Civil Remedies. op.cit. p.276.
- 4-"*Pretium affectionis* ", is "an imaginary value upon a thing by the fancy of the owner, and growing out of his attachment for the specific article, its association, his sentiment for the donor, etc". See, Henery, Campbell Black, Black's law Dictionary, 5th ed, West publishing Co. 1979 at p.1069.
- 5-(1913) S.C. 954, per Lord President Dunedin at p. 958.
- 6-Post. at pp. 65-66.
- 7-(1860) 22D. 665. at p.671.
- 8-Ante. at pp. 39-40.
- 9-Stewart v. Kennedy , supra., 10, per Lord Watson; Moore v. Paterson, supra, at p.351 per Lord Shand.
- 10-Post. at pp. 84-89; 95-100; see also, Stewart v. Kennedy, supra. at p.10, 11.
- 11-Gloag, Contract, op.cit. p. 657
- 12-Gloag, supra.
- 13-J.J.Gow, Mercantile & Industrial law, op.cit. p.219.
- 14-Post. at pp.84-89; 95-100; 106-111; 116-117; see also, Stewart v. Kennedy, supra. p.10, per Lord Watson; at p.11 per Lord Macnaghten.
- 15-Gloag, Contract. supra. at p. 657.
- 16-Post, at pp. 84-89; 95-100.
- 17-post. at p.200; see also for more details, G.Jones & W.Goodhart, Specific Performance, op.cit. pp.18-22.
- 18-Davidson v. Macpherson, supra, per Lord young, at p.6.
- 19-Stewart v. Kennedy, supra, per Lord Herschell, at p.5.
- 20-Stewart v. Kennedy, supra.
- 21-Supra, per Lord Watson, at p.10.
- 22-Ibid, at p.9.
- 23-Ibid, per Lord Macnaghten, at p.11.
- 24-Ante. pp. 41-43; post, at pp. 84-89; 95-100; compare, Stewart v. Kennedy, supra at p.10.
- 25-Ante. at pp. 65-66.
- 26-Stewart v. Kennedy, supra, per Lord Watson, at p. 10.at
- 27-Davidson v. Macpherson, supra, per The Lord Justice-Clerk, at p.6
- 28-Ibid.
- 29-(1860) 22D. 665 at p.671.

30-Sutherland v. Montrose Shipbuilding Co. *supra*.

31-Ante. at pp. 15-18.

32-Pusey v. pusey (1684) 1Vern. 273; Somerset v. Cookson (1735) 3P. Wms. 390; Lowther v. Lowther (1806) 13Ves. 95; Cohen v. Roche (1927) 1K.B.169; Behnke v. Bede Shipping Co. (1927) 1K.B. 640; see also, G.H.Treitel, specific performance in the sale of goods, *supra*, at pp. 214-215; G.H.Treitel, The law of contract, 5th ed. London, Stevens & Sons 1979 at p.753; North v. G.N.Ry (1860) 2Giff. 64; Batthyany v. Bouch (1882) 50L.J. Q.B.421; Lingen v. Simpson (1824) 1S.&S. 600 (pattern books).

33-G.H.Treitel, specific performance in the sale of goods, *supra* at p.214, referring to the cases of, Phillips v. Lamdin (1949) 2K.B. 33; Cohen v. Roche (1927) 1K.B. 169.

34-Thomas S. Ulen, "The efficiency of specific performance toward a unified theory of contract remedies" Michigan L.Rev. vol:83, November 1984 at p.373.

35-Anthony T.Kronman, "specific performance", The University of Chicagow L.Rev. vol: 45, 1978 at p.363.

36-Thomas S. Ulen, *op.cit.* p.375.

37-J.J.Gow, Mercantile & Industrial law, *op.cit.* p.219.

38-Gloag, Contract. *supra*, p.657.

39- Ante at pp. 15-18.

40-Ante at pp.18-24.

41-post at pp. 73-76; see also, Sale of Goods Act 1979, Sec. 52.

42-Ante. at pp. 15-18; 18-24.

43-T.G.Wright, "Lecture on sale" (1872), Journal of Jurisprudence (16), *supra*, at p.405.

44-R.Brown, Commentaries on sale of goods, *op.cit.* p.249.

45-J.J.Gow, Mercantile & Industrial law, *op.cit.* pp.218-219.

46-(1860) 22D. 665 at p.671.

47-Sutherland v. Monterose Shipbuilding Co., *supra*, at p.671 per Lord Cowan.

48-Supra.

49-Supra, at pp.671-672.

50-(1949) S.C. 49 at p.52.

51-Ibid. at p.55.

52-Falcke v. Gray (1859) 4Drew. 651 at p.658, per Kindersley V-C.

53-Nutbrown v. Thornton (1804) 10Ves. 160 at p.163, per Lord Eldon LC.

54-G.Jones & W.Goodhart, Specific Performance, *op.cit.* p113.

55-Whitely Ltd. v Hilt (1918) 2K.B. 808 at p.819, per Swinfen Eady MR.

56-Stewart v. Kenndy , *supra*, at p.5.

57-Stewart v. Kennedy, *supra*, at pp. 9-10.

58-Ibid, at p.11.

59-Ante. at pp. 65-68; 68-71, see also, Union Electric Co. Ltd. v. Holman (1913) S.C. 954,

per Lord President, at p. 958 ; D.M.Walker, Civil Remedies. op.cit. at p.278, referring to the case of Union Electric Co. Ltd. v. Holman, supra, without any comment. See also, William W.McBryde, The Law of Contract in Scotland , 1st ed. Edinburgh, W.Green & Son Ltd, 1987, at p.513, referring to the cases of Union Electric Co. Ltd v. Holman, supra, and, Davidson v. Macpherson, supra, at p.6, per Lord Young, without any comment.

60-D.M.Walker, Civil Remedies. op.cit. at p.278.

61-Gloag, Contract, op.cit. at p.657.

62-J.J.Gow, Mercantile & Industrial law, op.cit. at p.219.

63-Sutherland v. Montrose Shipbuilding Co., supra, at p.671; see also Lord President Dunedin's observations in Union Electric Co. v. Holman, supra ; J.J.Gow, Mercantile & Industrial law, supra at p.219.

64-Harvey v. Smith (1904) 6F. 511.

65-Harvey v. Smith, supra at p.523, per Lord M' Laren.

66-Hasham v. Zenab (1960) AC. 316 at p.329.

67-D.M.Walker, Civil Remedies. op.cit. p.276.

68-Middleton v. Leslie (1892) 19R. 801; Robertson v. Cockburn (1875) 3R. 21.

69-Middleton v. Leslie, supra, per Lord President at p.802.

70-Ibid, at p.802.

71-Ibid.

72-Hendry v. Marshall (1878) 5R. 687, per Lord President at p.690.

73-Robertson v. Cockburn (1875) 3R. 21; Hendry v. Marshall, supra.

74-Post. at pp. 266-267.

75-Compare, Sec.52, of the Sale of Goods Act 1979.

76-Sec.56 of the Sale of Goods Act 1979.

77-Forrest v. Aramayo (1900) 83L.T.R. 335.

78-J.J.Gow, op.cit. p.76; D.M.Walker, contract, op.cit. pp. 10-11.

79-Gloag, Contract, supra, p16.

80-Gloag, Contract, op.cit. p.6 ; see also, Stewart v. Kennedy , supra, p. 25 per Lord Watson at p.29 ; Laing v. Provincial Homes Investment Co. Ltd. (1909) S.C. 812, per Lord Kinnear at pp.822, 826.

81-Stair, Institution, 10,1; Bell, Principles.. sec. 7 ; Erskine, Jhon, Institution to the law of Scotland, Edinburgh, 1824, iii. 2, 3.

82-D.M.Walker, Contract, op.cit. p.560.

83-Granor Finance v. Liquidator of Estate Ltd. (1974) S.L.T. 296.

84-Post. at pp. 89-94; 100-105; 111-115; 117-123.

85-Post. at pp. 217-218.

86-Compare Article 246 (2) of Iraqi Civil Code; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2. supra, at pp.761-766.

87-Article 246 (1) of Civil Code; see also, Abdul baqi, Abdul fattah, lessons in the principles of the obligation, op.cit. p.39; compare, Egyptian Court of Cassation, civil cassation, on 12/june/1952, Cassation Clection, No.187, the 3rd year, at p.1187.

88-There are no law cases or judgments deal with these two matters in Iraqi judiciary.

89-Al-hakeem, Abdul Majid, Commentary on civil law, principles of the obligation, vol. 2, op.cit. pp.9-17; Al-dhanoon Hasan Ali, The general theory of obligations, op.cit. at pp.340-341; It should be noted, that the Egyptian civil jurisprudence has established these three conditions, in addition to the creditor should serve formal summons on the debtor. see, Al-sanhoori, Abdul razzaq, Commentary on Civil Law, vol.2 op.cit. pp.760-767; Abdul baqi, Abdul fattah, Lessons in the principles of the obligation. op.cit. pp.40-44. Amir, Hussien, Civil liability, supra, pp. 530-533.

90-Al-hakeem, Abdul majid, Commentary on civil law, vol. 2, principles of Obligation, supra at pp.9-15; Al-bakri, Abdul baqi, Commentary on civil law, supra at pp.35-36; compare, Article 246 (1) of Iraqi Civil Code; Abdul baqi, Abdul fattah, lessons in the principles of the obligation, op.cit. pp.40-41; Al-dhanoon; Hasan Ali, the general theory of obligation, op.cit. p.340.

91-Article 246 (2) of Civil Code; Al-hakeem, Abdul majid, Commentary on civil law, principles of obligation, vol. 2 op.cit. pp.15-16; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. pp.36-38; Al-sanhoori, Commentary on civil law, vol. 2, op.cit. pp.764-765; Sulttan, Anwar, the principles of obligation, op.cit, pp.46-47.

92-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. pp.38-39; Al-hakeem, Abdul majid, the principles of obligation, vol.2, supra, at pp.16-17; Al-dhanoon. Hasan Ali, the general theory of obligation, supra at p.340; Sulttan, Anwar, the principles of the obligation, supra at p. 43; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, supra, at pp. 761-764.

93-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. pp.34-43.

94-Post. at pp. 100-105.

95-Ante.at pp. 34-35.

96-Taha Ghani Hassoun, Commentary on the specific contracts, Sale contract, op.cit. at p.255; Al-hakeem Abdul majid, Commentary on civil law, vol.2, supra, at p.11.

97-Post, at pp. 89-91.

98-Summons, is a written demand, which may either be prepared by a lawyer or by the party himself, which must be served on the other side by public servant; see for more details, Murqus, Sulayman, Commentary on civil law, supra, at pp. 569-582; Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.88-104; Al-hakeem, Abdul majid, Commentary on civil law, sources of obligation, vol.1 supra, at pp.28-35.

99-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.167; Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, op.cit. p.255;

Murqus, sulayman, Commentary on civil law, supra at pp.569-570.

100-Taha, Ghani Hassoun, Commentary on the specific contract, supra, at p.255-256; Al-windawi Kamal Tharwat, Commentary the sale contract, supra, at pp. 166-167 ; Al-amiri, Sa'doun, Commentary on the sale and lease contracts, op.cit. at pp. 122-123; compare Article 177 (1) of Iraqi Civil Code.

101-See for more details concerning the summons in Egyptian civil law, Al-sanhoori, Abdul razzaq, Commentary on Civil Law, vol:2 Supra, at pp.766-767; Murqus Sulayman, Commentary on civil law. op.cit. pp.569-580; see also, Egyptian Mixed Appeal, 20/March/1935, Mixed, 47, p.211; 28/March/1935, Mixed, 47, p.223; Abdul fattah, Abdul baqi, Lessons in the principles of the obligation, supra, at p.43; Murqus, Sulayman & Imam, Mohammad Ali, Contract of sale in the new civil code , Nahdhat Mussir press, 1955, at p.336.

102-There is not any indication to serve formal summons on the debtor under the section which is devoted to specific performance in Articles 246- 252. of Iraqi Civil Code.

103-Al-bakri, Abdul baqi, Commentary on Civil Law, op.cit. p.94; for more details as regards serving summons on the debtor in granting damages, Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.88-104; Al-dhanoon, Hasan Ali, the general theory of obligation, supra at pp.349-351; Al-hakeem, Abdul majid, Commentary on civil law, principles of the obligation, vol.2 op.cit. pp.29-34.

104-Al-hakeem, Abdul majid, Commentary on Civil Law, vol. 2, supra, p.11

105-Al-bakri, Abdul baqi, Commentary on civil law, supra, p.49-50; Abdul baqi, Abdul fattah, Lessons in the principles of the obligation, supra, at p.46-48.

106-Al-amiri, Sa'doun, Commentary on the sale and lease contracts, supra at pp.99-100; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.49.

107-Compare Article 248 of Iraqi Civil Code; Al-amiri Sa'doun, Commentary, supra;

108-Al-bakri, Abdul baqi, Commentary on civil law, supra,

109-Ante, at pp. 35-37; Murqus Sulayman, Commentary on civil law, supra, at p.565; Al-sanhoori, Abdul razzaq, Commentary on Civil Law, vol:2, op.cit. at p.777-778; Taha, Ghani Hassoun, Commentary on the specific Contracts, vol. 1, op.cit. p.215.

110-Taha, Ghani Hassoun, Commentary on the specific contracts, sale contract, supra, at pp.214-215; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol:2, supra, pp.775-776; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. pp.17,49; Murqus, Sulayman, Commentary on civil law, supra, at pp.564-565.

111-Article 248 (2) of Civil Code; Al-dhanoon, Hasan Ali, The general Theory of obligations, supra, at p.343; Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.49-50; Sulttan, Anwar, the principles of the obligation, supra, at p.50; Al-amiri, Sa'doun, Commentary on the Sale and Lease contracts, op.cit. p.123.

112-Al-bakri, Abdul baqi, Commentary on civil law, supra, at p. 50 ; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol. 2, supra, pp. 777-778; Al-windawi, Kamal Tharwat, Commentary on sale contract, op.cit. p.166-167; Abdul baqi, Abdul fattah, Lessons in the obligations, supra, pp. 46-47 ; Al-hakeem, Abdul majid, Commentary on civil law, principles of obligation, vol. 2 supra, at pp. 11-12; Sulttan, Anwar, the principles of the obligation, op.cit. p. 50 ; Murqus, Sulayman, Commentary on civil law, op.cit. pp.584-585; Tanagho, Sameer Abdul sa'ied, the contract of sale, op.cit. pp.343-344.

113-Ante. at pp. 29-31.

114-Article 246 of Iraqi Civil Code.

115-Post. at pp. 89-94; 100-105; 217-218.

116-Article 246 (1) of Iraqi Civil Code; see also, Al-windawi, Kamal Tharwt, Commentary on sale contract, op.cit. p.167 foot-note (1); Al-sanhoori, Abdul razzaq, Commentary on civil law, vol. 2, op.cit. pp.760-761; Al-bakri, Abdul baqi, Commentary on civil law, supra, at pp.35-36; compare, the Iraqi Court of Cassation decisions, Nos.220, 229, Appellate, 1970, on 29/4/1971, Judicial Publication, 2nd issue, the 2nd year, 1972, at p.102.

117-Compare Article 246(2) of Civil Code;

118-Article 248 (2) of Iraqi Civil Code.; Unfortunately, the provision of that Article does not show the reason of the debtor's refusal to perform his obligation. Therefore one may be confused when he reads the meaning of that Article which seems to encourage the debtor to refuse performing his obligation, because the debtor is ordered to pay expense and the creditor is allowed to buy things of the same kind. Nevertheless, when the fungible goods remain on the debtor's possession but he refuses to perform no answer or clue can be found under this Article. The only clue can be supported by the above Article is, to buy goods of the same kind at the expenses of the debtor. Surely, it can be said that, this is the result the refusing party wishes to get from his refusal to perform the contract.

119-Egyptian Court of Cassation judgment, on, 12 June, 1952, Publication of the Court of Cassation decisions 3, No.187, at p.1187; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.38; compare, Sulttan, Anwar, the principles of the obligation, op.cit. pp.43-44; Egyptian Court of Cassation decision, on 16/12/1948, Omar Collection, vol.5, No.305, at p.682.

120-Al-bakri, Abdul baqi, Commentary on civil law, supra.

121-Ibid.; see also, Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, op.cit. at p.762 foot-note(2).

122-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.38; Egyptian Civil Cassation, on 12/june/1952, Publication of the Court of Cassation decisions, 3, No.187. at p.1187; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, op.cit. p.762.

123-Articles 282 (1), 280, 177 (1) of Iraqi Civil Code.

124-Al-hakeem, Abdul majid, Commentary on civil law, vol. 2 supra at p. 17; Shanab,

- Mohammad Labeeb, "Anticipated breach of contract, study in American, Egyptian, and French laws", The legal and Economic Sciences Journal, January, 1961, vol:1, 3rd year, at pp.153-154; Taha, Ghani Hassoun, Commentary on the specific contracts, supra at pp.357-358.
- 125-Gloag, Contract. op.cit. p.657; compare, Sharpe, RJ. Injunction & Specific performance, op.cit, at p.394.
- 126-Gloag, Contract. op.cit. Ch XIX; D.M.Walker, Contract. op.cit. chap. 11; Mc Bryde, W.M, Contract, supra, chap. 15; Stephen, Woolman, Contract, 1st ed. Edinburgh, W.Green & Son Ltd. 1987, at pp. 168-176; J.J.Gow, Mercantile & Industrial law, op.cit. at pp.36-37.
- 127-Leitch v. Edinburgh Ice Co. (1900) 2F. 904; Sec.7 of the Sale of Goods Act, 1979.
- 128-Campbell B. Burns & John N. Quar, Commercial law of Scotland , 3rd ed. 1960, at op.52.
- 129-Petrie v. Forsyth (1874) 2R. 214; Mac Arthur v. Lawson, supra, opinion of Lord President Inglis, at p.1136
- 130-Leithy v. Edinburgh Ice. & Cold Storage Co.(1900) 2F 904; Sale of Goods Act 1979, Sec. 7.
- 131-Gloag, Contract, supra, at p.350.
- 132-Pommer & Thomson v. Mowat (1906) 14S.L.T.373; Dunlop & Co. v. Lambert (1839) M'lean & Rob. 663; Delaurie v. Wyllie (1889) 17R.167.
- 133-Cambbell B. Burns & John N. Quar, op.cit. at p.52.
- 134-Gloag, Contract, supra.
- 135-Mac Arthur v. Lawson, supra, at p. 1136, per Lord President Inglis
- 136-Supra.
- 137-(1877) 4R. 1134.
- 138-Supra. at p.1135 per Lord President.
- 139-Gloag, Contract, op.cit. p.345.
- 140-J.J.Gow, Mercantile & Industrial law, op.cit. p.36-
- 141-Watson v. Shankland (1871) 10M. 142; Cantiere San Roco v. Clyde Shipbuilding Co. (1923) S.C. (H.L.) 105.
- 142-Sec.20 of the Sale of Goods Act 1979; Robb v. Gow (1905) 8F. 90 per Lord President Dunedin at p. 101; Kinnear v. Brodies (1910) 3F. 450.
- 143-Sec.20 (i) of the Sale of Goods Act 1979; J.J.Gow, Mercantile & Industrial law, op.cit. at p. 137.
- 144-Gloag, Contract, op.cit. at p. 658.
- 145-Post. at pp. 290-291.
- 146-Middleton v. Lesile (1892) 19R. 801,802.
- 147-Supra.
- 148-Fleming & Ferguson v. Paisley Magistrates (1948) S.C. 547, per Lord President Cooper, at p. 557.

- 149-(1949) S.C. 49 at p. 55.
- 150-Post. at pp.266-269
- 151-Middleton v. Leslie, supra; Robertson v. Cockburn (1875) 3R. 21.
- 152-D.M.Walker, Civil Remedies, op.cit. p.269.
- 153-Gloag, Contract, op.cit. p.661.
- 154-Petrie v. Forsyth, supra; M'Arthur v. Lawson, supra, opinion of Lord President Inglis; Gloag, Contract, op.cit. p. 658; M'Kellar v. Dallas's Ltd. (1928) S.C. 503.
- 155-Al-hakeem, Abdul majid, Commentary on civil law, vol. 2, principles of obligation, op.cit. pp.514-521.
- 156-Al-dhanoon, Hasan Ali, The general Theory of obligation, supra, at pp.470-471.
- 157-Iraqi Court of Cassation decision, No: 102/ First Instance/ 55/ Basrah, on 19/2/1955, cited by, Bayat Salman, Iraqi civil judiciary , vol:1, 1962, at p.225.
- 158-Article 547 (1) Iraqi Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at pp.263-266.
- 159-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.153.
- 160-Iraqi Cassation Court has decided that, "So long as the defendat has admitted that he has sent the goods to the purchaser by another person, who lost the goods during the process of transportation, therefore, the purchaser is not liable for such a loss, and risk before delivery lies with the seller who is compelled to pay the sum of money that has been claimed". the decision issued on 18/1/1958, cited by Bayat Salman, Iraqi civil Judiciary , vol. 2.,1962 at p.58.
- 161-For more details, see, Al-dhanoon, Hasan Ali, The General Theory of Rescission in Islamic Jurisprudence and Civil Law, comparative study , a Thesis Approved for the degree of Ph.D., University of Fua'ad the First, 1946. at pp.241-256; Taha, Ghani Hassoun, The General theory of Obligation, sources of obligation, supra, at pp.391-393.
- 162-Al-hakeem, Abdul majid, Commentary on civil law, Rules of obligation, op.cit. p.515.
- 163-Al-amiri, Sa'doun, Commentary on the Sale and Lease, op.cit. pp.110-114; see also, Articles 538 (1), 536 of Iraqi Civil Code.
- 164-Article 547 (2) of Iraqi Civil Code; see also, Al-windawi, Kamal Tharwat, Commentary on the contract of sale, op.cit. at p.152.
- 165-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. P.35.
- 166-Al-windawi, Kamal Tharwat, Commentary on sale contract, op.cit. p.152.
- 167-Ante. at pp. 85-86.
- 168-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, principles of the of obligation, op.cit. p.515.
- 169-Ibid.
- 170-Al-sanhoori, Abdul razzaq, Commentary on Civil Law, the sale contract , vol:4, Cairo, 1960, p.612 foot-note (3).

171-Taha, Ghani Hassoun, Commentary on the specific contracts, Sale contract, op.cit. pp.269-270 ; see also, Article 547 (1) of Civil Code.

172-Article 578 of Civil Code.

173-Article 577 of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, Sale contract, op.cit. pp.270-271; compare also, Article 428 of Civil Code.

174-Taha, Ghani Hassoun, Commentary on the specific contracts, Sale contract, op.cit. p. 258; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.156.

175-Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at p.264; Al-amiri, Sa'doun, Commentary on the sale and lease contracts, op.cit, p.110-111 ; Al-windawi, Kamal Tharwat, Commentary on sale contract, op.cit. pp. 129-130.

176-Taha, Ghani Hassoun, Commentary on the specific contracts, Sale Contract, supra, at p.258.

177-Article 179 of Iraqi Civil Code; Al-hakeem Abdul majid, Commentary on civil law, Sources of obligation, vol. 1, op.cit. at pp.432-433, Al-dhanoon, Hasan Ali, The General Theory of Rescission, op.cit. at pp. 470-471; Taha, Ghani Hassoun, The General Theory of Obligation, supra, at p.391.

178-Al-hakeem, Abdul majid, Commentary on civil law, vol.1, sources of obligation, op.cit. at p.433.

179-Al-hakeem, Abdul majid, Commentary, principles of the obligation, vol2, op.cit, at p.515.

180-Ibid.

181-Ibid.

182-Ibid.

183-Al-dhanoon, Hasan Ali, The general theory of rescission, op.cit. p.78.

184-Al-naddawi, Adam w., Civil procedures, 1988, at p.348.

185-Juma'ei, Abdul bassitt, Principles of procedures, Alfikir Al-arabi press, 1980, pp.520-521; compare, Al-a'llam, Abdul rahman, Iraqi procedures rules vol.2, Baghdad, 1962, at p.135; The Court of Cassation decision No: 485/1957 on, 12/6/1957, cited by Al-a'llam, Abdul rahman, Iraqi procedures rules, vol. 2, op.cit.173; see also, the Court of Cassation decisions, No: 667/956 on 9/6/1956; No: 2679/1957 in 16/11/1957; No: 2687/1957 on 27/1/1958; No:2014/1956 on 5/12/1956, all these decisions are cited by Al-a'llam, Abdul rahman, Iraqi procedures rules, supra, at pp.173-174.

186-Al-nadawi, Adam W., Civil procedures, op.cit. p.154; the Iraqi Court of Cassation decision, No: 247/86/ extended committee/ 86/87, on 31/3/1987, cited by Al-naddawi, Adam W., civil procedures, supra, at p.154, foote-note (2).

187-Sharpe, R.J., Injunction & specific performance, Canada Law Book Co., Toronto, 1983, p.379.

188-Sharpe, R.J., Injunction and specific performance, supra; Campbell B. Burns & John N.

- Quar, Commercial law of Scotland, op.cit. p.52.
- 189-Sharpe, R.J., Injunction and specific performance, supra, at p.376.
- 190-Gloag, Contract, op.cit. at p.660.
- 191-Sharpe R.J., Injunction & Specific performance, supra, at p.379.
- 192-Spry, Equitable Remedies, op.cit. p.193.
- 193-Wedgwood v. Adams (1843) 6Beav. 600;Dowesett v. Reid (1912) 15C.L.R. 695;Sutter v. Groundowda Pty. Ltd. (1950) 81C.L.R. 418 at pp.438-439.
- 194-Dowsett v. Reid, supra, at pp.706-707; Webb v. Direct London & Portsmouth Ry. Co. (1852) 1De G.M.&G. 521, 42ER. 654.
- 195-Wedgwood v. Adams, supra; Dowsett v. Reid, supra.
- 196-Wedgwood v. Adams, supra, at p.605.
- 197-Wedgwood v. Adams, supra, per Lord Longdale, at p. 605.
- 198-Spry, Equitable Remedies. op.cit. at p.194.
- 199-Spry, op.cit. at p. 196.
- 200-Miller v. Jackson (1977) Q.B. 966; Hutchinson v. Payne (1975) V.R. 175.
- 201-(1889) 30S.L.R. 2.
- 202-Davidson v. Macpherson, supra, per Lord Young, at p.6.
- 203-(1881) 9R. 337.
- 204-supra, at p.351.
- 205-Moore v. Paterson, supra, at. P.351.
- 206-(1882) 9R. (H.L.) 91.
- 207-supra, at p. 91.
- 208-(1875) 3R. 35 at p. 43.
- 209-G.Jones & W.Goodhart, Specific Performance, op.cit. p.81.
- 210-Nicolas v. Ingram (1958) NZLR. 972; Keat v. Wallis (1953) NZLR. 563.
- 211-Perbroke v.Thorpe, 3SW. 443 N.
- 212-(1908) S.C. 580.
- 213-(1966) S.C. 237.
- 214-Supra, at pp.248-249.
- 215-Stewart v. Kennedy, supra, per Lord Watson at p.10.
- 216-Ibid.
- 217-Ante. at pp. 95-98
- 218-Spry, Equitable Remedies, op.cit. p.191; Fry, Specific Performance, op.cit.199.
- 219-Spry, Equitable Rmedies, supra, at p.192; compare, Price v. Strange (1978) Ch.337.
- 220-Spry, Equitable Remedies, supra, at p.192.
- 221-Francis v.Crowcliff Ltd. (1976) 120Sol Jo 353; also, Nicholas v.Ingram (1956) NZLR 972.

- 222-Roberts v. O'Neill (1983)1R. 47.
- 223-Spry, Equitable Remedies, supra at p.192.
- 224-G.Jones & W.Goodhart, Specific Performance, supra, at p.83; Costigan v. Hastler (1804) 2Sch & Lef 159.
- 225-Stewart v. Kennedy, supra at p.10. per Lord Watson.
- 226-Moore v. Paterson, supra, at p.348.
- 227-supra. at p. 351.
- 228-Grahame v. Magistrate of Kirkcaldy (1882) 9R. (H.L.) 91, per Lord Chancellor at p. 97.
- 229-Ante, at pp. 95-96.
- 230-Naji, Ghazi Abdul rahman, Economical balnce of contract, supra, at p.101.
- 231-Ibid.
- 232-Ibid.
- 233-Sulttan, Anwar, Principles of obligation, op.cit. at p.52.
- 234-Al-sanhoori, Abdul razzaq, Commentary on Civil Law, Sources of obligation, vol. 1, op.cit. p.645; Iraqi Court of Cassation decision, No:109/ civil /1974, judicial publication, the 3rd issue, the 5th year, at p.48.
- 235-Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, op.cit. p.645.
- 236-Al-hakeem, Abdul majid, Commentary on Iraqi Civil Law, Sources of obligation, vol. 1, op.cit. p.395; Naji, Ghazi Abdul rahman, Economical balance, op.cit. pp.103-106.
- 237-Al-hakeem, Abdul majid, Commentary on civil law, sources of the obligation vol. 1, supra; Naji, Ghazi Abdul rahman, Economical balance of the contract, supra, at p.103.
- 238-Article 146 (2) of Iraqi Civil Code provides,that, "When, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the court may, after taking into consideration the interest of both parties, reduce to a reasonable limits, the obligation that has become onerous, if the principles of equity have required so". ; see also, the criticism on the above Article in Al-hakeem, Abdul majid, Commentary on civil law, Sources of obligation, vol.1, op.cit.396; Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, op.cit. pp.646-657.
- 239-Naji, Ghazi Abdul rahman, Economical balance of the contract, supra, pp.110-111.
- 240-Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, op.cit. p. 645; Iraqi Court of Cassation decision, No. 109/ civil/ 1974, supra.
- 241-Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of Obligation, vol. 1, supra, p.645.
- 242-Naji, Ghazi Abdul rahman, Economical balance of the contract, op.cit. p.110; Iraqi Court of Cassation judgment, No:117/First Instance/965, Baghdad, on 21/6/1965, Judiciary of Iraqi

- Court of Cassation, vol:3, 1969, at p.97; see also the criticism on such a decision by Al-sanhoori, Abdul razzaq, Commentary on civil law vol.2, supra,
- 243-Iraqi Court of Cassation decision, No:109/civil/ on, 11/9/1974, Judicial Publication, No:3, the 5th year, at p.48, which says,"The criterion of too onerous for the debtor is flexible, and it is changable according to the circumstances, for what is too onerous for one debtor may not be so for the other, and what is too onerous for a debtor in certain circumstances may not be so for him or for another in different circumstances.
- 244-Naji, Ghazi Abdul rahman, Economical balance of the contract, op.cit. p.111.
- 245-Article 246 (2) of Iraqi Civil Code.
- 246-Al-bakri, Abdul baqi, Commentary on Civil Law, op.cit. pp.37-38; Abdul baqi, Abdul fattah, Lessons in the principles of the obligation, op.cit. p.41; Al-hakeem, Abdul majid, Commentary on civil law, principles of the obligation, vol. 2, op.cit. p.12; Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, op.cit. p.764.
- 247-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. at pp.36-38; Abdul baqi, Abdul fattah, Lessons in the principles of the obligations, supra, at pp.41-42.
- 248-Al-hakeem Abdul majid, Commentary on civil law, Sources of the obligation, vol. 1, op.cit. pp.395-396.
- 249-Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, op.cit. p.765, foot-note (2).
- 250-Al-hakeem, Abdul majid, Commentary on civil law, Sources of obligation, vol. 1, op.cit. p.519; Articles 1092, 1060, 96, 7 of Iraqi Civil Code.
- 251-Naji, Ghazi Abdul rahman, Economical balance of the contract. op.cit. at p. 112.
- 252-Supra.
- 253-Supra.
- 254-Supra.
- 255-Supra.
- 256-Al-dhanoon, Hasan Ali, the general theory of obligation, op.cit. p.156.
- 257-Article 246 (2) of Iraqi Civil Code.
- 258-D.M.Walker, Contract, supra, at p.518.
- 259-J.J.Gow, Mercantile & Industrial Law, supra. at p.38.
- 260-Erskine, Instit., III, 3, 86.
- 261-(1856) 18D. 1190 at p.1198.
- 262-(1874)1R. 730.
- 263-Turnbull v. M' Lean & Co., supra, at p. 739.
- 264-J.J.Gow, Mercantile & Industrial law, op.cit. p.38.
- 265-J.J.Gow, Mercantile & Industrial law, op.cit. at p.203.
- 266-Bell, Principles, supra, §. 70.
- 267-J.J.Gow, Mercantile & Industrial law, supra, at p.182.

- 268-Atiyah, Sale of goods, op.cit. at p.211.
- 269-Turnbull v. M'Lean, supra, per Lord Justice-Clerk Moncreiff at p.738.
- 270-D.M.Walker, Civil Remedies, op.cit, pp.656-657; J.J.Gow, Mercantile & Industrial law, op.cit, pp.153-155.
- 271-J.J.Gow, Mercantile & Industrial law, op.cit. p.183.
- 272-J.J.Gow, Mercantile & Industrial law, supra, at pp.183-184.
- 273-Barclay v. Anderson Foundry Co. (1856) 18D. 1190 at p.1198.
- 274-J.J.Gow, Mercantile & Industrial law, op.cit. at p. 184.
- 275-Collard v. Carswell (1892) 19R. 987 per Lord M'Laren, at p. 996.
- 276-(1863) 2M. 88.
- 277-Gloag, Contract, op.cit. at p. 618.
- 278-Morris v. Baron (1918) A.C. 1 per Finlay, L.C., Lords Dunedin & Parmoor.
- 279-Atiyah, Sale of goods, op.cit. p.211; J.J.Gow, op.cit. p.182.
- 280-J.J.Gow, Mercantile & Industrial law, supra, at p.215; see also, Sec. 49 (2) of Sale of Goods Act 1979.
- 281-Leggat v. Gray (1908) S.C. 67; M' Dowall & Nielson's Tr. v. Snowball (1904) 7F. 35.
- 282-Martindale v. Smith (1841) 1Q.B. 389.
- 283-J.J.Gow, Mercantile & Industrial law, op.cit. p.184.
- 284-Sale of Goods Act 1979, Sec. 37.
- 285-J.J.Gow, Mercantile & Industrial law, supra.p.184.
- 286-Sec.37 of the Sale of Goods Act 1979.
- 287-Sec. 27 of the Sale of Goods Act 1979.
- 288-J.J.Gow, Mercantile & Industrial law, op.cit. p.184.
- 289-(1897) 24R. 312.
- 290-Gloag, Contract. op.cit. p.611.
- 291-Gloag, Contract. supra, at p.612.
- 292-The cases concerning a reasonable time are cited by, D.M.Walker, Civil Remedies, op.cit. p.668; see also for "no-timeous rejection", D.M.Walker, supra, at pp.668-669.
- 293-Gloag, Contract, op.cit. p.612
- 294-Ante. at pp. 107-108.
- 295-Johnannesburg Municipal Council v. Stewart & Co. (1909) S.C. 860; (1909 S.C. (H.L.) 53.
- 296-Australian Hardwoods Proprietary Ltd. v. Railways Comr. (1961) 1WLR. 425 at pp.432-433; Chappell v. Times Newspapers Ltd. (1975) 1WLR. 482 at p.502, per Lord Denning MR. ; Measures Bros Ltd. v. Measures (1910) 2Ch. 248; Doyle v. East (1972) 1WLR.1080 at p.1084, per Brightman J.
- 297-Al-hakeem, Abdul majid, Commentary, Sourecs of obligation, vol. 1, op.cit. p.45; Al-sanhoori, Abdul razzaq, Commentary on civil law, sources of obligation, vol. 1, op.cit. at

p.730.

298-Al-hakeem, Abdul majid, Commentary on civil law, vol.1, Sources of obligation, supra, at p.421; for more details see, Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, supra, at pp.727-738.

299-Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, supra, at pp.158-159, 704; Al-dhanoon, Hasan Ali, The general theory of obligation, op.cit. pp.31-32; compare, Egyptian Mixed Appeal on, 13/November/ 1913, vol:26, at p.137.

300-Articles 177, 581 (1) of Iraqi Civil Code.

301-Alwindawi, Kamal Tharwat, Commentary on the sale contract, op.cit. at pp.310-311; Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol.1, supra, at p.701; Al-hakeem Abdul majid, Commentary on civil law, Sources of obligation, vol, 1, op.cit. p.425.

302-Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol. 1, op.cit. pp.701-702; Al-hakeem, Abdul majid, Commentary on civil law, Sources of obligation, vol. 1, op.cit. p.425; Al-windawi, Kamal Tharwat, Commentary on the sale contract. op.cit. p.308.

303-Al-windawi, Kamal Tharwat, Commentary on the sale contract, supra, at p.271; "payment of the price is one of the essential obligations on the buyer under the sale contract", see: Iraqi Court of Cassation judgment (real property), No:71/First Instance/1970/ on 6/5/1970, Judicial publication, the 2nd issue, at p.120.

304-Taha, Ghani Hassoun, Commentary on the specific contracts, contract of sale, op.cit, pp. 344-350 ; Al-amiri, Sa'doun, Commentary on the sale and lease contracts, op.cit. at p.167; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit, p.295.

205-Al-windawi, Kamal Tharwat, Commentary the sale contract, op.cit. p.296; Iraqi Court of Cassation decision, No: 2573/civil/1957, Karadah, on 12/3/1958, cited by Bayat Salman, Iraqi civil judiciary, vol.2, op.cit. pp.79-80; see also, Al-amiri, Sa'doun, Commentary on the sale and Lease contracts, supra, pp.168-169.

206-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.296.

207-Article 280 of Civil Code.

208-Article 579 (2) of Civil Code; compare, Article 295 of Civil Code; for more details, see, Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.300.

309-Article 579 (2) of Civil Code.

310-Article 580 of Civil Code; compare, Article 290 of Civil Code.

311-Al-windawi, Kamal Tharwat, Commentary on the sale contract, supra, at p.305.

312-Ibid.

313-Article 177 of Civil Code; Al-sanhoori, Abdul razzaq, Commentary on civil law, Sources of obligation, vol.1, pp. 727-738.

314-Article 576 (1) of Civil Code; see also for more details, Al-widawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.288-291; Al-amiri, Sa'doun, Commentary on the sale and lease contracts, op.cit. pp.165-166; Taha, Ghani Hassoun, Commentary on specific contracts, sale contract, supra, at pp.273-290; Al-widawi, Kamal Tharwat, Commentary on the sale contract, supra; Al-amiri, Sa'doun, Commentary on the sale and lease contract, op.cit. p.166.

315-Article 576 (2) of Iraqi Civil Code; compare Al-amiri, Sa'doun, Commentary on the sale and lease contract, supra.

316-There are certain conditions stand against the purchaser's right of retention of the price. see for more details, Al-widawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.292-294; Taha, Ghani Hassoun, Commentary the specific contracts, sale contract, op.cit. p343.

317-Article 581 (1) of Civil Code.

318-Taha, Ghani Hassoun, Commentary on the specific contracts, supra, p.350; Al-widawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p310.

319-Article 582 of Civil Code; Al-sanhoori, Abdul razzaq, Commentary on civil Law, sources of obligation, vol:1, op.cit. pp.715-721; Al-widawi, Kamal Tharwat, Commentary on sale contract supra, pp311-313; Taha, Ghani Hassoun, Commentary on the specific contract, op.cit. p.350.

320-Compare, Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.342.

321-Article 581 (1) of Civil Code; compare also, Articles 177, 178 of Civil Code.

322-Al-widawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.310.

323-Article 581 (1) of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p355.

324-Article 581(1) of Civil Code; Al-widawi, Kamal Tharwat, Commentary on sale contract, op.cit. p.306; Taha, Ghani Hassoun, Commentary on the specific contracts, sale contract, op.cit. pp.357-358.

325-Compare, Taha, Ghani Hassoun, Commentary on the specific contracts, supra at p.357; Article 581(1) of Civil Code; see also, Articles 177, 178 of Civil Code.

326-Al-amiri, Sa'doun, Commentary on the sale and lease contracts, op.cit. p.173; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.357.

327-Ibid

328-Article 387 (2) of Civil Code.

329-Article 560 (1) of Civil Code; see also, Al-widawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.234-235; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.313; Al-sanhoori, Abdul razzaq, Commentary of the civil law, the sale contract, supra, at p.735.

330-Al-widawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.235, and foot-

note (2); Taha, Ghani Hassoun, Commentary on the specific contracts, supra, p.314.

331-Taha, Ghani Hassoun, Commentary on the specific contracts, supra, p.314.

332-Al-sanhoori, Abdil razzaq, Commentary on civil law, Sale contract, vol. 4, op.cit. para.374; Taha, Ghani Hassoun, Commentary on the specific contract, op. cit. pp.315-316 and the references he cited in foot-note (1) of page. 316 supra.

333-Taha, Ghani Hassoun, Commentary on specific contracts, supra, at p.317; see also, Article 562 of Civil Code.

334-Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at pp.320-321; Article 563 of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at p.318.

335-J.J.Gow, Mercantile & Industrial Law, op.cit. p.143.

336-Sec. 12 of the Sale of Goods Act 1979; see also for more detail, D.M.Walker, Civil Remedies, op.cit pp.676-677; Leith Heritage Co. v. Edinburgh Glass (1876) 3R. 789; J.J.Gow, Mercantile & Industrial law, supra, pp.143-145.

337-Sec.27, 29 (5), 62 (4), 28, 29 (1) of the Sale of Goods Act 1979; see for more details concerning the obligation of delivery upon the seller, in, J.J.Gow, Mercantile & Industrial law, supra at pp.145-160.

338-Sec.52 of the Sale of Goods Act 1979.

339-See in this meaning, D.M.Walker, Civil Remedies, op.cit. p.660, when he said, "specific implement is a remedy open only to the buyer where the sale is of a specific article or of ascertained goods.....".

340-Gloag, Contract, supra, at pp. 655-656.

341-Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, op.cit. pp.207-208; Article 247 of Civil Code; Tanagho, Sameer Abdul saied, the sale contract, supra, at pp.158-159.

342-Tanagho, Sameer Abdul saied, the sale contract, supra, at pp.159-160; Taha, Ghani Hassoun, Commentary on specific contracts, the sale contract, op.cit. pp.214-215; Al-widawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp. 108-109.

343-Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. p.419; Article 135 (1) of Civil Code; Al-amiri, Sa'doun, Commentary on the contracts of sale and lease, op.cit. p.94; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.208.

344-Al-widawi, Kamal Tharwat, Commentary on the sale contract. op.cit. pp.109-114; Article 135 of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, supra, at p.208; Al-amiri, Sa'doun, Commentary on sale and lease contracts, op.cit. p.94.

345-Al-widawi, Kamal Tharwat, Commentary on the sale contract, supra, p.113; Al-hakeem, Abdul majid, Commentary on civil law, Sources of obligation, vol. 1, supra,

pp.437-438; Article 180 of Civil Code.

346-see Article 177 of Iraqi Civil Code.

347-Article 252 of Civil Code; compare, Iraqi Court of Cassation decision, No:262/ civil / 1970, on 27/5/1971, Judicial publication, 1972, the 2nd issue, the 2nd year, p.130.

348-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.115-116; Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. p.420, foot-note (1); compare, Articles 292, 532 of Civil Code; Al-amiri, Sa'doun, Commentary on sale and lease contracts, supra, pp.94-95.

349-Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, op.cit. p.209; Al-amiri, Sa'doun, Commentary on the sale and lease contract, op.cit. p.95.

350-Articles 248 (1), 531 of Civil Code; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.108-109.

351-Al-amiri, Sa'doun, Commentary on sale and lease contract op.cit. pp.99-100; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p. 109.

352-Article 248 (2) of Civil Code; compare, Al-widawi, Kamal tharwat, Commentary, on the sale contract, op.cit. p.109; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.215-216; Tanagho, Sameer Abdul saied, the sale contract, op.cit. pp.161-162.

353-Article 248 (2) of Civil Code; Tanagho, Sameer Abdul saied, the sale contract supra, at p.162; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.109; Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at p.216; "The purchaser is entitled to ask for rescinding the contract with damages if they due". Al-sanhoori, Abdul razzaq, Commentary on civil law, vol:2, para.423.

354-Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.229; Article 143 of Civil Code; see also, Egyptian Court of Cassation decision, "Cassation 3/2/1938, Publication of the rules which are decided by the Court of Cassation, vol. 1, p.353, para.56.

355-Article 538 (2) of Civil Code; Al-windawi, Kamal Tharwat, Commentary on sale contract, op.cit. P.131; Al-sanhoori, Abdul razzaq, Commentary on civil law, sale contract, vol. 4, op.cit. p.587 foot-note (3); compare, Article 435 (1) of Civil Code; Al-sarraf, Abass Hasan, Commentary on the contracts of sale and lease in Iraqi civil law, Baghdad, 1956, para.374; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.232-236.

356-Article 539 of Civil Code; Also Article 540 of Civil Code; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.133-135; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.236-238; Al-sanhoori, Abdul razzasq, Commentary on civil law, sale contract, vol.4, op.cit. p.594, para.308.

357-Article 541 (2) of Civil Code; also Article 541 (1) of Civil Code; Alsarraf, Abass Hasan, Commentary on sale and lease contracts in Iraqi civil law, op.cit. para. 406; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.251-252; Al-windawi, Kamal Tharwat, Commentary on sale contract, op.cit. pp.163-164.

358-Article 541 (1) of Civil Code;

359-Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.250; Article 536 of Civil Code; Al-amiri, Sa'doun, Commentary on sale and lease contracts, op.cit. pp.114-115; Al-sarraf, Abass Hasan, Commentary on the sale and lease contracts, op.cit. para.403.

360-Taha, Ghani Hassoun, Commentary on specific contracts, op.cit. pp.243-244.

361-According to the general rules of obligation, in Articles 146 (1), 248 (2), 258 (A), 177 of Iraqi Civil Code; compare, Taha, Ghani Hassoun, Commentary on specific contracts, op.cit. pp.255-257.

362-Al-hakeem, Abdul majid, Commentary on civil law, Principles of obligation, vol. 2, op.cit. p.144; Article 280 (2) of Civil Code. Al-sanhoori, Abdul razzaq, Commentary on civil law, Sale contract, vol. 4, supra, at pp. 623-640.

363-Naji, Ghazi Abdul rahman, "Warranty against disturbance and dispossession in the sale contract in Iraqi civil law", Journal of Comparative Law, Issued by Iraqi Comparative Law Association, No:12, 9th year, 1981, at pp.136-137; Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at p.274; Article 549 of Civil Code.

364-Al-amiri, Sa'doun, op.cit. p.130; Al-windawi, Kamal Tharwat, Commentary on sale contract. supra, at p.172; Naji, Ghazi Abdul rahman, Warranty against disturbance. op.cit. pp.139-140.

365-Murqus, Sulayman, The Specific Contracts. vol. 1, the sale contract, Cairo, 1968, p.378, para.202; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.274; Naji Ghazi Abdul rahman, Warranty against disturbance, supra. p.141.

366-Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.142-143.

367-Iraqi Court of Cassation decision, No: 1760/civil/56/ Ba'aquba, on, 13/11/1956, cited by, Bayat, Salman, Iraqi civil judiciary, vol. 2, op.cit. pp.58-59.

368-Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. para.335; Al-amiri, Sa'doun, Commentary on sale and lease contracts op.cit. p131; Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. p.148.

369-Naji, Ghazi Abdul rahman, Warranty against disturbance op.cit. p.148 and foot-note, (48); see also, Articles 177, 178 of Civil Code.

370-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.179.

371-Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. p.152; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.278; Al-windawi, Kamal Tharwat, Commentary on the sale contracts, op.cit. p.179.

372-Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract vol. 4, op.cit. para.341; Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. p.153.

373-see for more details, Naji, Ghazi Abdul rahman, Warranty against disturbance, supra, at pp.159-160; Al-amiri, Sa'doun, Commentary on the sale and lease contracts, op.cit. p.134; Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit.

para.340; Tanagho, Sameer Abdul saied, the sale contract, op.cit. para.68.

374-Naji, Ghazi Abdul rahman, Warranty against disturbance, supra, p.160; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. at p.281; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.180-181, and foot-note (1) of page 180.

375-Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.281; Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. p.160.

376-Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. p.644; Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.156-158; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.280-281; compare Article 550 of Civil Code.

377-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.185, 185 foot-note (1).

378-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.184.

379-Article 555 (1) of Civil Code; Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. para.353; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.290-292; Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.187-191.

380-Article 554 (1) of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, op.cit. p.284; Al-windawi, kamal Tharwat, Commentary on the sale contract, supra. at p.187.

381-Al-windawi, Kamal Tharwat, commentary on the sale contract, op.cit. pp.187-191; Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.175-183; Article 554 (1) of Civil Code.

382-Article 554 (2) of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit pp.289-290; Naji, Ghazi Abdul rahman, Warranty against disturbance, supra, p.183.

383-Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.175-177 and foot-note(107) of page 175 supra, and foot-note (108).

384-Articles 554 (1), 1165 of Civil Code; Al-amiri, Sa'doun, Commentary on sale and lease contracts, op.cit. p.139; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.287.

385-For more details see, Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.181-183; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.287-288; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.190-191, also, foot-note (1) of page 190.

386-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.192-193; Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at p.289.

387-Al-amiri, Sa'doun, Commentary on sale and lease contracts, op.cit. p.141; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.289-290; Article 169 of Civil Code; Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. p.683.

388-Article 555 (1) of Civil Code; Al-sarraf, Abass Hasan, Commentary on sale and lease contracts, op.cit. para.466; Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp. 189,191.

389-Article 555 (2) of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contracts, op.cit. p.292.

390-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit, at pp.184-196

391-Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.195-196.

392-Article 555 of Civil Code.

393-Supra.

394-Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.283; Naji, Ghazi Abdul rahman, warranty against disturbance, op.cit. pp.192-194.

395-Al-amiri, Sa'doun, Commentary on sale and lease contracts, op.cit. p.137; Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol.4, para.315.

396-Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. pp.194-195.

397-Naji, Ghazi Abdul rahman, Warranty against disturbance, op.cit. p.195; Article 551 (2) of Civil Code.

398-Naji, Ghazi Abdul rahman, Warranty against disturbance, supra.

399-Article 560 (2) of Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.313-344; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.235-236; Article 560 (1) Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, supra, at pp.312-343; Al-windawi, Kamal Tharwat, Commentary on the sale contract, supra, at pp.233-234; Alwindawi, kamal Tharwat, supra, at pp.235-236, see also foot-note (2) of page,236; Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. p.737 foot-note (1); Article 560 (2) of Iraqi Civil Code.

400-Compare Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. 237 footnote (1).

401-Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, op.cit.pp.315-316; Al-dhanoon, Hasan Ali, Commentary on the the specific contracts, the sale contract, Baghdad, 1953, at pp.244-245.

402-Al-windawi, Kamal Tharwat, Commentary on the contract of sale, op.cit. p.238 foot-note (1).

CHAPTER THREE
BY OR AGAINST WHOM SPECIFIC IMPLEMENT IS
GRANTED

Introduction

A claim for the remedy of specific implement is raised against the party in breach. Each contracting party is supposed to perform his obligation towards the other. If he refuses to do so, he may be compelled to perform specifically what he has undertaken. However, the case is not always as simple as that, for the seller or the purchaser may, sometimes, become insolvent or bankrupt, or he may assign his right to another person. Thus, to consider the possibility of granting the remedy of specific implement by or against the contracting party, certain categories of persons will be considered, namely:

- 1-The purchaser.
- 2-The seller.
- 3-The bankrupt or insolvent.
- 4-The assignor and assignee.

Section One: Granting specific implement by or against the purchaser

A purchaser to a contract for sale of goods is subject to perform his obligations towards the seller to obtain what he has contracted for. The remedy is restricted, in that it is granted only to the purchaser. Furthermore, the purchaser's remedy of specific implement in Scots law is restricted to the case when the seller has refused to deliver the goods.

In Iraqi civil law the remedy is open to the seller and the buyer whenever the contracting party is in breach to his obligation. Therefore, granting the remedy of specific implement by or against the purchaser will be dealt with in Scots and Iraqi systems respectively as follows:

Sub-Section: 1-The purchaser in Scots law

Generally, the purchaser's remedies depend on the nature of the seller's failure to perform his obligation.⁽¹⁾ Damages can cover the whole area of the purchaser's remedies, whether the seller has failed to provide goods to the buyer,⁽²⁾ or has delivered them but they are disconform to the contract.⁽³⁾ To what extent, is specific implement granted by or against the refusing purchaser?

The purchaser may insist on having the obligation specifically performed under Sec. 52 of the Sale of Goods Act 1979, when certain grounds exist,⁽⁴⁾ providing no exceptional circumstances or equitable grounds or grounds of law stand against granting the remedy.⁽⁵⁾ The purchaser has the right to specific implement,⁽⁶⁾ but on assumption that he has fulfilled his whole obligations towards the seller, for fulfilment by one contracting party to his undertaking is dependant upon fulfilment by the other,⁽⁷⁾ and it has been noticed that "the duty to begin lies with the buyer".⁽⁸⁾ Thus, "Fulfilment by the buyer of his undertaking to tender the price is a condition suspensive of the seller's undertaking to let him into possession".⁽⁹⁾ Erskine laid down,⁽¹⁰⁾ that "No party in a mutual contract, where the obligation of the parties are the causes of one another, can demand performance from the other if he himself either cannot or will not perform the counterparts, for the mutual obligations are considered as conditional".

In Turnbull v. Mclean & co.⁽¹¹⁾ when The Lord Justice-Clerk declared that "1st, that the stipulation on either side are the counterparts and the consideration given for each other; 2nd, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance ; 3rd; that, where one party has refused or failed to perform his part of the contract in any material respect the other is entitled either to insist for implement, claiming damages for the breach or to rescind the contract altogether, except so far as it has been performedall the conditions of a mutual contract are dependent on their counterparts, as a general rule, when they are of the substance of or material to the subject-matter of the contract itself".

Furthermore, Lord Benholme,⁽¹²⁾ has pointed out, that the defaulter cannot refuse

to fulfil his part of the contract and insist on the other party performing his part. If the purchaser intends to have his contract specifically performed, he must give the seller no opportunity to raise any claim against him. Thus, the purchaser is not entitled to insist on specific implement, if he has caused the delay of delivery by refusing without any legal reason to pay the price, as the seller is entitled to retain the goods, unless the obligation of payment has been fulfilled by the buyer.⁽¹³⁾

When the seller fails to deliver goods conforming with the contract of sale, the purchaser is entitled to reject them.⁽¹⁴⁾ There is no right in Scots law for the buyer to reject the goods and apply to the court to obtain goods which conform to the contract. Nevertheless, examining the case may lead to the conclusion that the buyer's right to specific implement is limited to the case of failure to deliver the goods according to Sec. 52 of Sale of Goods Act 1979. Any other breach by the seller to one of his other obligations, does not give the purchaser the right of specific implement. It gives him the right to reject the goods,⁽¹⁵⁾ or to rescind the contract,⁽¹⁶⁾ or repetition of the price if paid.⁽¹⁷⁾ He is, also, entitled to claim damages.⁽¹⁸⁾ Furthermore, the purchaser is not deprived of the remedy of retaining the goods and claiming damages if he has tried to reject them by an abortive attempt.⁽¹⁹⁾ The other reason for not allowing the buyer to insist on specific implement when rejecting the goods which disconform to the contract is that, transferring of the property requires that the goods must be specific or ascertained. Thus, to give the buyer alternative goods, means another contract is concluded, i.e. "another agreement upon the goods which represent the subject-matter of the contract". The goods cannot be substituted by another, unless the two contracting parties agreed upon them even if the goods are of the same nature and of the same quality.

To take another case, suppose the seller who contracts to sell goods to a purchaser, but before completion of the contract, the seller transfers the property of those goods to another purchaser who is "*bona fide*".⁽²⁰⁾ Who is entitled to compel the seller, in such a case and to perform his obligation of delivery, i.e. "specific implement"?

The seller, according to the Common law is obliged to deliver the goods to the

purchaser and is bound not to involve the goods in any right which a third party may claim.⁽²¹⁾ He is also obliged to warranty against eviction, whether totally or partially.⁽²²⁾ Nevertheless, the purchaser "in rapid intercourse of trade", "is not allowed to stop the bargain on pretence of want of title or on more doubt as to the possibility of challenge".⁽²³⁾ He "the buyer" on the other hand, "cannot be obliged to accept and pay for goods concerning the title to which there is dispute".⁽²⁴⁾ "He has not contracted to buy a litigation and the buyer is entitled to retain the price until either the seller clears the title or by his failure so to do justifies the buyer in holding the contract as repudiated".⁽²⁵⁾ Once the action is raised against the purchaser,⁽²⁶⁾ no litigation is needed, but the buyer in this case is not compelled to leave the decision to defend the seller's whim and the buyer's action for relief may be brought instantly.⁽²⁷⁾ In addition, Sec. 12 (3) of the Sale of Goods Act 1979, provides for, "an implied warranty that the goods shall be free from any charge or encumbrances in favour of any third party, not declared or known to the buyer before or at the time when the contract is made". So, a breach of such a warranty gives the buyer two options, either to repudiate the contract or to claim damages. Consequently, in the said question, it is thought, that one of the two purchasers has the right to specific implement against the seller, and the remedy should be given to the former contracting buyer, i.e. "whose contract concluded first". While the later is entitled to be refunded his money at the price which he already has paid, and to damages. If, however, the charge or encumbrance is not discovered until after possessing and using goods, the buyer's remedy is restricted to damages.⁽²⁸⁾

The other issue is whether specific implement is ordered against the purchaser to perform his obligation towards the aggrieved seller. It seems that there is no opportunity for the seller to order the refusing purchaser to perform his obligation specifically.⁽²⁹⁾ If the purchaser delayed taking delivery of the goods sold without legal justification, or he has refused to take delivery or has refrained from paying the price, he is deemed to have committed breach of his contract. He may be ordered to

pay damages to the aggrieved seller, but cannot be ordered to perform his obligation specifically for the following reasons:

1-Specific implement is confined to the purchaser alone.⁽³⁰⁾ However, the seller, according to Sec. 49 (1) of Sale of Goods Act 1979 may have an action for money price against the refusing purchaser, but not specific implement.

2-The seller's right is restricted to in damages, or in rescinding the contract or retaining the goods, in addition to his right to raise an action for the price of the goods whenever the purchaser is in breach to his obligations.

3-The seller cannot compel the purchaser to perform his obligation specifically, because the obligation is to pay money and such an obligation has special consideration in Scots law.⁽³¹⁾

Finally, whatever is the purchaser's failure to perform his obligation towards the seller, the seller is not given the right to compel him to perform that obligation specifically.

Sub-Section:2:The purchaser in Iraqi civil law

The buyer in Iraqi civil law has the right to enforce specific performance against the seller whenever it is possible, according to Article 246 (1) of Iraqi Civil Code. Thus, when the seller fails short of fulfilling his obligations, such as, non-delivery of the goods sold, or delivery has been fulfilled but in a different place,⁽³²⁾ or the goods have been delivered but in a different condition,⁽³³⁾ he " the seller" is considered to be in breach of his obligations towards the purchaser. The purchaser can ask either for specific performance if it is possible, or rescission of the contract with damages.⁽³⁴⁾

The purchaser who insists on having the contract specifically performed, should and must perform his obligation and should not give the seller the opportunity to raise any claim or defense against him.

The purchaser has the right to compel the seller to perform his obligation specifically whenever the seller commits a breach of his obligations. Thus, the

purchaser is entitled to enforce the seller performing his obligation specifically, when the seller delivers the goods at the time agreed upon and in a fixed place, although the goods are defective,⁽³⁵⁾ or the purchaser has been disturbed whether legally,⁽³⁶⁾ or materially,⁽³⁷⁾ by the seller himself,⁽³⁸⁾ or by a third party.⁽³⁹⁾ Furthermore when the seller commits a breach to his obligation of warranty against dispossession, the purchaser's first act is to claim that the seller has committed a breach to his obligation, i.e. "the obligation of refraining from doing something".⁽⁴⁰⁾ His "the seller's" claim should be rejected. Thus, the obligation of "refraining from disturbing the buyer" must be performed specifically in such a case.⁽⁴¹⁾ In addition the seller must warrant the buyer in situation in which disturbance has occurred because of the action of a third party, according to Article (549) of Civil Code. The seller's obligation in such a case is to do something, which is to protect the purchaser against any disturbance of that kind. If, for instance, the third party has claimed that he has a right over the goods, or if the thing sold is still in the third party's possession, or the third party claims title over the goods, the seller must join the purchaser in his action of revendication, as a co-defendant.⁽⁴²⁾ If the seller has obtained a judgment in favour of the purchaser, he is deemed to have fulfilled his obligation specifically.⁽⁴³⁾ However, if the third party has proved his claim over the thing sold and succeeded to obtain a court's decision confirming his claim, the seller is no longer able to comply with his obligation, because it becomes impossible, and the only remedy that the buyer can obtain, is damages.⁽⁴⁴⁾ Nevertheless, the purchaser's right to specific performance against the seller who is in breach to his obligation of warranty against dispossession may fail, by virtue of certain circumstances.⁽⁴⁵⁾

The seller, may deliver goods disconform to the contract. Nevertheless, it is questionable whether the purchaser is entitled to force the seller to specific performance, or to substitute other goods for the defective ones, or to repair the defect, or to be confined only to damages.

The seller, on one hand, is under obligation of warranty against defects.⁽⁴⁶⁾ The purchaser, on the other hand, is obliged to give notice to the seller upon discovery of

the defects.⁽⁴⁷⁾ He may then raise an action of warranty against defects by which the buyer has the option either of rescinding the contract and recovering the price, or keeping the defective goods,⁽⁴⁸⁾ without reducing the price. The purchaser, as has already been considered,⁽⁴⁹⁾ has the right to insist on repairing the defective goods at the seller's expense. What is the solution if the buyer insists on a substitution for the defective goods? As long as the purchaser is entitled to compel the seller to do so at his expense, it may be argued that, substitution of part of the goods is permissible and the seller should be compelled to do so. It seems doubtful, however, that a substitution of the whole goods may be made, because the goods sold are agreed upon by the contracting parties as an object to the sale contract. Thus, to substitute these goods by others needs to be agreed upon, and that obviously means concluding another contract of sale with a different object (goods) and by different agreement. The above two outcomes can be achieved if the contracting parties have agreed upon them.⁽⁵⁰⁾ Subsequently, without an agreement by the two contracting parties, the buyer is not entitled to substitute the defective goods as a whole, for the purchaser may find the solution in the option that has been given to him under Article 558 (1) of the Civil Code

The seller should transfer the title of the goods sold to the purchaser, but what if the seller has transferred the title to a third party? Who has the right to insist on the seller transferring the title and delivering the goods thereafter?

It has been established that the first purchaser is preferable and has a prior claim to the title of the goods sold, even if they have not yet been delivered to him.⁽⁵¹⁾ However, there is an exceptional rule. It says that "who buys in a good faith a specific or ascertained movable, and has taken delivery of it, becomes the owner of that movable".⁽⁵²⁾ Thus, if the goods have been delivered to the third party who is *bona fide*, he is then deemed to have obtained legal possession to the goods. Therefore no action can be brought against him. However, if he has not yet taken delivery of the goods, the first purchaser is the contracting party who may insist on having the goods delivered to him, for any action is brought against the seller or any claim against the

thing sold, renders the third party as *mala fide* party. The third party may insist on specific performance, as long as, he is *bona fide*. The moment he knows that the goods are involved in another contract he is no longer *bona fide* third party, and he cannot enjoy the protection of the said rule. Consequently, the first purchaser has the right of specific performance against the seller, so long as the goods have not been delivered to the *bona fide* third party. Otherwise he cannot insist on having specific performance. He may have damages if they are due.

The purchaser is entitled to have the remedy of specific performance, unless he has contributed by his own fault to the breach of the contract,⁽⁵³⁾ or he himself is the reason for such a breach by refusing to perform, for instance, one of his obligations towards the seller. The purchaser in such a case may be subject to be enforced to specific performance.⁽⁵⁴⁾

The purchaser is thus required to perform his obligation specifically whenever granting specific performance is feasible, to the same degree as the seller is subject to perform his obligation specifically. The purchaser is a debtor as regards his obligations towards the seller, and he may be compelled to perform specifically in accordance with Article 246 (1) of Iraqi Civil Code.

Thus the Iraqi Civil Code treats sellers and purchasers alike as entitled to specific performance, and is not restricted to the purchaser.

Comment

1-The purchaser's right of specific implement in Scots law is restricted to the case of non-delivery of specific or ascertained goods. He is not entitled to obtain specific implement where there is another breach to the contract, such as delivery of defective goods, or warranty against disturbance or dispossession of the goods sold.....etc.

In Iraqi civil law the case of specific performance is different and it is much wider, for the purchaser is entitled to the remedy of specific performance whenever the seller is in breach of his obligations towards the purchaser. It is a more available remedy, for

specific performance is granted whenever performance of the obligation is possible. Specific performance is applicable even if the seller is obliged to refrain from doing something such as warranty against enjoyment or dispossession.

2-The laws of both countries are at one on the point that each purchaser should perform all his obligations, under the contract before claiming specific implement, or at least he should show his readiness and willingness to perform, for if the seller has the chance to raise any claim against the buyer, he, "the buyer", is not entitled to have specific implement, unless he responds to the seller's claim, in accordance with the rule of "*Exceptio non adimpleti contractus*"

3-In Scots law the purchaser, where the goods are defective, is entitled either to reject them with damages or to retain them and claim damages. Also, the repair of the goods may be ordered, without prejudice to the purchaser's right of damages.

The same remedy is available in Iraqi civil law, although, to oblige the seller to repair the goods at his expense, is regarded as specific performance because he is deemed to have committed breach to his obligation of warranty against defects. To substitute the goods however, is not to be considered as one of the consequences of the obligation of delivering goods conform to the contract.

4-Granting a purchaser the remedy of specific implement in Scotland does not reflect the fact of the principles of mutual obligations, i.e., "does not give rise to the equality between the two contracting parties "the seller and purchaser" in the positive side of the mutual obligations rules. It does give rise to the equality between the seller and the buyer in the negative side, for instance, "if the purchaser refuses to pay the price the seller will not deliver the goods to him, but, the purchaser is entitled to enforce the seller to deliver him the goods when he performs all his obligations towards the seller, however the seller is not entitled to oblige him to take delivery". That is an unjust and unfair solution. It seems that the purchaser is superior to the seller although the law treats the remedy of specific implement as an ordinary legal remedy to the aggrieved party,⁽⁵⁵⁾ and it is a matter of right to him.⁽⁵⁶⁾

In Iraqi civil law the case is different. The seller and the purchaser are treated

equally towards granting specific performance by or against each other. The purchaser is entitled to have his right specifically performed. In turn he is enforced to do so when he is in breach of his obligation.

Section Two: Granting specific implement by or against the seller

Specific implement may be granted against the seller, but not in his favour in Scots law, unlike the seller in Iraqi civil law, who enjoys full right to the remedy of specific performance. The Scots seller of goods is deprived of the remedy of specific implement whatever the breach of the contract by the purchaser. Thus, the seller's case is not recognised as important case, unlike the case in Iraqi civil law. However, the seller's case will be considered in Scots and Iraqi laws respectively as follows:

Sub-Section 1: The seller in Scots law

Specific implement is a remedy granted to the aggrieved party.⁽⁵⁷⁾ It is an ordinary legal remedy.⁽⁵⁸⁾ However, in the sale of goods contract, it is open to one particular party, which is the purchaser.⁽⁵⁹⁾ The seller, has no right to claim such a remedy whatever his problem is, however controversial the case may be. The seller's remedy arises where there is wrongful refusal by the purchaser to accept the goods,⁽⁶⁰⁾ or when he fails to pay the price of the goods sold.⁽⁶¹⁾ The seller may maintain an action of damages.⁽⁶²⁾ Also, repudiation would be justified, then resale of the article "preferably under a warrant from the Sheriff".⁽⁶³⁾ It remains as unsolved, why the seller cannot compel the purchaser who has wrongfully refused to take delivery of the goods sold which are conform to the contract of sale. Nevertheless, a Scots scholars stated once that, "If the goods are conform to contract, theoretically whatever he does, in fact the buyer is bound to accept them".⁽⁶⁴⁾ In practice, however, it is submitted that, the purchaser is not bound to do so, for the following reasons:

1-Section 50 of Sale of Goods Act 1979, provides; that an action for damages may be maintained.

2-Enforcing the buyer to accept the goods means ordering him to perform specifically his obligation in favour of the seller, and there is no support among the Scots scholars so far for the argument that the seller is entitled to the remedy of specific implement. The seller, unless barred by his fault, is entitled to maintain an action against the purchaser for the price.⁽⁶⁵⁾ Furthermore, if the buyer fails to pay the money price where the property has passed and the goods have been accepted, the seller's remedy is an action for the price by virtue of Sec. 49 (1) of Sale of Goods Act 1979. Also, he may claim interest under Sec. 49 (3) of Sale of Goods Act 1979.

It is questionable whether such an action against the buyer to perform his obligation of payment, is specific implement. It was stated,⁽⁶⁶⁾ that "Because the buyer's obligation is to pay money it is seldom the seller will be entitled to a decree *ad factum praestandum*, as a rule the sole remedy of a creditor in money obligation is to enforce payment by diligence". Also, in White & Carter v. McGregor,⁽⁶⁷⁾ Lord Keith of Avonholm stated, "They, the courts, will merely give damages for failure to take delivery. Nor will they give a decree *ad factum praestandum* of payment of money". Further, the action for specific implement is restricted to the case of refusing to deliver specific or ascertained goods, and therefore no other case can be included even if the obligation is to pay money price. Nevertheless, the order of payment might be a decree *ad factum praestandum* "if the buyer avails himself of his alternative remedy under Sec. 11 (2) of Sale of Goods Act 1979, by retaining the goods and claiming an abatement of the price by way of compensation and the seller brings an action for the price, the court may order the buyer to consign the price. Such an order is a decree *ad factum praestandum* enforceable by imprisonment".⁽⁶⁸⁾

The seller's right to specific implement is inapplicable, because money debt is enforceable by diligence.⁽⁶⁹⁾ Nevertheless, if the debtor's obligation is to do a specific act, such as to execute deed or to consign money, the court, it was said, "will decree for specific implement and this may be enforced by imprisonment".⁽⁷⁰⁾ Nevertheless, a decree for payment of the debt itself cannot be followed by imprisonment of the

debtor.⁽⁷¹⁾ It is true that the result of the decision of Mackenzie v. Balerno paper Co.,⁽⁷²⁾ "was not a decree for payment, but an order to lodge the money in court until it was seen if any debt was due and was therefore a decree *ad factum praestandum*". Consequently, it submitted that there are many reasons behind depriving the seller of specific implement, namely:

1-According to the Sale of Goods Act 1979, Sec. 52 provides, that, "In any action for breach of contract to deliver specific or ascertained goods". Thus, the Act support the buyer in maintaining an action if the seller fails to deliver the goods.

2-Possibly, the main reason for preventing the seller of his right of specific implement is that the seller's right in obtaining the money price as a debt, is secured by diligence. Therefore he does not need to raise an action for specific implement because the same result will be reached.

3-According to Sec. 49 (1) of the Sale of Goods Act 1979 the seller has the alternative to specific implement which is maintaining an action,⁽⁷³⁾ against the purchaser for the price of the goods sold, because "where the goods have been already delivered, the seller may have a personal action or may claim as a personal creditor for the price, and take his dividend along with the other creditors".⁽⁷⁴⁾ Such an action it was said, "is only competent if the price as money debt is presently due and payable under the contract".⁽⁷⁵⁾

4-Despite Sec. 52 (4) of the Sale of Goods Act 1979, which gives specific implement flexibility and freedom to avoid the influence of English law of specific performance, it seems that Scots law of specific implement remains under the English influence, for the seller's position is affected by English law of specific performance. It is doubtful whether depriving the seller of the right of specific implement in the case of a wrongfully refusing buyer to accept the goods sold or to take delivery of them is justified in a law grants specific implement as a matter of legal right to the aggrieved party.

It must be submitted that in this respect Scots law is inconsistent with the concept and the nature of the specific implement, for the following reasons:

1-To say that the remedy of specific implement is granted as a matter of legal right to the aggrieved party, then to deprive the seller who is considered an aggrieved party in many circumstances, conflicts with the definition and the nature of the remedy.

2-Every contracting party should have the benefit of using the remedy against the party in breach within the circumstances, since the aggrieved party has a legal right to apply for it.⁽⁷⁶⁾

3-Depriving the seller of the right to specific implement in the case of payment of the price may be justified by the fact that the seller's right is secured by diligence. However, what if the obligation, is to accept the goods or to take delivery of them?

Granting damages to the seller in such a case is not a fair solution. He should be permitted to have the right to compel the refusing buyer to perform his obligation specifically by accepting the goods.

Sub-Section 2: The seller in Iraqi civil law

The seller's right of specific performance is secured by the law in Article 246 (1) of Civil Code, for the contract of sale arranges mutual obligations upon the contracting parties. Where the purchaser refuses to pay the price the seller is empowered to obtain his right by using many legal methods in accordance with the civil law.⁽⁷⁷⁾ One of these methods is specific performance. The seller has the right to enforce the purchaser to perform his obligation of payment of the price specifically by raising an action against him to obtain judgment, ordering him, "the buyer", to pay the price.⁽⁷⁸⁾ The same can be done in the case of refusing to take delivery of the goods sold without any legal reason.⁽⁷⁹⁾ The seller, who intends to obtain specific performance, should perform all his obligations, and must not give the buyer any opportunity to raise any claim or defense against him, for that gives the buyer the right to have specific performance against him, or to rescind the contract.⁽⁸⁰⁾

The seller is entitled to enforce the purchaser performing his obligation of payment of the price specifically, unless there are certain circumstances stand against such

performance, namely:

First:-Legal Constraints

1-If the price is not payable,⁽⁸¹⁾ the seller cannot claim rescission of the contract,⁽⁸²⁾ and, *a fortiori*, cannot insist on having specific performance.

2-Unless the seller fulfils his part of the contract, he cannot insist on the purchaser to perform specifically, according to the principle of "*Exceptionon adimpleti contractus*"

3-When the thing sold was destroyed by reason of the seller's fault before delivery, the purchaser has the right to demand damages for losses he has suffered.⁽⁸³⁾ The seller is not entitled to the right of specific performance, for he should be held liable to compensate the aggrieved purchaser.

4-Refusing to transfer the title of the thing sold, where the object is described only as specie, gives the buyer the right to insist on the seller to individualize the thing sold.⁽⁸⁴⁾

5-Where a claim is brought by a third party against the thing sold.

All the above circumstances can be regarded as a breach by the seller to one of the obligations, unless the price is not payable, and as has already been examined,⁽⁸⁵⁾ that may do two things, first; it may deprive him of insisting on having specific performance. And; secondly; it may give the purchaser the right to enforce the seller to perform his obligation specifically.

The seller's right of specific performance to obtain the price is secured, by virtue of the law, providing there are no legal constraints against it. When the purchaser becomes the owner of the thing sold, the seller enjoys a privilege over the sold article, where by he can obtain his right prior to the purchaser's other creditors,⁽⁸⁶⁾ according to Article 137 (1) of Iraqi Civil Code which provides; "Sums due to the seller of a movable for a price and accessories are secured by a privilege over the movable sold. This privilege is enforcable as long as the movable sold preserves its identity, subject to

the rights acquired in good faith by a third party and subject to the special provisions applicable in commercial matters".

Secondly:Physical Constraints; (reasons beyond the seller's control).

1-*Force majeure*:when the thing sold is partially destroyed before delivery, by *force majeure*, the buyer has the option either to rescind the contract or to uphold the sale at a reduced price.⁽⁸⁷⁾ Neither specific performance nor damages can be claimed by the buyer, for destruction of the goods does not occur by the seller's fault.

Specific performance can be ordered, where the purchaser chooses to uphold the sale at a reduced price. Thus, every party should perform the obligations he has undertaken towards the other party. If the buyer has chosen to rescind the contract, specific performance no longer can be granted.

If the sold thing is entirely destroyed before delivery by *force majeure*, the seller is held liable. The sale will be revoked and the buyer will recover the price which he has already paid.⁽⁸⁸⁾ Subsequently, no specific performance can be ordered, because performance has become impossible. Nevertheless, specific performance may be granted in favour of the seller despite the destruction of the goods by *force majeure* whether totally or partially in the following cases

1-If the seller served formal summons on the purchaser to take delivery of the goods sold, but he has refused to do so. He, "the buyer", is liable for any destruction to the thing sold.⁽⁸⁹⁾ He is subject to be ordered to pay the price to the seller.

2-The two contracting parties may agree that, the risk lies with the purchaser.⁽⁹⁰⁾

3-If the purchaser refuses to pay the price, the seller is entitled to retain the thing sold. Any destruction to the thing sold during the time of retention, lies with the buyer, unless of course the destruction has occurred by reason of the seller's fault.⁽⁹¹⁾

4-If the purchaser has taken delivery of the goods before payment of the price, without the seller's permission, any destruction which occurs lies with the buyer.⁽⁹²⁾ The seller in such a case is not deprived of his right to enforce the buyer to pay the price of the thing sold.

2-Impossibility of performing the obligation

As has already been considered,⁽⁹³⁾ impossibility of performing any obligation stands as a bar, against granting specific performance. It is one of the substantial exceptional grounds for refusing the remedy of specific performance. An obligation is extinguished if the debtor proves that its performance has become impossible by reason beyond his control.⁽⁹⁴⁾ Nevertheless, the obligation to pay money price cannot be rendered impossible.⁽⁹⁵⁾ Thus, the purchaser is always subject to perform his obligation specifically.⁽⁹⁶⁾ The purchaser's other obligation is to take delivery of the goods sold at the time and in the place agreed upon.⁽⁹⁷⁾

The buyer may refrain from taking delivery of the goods sold. To what extent can the seller enforce him to take delivery of the goods?

The seller as every other creditor in Iraqi civil law, has the option of either insisting on specific performance, or asking for rescission of the contract under the general principles of obligations. He is also entitled to obtain damages. Thus, the seller is entitled to apply to the court to force the purchaser to take delivery of the goods sold. He may then deposit the thing sold in a certain place at the purchaser's expense and under his liability, providing the purchaser should be notified, according to Article 385 (1) of Civil Code. Deposit of the goods in such a case is regarded as equivalent to delivery itself when the court decides that deposit is a valid act, in accordance with Article 386 (1) of Civil Code.

The seller sometimes puts the thing sold under the buyer's control, so he can have it delivered easily. Thereupon, the seller is entitled to have the price paid regardless of, whether the purchaser has or has not taken delivery of the thing sold, for the seller is deemed to have performed his obligation by enabling the buyer to take delivery. In addition, the seller may ask the court to enforce the purchaser to perform his obligation specifically. If he refuses to do so, he is subject to pay penalties for every hour or day or week he delays taking delivery, in accordance with Article 253 of Civil Code.

The seller has the right of specific performance to the same degree that the

purchaser has. His right to the remedy is governed by the general theory of the obligation.⁽⁹⁸⁾ The seller must perform all his obligations. Otherwise the rule of "*Exceptio non adimpleti contractus*" will stand against him.

Comment

1-In Scotland, the seller is deprived of having the remedy of specific implement. There is no explanation justifying why the seller is not entitled to have such a remedy. The seller should be treated equally to the purchaser in having the right of specific implement, where such a remedy is regarded as an ordinary legal remedy. It is submitted, that the only main reason for such consequences in Scots law is that Scots courts are influenced by the English law's concept of specific performance. It may be argued that the seller should be freed from this restriction and should be given the right to specific implement, for depriving him of such a remedy reflects inequitable and unfair consequences, and makes the buyer superior sometimes, especially in the case of refusal to take delivery or refusal to accept the goods wrongfully and without any justified reason.

It is true that the seller may insist on damages or he may obtain the money price by diligence. He should be entitled to compel a refusing purchaser to perform his obligation. Sec.52(4) of the Sale of Goods Act 1979, encourages and induces the idea of treating the seller equally to the buyer, when it provides that "the provision of this Section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland". Why is it then that such a special treatment of specific implement in Scotland has not been taken into consideration? Scholars and judges in Scotland have treated the seller similarly to the seller in English law, who is deprived also of having such a remedy. There no comment can be drawn on the seller in English law because it is a natural consequence to the nature of the remedy of specific performance, which in England is equitable, exceptional, and discretionary remedy. In Scotland, by contrast it is an ordinary legal remedy, and a matter of legal right to the

aggrieved party. How then can depriving the seller of that remedy comply with the rules and principles of that nature? It is inconsistent with the nature of the remedy in Scots law. It is submitted, however, that specific implement in general and the position of the seller in particular in Scots law should be isolated from the influence of the English law of specific performance.

2-The seller in Iraqi civil law is entirely different. The remedy of specific performance is connected with the breach of the obligation by the debtor. Granting specific performance to the seller is governed by the principle of mutual obligations. He is entitled to the remedy providing he has performed all his undertakings towards the purchaser,⁽⁹⁹⁾ or he is ready and willing to do so.

3-Specific performance is granted by or against any party to the contract. It is guided by the Iraqi Civil Code provision which says the debtor is obliged to perform his obligation specifically, when it is possible to do so.⁽¹⁰⁰⁾ The seller may act as a creditor and as a debtor at the same time, and he may be subject to perform his obligation specifically where there is no legal or equitable bars against ordering him doing so. It seems that the grant of specific implement by or against the seller, is much wider in Iraqi civil law than in Scots law.

Section Three: Bankruptcy, "Insolvency"

In Scots law the insolvent debtor generally is not entitled to conclude any contractual relationship, because his property vests in his trustee. The trustee holds such a power. In Iraqi civil law, insolvency has been considered differently. The insolvent debtor is empowered sometimes to act as a custodian, who may obtain specific performance, or may be ordered to do so. Also, the liquidated company may be subject to specific implement. The liquidator, is in charge of performing its obligations. He has the power to contract and specific implement may be granted by or against him. Bankruptcy and liquidation will be examined in Scots and Iraqi laws respectively as follows:

Sub-Section 1: Bankruptcy in Scots law

1.1-The Bankrupt

If a party has been adjudicated bankrupt, his property vests in his trustee in bankruptcy,⁽¹⁰¹⁾ If a debtor is aware of his insolvency, but acts and confers a preference on favourite creditors after his funds become inadequate to cover all his debts, his act, is fraud.⁽¹⁰²⁾

Insolvency itself, as a general rule, does not end the contractual relationship between the insolvent party and the other contracting party.⁽¹⁰³⁾ It, *per se*, is not considered as a breach of contract, nor does it forbid the insolvent party to engage in a contractual relationship,⁽¹⁰⁴⁾ unless it is notorious and refers to abandon the estate to creditors intentionally.⁽¹⁰⁵⁾ Insolvency of a contracting party is not equivalent to a refusal to perform ones obligation. Thus, it does not give the other party to the contract the right to rescind it.⁽¹⁰⁶⁾ Nevertheless, insolvency of one contracting party may entitle the other to refrain from or to delay, performing the contract.⁽¹⁰⁷⁾

The other contracting party, in case of insolvency, is entitled to exercise a right of retention.⁽¹⁰⁸⁾ Where a seller has been given a notice by an insolvent purchaser, as regards his state of affairs amounting to a declaring of his inability or unwillingness to fulfil his part of the obligation,⁽¹⁰⁹⁾ that might be treated as repudiation of the contract by the seller, and he then may claim damages, unless the trustee elects to fulfil such obligation, within a reasonable time by payment of the price in cash, for instance.⁽¹¹⁰⁾ It is questionable, whether specific implement is granted by or against the bankrupt debtor.

Generally, the insolvent party is not entitled to obtain the remedy of specific implement, or to be ordered to perform specifically for following reasons:

1-As soon as an award of sequestration has been made, a trustee is appointed. So, during the period between the statutory meeting and the awareness of sequestration, the interim trustee has the power to require the debtor to deliver up to him any valuables, money, documents, regarding his financial affairs or business, to deliver up any perishable goods, in order to arrange to sell them, and to require the insolvent debtor to

fulfil any transaction entered into by him.⁽¹¹¹⁾ Subsequently, all transactions and business are subject to the interim trustee's supervision. Nevertheless, the insolvent debtor may have the right of specific implement or may be ordered to do so, but it should be under the approval and the supervision of the trustee.

2-The debtor must follow the instructions and requirements of the interim trustee. If he fails to comply with them without any reasonable reason, he is deemed to have committed an offence.⁽¹¹²⁾ Thus, specific implement is applicable, although it must be granted under the trustee's approval.

3-According to the general principles of the Common law, the debtor at the moment of his insolvency is bound to act with regard to his creditors' interest.⁽¹¹³⁾ Thus granting the remedy of specific implement against the insolvent debtor is not for his creditors' interest.

4-According to the Bankruptcy Act,⁽¹¹⁴⁾ the whole estate of the debtor vests at the date of sequestration in the trustee for the benefit of the creditors. So that, no transaction or bargain or act can be made by the insolvent without being approved and supervised by the trustee.

As soon as the trustee is appointed, he takes possession of the debtor's estate.⁽¹¹⁵⁾ He is then entitled to take delivery of any title, deeds, or any other documents which belong to the debtor.⁽¹¹⁶⁾ He is also entitled to carry on any business of the debtor if he considers that would be beneficial to do so.⁽¹¹⁷⁾ In addition, the trustee is empowered⁽¹¹⁸⁾ to adopt any contract entered into by the debtor before the date of sequestration, if he considers that it would be beneficial to do so, except where there is an express or even implied term of the contract precluding him from doing so. It seems that the trustee is entitled to insist on having specific implement, as long as the contract is entered into by the debtor before the date of sequestration. Further, if the contract for the sale was made before commencement of the bankruptcy, the trustee is entitled to the remedy of specific implement provided that performance of such an obligation does not need the exercise of any skill or discretion which is personal to the bankrupt party

himself.⁽¹¹⁹⁾ If the obligation needs skill which is personal to the bankrupt party, the trustee in such a case cannot obtain specific implement by offering to perform the obligation by a third party or even by himself.⁽¹²⁰⁾ What if the interest of the creditors is to let the debtor perform specifically? i.e., (when the debtor performs the obligation specifically they may gain benefit, which strengthens their financial situations). The bankrupt party cannot perform his obligation unless the trustee approves it. However, it is suggested that the bankrupt is entitled to perform and to insist on having specific implement as long as performance of the obligation is in his interest, and the trustee will not oppose such performance, for he has the right to adopt voluntary obligations, and contracts entered into by the debtor, provided that he is not barred by the element of "*delectus personae*".⁽¹²¹⁾ The trustee may enter into any contract if it is a profitable one for the administration of the debtor's estate.⁽¹²²⁾ Thus, the other contracting party is entitled to enforce specific implement against the trustee who is deemed to have adopted the contract.⁽¹²³⁾ If the trustee is deemed to have refrained from adopting the contract, it is believed that the specific implement can no longer be enforced against the trustee. Thus, he cannot insist on having specific implement, for he has refrained from adopting the contract.

The trustee is entitled to deal with the bankrupt's action. Thus, he may raise any action on behalf of the bankrupt debtor except actions for personal matters. He may raise an action for breach of contract, since the result of winning the case would be to enlarge or preserve the bankrupt's property in favour of the creditors.⁽¹²⁴⁾ Specific implement may be granted if the action is for breach of contract for sale of goods, for instance, against the seller who has refused to deliver goods. The trustee, not the bankrupt purchaser, should raise the action, for the trustee has the power to deal with the bankrupt's estate and action.

Performance of the obligation by one party must be met by the other party's performance. The purchaser should pay the price to the seller, who has fulfilled his obligation. However, he cannot do so if he is a bankrupt purchaser, for his property vests in his trustee. The trustee must pay the price in order to obtain performance of the

contract.

1.2-The liquidator

The function of a liquidator and of a trustee, is similar, ⁽¹²⁵⁾ although, there are differences between them, for instance, the property of the company in case of liquidation is not vested in the liquidator, while the bankrupt's assets and properties vest in the permanent trustee.⁽¹²⁶⁾

Generally, the liquidator has the power in winding up according to Schedule (4) of Insolvency Act 1986. He is subject to the court's supervision in exercising his power, such as to pay to the creditors or to make any compromise or arrangement with the creditors.⁽¹²⁷⁾ It is questionable whether specific implement can be granted by or against a liquidator or "a company in liquidation".

No specific implement can be granted by or against the company if the contract was made after commencement of winding up without the leave of the court. However, if the company entered into a contract in good faith in the ordinary course of business, can specific implement be granted by or against it.?

It was laid down, that if title has passed to the buyer between the presentation of petition and the order of making of winding up, the court shall direct to complete the contract by the company, where as the buyer shall be left to damages if no title has passed to him.⁽¹²⁸⁾ Further, in Mersey steel & Iron Co. v. Naylor, Benzon & Co.,⁽¹²⁹⁾ it was held, that if the company entered into a contract, then went into a liquidation, such a contract is not determined by the liquidation's commencement, and such an obligation remains enforceable by or against the company.⁽¹³⁰⁾ The liquidator may by an order of the court be able to exercise the following powers, provided that, there is no liquidation committee; such as, bring or defend any action in the name and on behalf of the company.⁽¹³¹⁾ Thus, that action might be an action for claiming the remedy of specific implement. However, any disposition of property of the company made after commencement of the winding up, is void, unless the court

decides otherwise. It seems, that the liquidator is entitled to specific implement, but only under supervision and leave of the court. He may be ordered to perform the obligation specifically on behalf of the company. Granting specific implement by or against the company in the case of winding up by the court's order is doubtful without leave of the court.

In voluntary winding up, the company should cease of carrying on its business since commencement of winding up, except that which may be required for the company beneficial winding up.⁽¹³²⁾ Thus, after winding up, any transfer of shares without the liquidator permission, is void.⁽¹³³⁾ Furthermore, the liquidator's power is subject to either the court's sanction or the liquidation committee,⁽¹³⁴⁾ or an extraordinary resolution of the company.⁽¹³⁵⁾ Thus, the liquidator should obtain the consent of the above structures when he acts. It is thought therefore, that specific implement can be granted by or against the company without the above structures' permission, although the liquidator has power to sell any of the company's property and to transfer it to any person,⁽¹³⁶⁾ without the court's sanction.⁽¹³⁷⁾ Furthermore, he has power to do all acts and execute all deeds,⁽¹³⁸⁾ without sanction. It can be concluded, that the liquidator is entitled to the remedy of specific implement, since he has all these powers, especially to sell any of the company's property by public auction or private contract.

The liquidator has power to bring or defend any action in the company's name and on its behalf,⁽¹³⁹⁾ so that he may bring an action for specific implement, or he may be compelled to do so, bearing in mind the seller cannot insist on having the contract specifically performed,⁽¹⁴⁰⁾

1.3-The receiver

The receiver is given powers relating to the company property, by the Insolvency Act 1986.⁽¹⁴¹⁾ These include the power to sell, feu, hireout, to dispose of the property by public roup or private bargain.⁽¹⁴²⁾ In addition, he enjoys the power to bring or

defend any action on the company's behalf and in its name.⁽¹⁴³⁾ Furthermore, he has the power to contract and to sue or to be sued, for "he is deemed to be an agent of the company in relation to its property".⁽¹⁴⁴⁾ It is questionable whether specific implement can be decreed by or against the company.

In the light of the receiver's power, it is submitted that specific implement is granted. He may be ordered to perform specifically since he has the power to contract and to bring or defend actions on behalf of the company and in its name. If a receiver, for instance, has bought 100 tons of rice on behalf of the company, but the seller has refused to deliver the goods, the receiver, as a contractor or as an agent has certain powers, and may bring action on behalf of the company and in its name. He may be granted the remedy of specific implement. If the company is a seller, specific implement may be decreed against it, for in Freevale Ltd. v. Metrostore (Holdings) Ltd.,⁽¹⁴⁵⁾ it was stated that the purchaser's right in performing his obligation specifically is not affected by the appointment of the receiver after the date of the contract, since the equitable interest of the buyer is not destroyed by the receiver's appointment. May the receiver be held liable personally in some cases? and, can specific implement be ordered by or against him?

The receiver may be held liable personally for any obligation entered into by him during the period of performing his task, unless it is stipulated otherwise.⁽¹⁴⁶⁾ So, specific implement may be ordered by or against him within the circumstances of every case, although the remedy was refused on the ground that, implement of the obligation by the company shall involve expenses for which the receiver might be personally held liable.⁽¹⁴⁷⁾

Again, Lord Ordinary Stott had no doubt that the receiver is deemed to be the agent of the company's act.⁽¹⁴⁸⁾ "They are his own acts and by Sec.17 (2) of the Act,⁽¹⁴⁹⁾ he incurs personal liability on a contract entered into by him in the performance of his function".⁽¹⁵⁰⁾

Sub-Section 2:Insolvency in Iraqi civil law

2.1-The Insolvent

A debtor whose assets become insufficient to pay his due debts is deemed to be an insolvent. There should be apprehension based on reasonable grounds that he will lose or hide his property or transfer it to others, otherwise the debtor cannot be judged insolvent.⁽¹⁵¹⁾ The creditors should apply to the court for interdiction of the debtor, who shall not be able to dispose of his property, or to acknowledge of any other debt thereafter.⁽¹⁵²⁾ The insolvent debtor cannot dispose of his property, after the court's judgment. Every creditor is entitled to obtain a copy of the court's decision for enforcement and execution of the decree by the Execution Administration Office.⁽¹⁵³⁾ In addition, a custodian should be appointed to administrate the debtor's property on behalf of the creditors and the insolvent debtor himself. The insolvent debtor can be appointed as a custodian to look after his assets, unless there is fear of his bad faith or other good reason.⁽¹⁵⁴⁾

Issues such as to what extent specific performance can be compelled by or against the insolvent debtor, should the insolvent debtor be subject to the supervision of the custodian, are fundamental issues.

As a general rule, the debtor is prevented from acting or disposing of his property, whether sale, mortgage, donation,..etc, unless stipulated otherwise.⁽¹⁵⁵⁾ However, the following cases are exceptions to the above rule.

1-The insolvent debtor is entitled to sell the whole or some of his assets, where the majority of the creditors, which represent three quarters of the debt, agree, provided that, the price must be appropriated for payment of the debt,⁽¹⁵⁶⁾ either by paying the sum to them directly or to the court's treasury.⁽¹⁵⁷⁾ to be distributed between them.

2-A debtor, with the court's permission, may dispose of his property even without his creditor's consent, providing he does so at its normal price and value which should be then deposited to be distributed between the creditors.⁽¹⁵⁸⁾ It seems that the debtor may be subject to be compelled to perform specifically, or he may be granted the remedy

The contracting party will hesitate to contract with the insolvent party, because the creditors of the insolvent debtor are entitled to oppose his act in order to protect the debtor's assets from being disposed of. If, however, the debtor is permitted in the manner described above, the other party can enforce the obligation against the debtor without any opposition by the creditors. The debtor, consequently, may enforce the other contracting party to perform specifically as well, if it is possible. Specific performance may be granted by or against the insolvent debtor who is permitted by the court to contract, regardless of the creditor's situation.⁽¹⁵⁹⁾

The custodian

The insolvent debtor, as a general rule, cannot dispose of his property and he is not allowed to contract, since he is judged insolvent.⁽¹⁶⁰⁾ The person who undertakes such responsibility is the custodian. He is empowered to act and to dispose of property. Nevertheless, the insolvent debtor himself could under some circumstances, be appointed as a custodian,⁽¹⁶¹⁾ or the custodian may be another person, whether one of the creditors or a person who is not a party to the contractual relationship. Thus;

1-The custodian is the debtor himself.

2-The custodian is a creditor or a stranger to the contractual relationship.

1:The custodian is the debtor himself

In accordance with Article 171 (1) of Iraqi Civil Code, the debtor, originally is the custodian over his property, for he is in a better position than others to administer his property for his creditor's benefit and for himself. If the insolvent debtor takes responsibility for the custody and administration of his property, it means that he is approved by his creditors and by the court to do so. Therefore, every transaction he concludes is valid, and consequently, specific performance can be enforced by or against him as a normal contracting party.

2: The custodian is either a creditor or a stranger to the contract

The custodian should be appointed to administer the property on behalf of the creditors and the insolvent debtor himself, the custodian in this case being either a creditor or a stranger to the contractual relationship. It is questionable whether specific performance can be enforced by or against the custodian.

It seems that the custodian may be ordered or granted the remedy, for the following reasons:

1-All the debtor's assets are regarded as confiscated, except certain categories.⁽¹⁶²⁾ After the confiscation, there should be a person responsible for administering the assets until they are divided and distributed between the creditors. If the custodian is one of the creditors or a stranger to the contract, he takes responsibility for performing the obligations entered into by the insolvent debtor. Thus, specific performance may be granted by or against him.

2-As long as the insolvent debtor is not allowed to conclude any contract or to dispose of his property, the custodian ⁽¹⁶³⁾ should take the responsibility of doing so.⁽¹⁶⁴⁾ Thus he, according to his contracts or transactions, is compelled to perform specifically, or he is entitled to order the other contracting party to do so.

The insolvent debtor may be either a custodian or a debtor who is deprived of disposition of his property and prevented from acting in it. If the debtor is a custodian, he is able to conclude contracts and to dispose of his property for the interest of his creditors and for himself. Thus, in such a case, he is not acting as an insolvent debtor. Therefore, he does not need to act or to dispose of his property under the supervision of a custodian, for there is no custodian but himself. Specific performance then is granted by or against him. On the other hand, if the custodian is a creditor or a stranger to the contractual relationship, the insolvent debtor is not entitled to act or to conclude any kind of disposition, unless there is approval either by the court,⁽¹⁶⁵⁾ or the creditors,⁽¹⁶⁶⁾ or by the custodian. The custodian, then is subject to be held liable for his transactions and contracts, and therefore specific performance is decreed by or against him. The insolvent debtor's act, whether under the supervision of the court, or

the creditor is regarded, as valid as the custodian's act, because he is permitted to act.

The insolvent debtor sometimes acts when he is not entitled to act. To what extent is such an act valid?

Iraqi Civil Code has established a solution for the interest of all parties. The law considers the insolvent debtor's acts under no supervision or permission by the court or by the creditors, is suspended in the interest of the creditors, who have the power either to ratify or to nullify it.⁽¹⁶⁷⁾ Thus, if the act is ratified by the creditors, the insolvent debtor may take full responsibility for his act as a legal act and he may then be compelled to perform such act specifically, or he may be granted specific performance. If the act is nullified by the creditors, no specific performance can be granted by or against the insolvent debtor.

2.2-The Liquidator

The liquidator plays a substantial role in the case of a company in liquidation.⁽¹⁶⁸⁾ He, according to the companies law, has many duties to do. He has the power to fulfil all the contracts which are concluded by the company.⁽¹⁶⁹⁾ Furthermore, according to Article 159 (Secondly) of Companies Code, the liquidator is an agent for the company within the powers which are given to him during the period of liquidation. He may fulfil the obligations and he may act on behalf of the company. Thus, he may be granted specific performance, or he may be compelled to do so under the obligation he has undertaken on behalf of the company.

The liquidator is subject to the general committee's supervision, by virtue of Article 166 of Companies Code. He, is also subject to the registrar's supervision. He should report in detail to the registrar concerning the liquidation, the activities, and the development of liquidation every three months. The registrar takes responsibility for studying and examining these reports to see whether the liquidator acts within his powers, and oversees the procedures of these acts. The registrar is entitled to discuss with the liquidator every thing concerning the liquidation in accordance with Article 164

of Companies Code.

It seems that although the liquidator is considered as an agent during the period of liquidation, he is restricted to acting under the supervision of the general committee of the company or the supervision of the registrar to a certain extent. He is able to fulfil the obligations of the company, under Article 161 of Companies Code. Nevertheless, the liquidator is not obliged to follow the advice or the supervision of the registrar or the general committee of the company, unless he has acted in an unprofitable way or has caused damages or losses. The law in such a case has established certain restrictions under Articles 158,168 of the Companies Code to protect those who have a contractual relationship with the company, whether creditors or members.

Thus, specific performance can be granted by or against such a liquidator on behalf of the company in liquidation. Granting or refusing specific performance in such a case is based on the general rule of the theory of obligation in performing specifically.⁽¹⁷⁰⁾

Comment

1-In Scotland the bankrupt party has the right to specific implement, but it should be under the supervision of the trustee, whether interim or permanent, for the whole estate of a bankrupt party vests in the trustee for the benefit of the creditors. It seems that granting specific implement by or against the bankrupt party should be fulfilled through the trustee, either by supervising the bankrupt's act or by approving it. Therefore, the bankrupt party is restricted in disposing of his property. In Iraqi civil law, the case is slightly different and the insolvent debtor enjoys more power in dealing with his assets and contracts, and there are circumstances in which the insolvent debtor is entitled to act and to dispose of his property. Thus, specific performance can be granted by or against the insolvent debtor.

It seems that Iraqi civil law regarding the ability of the insolvent debtor to act and to dispose of his assets is more flexible than Scots law. It is true that both laws appoint a person to administer the property and assets of the insolvent debtor and the bankrupt

person. He is a trustee in Scotland, and a custodian in Iraqi civil law. In Scots law the bankrupt debtor is deprived of any freedom to act on his property, unless the trustee approves such an act, even if it is for the benefit of the creditors, whereas, the insolvent debtor in Iraqi civil law is entitled to contract and to act in two cases which enrich his property and assets for the benefit of his creditors and for himself.

2- In Iraqi civil law the insolvent debtor may be appointed as a custodian over his property. That means, he can contract and dispose of his property, for appointing him as a custodian reflects the approval of the creditors and the court's permission. It seems that the insolvent debtor in such a case has more scope to act with his property. That may be more beneficial for all the creditors because the insolvent debtor knows his property and the means of exploiting better than any one else.

In Scots law, the case is different, for the bankrupt debtor has no opportunity at all to become a trustee. He is always under the supervision of a trustee.

As a general rule, Iraqi civil law concurs with Scots law as regards depriving the insolvent debtor of acting or disposing of his property. However both laws are very different regarding the opportunity of the insolvent debtor to act or to be appointed as a trustee or a custodian. In addition, the two laws are different regarding the details of whether the insolvent can act or contract, or can be compelled to perform specifically, or to be granted specific performance. Also, they have different stand point concerning the ability of the bankrupt debtor to act freely and independently.

Each law is vulnerable to criticism, for in Iraqi civil law, giving the insolvent debtor such power to contract and to become a custodian, may make him abuse such power and reduce the creditors' chance to obtain their debts. It may encourage the debtor's escape from paying, despite the advantages of giving the insolvent debtor such a power.

In Scots law, the above risk does not exist and there is no fear of abusing such a right or a power, because he is deprived of it. However, depriving the bankrupt of any right to his assets and property is too extrem. Scots law treats the insolvent debtor as if he does not exist, and thus there is no way to consider his acts or contracts without his

trustee's supervision and approval.

3-The liquidator in Scots law is subject to the court or the liquidation committee supervision in accordance with case of winding up. He may also act without need to be supervised by the court. In these different situations, the liquidator is the person who should deal with the company's acts. He may be ordered to perform the obligation of the company specifically, or he may insist on having specific implement if the company is a purchaser. The court plays an essential role in supervising the liquidator. However, he may not be supervised sometimes. Thus, whether the liquidator is or is not supervised, the consequences are to benefit the company and its creditors.

In Iraqi civil law, the liquidator has the power to fulfil all the obligations of the liquidated company, although it is under different supervisions. The liquidator is subject to the supervision of the general committee and the registrar. The liquidator is regarded as an agent for the company in liquidation.

Section 4: Assignment, i.e., "Assignment"

A contracting party may assign his right under certain circumstances to another party. Specific implement as a matter of right to the aggrieved party may be assigned similar to other rights from one party to another, although no one can confer more rights than he possesses. Although assignability of specific implement is possible, it is affected by certain circumstances in both Scots and Iraqi systems.

The case will be considered in both systems respectively as follows:

Sub-Section 1: Assignment of specific implement in Scots Law

The only person who is affected by an obligation is the contracting party.⁽¹⁷¹⁾ No liability can be imposed on or right to be sued on strangers to the contract.⁽¹⁷²⁾ Nevertheless, there are many exceptions to the above general rule, for a third party may have a right to compel an obligation under a contract, despite not having any contractual right to sue for damages where the performance is defective.⁽¹⁷³⁾ In addition, "The purchaser of an article acquires no title to sue on a contract which the seller may have

made in relation to that article, nor is he bound by them".⁽¹⁷⁴⁾ Thus, "...a purchaser of movable incurs no liabilities. If he is a sub-purchaser, he is not liable for the price to the original seller".⁽¹⁷⁵⁾ It is questionable whether specific implement is assignable.

A person, who is a third party to a contract, may acquire liability if such right and liability of the original contracting party can be and has been assigned to him.⁽¹⁷⁶⁾ "He steps into the shoes of and stands in the place of one of the original contracting parties".⁽¹⁷⁷⁾ Moreover, "a right of action for breach and claim of damages for breach are all assignable, even though the contracts which they arise are not assignable".⁽¹⁷⁸⁾

It seems so far that specific implement is an assignable remedy, unless there is *detectus personae* creditor,⁽¹⁷⁹⁾ which is applied, according to Lord Kinnear, in Cole v. Handasyde,⁽¹⁸⁰⁾ "when a person is employed to do work or to perform services requiring some degree of skill or experience. And it is therefore to be inferred that he is selected for the employment in consequence of his own personal qualification. Such a contract is not assignable by him to a third person who may not be competent for the work". It was laid down that, if the contract is one for which specific performance could have been obtained before assignment, the assignee will be able to obtain specific performance after assignment.⁽¹⁸¹⁾

In Scots law, the rules and principles of assignation lead to the conclusion that specific implement is assignable, for an assignee is put by the assignation in the situation of, or in the place of the cedent. Thus, he will be entitled to sue or to be sued as the cedent has been.⁽¹⁸²⁾ All claims arising out of the obligation which could have been pled against the assignor may face the assignee.⁽¹⁸³⁾ The assignee, subsequently may face a claim of specific implement if the contract is for sale of goods, although the "assignee is not....necessarily exposed to latent or undisclosed claims which could have been made against the cedent. If he takes in good faith, for value and without notice of any trust or claim limiting the assignor's right, he takes free from any latent claims affecting the object assigned".⁽¹⁸⁴⁾

Specific implement could be a liability on the assignee, in the case of assignation

from the seller's side. The assignee is ordered to perform what has been assigned to him by the assignor, "the seller", for "if.....a contract be assigned by one of the parties, the assignee may in general compel the other party to do for his benefit whatever he would have been liable to do for the assignor's benefit,...".⁽¹⁸⁵⁾ Where there is an agreement between the contracting parties that the right resulting from the contract is unassignable,⁽¹⁸⁶⁾ specific implement is considered unassignable. It was stated ⁽¹⁸⁷⁾ that, even though there is no restriction on assignment of the contract expressly, the court can conclude from the contract's nature and the surrounding circumstances that the contracting parties have intended that the assignor's obligation should be performed personally.

The cedent cannot confer greater right than he himself possesses,⁽¹⁸⁸⁾ and the right which is conferred to the assignee is subject to all defences, exceptions and pleas which are pleadable by the debtor against the assignor.⁽¹⁸⁹⁾ Thus, the assignee obtains what the assignor had obtained before assignment. If, for instance, a seller A has sold 100 cars to a purchaser B. The purchaser B has assigned his right of obtaining the 100 cars to a purchaser C. C is entitled to claim specific implement against the seller A directly, because the assignee acquires the right to sue if the contract is assigned,⁽¹⁹⁰⁾ and the law implies that the assignee is conferred every thing necessary by the assignor to make the assignation effective.⁽¹⁹¹⁾

It is questionable whether the third party, such as a sub-contractor or another assignee in case of several assignments of one right, is entitled to obtain the remedy of specific implement.

The third party is either another assignee or creditor or claimant to the fund or the debt.⁽¹⁹²⁾ A has assigned, for instance, a debt due to him to B. Latter, he has assigned the same debt to C. Who is preferable to obtain his right first? The criterion in preferring one party to another is the intimation.⁽¹⁹³⁾ Thus, he who is intimated first will carry out the debt and obtain his right.⁽¹⁹⁴⁾ Further, the attachment which is "prior in date to the intimation, even though it is subsequent to the assignation, will prevail over the assignation".⁽¹⁹⁵⁾ When the intimation is prior in date to the

arrestment, the assignation will be preferred. It seems that the third party who obtains a right assigned to him from the assignor is able to enforce it against the debtor.⁽¹⁹⁶⁾ The problem that the third party may face is the matter of preference between him and another party. If he is preferred and obtains the right assigned, he is entitled to seek specific implement. In the case of a sub-contractor, for instance, A has contracted with B to sell him specific or ascertained goods. Is A entitled to assign his duty of performance to another party C? The answer is, yes, unless there is *delectus personae debitoris*.⁽¹⁹⁷⁾ or, there is express or implied agreement between the contracting parties to the contrary. To what extent can specific implement be compelled by or against the sub-contractor?

The contracting party may delegate the performance of the contract to another party, and he is entitled to assign his right under the contract.⁽¹⁹⁸⁾ The contract may also be performed by a third party or a sub-contractor, unless there is *delectus personae*.⁽¹⁹⁹⁾ If, for instance, the original contracting party's obligation, is to pay the price, why should not the other party agree and accept such payment by a sub-contractor, or a third party?

It is submitted, therefore, that there is no reason or bar against ordering the third party, or the sub-contractor to perform specifically the obligation which has been assigned to him by the assignor. In addition, the sub-contractor may seek for specific implement, as long as, he has fulfilled all his obligations towards the other contracting party. Furthermore, specific implement is more applicable, for the responsibility of the original contractor stands still even though he has delegated his obligation.⁽²⁰⁰⁾ Thus, the two parties, "the original and the sub-contractor", will remain liable against the other party who seeks the remedy of specific implement, because "it is not generally competent for a party to a contract, whatever its nature may be, to assign it so as to get rid of the liabilities he has undertaken. He may be entitled to tender performance by a third party, but will remain liable if that third party's performance be defective".⁽²⁰¹⁾ Therefore, the party bound by the contract must exercise care in choosing the sub-

contractor, otherwise he will be responsible for any harm resulting from choosing an unsuitable sub-contractor.⁽²⁰²⁾

Sub-Section 2: Assignment in Iraqi civil law

A creditor shall have the right to transfer to others the right over debts which are owned to him, provided that, there is no stipulation against such transference, whether by law or by an agreement of the two contracting parties, or by the nature of the obligation.⁽²⁰³⁾ In Iraqi civil law every obligation is assignable, whether that right is a civil or commercial right.⁽²⁰⁴⁾ However, there are exceptions to the above rule, by virtue of Article 362 of Iraqi Civil Code.⁽²⁰⁵⁾ The question arises, whether specific performance is granted by or against the assignee?

The assignee replaces the assignor in his right, which is transferred to the assignee with all its properties, appurtenances and securities. In addition, assignment of a right comprises its warranties, such as, sureties, privileges and mortgages, as well as interests and instalments that have fallen due.⁽²⁰⁶⁾ Every obligation is also assignable,⁽²⁰⁷⁾ unless agreed otherwise, or provided by the law,⁽²⁰⁸⁾ or when the nature of the contract stands as a bar against assignment,⁽²⁰⁹⁾ or if the creditor personally is considered in concluding the obligation.⁽²¹⁰⁾ If a seller A has assigned his contract to B, B is compelled to hold full responsibility of the sale contract towards the purchaser. Meanwhile he is entitled to be secured by the assignor who has transferred that right to him, for he shall have the contract transferred to him with all its properties, appurtenances and securities.⁽²¹¹⁾ The assignee B shall face all defences that the debtor of the right assigned is entitled to raise against the assignor at the moment the assignment becomes effective against him. Thereupon, the assignee is entitled to the remedy of specific performance and he is subject to perform specifically if the debtor had such a right in the first place.

It is inconceivable that the assignee should be prevented from securing that right, for the general principles of Iraqi civil law give the assignee the right to defend, to

claim, and to raise an action of specific performance.

Assignment is not effective as against a debtor or a third party unless it is accepted by the debtor or at least he is notified that there is an assignment. Acceptance by the debtor does not render the assignment valid as against third parties, unless it has an established date.⁽²¹²⁾ Thus, if the debtor has been notified of the assignment and he has accepted it, there is no excuse for refraining from performing the assigned obligation. It is questionable whether the third party, such as a sub-contractor, or another assignee, when there are several assignments, is entitled to insist on having the remedy of specific performance, or to be obliged to perform his obligation specifically. In the case of several assignments of one right, the first assignee, who executes his right is preferred on the other assignees.⁽²¹³⁾ The third party in the assignment is, whoever obtains right over the assigned right.⁽²¹⁴⁾ Thus, the third party is either another assignee, or a creditor to the assignor who has attached on the assigned right, or other creditor to the assignor when has been declared insolvent. The assignee who notifies the debtor first, or has obtained the debtor's acceptance⁽²¹⁵⁾ is preferred over other parties. He may be granted specific performance, or he may be compelled to do so.

If an attachment is served upon the debtor of the assigned debt, before the assignment becomes valid and effective for the third party, the assignment will be regarded as equivalent to an attachment vis-a-vis the distrainer, according to Article 374 of Civil Code. However, if another attachment is made after the assignment becomes valid and effective as against the third party, the debt is divided *pro rata* between the first distrainer, the assignee, and the second distrainer. It is inconceivable, that one of the creditors, in the above case, alone has the right of specific performance. It is the right of all creditors to have specific performance if it is applicable.

The third party could be the creditor of the insolvent assignor if, before the assignment becomes valid and effective as against the debtor, the assignor has become insolvent, in such a case, all the assignor's creditors become as third party.⁽²¹⁶⁾ The right assigned is considered as a part of the whole property of the debtor "assignor",

which is divided *pro rata* between the creditors and the assignee.⁽²¹⁷⁾ The third party to the assignment is entitled to have the right of specific performance, and he is equivalent to the assignee in obtaining the remedy, in accordance with the general rule of specific performance in Article 246 of Civil Code, but the priority depends on whether the assignment becomes valid and effective before or after commencement of the insolvency.

Comment

1-Both laws concur on the point that the assignee is entitled to the remedy of specific implement if the assignor has that right before assignment in the first place. No higher right or additional right can be assigned to the assignee by the assignor. In addition, all pleas and exceptions pleable against the assignor's right in the first place, i.e. "before assignment" are pleadable against the assignee, unless agreed otherwise.

2-The law of Scotland and Iraq diverge, however, upon the case of the assignability of the remedy of specific implement as regards the seller as an assignor, or even as an assignee, for in Scots law the seller cannot confer such a right to the assignor. He does not have the right of specific implement, so he cannot transfer it to other party, whereas in Iraqi civil law the seller can do so.

CONCLUSION

1-Granting or refusing the remedy of specific implement by or against the purchaser relies on the principle of "*Exceptio Non adimpleti contractus*". Nevertheless, the Scots purchaser cannot be compelled to perform his obligation specifically whatever that obligation is. That may lead to the conclusion that specific implement is a remedy restricted to certain type of aggrieved parties i.e., the purchasers only and always. This conclusion affects the concept of the remedy and its nature in Scotland. The consequences for the seller is that whether he is bankrupt or insolvent, assignor or assignee, he is deprived of the remedy of specific implement.

2-Restricting the right of specific implement in Scotland to the case of refusal of delivery by the seller is incomprehensible, for specific implement is an ordinary legal right, which should cover all cases of breach and it should be decreed whenever it is possible. It is inconsistent with the nature of the remedy in Scotland.

3-Depriving the aggrieved seller of his right of specific implement cannot find any reasonable justification and support in Scots law, for the remedy should be a mean which can be used by any aggrieved party.

4-To treat equally all contracting parties in granting or in refusing the remedy of specific performance in Iraqi civil law, reflects and represents the true nature and the real concept of the remedy as an ordinary legal remedy. It is a matter of right open permanently to the aggrieved party no matter who he is.

5-Granting specific implement as a remedy for breach of contract for the sale of goods in Scots law, whether the obligant is a purchaser or a bankrupt or as an assignee who represents the purchaser's side, is governed by the general principle, which is "specific implement is granted whenever there is breach to the obligation of delivery of goods, providing, it is possible to perform such obligation against the failure party, who is always the seller", and there are no exceptional grounds of law or equity stand against it being granted.

FOOT-NOTES

- 1-Gloag and Henderson, Introduction to the law of Scotland, *supra*, p.215.
- 2-Sale of Goods Act 1979, Sec. 51(1).
- 3-For more details, J.J.Gow, Mercantile & Industrial law, *op.cit.* pp: 226-230.
- 4-Ante. at pp. 71-76.
- 5-Ante. at pp. 84-89; 95-100; 106-111; 116-117.
- 6-Ante. at pp. 106-111; 116-117.
- 7-Ante. at pp. 106-111.
- 8-J.J.Gow, Mercantile & Industrial law, *op.cit.* at p.203.
- 9-Ibid.
- 10-Erskine, Instit., I ,3 , 86.
- 11-(1874) 1R. 730 at p.739.
- 12-Turnbull v. M' Lean & Co. (1874)1R. 730 at p.739.
- 13-Sale of Goods Act 1979, Sec.28, 27; Gloag & Henderson, Introduction to the law of Scotland, *op.cit.* pp.220-221.
- 14-J.J.Gow, Mercantile & Industrial law, *op.cit.* at p.226; Sale of Goods Act 1979 Sec.11(5).
- 15-J.J.Gow, Mercantile & Industrial law, *op.cit.* p.227.
- 16-Kyle v. Sim (1925) S.C. p.425
- 17-*supra*.
- 18-Duncan v. Leith (1957) S.L.T. (Sh.ct.) 46.
- 19-Pollock v. Macrae (1922) S.C. (H.L.) 192; see also: Aitken, Campbell & Co. Ltd. v. Boullen & Gatby (1908) S.C.490; Croom & Arthur v. Stewart (1905) 7F. 563; Electric Construction Co. v. Hurry & Young (1897) 24R. 312.
- 20-For the meaning of a good faith, see, Gloag & Henderson, Introduction to the law of Scotland, *op.cit.* at p.208; see also; Hayman v. American Cotton Oil Co. (1910) S.C. 1095.
- 21-Brown, Notes & Commentaries on the Sale of Goods Act, *supra*, at p. 259; J.J.Gow, Mercantile & Industrial law, *op.cit.* at p. 143.
- 22-Erskine, Instit., *supra*, III,3,9.
- 23-J.J.Gow, Mercantile & Industrial law, *op.cit.* p.143.
- 24-Ibid.
- 25-J.J.Gow, Mercantile & Industrial law, *op.cit.* p.143.
- 26-J.J.Gow, Mercantile & Industrial law, *op.cit.* p.144.
- 27-Melville v. Wemyss (1842) 4D. 385.
- 28-Brown, Notes & Commentaries on the Sale of Goods Act, *supra*, at pp: 61-62.
- 29-Ante. at pp. 116-117.
- 30-D.M.Walker, Civil Remedies, *op.cit.* at p.660 ; see also; post, at pp. 116-117.
- 31-Gloag, Contract, *op.cit.* at p.655

32-The place can be fixed by the law or by the agreement of the contracting parties; Compare, Al-sarraf, Abbass Hasan, Commentary on the sale contract in Kuwaite civil law , Comparative study, Kuwait, at pp.485-487.

33-Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, op.cit. pp:244-250; Article 543 of Civil Code; compare also, Articles 544, 545, 546 of Civil Code.

34-Articles 177, 243 of Iraqi Civil Code; Al-sarraf, Abbass hasan, Commentary on the sale contract, supra at pp.486-487.

35-Article 581 (1, 2) of Civil Code; compare also, Articles 177-178 of Civil Code; see also, Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.349-351; Alamiri, sadoun, Commentary on sale and lease contracts, op.cit, pp.170-171.

36-Taha, Ghani Hassoun, Commentary on the specific contracts, supra, p.255, also, pp. 245-250.

37-Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit, p.274.

38-Al-sarraf, Abass Hassan, Commentary on the contracts of the sale and lease, op.cit, paras: 444-445; Al-amiri, Sadoun, Commentary on sale and lease contracts, p.130.

39-Al-amiri, Sadoun, Commentary on sale and lease contracts, supra, pp.129-130; Taha, Ghani Hassoun, Commentary on the specific contracts, supra, pp.274-276.

40-Article 252 of Civil Code; Al-amiri, Commentary on sale and lease contracts, op.cit, pp.132-134; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. pp.277-281.

41-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.175; Al-amiri, Sadoun, Commentary on sale and lease contracts, op.cit, p.132.

42-The Egyptian Court of Cassation decision, No.:22, on, Jan.1941, Omar Collection, No.87, p.294; See also, Al-windawi, Kamal Tharwat, Commentary on the sale contract, p.184.

43-AL-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.184; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.281.

44-Al-amiri, Sadoun, Commentary on sale and lease contracts, op.cit. p.136; AL-windawi Kamal Tharwat, Commentary on the sale contracts, supra, p. 185.

Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.282

45-Ante at pp. 135-138; Article 552 of Civil Code; compare, Article 551 of Civil Code; see also, Al-amiri, Sadoun, Commentary on sale and lease contract, op.cit. pp.136-137.

46-For the conditions of the defective goods, see for the first one: (the defect should be undisclosed), AL-windawi Kamal Tharwat, Commentary on the sale contract, op.cit. pp.218-222; AL-sanhoori, Commentary on civil law, the sale contract, vol:4, p.720 foot-note(2); Iraqi Court of Cassation decision, No: 543/1970, on, 20/5/1970, Judiciary Journal, No.3, the 25th year, 1970, p.236; another decision, No: 2345/civil/956, Basrah, on 21/1/1956, cited by, Bayat, Salman, Iraqi civil judiciary, op.cit at p.66.; see also, Taha, Ghani Hassoun,

Commentary on the specific contracts, the sale contract, op.cit. p.308; for the second condition, (it should be existed at the time of contracting or after making the contract but before delivery), see, Al-amiri Sadoun, Commentary on sale and lease contracts, op.cit. p.150; Iraqi Court of Cassation decision, No.1774 /civil/ 955 Baghdad, on 29/11/1955, cited by Bayat Salman, Iraqi civil judiciary, vol. 2, op.cit. pp.63-64. For the third condition, (it should be unknown to the purchaser), see, the Iraqi Court of Cassation decision, No.582 /civil/ 958 Baghdad on 22/3/1958, cited by Bayat Salman, supra, vol. 2, at p.66; Egyptian Court of Appeal decision, 23/Feb/1932, Bar Journal No.37, p.94; Al-windawi Kamal Tharwat, Commentary on the sale contract, op.cit. pp.226-228. For the forth condition, (it should be effectual), i.e. the defect should diminish the sold thing's value or usefulness. see, Al-amiri Sadoun, Commentary on sale and lease contracts, op.cit. p. 149; Al-sanhoori, Commentary on civil law, the sale contract, vol.4, p.718; Al-saraf Abass, Commentary on sale and lease contracts, op.cit. para.493; see also Article 558 (2) of Civil Code.

47-Article 560 (1) of Iraqi Civil Code, Al-sanhoori, The Right Sources in Islamic jurisprudence, vol. 1, Cairo,1955, p.273, foot-note (2); Al-sanhoori, Commentary on civil law, the sale contract, vol.4, op.cit p.737, foote-note (1, 2); Al-widawi Kamal Tharwat, Commentary on the sale contract, supra, p.235-236.

48-Article (558/1) of Civil Code; Al-windawi Kamal Tharwat, Commentary on the sale contract, op.cit. p.237 foot-note(1)

49-Ante. at p. 123.

50- Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. pp.238-239.

51-Taha, Ghani Hassoun, Commentary on the specific contracts, sale contract, op.cit. pp.212-214.

52-Taha, Ghani Hassoun, Commerntary on the specific contracts, op.cit. p.213; Article 1163 of Iraqi Civil Code; Murqus, Sulayman, Commentary on the specific contracts, vol.1, the sale contract, supra, paras. 153,154.

53-Al-hakeem, Abdul Majid, Commentary on civil law, vol. 2, op.cit. pp.144; see also, Article 280 of Iraqi Civil Code; compare, Article 177 of Iraqi Civil Code

54-Supra.

55-Ante. at pp. 39-40.

56-Ante. at pp. 39-40; 41-43.

57-Ante. at pp. 39-40.

58-Ante. at pp39-43.

59-D.M.Walker, Civil Remedies, op.cit. p.660; Sale of Goods Act 1979 Sec.52.

60-J.J.Gow, Mercantile & Industrial law, op.cit. pp. 216-217; compare, Lamond v. Davall (1847) 9Q.B. 1030.

61-Sale of Goods Act 1979 Sec.49 (1) ; J.J.Gow, Mercantile & Industrial law, op.cit. P.215.

62-Sale of Goods Act 1979 Sec.50; Gloag & Henderson, Introduction to the law of Scotland,

op.cit. pp.220-221.

63-Bell, Principles. §.128; Gloag & Hendrson, Introduction to the law of Scotland, supra, at p.219.

64-J.J.Gow, Mercantile & Industrial law, op.cit. p.184.

65-Sale of Goods Act 1979 Sec.49; J.J.Gow, Mercantile & Industrial law, op.cit, pp.186-187.

66-J.J.Gow, Mercantile & Industrial law, supra, p.214.

67-(1962) S.L.T. 9 at p.14.

68-J.J.Gow, Mercantile & Industrial law, op.cit. p.214; see also, Sale of Goods Act 1979 Sec.58, which provides: "In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court which the action depends, to consign or pay into court the price, or to give other reasonable security for its due payment".

69-J.J.Gow, Mercantile & Industrial law, op.cit. p.214.

70-Stewart, Law of diligence, supra, at pp.726-727.

71-Stewart, Law of diligence, supra. at p.727.

72-Stewart, supra; compare, Mackenzie v. Balerno Paper Co. (1883)10R. 1147.

73-Under Sec.61 of the Sale of Goods Act 1979, "Action" includes counter claim and set off, and in Scotland condescendence and claim and compensation. Condescendence and claim "is the title applied to a claim in an action of multipointing. "Compensation" is the Scottish term for "set off"; see also, Brown, Commentaries on the sale of goods, p.422; Michael C.Blair, Sale of Goods Act 1979, London, 1980, p.98.

74-Bell, Commentaries, 1,471-472.

75-J.J.Gow, Mercantile and Industrial law, op.cit. p.215.

76-Ante. at pp. 39-43.

77-Al-windawi Kamal Tharwat, Commentary on sale contract, op.cit. pp.295-305; Al-amiri, sadoun, Commentary on sale and lease contracts, op.cit. pp.167-170; Al-dhanoon Hassan Ali, Commentary on the specific contracts, op.cit, at pp.184-185; Iraqi Court of Cassation decision, No: 2573 /civil/ 1957/Karadah, on 12/3/1958, cited by Bayat, Salman, Iraqi civil judiciary, vol. 2 op.cit. at pp.79-80.

78-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.295; Tanagho, Sameer Abdul sai'ed, The sale contract, op.cit. at pp.358-359.

79-Taha, Ghani Hassoun, Commentary on the specific contracts, sale contract, op.cit. at p.357; Al-sarraf Abbass Hasan, Commentary on the sale contract in kuwaiti civil law, supra, at pp.672-673.

80-Taha, Ghani Hassoun, Commentary on the specific contracts, the contract of sale, op.cit. PP.349-350; Articles 177, 178 of Civil Code; see also, Article 581 of Civil Code.

81-The price becomes payable, when the purchaser becomes insolvent or he reduces the securities, or he opposes offering more securities. See for more details, Al-windawi, Kamal Tharwat, Commentary on the sale contract, supra. p.308.

82-Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. p.308.

83-Tanagho, Sameer Abdul saied, the sale contract, supra. at pp.246-247; Al-windawi, Kamal Tharwat, Commentary on the sale contract, op.cit. at p. 152; Al-sarraf, Abbass hasan, Commentary on the sale contract, supra, at p.507; see also Article 547 (1) of Civil Code, the purchaser will have the choice between either revocation of the contract of sale or reducing the price, unless the destruction occurred after serving a formal summons on the purchaser.

84-Article 531 of Civil Code; Al-amiri, Sadoun, Commentary on sale and lease contracts, op.cit. pp.99-100; Tanagho, Sameer Abdul sa'ied, the sale contract op.cit. pp.160-162; see also Article 248 (2) of Civil Code which provides: If the debtor does not fulfil his undertaking, the creditor may upon an order of the court, or in case of urgency even without such an order, acquire at the expense of the debtor, an article of the same kind, he may also claim the value of the articles without prejudice to his rights to damages in either case.

85-under the the first Section of the Iraqi Civil Code in Articles 246-252, which is devoted to the remedy of specific performance, summons is not mentioned.

86-Tanagho, Sameer Abdul Saied, the sale contract, op.cit. p.359; Al-widawi, Kamal Tharwat, Commentary on sale contract, op.cit. p.296.

87-Article 547 of Civil Code; compare, Al-sanhoori, Commentary on civil law, sale contract, vol. 4, op.cit. p.677, foote-note (2) of p.677; Al-sarraf Abbass Hasan, Commentary on the sale contract in Kuwaiti civil law, supra, at pp.263, 518-519.

88-The destruction of the goods before delivery will be under the seller's liability, and nothing on the buyer, see, Iraqi Court of Cassation decision, on 18/1/1958, cited by Bayat Salman, Iraqi civil judiciary, vol.2, 1962 op.cit. at p.58; for more details, Al-sarraf Abbass Hasan, Commentary on the sale contract in kuwaiti civil law, supra, at pp.506-517.

89-Article 547 (1) of Civil Code; compare, Al-sarraf Abbass Hasan, Commentary on the sale contract in Kuwaiti civil law, supra, at p.517; Article 437 of Egyptian Civil Code.

90-Al-widawi, Kamal Tharwat, Commentary on sale contract, op.cit. p.157; Al-sarraf, Abbass Hasan, Commentary on the sale contract, supra, at p.517.

91-Al-sarraf, Abbass Hasan, Commentary on the sale and lease contracts, op.cit. at p.434.

92-Article 578 (2) of Civil Code.

93-Ante. at pp. 89-94.

94-Al-hakeem, Abdul Majid, Commentary on civil law, vol.2, op.cit. p.514; Al-sarraf, Abbass Hsan, Commentary on the sale contract in Kuwaiti civil law, supra, at p.524.

95-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. at p.35

96-The purchaser's other obligations may be rendered impossible, and he is treated as any

other debtor.

97-Taha, Ghani Hassoun, Commentary on the specific contracts, sale contract op.cit. p.355;
see also Article 541 of Civil Code.

98-Article 246 (1) of Civil Code.

99-Ante. at pp. 149-150; 157.

100-Article 246 (1) of Civil Code.

101-G.Jones & W.Goodhart, Specific Performance, op.cit. p.171.

102-Bell's Commentaries, II, 226; M'cowan v. Wright (1853) 15D. 494 at p.504, Lord Justice-clerk Hope; J.J.Gow, Mercantile & Industrial law, op.cit. p.618.

103-Bell's Commentaries, I, 264; Goudy, Bankruptcy 4th ed., 1914, at p.20; D.M.Walker, Civil Remedies, op.cit. p.506; Weir v. Buchanan (1876) 4R. 8; Richmond v. Railton (1854) 16D. 403; Ehrenbacher v. Kennedy (1874) 1R. 1131.

104-Bell, Commentaries, supra; D.M.Walker, supra; Morton v. Abercromby (1858) 20D. 362.

105-Bell's Commentaries, I, 266; Goudy, Bankruptcy, op.cit. pp.20-21; Watt v. Findly (1846) 8D. 529; Crawford v. Black (1829) 8S. 158; Hutton v. Fleming (1871) 9M.718.

106-Gloag, Contract, op.cit. p.601.

107-supra. at p.602.

108-Bell's Commentaries, I, 145; Mc Nair v. Don (1933) 48 Sh.ct. Rep. 99; D.M.Walker, Civil Remedies, op.cit. p.506.

109-Rephoenix Bessemer Steel Co. (1876) 4Ch.D. 108; D.M.Walker, Civil Remedies, op.cit. p.507.

110-Exp. Chalmers (1873) L.R. 8Ch. 289.

111-Bankruptcy (Scotland) Act 1985, Sec.18 (7).

112-Bankruptcy (Scotland) Act 1985, Sec.18 (5, 6).

113-Bell's Commentaries, II, 170.

114-Bankruptcy (Scotland) Act 1985, Sec.31(1); There are exceptions, see Sec.33 (1)a; Sec. 33 (1) b.

115-Bankruptcy Act 1985 supra, Sec. 38 (1).

116-Supra, Sec.38 (4).

117-Supra, Sec.39 (2).

118-Supra, Sec. 42; compare also, Sec.42 (2).

119-Powell v. Lloyd (1828) 2Y&J. 372; Brooke v. Hewitt (1796) 3Ves. 253.

120-Knight v. Burgess (1864) 33LJ. Ch. 727; see also, G. Jones & W.Goodhart, Specific Performance, op.cit. p.172; compare, Gibson v. Carruthers (1841) 3M&W. 321 at p.343, Lord Abinger CB.

121-Goudy, Bankruptcy, op.cit. p.284; J.J.Gow, Mercantile & industrial law op.cit. p.638.

122-Bankruptcy (Scotland) Act 1985, Sec. 42(4).

- 123-Supra, Sec. 42 (2).
- 124-J.J.Gow, Mercantile & Industrial law, op.cit. p.638, foote-note (89).
- 125-G.Jones & W.Goodhart, Specific Performance, op.cit. p.174.
- 126-Gloag & Henderson, Introduction to the law of Scotland, supra. pp.390-391; see also, Act 1986, Sec.145.
- 127-Act 1986 Sec. 167 (1); also, Schedule (4) part (1) of Insolvency Act 1986.
- 128-Supra.
- 129-(1884) 9A.C. 434, H.L.
- 130-G.Jones & W.Goodhart, Specific Performance, op.cit. p.174.
- 131-Act 1986, Sec. 169, 1 (a).
- 132-Insolvency Act 1986 Sec. 87.
- 133-Supra, Sec. 88.
- 134-Supra, Sec.165 (2) b.
- 135-Supra, Sec.165 (2) a.
- 136-Insolvency Act 1986, Schedule 4 part (III) (6).
- 137-Supra, part (II) of Schedule 4.
- 138-Supra.
- 139-Insolvency Act 1986, Schedule (4) part (II)
- 140-Ante. at pp. 154-157.
- 141-Insolvency Act 1986, Sec. (55)
- 142-Supra, Schedule 2 (2).
- 143-Supra, Schedule 5.
- 144-Insolvency Act 1986, Sec. 57 (1).
- 145-(1984) Ch. 199; compare with, Insolvency Act 1986 Sec. 57 (4).
- 146-Insolvency Act 1986 Sec. 57 (20).
- 147-Macleod v. Alexander Sutherland Ltd. (1977) S.L.T. (notes recent decisions) 44.
- 158-Supra.
- 149-now Sec. 57 (2) of Insolvency Act 1986.
- 150-Macleod v. Alexander, supra.
- 151-Al-hakeem. Abdul majid, Commentary on civil law, vol. 2, Principles of obligation, op.cit. p.129; Al-dhanoon, Hassan Ali, The general theory of obligation, op.cit. p.371; Article 270 of Iraqi Civil Code; Al-khatteeb Ahmad, Interdiction of the debtor for the benefit of the creditors in Islamic law, Cairo, 1964 at p.361; Al-sanhoori, Brief of commentary on civil law, vol.1, Cairo, 1966, p918; Shafiq Muhsin, Commercial law of Egypt, vol. 2, 1951, at p.15; Abdul bir, mohammad Zeki, The Interdiction of the debtor in Islamic jurisprudence, The Bar journal, the 9th issue, of the 36th year, May 1956, at pp.1435-1436, 2438; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, op.cit, pp.1209-1219.Sulttan, Anwar, The General Theory of Obligation, vol.2, the principles of obligation, at pp.211-213.

152-Article 270 of Iraqi Civil Code; Al-sanhoori, Abdul razzaq, Commentary on civil law, supra, at pp. 1211-1214, 1217-1218; Sulttan, Anwar, the general theory of obligation supra, at p.214.

153-Al-dhanoon, Hassan Ali, The General Theory of obligation, op.cit. p.371; Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. p.129; see also, Article 271 of Civil Code.

154-Al-bakri, Abdul Baqi, Commentary on Iraqi civil law, op.cit. p.397.

155-Al-khatteeb, Ahmad, The interdiction of the debtor for his creditors benefit, supra, at p.538; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.399; Al-sanhoori Abdul razzaq, Commentary on civil law, vol.2, supra, at pp.1229-1234.

156-Article 276 of Civil Code.

157-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. PP.399-400; see also, Article 276 of Iraqi Civil Code.

158-Al-hakeem, Abdul majid, Commentary on civil law, vol.2 supra, at p.171: compare, Article 258 of Egyptian Civil Code.

159-Al- bakri, Abdul baqi, Commentary on Iraqi civil law, op.cit. pp.426-427.

160-There are exceptions to this rule.

161-Article 271 (3) of Iraqi Civil Code.

162-Article 270 of Civil Code; compare also, Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p369.

163-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. p 130.

164-Al-khatteeb, Ahmad, Interdiction of the debtor, supra, p. 538; Al-bakri, Abdul baqi, Commentary on Iraqi civil law, supra, p.398.

165-Article 277 of Civil Code; Al-hakeem, Abdul majid, Commentary on civil law, vol.2, supra, p.131.

166-Article 276 of Civil Code.

167-Article 134 of Civil Code; Al-bakri, Abdul Baqi, Commentary on civil law, op.cit. pp.402-403.

168-Ridha Muoafaq Hasan, The Companies law, Baghdad, 1985, at p.188

169-Article 167 of Iraqi Companies Code; Yamulki, Akram and Salih, Basim Mohammad, Commercial law. Part Two, baghdad, at pp.265-267; Al-nahi, Salah Al-deen, The Companies and Liquidation, The Comarative law journal, the 3rd issue, the 4th year, 1970, at pp.70-72; Jad, Hasan, Commentary on Iraqi Commercial law, vol.1, Baghdad, 1940, at pp.827-828.

170-Ibid; Article 246 (1) of Civil Code.

171-Gloag & Henderson, Introduction to the law of Scotland, op.cit. pp 112-113.

172-Supra.

173-Robertson v. Fleming (1861) 4Macq. 167.

174-Gloag & Henderson, Introduction to the law of Scotland, supra at p.117.

- 175- Ibid.
- 176-D.M.Walker, Contract. op.cit. p.460.
- 177-Ibid.
- 178-Ibid.
- 179-Gloag & Henderson, Introduction to the law of Scotland, op.cit. p.118; D.M.Walker, Contract. op.cit. p.461.
- 180-(1910) S.C. 68 at p.75.
- 181-Morgan v.Rhodes (1834) 1My&K. 431; Manchester Brewery Co.v.Coombs (1901) 2Ch. 608 at pp.616-617.
- 182-Microwave System (Scotland) Ltd.v.Electro Phsiological Instruments Ltd. (1971) S.C. 140.
- 183-Stair, Institution, supra, 10, 6; D.M.Walker, Contract. op.cit. p.466; Arnott's Trustee v. Dorbes (1881) 9R. 89.
- 184-D.M.Walker, Contract. op.cit. p.465.
- 185-Queen's Land Insurance Co. Ltd. v. Australian Mutual Fire Insurance Society Ltd. (1941) 41SR. NSW. 159 at p.201 per, Curiam.
- 186-G.Jones & W.Goodhart, Specific performance. op.cit. p.146.
- 187-English cases; Rayner v. Grote (1916) 15M&W. 359 at p.465; Bruce v. Tyley (1916) 21CLR. 277 at p.289 per, Isaacs J; Gibson v. Carruthers (1841) 8M&W 321 at p. 343 per Lord Abinger; Tolhurst v. Associated Portland Cement Manufactures Ltd. (1920) 2K.B. 660 CA. at pp.668, 669 per Collins MR.
- 188-Gloag & Henderson, Introduction to the law of Scotland, op.cit. pp.632-633.
- 189-Supra.
- 190-Supra, at p.117.
- 191-Miller v. Muirhead (1894) 21R. 658.
- 192-Gloag & Henderson, Introduction to the law of Scotland, op.cit. p.629-630.
- 193-Supra, at p.629; see for the importance of limitation, Thome v. Thome (1683) 2Brown's Sup. 49; Stair, Institution, supra, III, 1, 6; Bell's Commentaries. II, 16; Erskine, Instit., supra, III, 5,3.
- 194-Gloag & Henderson, Introduction to the law of Scotland, supra, at p.630.
- 195-Stair, Institution, supra, III,1,43-44; Liquidator of Union Club v.Edinburgh Life Assurance (1906) 8F. 114.
- 196-Ante at p. 176.
- 197-There is not necessarily *delectus personae* in all contracts, merely because the particular party has been chosen for the contract. see Gloag & Henderson, Introduction, op.cit. at p.119.
- 198-D.M.Walker, Contract. op.cit. p.466; Gloag & Henderson, Introduction to the law of Scotland, op.cit. p.119.
- 199.Gloag & Henderson, Introduction to the law of Scotland, supra, atpp.118-119.

- 200-D.M.Walker, Contract, supra, at pp. 466-467.
- 201-Gloag & Henderson, Introduction to the law of Scotland, supra. at p.118.
- 202-D.M.Wallker, Contract, supra, at p.466.
- 203-Article 362 of Iraqi Civil Code; Al-hakeem, Abdul majid, Commentary on civil law, vol.2 supra, at p.346; Al-hilali, Ahmad Najeeb, & Zaki, Hamid, Commentary on Civil law , 3rd ed. 1954, at pp.602-605.
- 204-Iraqi Court of Cassation decision, Judicial publication, No.2, the 4th year, at p.81.
- 205-The exceptions are as follows: (1)- The contracting parties agreement. (2)-"A right can only be assigned to the extent of its susceptibility of confiscation", according to the provision of Article 364 of Civil Code. (3)-By the nature of the obligation. (4)-By virtue of the law.
- 206-Article 365 of Civil Code; see also, Sulttan, Anwar, the principles of obligation, at pp. 316-317; Al-dhanoon, Hasan Ali, The General Theory of obligation, op.cit. pp.434-435; Al-hilali, Ahmad Najeeb, & Zaki, Hamid, Commentary on Civil law, supra, at pp.605-609.
- 207-Al-hilali, Ahmad Najeeb, & Zaki, Hamid, Commentary on Civil law, supra, at pp.563-567; Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. p.347.
- 208-Article 362 of Civil Code.
- 209-Al-dhanoon, Hasan Ali, The general theory of obligation, op.cit. p.432; Article 362 of Civil Code.
- 210-Supra.
- 211-Article 365 of Iraqi Civil Code.
- 212-Al-hilali, Ahmad Najeeb, & Zaki, Hamid, Commentary on Civil law, op.cit, pp.567-571; Article 363 of Iraqi Civil Code.
- 213-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. p.382.
- 214-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, supra, at p.381.
- 215-Article 373 of Civil Code. Al-hakeem, Abdul majid, Commentary on civil law, vol.2, supra, at p.382.
- 216-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. p.381.
- 217-Supra.

CHAPTER FOUR
DISTINCTION BETWEEN SPECIFIC IMPLEMENT, DAMAGES
AND INTERDICT, i.e. "PERFORMANCE OF THE OBLIGATION
TO REFRAIN FROM DOING SOMETHING"

Introduction

Damages may be granted either in addition to or in substitution for specific implement under certain circumstances.

Every obligation has a positive and a negative character, an obligation to do, and an obligation to refrain from doing something. Scots law has differentiated between these two characters and has different remedies for each. Thus, the remedy of interdict has been established. On the contrary Iraqi civil law considers doing and refraining from doing something as two aspects of one remedy, specific performance.

The issue of the distinction between damages, specific implement, interdict and performance of the obligation to refrain from doing something will be considered in two sections, as follows:

Section one: Damages

Section:Two:-The remedy of Interdict and specific performance as a remedy for breach of the obligation to refrain from doing something.

Section One: Damages

Damages as a remedy for breach of a contract for sale of goods may be granted with or without the remedy of specific implement. However, the award of damages depends on whether specific implement is granted or refused. Furthermore, where damages are awarded in addition to the remedy of specific implement, the problem of adequacy of damages arises. To consider these further:

Sub-Section 1: Effect of adequacy of Damages on the remedy of specific implement.

Sub-Section 2: Damages in addition to or in substitution for specific implement.

Sub-Section 1:Effect of adequacy of damages on specific implement

The adequacy of damages test plays a substantial role in the case of specific performance in English law, for where complete justice can be achieved by damages, specific performance will not be granted. However, the case is different in Scots and Iraqi laws, when the test of adequacy does not play an important role. The case of adequacy will be examined as follows.

1-The adequacy of damages in general.

2-Influence of adequacy of damages on specific implement.

1-The adequacy of damages in general

"Adequacy of remedies has always been somewhat mercurial".⁽¹⁾ In addition, "The adequacy test, for the most part, remains as a stumbling block to specific performance of chattel contracts".⁽²⁾ "It is a severe limitation in sales of other things than lands".⁽³⁾ "It is arbitrary and irrational".⁽⁴⁾ The question of adequacy of damages is more or less ambiguous, and there is no clear rule by which the court can always examine the adequacy of damages test. It is a matter of discretion. Professor Corbin has pointed out,⁽⁵⁾ that "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". Damages are considered to be an inadequate remedy in certain cases and therefore, the remedy of specific performance has been granted.⁽⁶⁾ Nevertheless, there are many cases, where specific performance was refused on the grounds that the remedy (damages) at law is adequate.⁽⁷⁾

Where damages fail to afford a complete remedy to the aggrieved party,⁽⁸⁾ or the amount of damages is impossible to assess,⁽⁹⁾ they are considered an inadequate remedy.⁽¹⁰⁾ Therefore, specific performance is granted.

Specific performance in English law is affected substantially by the adequacy test. It is not granted when the plaintiff obtains the equivalent to what he has contracted for by damages.⁽¹¹⁾ Lord Redesdale stated,⁽¹²⁾ that "unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled: that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the court in a variety of cases, has refused to interfere, where from the nature of the case, the damages must necessarily be commensurate to the injury sustained". Furthermore, Kindersley V-C. pointed out,⁽¹³⁾ that specific performance will not be decreed by the court with regard to personal chattels in the minority of cases by reason of that damages are sufficient. Nevertheless, specific performance will be ordered if damages are not sufficient remedy to compensate the aggrieved party.⁽¹⁴⁾

The question of adequacy of damages is a question of fact in each case.⁽¹⁵⁾ "it is unsafe to rely on decisions reached on other contracts and in other circumstances".⁽¹⁶⁾ Thus, in a contract for sale of chattels "the circumstances often are found to be such that an award of damages which is intended to enable similar chattels to be purchased does not provide an adequate remedy".⁽¹⁷⁾ Damages may be inadequate, even when the pursuer can buy goods similar to those in the contract, if the fluctuation of the price is so great, that the party who is obliged to accept damages cannot be sure of being put in as good a position as he would have been if the contract were specifically performed and the goods supplied.⁽¹⁸⁾ Furthermore, where the goods or items are unique, specific performance can be granted. Thus, "the more unusual the subject-matter of the contract, the more difficult it becomes to assess the plaintiff's loss",⁽¹⁹⁾ and "damages can be readily assessed but not so easily collected".⁽²⁰⁾

Nor can damages be described as an adequate remedy when the defendant is unable to pay them, because of his insolvency.⁽²¹⁾ Under these circumstances specific performance is justified and will be decreed.⁽²²⁾

In Allseas International Management Ltd. v. Panroy Bulk Treansport and others,⁽²³⁾ Allseas claimed that the vessels Star Delta and Star Gazar had been sold to them by the

defendants (Panroy, Roymar, and the bank) on March 19, 1984. The plaintiffs obtained an injunction to prevent the sale from taking place to Saned, the fourth defendant. The plaintiffs applied for a decree of specific performance of the sale contract or alternatively for damages. The owners opposed the plaintiff's claim. Saned who was the purchaser of the two vessels by the agreement between him and the owners of the vessels, claimed specific performance of this agreement. They also claimed damages as an alternative remedy. Held by the Queen's Bench Division (Com. Ct.) that, "on the facts and the evidence no binding contract was reached between Allseas and the defendants and in the circumstances specific performance of the second agreement for the sale of the two vessels to Saned would be granted". Accordingly, without discussing whether damages are or are not an adequate remedy, specific performance was granted by the court. In addition, specific performance was ordered without examining the vessels to establish whether they were unique or easily obtainable from the market.

The way the court's decision may be regarded as advancing the law of specific performance is that it compelled the defendant to specific performance because, "the court has powers to make such an order under Sec. 52 of the sale of goods Act. Neither the owners nor the bank would wish to oppose such a sale which would indeed be in conformity with what they want".⁽²⁴⁾

The problem of adequacy where the contract was for something unique appeared again in Eximenco Handles A.G. v. Partrederiet Oro Chief and Levantes Maritime Corp.,⁽²⁵⁾ where; the first defendants agreed to sell the "Oro Chief" to the plaintiffs for \$8 Million. The time for delivery was extended from time to time, and by the date of Apr. 6, 1983 the plaintiffs failed to pay the price in exchange for the documents which are required by the contract. Accordingly, the first defendants, "the owners", cancelled their contract with the plaintiffs and contracted with Levantes, who became second defendant for a price \$ 8.2. Million.

It was held: "that: (6)- the owners were under a subsisting contractual

obligation to deliver the vessel to Levantes. (7)- if there had been a subsisting contract to sell to Eximenco, the court would have ordered it to be specifically performed". Many dicta can be taken from that judgment, namely:

1-Staughton J. said,⁽²⁶⁾ concerning the uniqueness and the characteristics of the vessel, "The test is plainly satisfied in the present case. Oro chief is an Ore/oil carrier. She has certain advantages of flexibility in trading. Only a limited number of such vessels of similar size exist. At present none is available for sale in the market". He added, in relation to Eximenco and their need for the vessel, "Eximenco sought to prove that they had a particular need for the vessel as an Ore/oil carrier. the attempt failed. An ordinary tanker would have suited just as well for the time being. And ordinary tankers of similar size are available".⁽²⁷⁾

The question of how much the party needs the article should be irrelevant. It is neither one of the principles of the uniqueness nor of the adequacy test. As far as specific performance is concerned many authorities recognise that,⁽²⁸⁾ where the article is unobtainable in the market, specific performance will be granted, regardless of the degree of the party's need for the goods. In addition, where damages are considered inadequate to compensate the aggrieved party, specific performance is decreed.⁽²⁹⁾

2-The judge stated,⁽³⁰⁾ "If I held that there was a subsisting contract to sell to Eximenco, I would have ordered it to be specifically performed". It is thought then, that there is some contradiction, for he said that,⁽³¹⁾ "An ordinary tanker would have suited them". Then he said that if there was a subsisting contract he "would have ordered" specific performance.⁽³²⁾ It indicates that he avoided the need test at least for Eximenco, but it was found substantial in this case for Levantes, who "made somewhat more of a case that they had a special need for this vessel".⁽³³⁾

Finally, it can be concluded that the judge would have been better to have concentrated on the test of uniqueness and adequacy, without considering the need for the vessel by either party. If it is unique and cannot be replaced by damages or cannot be obtained elsewhere, that should be a sufficient criterion, and provide satisfactory

ground to grant the remedy of specific performance, regardless of the need for such an article. That is the principle of English law as regards specific performance in the sale of goods contract.

In Cn Marine INC. v. Stena Line A/3 and Regie VOOR Maritiem Transport "The Stena Nautica" (No.2),⁽³⁴⁾ the defendants let their vessel to the plaintiffs for a period of 108 days during summer time in each year for a period of five years. The plaintiffs had an option to buy the vessel according to the charter at the end of the first five years. The plaintiffs renewed the contract for one year more. Accordingly, they were entitled to exercise their option to buy the vessel at the end of 1983. Nevertheless, the defendants (Swedish owners) entered into negotiations between (1981-1982) which were in breach of the contract to the plaintiffs. The defendants arranged to demise the vessel to the Belgians (the other plaintiffs) for two years with an option to buy the vessel. The Belgians took delivery of the vessel on Feb. 28. 1982 in good faith and without notice that she had been demised to the Canadians for the summer season.

It was held, by Q.B. (Com. Ct.) "that the Canadians were entitled to specific performance of the option to purchase.....".

It was held by the Court of Appeal: "that A (1) as a matter of law an order for specific performance could be made in respect of a vessel but it in no way followed that there should be an order for specific performance in respect of every contract for the sale of a vessel.

(3) in the circumstances, damages would be an adequate remedy for the Canadians and it would be just to confine them to that remedy..... .

(B) there were serious doubts whether even if an order for specific performance were made in favour of the Canadians, without the conditions imposed in favour of the Belgians, the vessel would be able to be in service; on balance the Canadians had failed to discharge the onus which lay on them, and the Belgians were entitled to specific performance of the charter party.....". This case, it is submitted, represents the English law's stand point in respect of specific performance as a remedy for breach of contract for the sale of goods, especially on the point that, "it in no way

followed that there should be an order for specific performance in respect of every contract for the sale of a vessel".⁽³⁵⁾ The reason for that is, that the remedy of specific performance is discretionary, and it is not granted except "if (the court) thinks fit"⁽³⁶⁾ and "specific performance can be made in the case of a ship; but in this case,....., it seemsthat damages would be an adequate remedy. In those circumstances, as a matter of discretion, it seems..... that this is not a case for any order for specific performance".⁽³⁷⁾

The principle of adequacy of damages dominates every occasion specific performance is applied for, even if the goods are specific or ascertained. Thus, for instance, Lord Justice May confirmed the above statement,⁽³⁸⁾ by saying that, "He (the judge) expressed the view, with which I entirely agree, that as a matter of law an order for specific performance can be made in respect of a ship. *Per contra*, it in no way follows that there should be an order for specific performance in respect of every contract for the sale of a ship". Courts, it seems, will not grant specific performance for delivery of a ship unless it is unique and it cannot be substituted by another ship. Otherwise, damages offer an adequate remedy, for "It seems quite clear.....that but for the fact that the vessel in question happened to be a sistership of two vessels in service with the Canadians, he "the judge" would have taken the view that damages were an adequate remedy".⁽³⁹⁾

The same happened in Societe Des Industries Metallurgiques S.A. v. The Bronox Engineering Co. Ltd.⁽⁴⁰⁾ It was held, "that (2) on the evidence, the machine was one which was obtainable in the market in the ordinary course upon placing an order and damages were sufficient remedy; and the buyers were not entitled to a decree of specific performance under Sec. 52 of Sale of Goods Act". Lord Edmund Davies, pointed out⁽⁴¹⁾ that, "That Sec.(52....) enables the court "if it thinks fit" to order specific performance of a contract to deliver "specific or ascertained goods". For present purpose I understand the parties to accept that the machinery in question was "ascertained goods" within the meaning of the section. But it is established law that

such an order will not be made if damages would fully compensate the party aggrieved".

where justice is achieved by the award of damages, English Courts will refuse the remedy of specific performance. Specific performance in English law is an equitable remedy only granted when damages fail to compensate the aggrieved purchaser, for "the courts of equity did not decree specific performance in contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy".⁽⁴²⁾ Further, Lord Justice Buckley stated,⁽⁴³⁾ "that you cannot walk into a store or warehouse or shop and buy this type of machinery from stock. Nevertheless, it is I think, on the evidence, a type of machinery which is obtainable in the market in the ordinary course upon placing an order and although delivery in response to such an order must involve delay.....".

It seems, however, that the exercising of the inherent discretionary power by the court, varies from one court to another, and there are no reliable criteria to justify or predict the conduct of the court in ordering specific performance or granting damages in a case where there are specific or ascertained goods, such as a ship or a machinery or some articles which are not easily obtainable. For instance, in Behnke v. Bede Shipping Co. Ltd.,⁽⁴⁴⁾ Wright J. said, "Section 52 of the Sale of Goods Act gives the court a discretion, if it thinks fit, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically. I think a ship is a specific chattel within the Act.... In the present case there is evidence that the City was of peculiar and practically unique value to the plaintiff". Specific performance was made.⁽⁴⁵⁾

In Hart v. Herwig,⁽⁴⁶⁾ Sir W.M.James, L.J. pointed out that, "The right of the plaintiff here was to have the ship delivered to him in exchange for the purchase-money". Sir G. Mellish, L.J.⁽⁴⁷⁾ said also, that "In fact he has entered into this contract for the purchase of the ship, and he is entitled to the ship". Mr. Justice Parker, in "The Stena Nautica" (No2),⁽⁴⁸⁾ whose judgment has been reversed by the Court of

Appeal, said that "ships are I fully accept not ordinary articles of commerce, nor can a purchaser, if his seller declines to deliver, normally obtain in the market a substantially identical vessel as could the purchaser in the Bronx case find, albeit after long delay, an identical machine". Furthermore, "The remedy under Sec.52 is both discretionary and can be made subject to conditions".⁽⁴⁹⁾ Nevertheless, the approach of another judge is different, for instance, Lord Denning stated,⁽⁵⁰⁾ that, "In those circumstances, as a matter of discretion, it seems to me this is not a case for any order for specific performance". Again, it was said,⁽⁵¹⁾ that, "the court has to ask whether in the circumstances it is just that the plaintiff should be confined to the remedy in damages".

Finally, it is submitted, however, that the choice of remedies as between specific performance and the award of damages varies from one case to another and from one court to another, or even from one judge to another within one court. Above all, the onus is upon the plaintiff to justify the claim that, damages would not achieve justice, and inadequate remedy, and that he "the plaintiff" should not be compelled to accept them.⁽⁵²⁾ The plaintiff may fail to prove that the goods are unique, and subsequently he will not obtain specific performance, but damages.

2-Influence of adequacy of damages on specific implement

The adequacy of damages may or may not affect the remedy of specific implement. To examine such influence on the remedy, the case should be considered as follows:

2.1-Influence of adequacy test on specific implement in Scots law

The adequacy or otherwise of damages should, if it is to comply with the concept and the nature of the remedy of specific implement in Scots law, have no influence for the following reasons.

1-If the remedy of specific implement is a legal remedy, and it seems that it is. It should then be granted when certain conditions exist. Therefore "in Scotland the breach of a contract for the sale of a specific subject.....gives the party aggrieved the legal right to sue for implement"⁽⁵³⁾

2-The pursuer cannot be obliged to resort to the alternative of an action of damages, unless specific implement is refused for different reasons.⁽⁵⁴⁾

3-In Scots law, the Lord Justice-Clerk,⁽⁵⁵⁾ stated, that the pursuer is perfectly entitled to say that "I do not choose to take the damages. I prefer to insist for implement". He added that "to say that a pursuer claiming implement, and alternatively damages, is not to be entitled to say, I prefer implement".

4-The remedy of specific implement is granted if it is clear that what would be ordered to be done could be done reasonably.⁽⁵⁶⁾ Also, "The general rule of our law is that when a party has it in his power to fulfil an obligation which he has undertaken, the court will compel him to do so".⁽⁵⁷⁾ Nevertheless, the circumstances sometimes restrict the court to order damages instead of specific implement.⁽⁵⁸⁾

5-"Specific performance was not a remedy to which a party was entitled at Common law in England..... In Scotland, on the contrary, specific implement is one of the ordinary remedies to which a party to a contract is entitled where the other party to it refuses to implement the obligation he has undertaken I do not of course mean to say that it would not be open to maintain there that in the circumstances of a particular case it would be inequitable to enforce that remedy".⁽⁵⁹⁾

6-"In England the only legal right arising from a breach of a contract is a claim of damages; specific performance is not a matter of legal right, but a purely equitable remedy, which the court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland, the breach of a contract for the sale of specific subject gives the party the legal right to sue for implement.....".⁽⁶⁰⁾

7-The court in Scotland, particularly, the Court of Session, has laid down that, even if implement is possible, it has inherent power to refuse the legal remedy upon equitable grounds.⁽⁶¹⁾

8-"In England the remedy of specific performance is an extraordinary remedy. it is always a matter of discretion, and defences are admitted in a suit for specific performance which are inadmissible according to the doctrines and practice of the

Courts of Scotland, where specific performance is part of the ordinary jurisdiction of the court".⁽⁶²⁾

Consequently, as long as specific implement has all these features and has all these differences from specific performance in English law, the adequacy of damages is not a relevant factor. i.e., (the adequacy of damages is a discretionary matter).⁽⁶³⁾ Specific implement may be refused, not because damages are an adequate remedy, but because of other grounds.⁽⁶⁴⁾

Scots courts do not reject specific implement just because damages are considered an adequate remedy, but because as Lord Young said,⁽⁶⁵⁾ "that would be hard on the party who is required to perform, and where complete justice would be done to the other party by damages". Nevertheless, it was stated that "where the party can procure specific implement for himself with money damages awarded to him he practically gets specific performance".⁽⁶⁶⁾ Again it was stated, "If there is an obligation to deliver a certain quantity of any marketable commodity - quite common article which can be got in the market - to order specific performance - to order delivery of it - would be inconvenient and is never resorted to".⁽⁶⁷⁾ That is vulnerable to criticism, however, for this is an entirely different approach to the remedy of specific implement, and one which is contradictory to the concept and the nature of the remedy in Scots law, for the following reasons:

1-There is no other reason to refuse specific implement except the grounds which have already been considered. If the court refuses specific implement, and grants damages as an alternative remedy, on the grounds that the aggrieved party will be able to reach the same result by obtaining damages, i.e. by buying the article he needs, this amounts to the same thing as specific performance in English law, which considers that specific performance is an exceptional and extraordinary remedy,... etc. Surely no one can say that Scots and English laws are consistent as regards the remedy of specific implement.

2-To say that, "what is done, is to order payment in the form of damages, if it

would enable the party against whom the breach has been committed to secure specific implement himself by going into the market and getting the article",⁽⁶⁸⁾ merely raises again the whole question of adequacy of damages, for instance, where price fluctuates so greatly or the standard of a "marketable commodity - quite a common article",⁽⁶⁹⁾ is different.

3-In English law, if damages are adequate, specific performance will not be decreed, because damages are considered as an equitable remedy,⁽⁷⁰⁾ and the plaintiff, by obtaining damages, can get the article he needs. In Scots law, according to Lord Young's view, the same result will be reached.

4-Ordering the defender to perform specifically by delivering the commodity, achieves more justice than ordering him to pay damages to the pursuer, who then has to go into the market to get the same commodity. He may not get the same, for many reasons.

5-Lord Young's dictum,⁽⁷¹⁾ "He may say - (I am not going into the market, and you can do your worst.) we could put him into jail for contempt, but it is far easier to order him to pay a sum of money which will enable the party he has disappointed to procure specific implement himself", is incomprehensible, because if the party refuses to obey the court's decision he should be imprisoned, unless he cannot perform that decision.

If specific implement is refused on the ground as Lord Young suggested, "because it is easier to order damages...." many defenders will refuse to perform, and subsequently damages will become the ordinary remedy. Thus the concept and the nature of the remedy will be changed.

6-Another criticism could be made on Lord Young's statement,⁽⁷²⁾ "But that is where justice would not be done by damages, and therefore specific performance is ordered". It is submitted, that this statement conflicts with the remedy of specific implement in Scots law. It represents the remedy in English law.

The above point of view is a result of the English law influence on Scots law, which leads to a very serious consequences, such as, turning up-side-down the

principles of the remedy in Scots law. It leads to the conclusion that, where justice would not be done by damages, specific implement is granted, and vice-versa. Damages will then become the ordinary remedy, and specific implement an exceptional one. Furthermore, through such a relationship to damages, it then also becomes a discretionary remedy, i.e. "if they are adequate no specific implement shall be decreed". Moreover, damages become the criterion by which specific implement is granted. It becomes an equitable remedy, because it is normally not ordered, unless damages fail to achieve justice.

To protect specific implement in Scots law, it may be suggested that the remedy should be isolated from the adequacy test and its effects.

2.2-Effect of adequacy of Damages on specific performance in

Iraqi civil law

The principle of adequacy of damages in respect of granting or refusing the remedy of specific performance has not been considered in Iraqi civil law, for the following reasons:

1-The creditor is entitled to have the contract or the obligation specifically performed, as long as it is possible to do so.⁽⁷³⁾

2-Specific performance is a legal remedy. Thus, whenever the creditor has applied for it, or the debtor has offered by himself to do so, then, unless it is impossible, there is no way to grant damages instead,⁽⁷⁴⁾ or even to consider the principles of adequacy of damages.

3-Specific performance, in fact, is not a discretionary remedy, for the court has no power to refuse it, if it is possible, in accordance with the meaning and spirit of the provision of Article 246 (1) of Civil Code. Nevertheless, it may be said, that the court has discretionary power to some extent according to Article 246 (2) of Civil Code. If specific performance is too onerous for the debtor, he "the debtor" may then limit performance to payment of sum of money as a remedy, providing this way of

performance does not seriously prejudice the creditor.⁽⁷⁵⁾ The court has such a discretion, but not to consider whether damages may or may not achieve justice better than specific performances, i.e. "adequate or inadequate". The adequacy test is out of consideration in this case, for the court even in the case of refusing specific performance under Article 246 (2) of Civil Code under equitable grounds examines only whether granting or refusing specific performance is just or unjust. It does not take into account any consideration whether damages are an adequate or inadequate remedy.

If the debtor has offered by himself to perform specifically, the creditor cannot reject this offer. The court should insist on having him accept specific performance,⁽⁷⁶⁾ regardless of damages, whether they are adequate or inadequate.

4-Because Specific performance is not an equitable remedy,⁽⁷⁷⁾ it is not restricted by any principle of whether the goods are or are not easily obtainable in the markets, for in Iraqi civil law if the creditor has applied for specific performance, or the debtor by himself has offered to perform his obligation specifically, the remedy will not be rejected by the court.

5-Under Article 248 (2) of Civil Code, the creditor has the right to acquire an article or goods at the expense of the debtor, where he "the debtor" has refrained from performing his obligation. Surprisingly, the Civil Code has provided for the above Article under the remedy of specific performance. It is submitted, however, that that kind of performance is not specific performance. It is an award of damages to obtain article or goods of the same kind.⁽⁷⁸⁾

Comment

Specific implement in Scots law, has sometimes fallen under the influence of specific performance in English law. Thus judges were of the opinion that the remedy of specific implement is not granted where justice can be achieved by damages.

The remedy of specific implement for breach of contract for the sale of goods

should not be affected by the adequacy test. Scots law is at one with the Iraqi civil law in that respect. The only slight difference is that the test of adequacy of damages is not taken into consideration at all by the Iraqi civil law.

**Sub-Section 2: Damages in addition to or in substitution for
specific implement**

Damages, sometimes, are granted in addition to specific implement to relieve loss the aggrieved party has suffered, when granting specific implement is not sufficient to compensate him.

Damages may be granted in substitution when specific implement is considered inappropriate.

Damages will be considered as follows:

- 1-Damages in addition to specific implement.
- 2-Damages in substitution for specific implement.

1-Damages in addition to specific implement

Damages are granted in addition to specific implement under certain circumstances in both laws. They will be dealt with as follows:

- Damages in addition to specific implement in Scots law.
- Damages in addition to specific performance in Iraqi civil law.

1.1-Damages in addition to specific implement in Scots law

The aggrieved party has been granted the remedy of specific implement, however, he may still suffer loss either by delay of performance, or because performance is defective. If, for instance, the seller has delivered the goods to the purchaser by a decree of specific implement, but the goods were defective, the purchaser still has the right to claim damages because he is not completely satisfied with the remedy.⁽⁷⁹⁾ It is unjust to leave the purchaser to his defective goods without any compensation. The purchaser has an unequivocal right to reject the goods.⁽⁸⁰⁾ Such a purchaser may claim damages in addition to specific implement. However, it was stated,⁽⁸¹⁾ that "it is scarcely necessary to stress that a party claiming implement may also be entitled to

damages". Nevertheless, suppose that a purchaser A has ordered a machine from a seller B. B knows and was informed that A has bought this machine for the purpose of carrying on his business. In addition, it was known to B that if the machine was not delivered at the time fixed by the contract, A would suffer loss of business and he may suffer other damages. It is questionable whether A is entitled to damages in addition to the remedy of specific implement.

A is entitled to the remedy of specific implement if he applies to the court asking for such a remedy,⁽⁸²⁾ and to damages alone if he is only applies for damages, because each party is entitled to recover damages if the party breaches the contract.⁽⁸³⁾

The purchaser A is entitled to recover damages in addition to specific implement, for it is unfair to leave the buyer who suffers loss he does not cause without a complete remedy. Moreover, it is unlawful enrichment, because, the seller "will reap an unjustified benefit at the expense of the other (the purchaser)".⁽⁸⁴⁾ So he should pay for the loss that he caused. Scots authorities are few in this respect.

1-In Linn v. Shields,⁽⁸⁵⁾ Lord Justice-Clerk pointed out that there are three aspects of measuring the damages, which he stated as being "a conclusion for damages over and above performance in respect of injury to the subject, or loss by delay". Furthermore, "proceeding for implement of a contract do not necessarily bar claim of damages founded on the same breach of contract as the defender's delay or failure to implement his obligation may have caused the pursuer loss over and the lack of having the obligation performed".⁽⁸⁶⁾

2-In Sutherland v. Montrose Shipbuilding Co.⁽⁸⁷⁾ Lord Cowan noticed that whatever damages may have been suffered by the purchaser from the delay in making delivery of the specific article beyond the period fixed by the contract, may be recovered from the seller. "He cannot otherwise be kept indemnified for loss sustained by him through the seller's mora. He is entitled to have the specific subject he has bought delivered to him and he is entitled to have indemnification for loss sustained by and through the seller's mora to deliver".

3-Support may be found in the English authorities. For instance, in Grant v. Dawkins,⁽⁸⁸⁾ the seller failed to perform a contract of sale of a house. The contract was for a sale free from incumbrances. The house was subject to two mortgages. The plaintiff raised many claims, including damages and specific performance,...etc. It was held that the purchaser was entitled to these remedies. Again, in Oakacre Ltd. v. Clair Cleaners (Holdings) Ltd.⁽⁸⁹⁾ it was held, "that whilst no cause of action had occurred for damages for breach of contract before the writ was issued, the court was not obliged to consider the damages claim as an isolated claim at law and, since the action was originally properly constituted and brought in good faith as a specific performance action, the court could consider the plaintiff's whole case..... that, in the circumstances it would be unjust for the plaintiffs to be deprived of relief to which they were entitled...". Again, in Jaques v. Miller,⁽⁹⁰⁾ the court awarded £250 to the plaintiff by way of damages in relation to his loss of profit, besides granting specific performance to the plaintiff. Also, in Cory v. The Thames Iron Works & Shipbuilding Co.,⁽⁹¹⁾ "a plaintiff who has filed his bill for specific performance of a contract and compensation in damages, and has obtained performance from defendants before the suit is brought to a hearing, does not thereby lose his right to consequential relief in damages in respect of injury occasioned to him by the delay of defendants in performing the contract".

It seems that damages can be decreed in addition to the remedy of specific implement according to the above cases, for there is no reason why the purchaser should not have the right to obtain damages, if he has suffered loss by reason of the seller's delay or defective implement, since that loss is a natural and a probable result of the seller's failure. They should be recoverable along with the remedy of specific implement.⁽⁹²⁾

1.2-Damages in addition to specific performance in Iraqi civil law

Damages, it was laid down, ⁽⁹³⁾ are either for non- performance specifically, as it

has already been discussed, or for delay in performance specifically by the debtor. Under Article 169 (2) of Iraqi Civil Code.⁽⁹⁴⁾ they are granted, in addition to specific performance whenever there is loss to the creditor caused by the debtor. Furthermore, under Article 168 of Civil Code it is established that damages are an appropriate remedy in addition to specific performance as a remedy for non-performance of the obligation, unless the reason for non-performance is impossibility, which arose beyond the debtor's control. It states, "when specific performance rendered impossible, the obligant shall be condemned to pay damages for non-performance of his obligation, unless he establishes that the impossibility of performance arose from a cause beyond his control. The same principle may apply, if the obligant delayed in performing his obligation".

The purchaser in Iraqi civil law is entitled to damages in addition to the remedy of specific performance on many occasions. The rule of granting damages in addition to specific performance can be established on the following grounds:

1-Any obligation can be performed specifically, unless certain circumstances stand against it.⁽⁹⁵⁾ Suppose that the seller has performed his obligation specifically but the goods somehow are defective,⁽⁹⁶⁾ or the seller has delayed delivering them to the purchaser,⁽⁹⁷⁾ In such cases the purchaser has suffered loss. In each case he is entitled to have the obligation specifically performed. In each case the purchaser is entitled to damages in addition to specific performance if he has suffered loss, for Article 169 (2) of Civil Code provides that, "Damages are an appropriate remedy for every obligation arises from the contract, whether it is an obligation to transfer property or benefit or any other real right, or an obligation to do or not to do something. It comprises the loss that the creditor has suffered and the profit he has missed, providing damages must be the natural consequence of non-performance of the obligation by the debtor, or his delay in performance". Thus, the purchaser is entitled to damages for any loss he has suffered or benefit he has had to forgo.

2-Depriving the debtor of any damages in addition to specific performance in the above cases could be considered unlawful enrichment, for the debtor, "the seller", will

gain unlawful benefit. Thus, he must compensate the aggrieved party "the creditor" under Article 243 of Iraqi Civil Code.⁽⁹⁸⁾

3-It was stated,⁽⁹⁹⁾ that where ordering the party in breach to stop his infringement is pointless, for there is nothing to be gained from granting the remedy of specific performance the aggrieved party is entitled to obtain damages for loss he has suffered and benefit he has missed.

4-The Iraqi Civil Code support the conclusion that damages may be awarded in addition to specific performance. Article 169 (1) provides that "If damages are not being determined in the contract, or if the provision of law does not determine them, the court then undertakes to do so". Additional support may be found under Article 169 (2) of Civil Code above.⁽¹⁰⁰⁾ Furthermore, Article 177 (2) of Civil Code, gives the creditor the opportunity to have damages in addition to specific performance. It states, "In bilateral contracts, if one of the contracting parties does not fulfil his obligation, the other contracting party may, after serving a formal summons, demand rescission of the contract with damages if due. However, the court may grant additional time to the debtor. The court may also reject the demand for rescission, if the part of the obligation which the debtor has failed to fulfil is insignificant in comparison with the whole obligation". Thus under the last paragraph of the above Article which says: "...the court may reject the application for rescission", the obligation should be performed, and the creditor is entitled to have damages for any loss he has suffered or for delay in performance. The creditor according to the above Article is entitled to damages in addition to rescission. Where the debtor has performed the obligation, and also caused loss, damages may also be awarded, subject to the court's discretion in considering the circumstances of whether the debtor deserves additional time to perform, or whether the debtor is *bona fide* or *mala fide*.⁽¹⁰¹⁾

Finally whatever he has chosen, whether specific performance or rescission of the contract, the buyer is entitled to damages for any loss he has suffered.⁽¹⁰²⁾

Comment

Again both Scots and Iraqi law are similar, in that damages may be awarded in addition to specific implement. The basis of granting damages in addition to specific implement in each law is sufficient to show that damages cannot be denied if performance of the obligation specifically does not satisfy the completion of performance of the contract. Furthermore, in both legal systems there is no justification for denying the buyer's right of damages in addition to specific implement, if he has suffered loss or been denied benefit. Nevertheless, it should be noted that Iraq law provides wider scope for this double remedy. The seller in Scots law does not have the right to obtain specific implement, unlike the seller in Iraqi civil law. Therefore, he can only obtain damages. In Iraqi civil law, specific performance can be granted in several circumstances such as delay in delivery or disturbance of the purchaser either by the seller himself or by a third party. Damages can be awarded in addition if they are due.

In Scots law specific implement is restricted to the case of delivery of specific or ascertained goods. Furthermore, all the obligations referred to above cannot be performed specifically. Therefore, damages would be granted either alone or in addition to another remedies, i.e., (Interdict, rescission....etc.).

2-Damages in substitution for specific implement

Damages may be granted in substitution for the remedy of specific implement on certain grounds in both Scots and Iraqi laws respectively, as follows.

2.1-Damages in substitution for specific implement in Scots law

The court may, instead of compelling specific implement grant damages. The choice of this remedy rests on many considerations, mostly "equitable grounds".⁽¹⁰³⁾ Although there is some overlap with the materials reviewed respecting the grounds for refusal of specific implement, the following points should nevertheless be noted:

1-In Scots law the breach of an obligation for the sale of a specific or ascertained goods or things gives the aggrieved party the right to sue for specific implement.⁽¹⁰⁴⁾ Generally, if the aggrieved party, "the purchaser", in Scots law elects to sue for specific

implement, "he cannot be compelled to resort to the alternative of an action of damages".⁽¹⁰⁵⁾ There is, however, an exception to the above principle which is, when "specific implement is shown to be impossible".⁽¹⁰⁶⁾ Where specific implement can be granted, however, damages cannot be awarded as an alternative.

2-In Moore v. Paterson,⁽¹⁰⁷⁾ Lord Shand pointed out that, "The general rule of our law is that when a party has it in his power to fulfil an obligation which he has undertaken the court will compel him to do so". This dictum, it seems conflicts with what was said that, "Frequently the court will not order specific performance. Indeed, as a rule it will not order specific performance.....where complete justice would be done to other party by damages".⁽¹⁰⁸⁾ This is because:

(1)-The court always has discretion to examine whether the remedy of specific implement or damages is the appropriate remedy within the circumstances ⁽¹⁰⁹⁾ of whether there are exceptional equitable and legal grounds.

(2)-"upon equitable grounds" ⁽¹¹⁰⁾ it is possible to reject specific implement by the court, otherwise the court should grant the remedy for the aggrieved party, because it is a legal and ordinary remedy.⁽¹¹¹⁾

(3)-Lord Watson cited three authorities,⁽¹¹²⁾ and pointed out that, "these authorities seem to establish, if that were necessary the proposition that the court has the power of declining, upon equitable grounds, to enforce an, admittedly, legal right; but they show that the power has been very rarely exercised".

3-Lord Young in the same dictum above,⁽¹¹³⁾ said that "the court will not order specific performance. Indeed as a rule it will not order specific performance where that would be hard on the party who is required to perform....". So again when it is hard no specific implement can be ordered. The alternative then will be granting damages.

4-In Union Electric Co. Ltd. v. Holman & Co.,⁽¹¹⁴⁾ The Lord President said "It is argued that this is an action *ad factum prestandum* and the subjects arrested cannot satisfy the judgment in such an action. No it seems to me that when a person asks for delivery of specific article of which there is a *pretium affectionis*, the decree that he wants is the true decree for specific performance; but when he says to the other person,

"we have a contract: under that contract you are bound to deliver; you have not delivered; deliver or else pay damages", he is not asking for a decree *ad factum praestandum* in the proper sense at all". According to that dictum, the criterion of whether the remedy of specific implement or damages are applicable, is whether the article represents *pretium affectionis*.

5-Professor D.M.Walker,⁽¹¹⁵⁾ on the basis of Davidson v. Macpherson,⁽¹¹⁶⁾ has suggested that "where it is reasonably practicable for the pursuer to implement the contract himself, he may be authorised to do so, and get decree against the defender for the cost of performance". It seems that the pursuer may be authorised to implement the contract himself, in order to have his obligation specifically performed. He is granted damages so that he can buy the thing that he has contracted for. By doing so the pursuer cannot be considered to have been granted specific implement. It is a decree for damages. The pursuer cannot be considered to be implementing the contract himself, but in fact he is granted damages, and granting the pursuer damages cannot be regarded as implement of the contract, for it has been said, that "damages are due from the party who fails in any particular respect to make due performance of all or any part of the obligation undertaken by him in a valid and subsisting legal contract".⁽¹¹⁷⁾

6-Damages can be granted as an alternative to specific implement, as in Summerlee Iron Co. v. Caledonian Ry.⁽¹¹⁸⁾ The defenders, (Railway Company), were bound to make and maintain a level crossing over land which belonged to the pursuers, (Iron Company). The pursuers sued for a decree compelling the defenders to construct the crossing. The pursuers then asked leave to amend their summons by adding a conclusion for damages instead of specific implement. The Court of Session allowed the amendment. Lord Salvesen,⁽¹¹⁹⁾ noticed that, "if the pursuers had for a moment anticipated that a decree for specific implement could not be granted, they would originally have sought the alternative remedy which they now ask leave to add". He added, "where a decree is asked for implement of a contractual obligation, and where the pursuers recognise that the defenders may have disabled themselves from giving

such implement, one is quite familiar with the insertion of conclusions for damages to provide against such a contingency".⁽¹²⁰⁾

The question arises as to whether the pursuers should have to amend the summons, when the remedy of specific implement is not obtainable, to have an alternative conclusion for damages, or the court should grant damages as an alternative to specific implement automatically without amending the summons.

The remedy of specific implement must be applied for by the pursuer, otherwise it cannot be granted, despite the party's right to the remedy when its the appropriate remedy, and despite the unjust consequences to deprive the party of his right to it.

Suppose that the pursuer does not mention in his petition any other remedy but specific implement and the court has refused the remedy for certain reasons. It is not fair and just to deprive him any other remedy, for the following reasons:

(1)-Generally, the remedy of specific implement is an alternative form of remedy to damages, although the two remedies "are not fully alternative, that is, it is not open to the pursuer in any and every case to conclude for both alternatively, nor for one or the other in his absolute discretion".⁽¹²¹⁾

(2)-In Moore v. Paterson,⁽¹²²⁾ it was noticed that, "assuming the pursuer had a title to sue, it was in the discretion of the court, in such a case, to determine whether it would ordain specific implement or give decree for damages only, and that in the present case the latter would have been the appropriate remedy". Thus, damages are the appropriate remedy within the circumstances.

(3)-In Stewart v. Kennedy,⁽¹²³⁾ Lord Watson pointed out that, ".....he cannot be compelled to resort to the alternative of an action of damages unless implement is shown to be impossible...". Thus damages are the appropriate remedy where performance of the obligation specifically is impossible, or even upon other equitable grounds. Further, "Even where specific implement is possible, I do not doubt that the Court of Session has inherent power to refuse the legal remedy upon equitable grounds".⁽¹²⁴⁾

(4)-In Mac Arthur v. Lawson,⁽¹²⁵⁾ Lord Shand said, "The law will not compel parties to enter upon, or in some cases to keep up, a close and intimate relation against their will, but will give damages for breach of contract. the most common example is an engagement to marry so also in partnership. the law shall not compel specific implement where the copartnership has not begun, but damages will be given in lieu of implement".

(5)-The exceptional hardship that would be involved in performing specifically renders the pursuer entitled to damages.⁽¹²⁶⁾

It seems that the court cannot order damages if the pursuer applied only for specific implement, because there could be no way of assessment to the damages. If specific implement is refused by the court, the pursuer would have to raise an action for damages. The pursuer, however, may amend his crave by adding an alternative crave for damages, ⁽¹²⁷⁾ so he can secure his right of damages where specific implement becomes impossible, ⁽¹²⁸⁾ or the court decides not to grant it within its discretion for exceptional circumstances.⁽¹²⁹⁾ If the pursuer includes an alternative crave for damages, he is not barred from insisting by his crave on a decree of specific implement.⁽¹³⁰⁾ Nevertheless, sometimes even if the pursuer claims specific implement, neither specific implement nor damages can be granted. For instance, in Leitch v. Edinburgh Ice Co.,⁽¹³¹⁾ a defender agreed to let a piece of ground to the pursuer. It also agreed that the pursuer should receive from the defender the old material of the buildings. The pursuer then brought an action against the company for damages for breach of contract by the defender in failing to hand him over the old material. It was held; that "the obligation to deliver the old material was an obligation to deliver a specific thing, and that as the thing had perished without fault on the part of the company, they were not liable in damages for failure to deliver it". It seems that neither specific implement nor damages can be granted if failure to perform is neither party's fault.

In Harvey v. Smith, ⁽¹³²⁾ it was noticed, " that the second conclusion was ancillary to the first, and that if the first conclusion was dismissed, damages could not

be awarded under the second". Consequently, it is submitted that damages cannot be considered as an alternative to specific implement in Scots law, unless there are grounds for refusing the remedy of specific implement. Furthermore, an application by the pursuer for specific implement and damages together does not affect the court's discretion to award damages as an alternative, if specific implement is refused.

2.2-Damages in substitution for specific performance in Iraqi civil law

Basically, in Iraqi civil law, damages are not an alternative remedy to specific performance. Nevertheless, damages may be granted as an alternative remedy in certain circumstances, namely:

1-It was laid down that,⁽¹³³⁾ if it is not possible to perform the obligation specifically because of the debtor's fault, damages are an appropriate remedy instead of specific performance. Furthermore, under Article 246 (2) of Iraqi Civil Code, if specific performance is too onerous for the debtor he may limit performance to payment of a sum of money as indemnity providing that this method of performance does not seriously prejudice the creditor.⁽¹³⁴⁾ Thus, damages may be granted instead of specific performance.

2-Damages may be an alternative to specific performance if the contracting parties have agreed that it is, regardless of whether specific performance is an appropriate or inappropriate remedy.⁽¹³⁵⁾ However, if the creditor has applied for specific performance, but specific performance cannot be granted, he is not entitled to damages alternatively, unless he adds a new crave or amends the original crave, for damages are not included implicitly in the original crave.⁽¹³⁶⁾ Furthermore, it was stated, ⁽¹³⁷⁾ that the court cannot judge or examine something unknown. In addition, the civil court is obliged to consider precisely what the plaintiff has applied for. Thus, the court is not empowered to grant the applicant more than he has applied for in his petition, or to grant him something different.⁽¹³⁸⁾ Also, it is in the defendant's interest, that the

plaintiff should be precise and definite in his petition, to let him know precisely what he is supposed to do, to prepare his defence against the action.⁽¹³⁹⁾

It seems that the court cannot grant damages instead of specific performance, unless the plaintiff has applied for them. It is submitted, however, that the court after considering the case, and presuming, that specific performance cannot be granted for one reason or another, the court may grant damages automatically. It is unjust to deprive the plaintiff of his right of damages, especially when the court becomes aware of his right within the action. Further, time and expenditure may be saved.

Nevertheless, it was pointed out ⁽¹⁴⁰⁾ that there is no separate option for either party to select damages as an alternative to performing the obligation specifically. Thus, the creditor is entitled to reject remedies which have been offered by the debtor, and to insist on having specific performance. The debtor also is entitled to reject the creditor's application for damages instead of specific performance provided that specific performance is appropriate.⁽¹⁴¹⁾

3-According to Article 248 (2) of Iraqi Civil Code, if however, the debtor does not fulfil his obligation, the creditor may, upon an order of the court, or in case of urgency even without such an order, acquire an article of the same kind at the expense of the debtor. Alternatively, he may claim the value of the article without prejudice to his rights to damages. It is doubtful whether such performance is specific performance. It is submitted, however, that whenever the creditor is unable to obtain the item he has contracted for, and obtains money damages to buy that article, specific performance is no longer applicable.

Comment

There is concurrence between Iraqi civil law and Scots law as regards whether damages are or are not granted alternatively to specific implement. They are granted in both laws within certain circumstances. Furthermore, the main considerations for granting damages as an alternative remedy to specific implement are either the

impossibility of performing the obligation or exceptional hardship or undue difficulty in doing so.

The courts in Scotland and Iraq cannot order damages automatically, where specific implement is refused, unless damages are sought for alternatively or additionally. That is due to the consequences of the ambiguous and indefinite crave.

Section Two: The remedy of interdict and specific performance for breach of an obligation to refrain from doing something

An obligation of a negative character (not to do something) may be enforced by an action called interdict in Scots law. In Iraqi civil law, it is called specific performance. Interdict is different from specific implement although Iraqi civil law considers it as a specific performance for breach of an obligation to refrain from doing something. Interdict and specific performance as a remedy for breach of an obligation to refrain from doing something should be considered in two sub-sections, namely:

Sub-Section 1: The nature of interdict and specific performance as a remedy for breach of an obligation to refrain from doing something.

Sub-Section 2: Grounds for granting and refusing interdict and specific performance as a remedy for breach of an obligation not to do something.

Sub-Section 1: The nature of Interdict and specific performance for breach of an obligation of refraining from doing something

Interdict has its own special nature. It is a discretionary, and exceptional remedy. By contrast, specific performance as a remedy for breach of an obligation not to do something is an ordinary legal remedy. These two remedies will be considered as follows:

1-The nature of interdict in Scots law.

2-The nature of specific performance as a remedy for breach of an obligation to refrain from doing something in Iraqi civil law.

1-The nature of interdict in Scots law

Interdict is a remedy ordered by the court "either against a wrong in course of being done, or against an apprehended violation of a party's rights, only to be awarded on evidence of the wrong, or on reasonable grounds of apprehension that such violation is intended".⁽¹⁴²⁾ The process of interdict is by its peculiar nature, quasi- criminal.⁽¹⁴³⁾ Therefore, it is different from any other civil suit.⁽¹⁴⁴⁾ Thus a party is liable to summary punishment, fine and imprisonment, and may be held liable for expenses too, if he fails to observe the interdict in any particular.⁽¹⁴⁵⁾ Furthermore, it is of an extraordinary nature, for it is "not to be given except for urgent reasons, and even then it is not as a matter of right, but only in the exercise of a sound judicial discretion".⁽¹⁴⁶⁾ An interdict is thus an extraordinary, and discretionary remedy.

Interdict is also a preventative remedy.⁽¹⁴⁷⁾ In Hay's Trs. v. Young,⁽¹⁴⁸⁾ Lord Gifford, noticed that, "The remedy of judicial interdict is a most important one, for it proceeds on the principle that prevention better than cure, and that in many cases it is more expedient to prevent a wrong from being done than merely to attempt to give subsequent redress." Further, it "is a preventive proceeding, and by its very nature it may competently be invoked in suitable circumstances to restrain the commission in the future of a violation of rights not yet committed but only reasonably apprehended".⁽¹⁴⁹⁾

The court's jurisdiction in granting or refusing interdict is equitable. The court is never bound to grant or refuse intrdict.⁽¹⁵⁰⁾ It has been laid down,⁽¹⁵¹⁾ that "there is an equitable power vested in the court in virtue of which, when the exact restoration of things to their former conditions is either impossible or would be attended with unreasonable loss and expense, quite disproportionate to the advantage which it would give to the successful party, the court can award an equivalent -in other words- they can say upon what equitable conditions the building should be allowed to remain where it is, although it has been placed there without legal right".

As a discretionary remedy, it follows that in many cases it will be inapplicable, or

will be refused even if there are good grounds in law especially if public interest is involved.⁽¹⁵²⁾ Furthermore, interdict has been refused by the court in circumstances where the other party had trespassed in good faith and unintentionally.⁽¹⁵³⁾

It is open to question to whether the discretionary aspect of the remedy means that it is equitable and exceptional.

It was also pointed out,⁽¹⁵⁴⁾ that the remedy of interdict is "not to be given except for urgent reasons". In addition, "even then as a matter of right, but only in the exercise of a sound judicial discretion".⁽¹⁵⁵⁾ Further, in Earl of Crawford v. Paton,⁽¹⁵⁶⁾ Lord Salvesen stated that "The court is not in the habit of granting the remedy of interdict unless a wrong has been done or is apprehended". It means, that granting the remedy of interdict relies on exceptional, and extraordinary circumstances.⁽¹⁵⁷⁾ In addition interdict cannot be granted, "unless a wrong has been done or is apprehended".⁽¹⁵⁸⁾ Also, "The essence of a case for interdict is that either there is a wrong being actually committed, or that a wrong is apprehended".⁽¹⁵⁹⁾ Again, "interdicts are granted by this court.....when appreciable wrong to a man, whether in his property or other rights is threatened".⁽¹⁶⁰⁾

Due to the very peculiar nature of the interdict,⁽¹⁶¹⁾ a party failing to perform or to observe it may be exposed to a punishment, such as fine and imprisonment.⁽¹⁶²⁾ It is of great importance that the courts should make a satisfactory examination of the urgent reasons and other circumstances i.e., a wrong being actually committed, or is apprehended.⁽¹⁶³⁾ The court may refuse to grant an interdict even when the prayer has shown good grounds in law for granting it.⁽¹⁶⁴⁾ In addition, a wrongful or illegal act being committed unintentionally and in a good faith,⁽¹⁶⁵⁾ may constitute a reason for refusing interdict by the equitable jurisdiction of the court. Consequently, the court's discretion is very wide. The court may use that discretion to examine the wrong or illegal act, in order to distinguish between completed and continuing wrongs,⁽¹⁶⁶⁾ for such a distinction is substantial for granting or refusing interdict.

Thus the court's discretion is the sole criterion in granting interdict. The equitable

jurisdiction is applied in favour of granting rather than refusing interdict. To the contrary, specific implement is based on legal grounds and therefore its not a discretionary remedy. Thus, the court's equitable jurisdiction will be applied against granting specific implement.

2-The nature of specific performance for breach of the obligation of refraining from doing something in Iraqi civil law

When a debtor undertakes to refrain from doing something, and commits a breach to such an obligation, the creditor may demand the suppression of the breach of the obligation, without prejudice to his right of damages.⁽¹⁶⁷⁾ This kind of obligation is of an ordinary nature. It is the negative character of specific performance, i.e to refrain from doing something.⁽¹⁶⁸⁾ The nature of specific performance as a remedy for breach of the obligation of refraining from doing something is similar in most respects to specific performance as a remedy for breach of obligation of doing something.⁽¹⁶⁹⁾

In the case of the obligation not to do something, the debtor is regarded as performing his obligation as long as he refrains from doing the thing that he has promised not to do.⁽¹⁷⁰⁾ The position is changed at the moment the debtor does the thing that he has promised not to do.⁽¹⁷¹⁾ Therefore, the obligation no longer can be respected, namely; "specific performance has become impossible", and damages will be granted as an alternative to ordering the debtor not to commit breach.⁽¹⁷²⁾

Although the remedy for breach of an obligation to refrain from doing something is considered in Iraqi civil law as specific performance, it has special characteristics which make it slightly different from specific performance for the obligation to do or to give something. The obligation not to do something is deemed to have been carried out so long as the debtor refrains from doing that thing, but if he breaches such obligation, the distinction should be drawn between two cases, namely:

(1)-When it is possible to remove the consequences resulting from the breach by ordering the defaulting party to stop his unlawful act,⁽¹⁷³⁾ or the creditor demands the court's order to suppress the debtor's act,⁽¹⁷⁴⁾ specific performance can be achieved by

the the court's judgment.⁽¹⁷⁵⁾ If for instance a purchaser A has bought specific goods from a seller B. The seller has undertaken under the contract, not to disturb the buyer in his enjoyment. The creditor may stop the disturbance by asking the court to compel the seller to do so. In this kind of cases the remedy for breach of the obligation of refraining from doing something can be fulfilled at any time the debtor commits breach to his obligation.⁽¹⁷⁶⁾

(2)-When it is impossible to remove the consequences resulting from the breach of the obligation, such as if the debtor discloses know-how.

Breach of the obligation in the above case is regarded as an end to the obligation, for it is impossible to be performed specifically any more by the debtor. The only remedy possible is damages. However, it is not impossible to ordain the party in breach to refrain from committing another breach at least for the future.⁽¹⁷⁷⁾ It was argued⁽¹⁷⁸⁾ that, as soon as the debtor commits a breach to his obligation, there is no alternative but compensation. In addition, the compensation can only be monetary, such as if the worker discloses the "know how", the employer cannot demand the suppression of the breach because it is impossible for the worker to respect his obligation. Thus, the remedy is called specific compensation, and this can occur by removing the suppression. The above argument differentiated between specific performance and specific compensation by saying that, specific performance always takes place before breach of the obligation. Thus, the debtor is considered as performing his obligation specifically as long as he refrains from committing breach of the obligation, whereas specific compensation always takes place after breach of the obligation. Therefore, suppression of infringement is always achieved by specific compensation.⁽¹⁷⁹⁾ This above argument has been criticised and rejected, by stating, that the purpose of suppression is to reinstate the debtor to his position before the infringement took place.⁽¹⁸⁰⁾ Above all, there is no distinction between the obligation to refrain from doing something, and performing the obligation to give or to do something, for in both specific performance is granted.⁽¹⁸¹⁾ Further, the above

argument (182) has been challenged (183) for the following reasons:

It is inconsistent with Article 212 of Civil Code,⁽¹⁸⁴⁾ which provides for the obligation to refrain from doing something, with the Chapter, which is devoted to the remedy of specific performance, not with the Chapter of compensation in lieu of performance.⁽¹⁸⁵⁾

Specific compensation cannot be considered as a remedy for a breach of obligation to refrain from doing something, for it has no legal basis. The law classifies two ways of performance, either specific performance, or compensation in lieu of performance, i.e. "damages" in this respect. In addition, specific compensation seems different from specific performance only in the heading, because under the above argument the remedy for breach of the obligation to refrain from doing something is considered under the subject of specific performance, and the examples are given show that the debtor, who infringes his obligation, may be compelled to stop the breach to his obligation when it is possible.⁽¹⁸⁶⁾

To what extent can specific performance as a remedy for breach of the obligation to refrain from doing something, be regarded as a preventive remedy?

Performance of the obligation not to do something, is fulfilled by warning the debtor not to do the thing which he has undertaken not to do, and by reminding him that he is subject to the punishment under Article 240 of Iraqi Criminal Code,⁽¹⁸⁷⁾ if he disregards the obligation.⁽¹⁸⁸⁾ Basically, the remedy for breach of the obligation to refrain from doing something is not a quasi-criminal nature. It is a civil law remedy. However, if the debtor insists on committing breach to his obligation after being informed not to do so, he then is subject to be punished under the above Article of Criminal Code.

There are two kinds of breaches to the obligation of refraining from doing something, namely:

1st:-Breach of the obligation, which can be prevented and stopped after being committed, and 2nd:-Breach of the obligation, which cannot be stopped and

prevented after being committed.

In the first case, the obligation is still effective. For instance, "the obligation not to disturb the purchaser in his enjoyment of the sold item". If the seller commits breach, he can be enforced to stop that.

In the second case, if for instance the debtor has disclosed know-how which should be confidential, thus ordering him not to break his obligation is no longer applicable, for it is pointless.

It seems that the remedy of specific performance for breach of obligation of refraining from doing something, is a preventive remedy. It can be assumed in the two above cases. When it is anticipated that the debtor will break his undertaking, thus, providing such expectation is based on reasonable reasons, the court can prevent him doing so.

The remedy for breach of the obligation to refrain from doing something is specific performance, for if the creditor has applied for it, the court should answer his application if performance of the obligation is still possible. It is a matter of right to the creditor.⁽¹⁸⁹⁾ Damages cannot be considered as an alternative to ordering the debtor to refrain from doing which he has promised not to do.⁽¹⁹⁰⁾ Nevertheless, if performance of the obligation is exceptionally hard and unduly difficult for the debtor, the court will order damages. If, for instance, the court has assumed that suppression of the infringement is too onerous for the debtor, it may limit performance to damages, provided that this method of performance does not seriously prejudice the creditor.⁽¹⁹¹⁾

The court's discretionary power appears to be stronger in this part of specific performance than in the positive part, i.e., "specific performance as a remedy for breach of obligation of doing something", especially, if the infringement is recurring. The court, in such a case, shall take the due steps and procedures to prevent the recurrence of such infringement whenever it is possible.⁽¹⁹²⁾ Where the breach of the obligation to refrain from doing something is of such a nature that it cannot recur, namely, "can be broken for once", such as in the case of disclosing know-how, the

only remedy then is damages. The court may use its discretion, however in deciding whether the obligation to refrain from doing something is worth respecting after the breach has been committed. The court will consider the circumstances and examine the nature of every obligation to decide whether specific performance is or is not possible. The court may be convinced that the debtor, even after he has broken his obligation, can nevertheless usefully be ordered to perform his obligation, at least for the future. There upon, the court may compel him to so.

The court's intervention to grant the remedy in the case of the obligation to refrain from doing something, does not affect or alter the nature of the remedy as an ordinary legal remedy.

Comment

1-In comparing interdict and specific performance as a remedy for breach of obligation to refrain from doing something, in both Scots and Iraqi laws, it should be observed that each has a different character, for ordering the debtor to refrain from doing something is specific performance in Iraqi civil law. It is a remedy for breach of an obligation of negative character. Thus, ordering the debtor to respect his obligation before he breaches it, and ordering him to stop his infringement if he has committed a wrong, means ordering him to respect the obligation which he has undertaken. It is not an order to indemnify the creditor. The creditor may be compensated if he has suffered loss. Furthermore, whenever it is possible to enforce the obligation against the debtor, i.e., "preventing him from doing what he has undertaken not to do", the obligation is deemed to have been fulfilled. On the contrary, in Scots law interdict is considered as a remedy granted by the court against the party who has committed wrong or is going to do so. It is not specific implement.

2-Ordering the debtor to respect what he has promised not to do is not an exceptional remedy. It depends on the character of the obligation whether it is of a negative or a positive character and, it is surely useful to order the debtor, who has

already, broken his promise to stop breaking that promise. Also, it depends on the state of the debtor who is going to break his obligation. Thus, in these cases, ordering the debtor to perform his obligation by the court, is not an exceptional remedy. It is performance of the obligation which is of a negative character.

In Scots law, the remedy of interdict is not to be given except for urgent reasons. Therefore, it is considered as an extraordinary and exceptional remedy.

3-The Iraqi court has discretion towards granting or refusing specific performance as a remedy for breach of an obligation to refrain from doing something, but it cannot be said that the remedy is a discretionary remedy. Consequently, performing the obligation of refraining from doing something is examined under the same principles as those of the obligation to give or to do something. The case of interdict on the other hand, is different. It is a discretionary remedy which relies very much on the court's discretionary power.

4-Specific performance for breach of an obligation not to do something, and the remedy of interdict, have something in common, namely:

- (1)-The contracting party, who has breached the obligation may be exposed to a punishment and to a fine.
- (2)-Both of the remedies can be regarded as a prophylactic measures against breaking the obligation by the contracting party.

Sub-Section 2: Grounds for granting and refusing the remedy of interdict, and specific performance for breach of an obligation to refrain from doing something

The decision to grant or refuse the remedy of interdict as a remedy for breach of an obligation of a negative character depends on the wrong and its circumstances. Not every wrong will give grounds for granting or refusing the remedy. Also, the court's discretionary power may play a substantial role in granting or refusing interdict.

Specific performance as a remedy for breach of the obligation to refrain from doing something is based on the same grounds as those of the remedy for breach of the obligation to do something. Granting or refusing the remedy of interdict and specific performance will be considered as follows:

1-Grounds for granting or refusing interdict in Scots law.

2-Grounds for granting or refusing specific performance as a remedy for breach of the obligation to refrain from doing something in Iraqi civil law.

1-Grounds for granting and refusing interdict in Scots law

It was stated,⁽¹⁹³⁾ that ".....in many cases it is more expedient to prevent a wrong from being done than merely to attempt to give subsequent redress". Moreover, "Interdict.....may competently be invoked in suitable circumstances to restrain the commission in the future of violation of right not yet committed but only reasonably apprehended".⁽¹⁹⁴⁾ Furthermore, it was pointed out that, "the essence of a case for interdict is that either there is a wrong being actually committed, or that a wrong is apprehended."⁽¹⁹⁵⁾ Again, "Broadly speaking, interdict is granted against a wrong which is in the course of being committed or where there is reasonable grounds for apprehending that a wrong is intended to be committed".⁽¹⁹⁶⁾

Thus, interdict is competent only against a wrong, but as it was laid down ⁽¹⁹⁷⁾ that if the act is something which is merely unpleasant or unwelcome, or harmful yet permissible in accordance with the law, interdict in such a case is not competent. Interdict is not competent against every wrong, although "it is competent to interdict only what is a legal wrong and infringement of the complainer's right".⁽¹⁹⁸⁾

If a contract of sale of goods, for instance, contains a clause under which one of the contracting parties is bound to refrain from pursuing some conduct, any breach or threat thereof may give the other party the right to claim interdict.⁽¹⁹⁹⁾

Interdict, it was said, "is not a remedy to be had for asking; it involves penal consequences in case of breach; and it will only be given upon clear averment and proof

of actual or definitely apprehended invasion of a legal right".⁽²⁰⁰⁾ Thus in the case of a contracting party who has undertaken not to continue a particular trade, interdict is the appropriate remedy, on the assumption that such an obligation is valid and legal.⁽²⁰¹⁾ By the same principle a seller who has undertaken not to damage or resale the sold goods or even not to disturb the buyer in his enjoyment, interdict is an appropriate remedy, because the seller's first obligation is to refrain from committing breach to his obligation.

Suppose, that a seller A has sold a car to a buyer B. A has undertaken not to do many things under the contract, such as; not to disturb, not to damage the goods, or not to resale the thing to another person. Suppose also, that the seller A has broken one or more of his undertakings after the completion of the contract. Is the buyer B entitled to interdict him from doing so?

The case for interdict is that either there is a wrong being committed, or a wrong is apprehended.⁽²⁰²⁾ Further interdict is granted on reasonable grounds against an apprehended violation of a party's rights.⁽²⁰³⁾ Thus interdict is granted against the seller for the following reasons:

First: 1-The wrong which has been committed by the seller should be either a threatened or continuing one, for interdict is regarded in many cases,⁽²⁰⁴⁾ as incompetent and inappropriate against a wrong completed. However, if there are averments of intention which show that the wrong will continue after being completed, interdict in this case is an appropriate remedy.⁽²⁰⁵⁾ Furthermore, it was pointed out by Lord MacLaren,⁽²⁰⁶⁾ that "the complainer has to establish such action on the part of the respondent as will justify a reasonable apprehension that they are going to interfere with his rights". Thus the above seller will be interdicted if he has committed a continuing wrong or a threatened one. The problem which arises here is, under which circumstances is the wrong if it is threatened, considered?

2-Interdict is an inappropriate remedy where the act is something just unpleasant or unwelcome, or even harmful but legally permissible.⁽²⁰⁷⁾ It should be a threatened wrong. It lies with the court's discretionary power to consider whether the wrong is or

is not threatened. Furthermore, "to support an application for interdict the complainer has to establish such action on the part of the respondent as will justify a reasonable apprehension that they are going to interfere with his rights".⁽²⁰⁸⁾ Also, "Broadly speaking, interdict is granted against a wrong.....where there is reasonable grounds for apprehending that a wrong is intended to be committed".⁽²⁰⁹⁾ Thus, the matter of reasonable ground is a matter subject to the court's discretion, although the court is never bound to grant an equitable jurisdiction unless is sure that granting such judgment will not cause another wrong.⁽²¹⁰⁾ In addition, in Winans v. Macrae,⁽²¹¹⁾ Lord Young, pointed out that, interdict is granted by the court, if appreciable wrong whether in property or in other rights, is threatened, otherwise, no interdict can be granted. In Caledonian Rly. Co. v. Magistrate of Glasgow,⁽²¹²⁾ it was held that, it was premature to order interdict, therefore, it was refused. Thus unless there is evidence of an instant threat or intention to do so, interdict cannot be decreed.

3-It seems that there are two substantial elements in considering whether the wrong is threatened, namely:

(1)-The court's discretionary power towards granting or refusing interdict.

(2)-The evidence which shows that the defender is intending to commit a wrong.

4-If a wrong is a continuing one, interdict is the appropriate remedy.⁽²¹³⁾ Nevertheless in Hood v. Trail,⁽²¹⁴⁾ interdict is considered inappropriate against a wrong which is contingent and which may not arise.

In Gavin v. Ayrshire County Council,⁽²¹⁵⁾ it was laid down by Lord Cooper that "Interdict is a preventive proceeding and by its very nature it may competently be invoked in suitable circumstances to restrain the commission in the future of a violation of rights not yet committed but only reasonably apprehended. That is a general rule. But when the subject of an application for interdict is an anticipated nuisance, the rule requires to be formulated with greater precision. There are certain operations or works which are "ticketed by law as nuisance.....because the law holds that they cannot be carried on without constituting a nuisance..". He added that, "I should have great

difficulty in regarding these apprehensions as reasonable, much less as presenting that degree of strong probability which the rule requires. The best that can be said for such speculative fears is that it is not impossible that at some unpredictable future date the envisaged concatenation of circumstances may occur. But that is all, and that will not suffice".⁽²¹⁶⁾

5-There is no difficulty in considering whether a wrong is a completed or a continuing one, as the court within its discretionary power can examine the circumstances. Thus a completed wrong may be interdicted if it is likely to recur,⁽²¹⁷⁾

Secondly:-The wrong which has been committed or is apprehended, should be illegal. Thus, "to justify the interposition of the court in granting an interdict, the party applying for it must show a legal title to the subject, of which his use and enjoyment and right of possession are alleged to be unlawfully interfered with; and further, he must show either that there has been plain invasion on his property by a party having no right or title whatever in or to the subject or its use...".⁽²¹⁸⁾ If the seller in the above example has disturbed the buyer because he is unpaid seller, no interdict can be granted against him. Furthermore, "interdict is competent against a threat to dispossess, as the taking of corporeal movables without the possessor's consent would be, civilly, spuilzie and, criminally, possibly theft".⁽²¹⁹⁾ Thus, an unpaid seller, who still retains possession of the goods under the right of lien until payment of the price, may justify interdict against the buyer who wants to take possession of the goods,⁽²²⁰⁾ because the seller still has lawful title to possession of the goods. If the seller lawfully has disturbed or even prevented the buyer from taking possession of the goods, the buyer cannot interdict him from doing so, because, "A decree of permanent interdict is an order prohibiting a defender from doing an illegal act",⁽²²¹⁾ on an assumption that the buyer has broken one or more of the contract's conditions. It can be concluded then, that the pursuer should not give the defender any opportunity to raise any legal claim against him. Otherwise, the wrong that has been committed or apprehended will be regarded as lawful, and therefore no interdict can be ordered.

Thirdly:-The wrong should not be committed in good faith,⁽²²²⁾ or mistakenly,⁽²²³⁾ or accidentally.⁽²²⁴⁾ To consider these facts, the court, in deciding whether to order or to refuse interdict, examines its equitable jurisdiction. The court, as has already been considered,⁽²²⁵⁾ has wide discretionary power to grant or refuse interdict.

Examining the circumstances surrounding the wrong itself is vital for granting interdict, for the wrong may be committed in good faith, or mistakenly or accidentally. Therefore the remedy will not be granted.

Finally, interdict is a decree issued by the court to order a defender to refrain from doing something. Granting or refusing interdict is based on the nature of the wrong, i.e., "threatened, committed, continuing" in accordance with the court's discretionary power.

On the contrary, specific implement is a legal remedy if the goods are specific or ascertained. Also, the wrong does not play any role in granting the remedy of specific implement, although it could be a reason for refusing it when the wrong is committed by the purchaser. Furthermore, there is no difference between seller or buyer, i.e., "any party to the contract is subject to be interdicted".

2-Grounds for granting or refusing specific performance as a remedy for breach of an obligation to refrain from doing something in Iraqi civil law

Ordering the debtor to respect his obligation of refraining from doing what he has undertaken not to do, is subject to the same grounds those have already been considered.⁽²²⁶⁾ However, it is doubtful whether the debtor's refusal to perform his obligation of refraining from doing something is subject to the court's discretionary power. Nevertheless, the remedy is not for the court to grant if it thinks fit. It must grant it whenever it is possible. for the following reasons:

1-It is considered as a specific performance,⁽²²⁷⁾ and the court's discretionary power plays little part.

2-If performing the obligation to refrain from doing something is possible, the court must order the debtor to comply with it. No other alternative remedy can be ordered.

Specific performance as a remedy for breach of the obligation, whether, to do or not to do, cannot be granted unless it is applied for to the court by the creditor.⁽²²⁸⁾ In the case of a threat to breach the obligation, the thing that the creditor can do, is to tell the court about it. The court will take the due steps to prevent such threat or it may warn him of the consequences of breaking his obligation. The court will examine the possibility of breaking the obligation, and if it thinks that the debtor is serious in his threat, warn him to respect the obligation. If the threat remains, and later the wrong is committed, that may convince the court to compel him to a greater penalty than if the wrong had been committed without persistence. This occurs when performance of the obligation is impossible. Where the obligation can be fulfilled even after being broken, the court orders the debtor to stop his infringement, and forces him to pay the penalty if he insists on not respecting the decree, taking into account the loss suffered by the creditor and the creditor's unjustifiable attitude.

Where the debtor refuses to comply with the obligation of refraining from doing something legally, that means that he is entitled not to perform his obligation by one way or the other, for in bilateral contracts in Iraqi civil law, if one of the parties does not perform his obligation, the other party may, after serving a formal summons on the debtor, demand the performance of the contract or its rescission with damages if due.⁽²²⁹⁾ Further, under Article 178 of the Civil Code the parties may agree that, in case of non-performance of the obligations flowing from the contract, the contract will be deemed to have been rescinded "*ipso facto*" without a court's judgment.⁽²³⁰⁾ Thus, whenever the debtor has an excuse, i.e. "legal excuse" not to perform, the creditor cannot compel him to do so. In the sale of goods contract, the seller is obliged, for instance, not to disturb or not to claim any right on the goods against the buyer. Suppose that the buyer has not paid the price. The seller in claiming repossession of

the property or in disturbing the buyer's enjoyment, is not deemed to have committed breach to his obligation. If the wrong has been committed or the breach of the obligation of refraining from doing something has occurred by mistake or in good faith or accidentally, the court will compel him to stop breaking the obligation. It seems that the court's order depends on the nature and the kind of the obligation whether it is possible to be repaired or it is impossible to be performed specifically, after committing a breach.⁽²³¹⁾ The debtor is deemed to have committed a wrong when he does not perform his obligation, whether deliberately or by negligence,⁽²³²⁾ because the debtor's obligation is an obligation to achieve a result i.e., refraining from doing the thing that he has promised not to do.⁽²³³⁾ Therefore, whenever the debtor does not achieve that result, he is deemed to have breached his obligation.

Iraqi civil jurisprudence and the judiciary are silent concerning the matter of specific performance as a remedy for committing a wrong or breaching a contract mistakenly or in good faith or accidentally. However, it is submitted that the debtor is obliged to respect his obligation and to stop breaking his promise if the obligation can be carried on after committing breach, such as to stop the seller from disturbing the buyer, and ordering him to pay damages if they are due. Nevertheless, if the obligation cannot be carried on after committing breach, the debtor should be compelled to pay damages, for performing the obligation specifically becomes impossible.

The kind of obligation of refraining from doing something, whether it can or cannot be carried on after committing breach, plays an essential role in ordering or refusing specific performance, and in the way that the court exercises its discretionary power towards the problem of granting or refusing the remedy. Nevertheless, the principles in Article 246 (1) of Civil Code, which provides; "A debtor shall be compelled to perform his obligation specifically, if such performance is possible", govern the whole matter.

Comment

The remedy of interdict in Scots law and specific performance for breach of an obligation to refrain from doing something in Iraqi civil law, have something in common; both of them are based on the wrong, whether it has been committed or it is being committed or it will be committed, taking into account the nature of the obligation, and whether it is possible to be performed after being broken by ordering the debtor to stop his wrong or it is rendered impossible at the moment that the contracting party breaks the obligation. Also, in both laws, the seller and the purchaser are equal in obtaining such a remedy. Nevertheless, Iraqi civil law and Scots law are entirely different upon certain cases, namely:

Interdict in Scotland is an entirely discretionary remedy. It is granted under the court's discretionary power even if the wrong is a continuing one, although the possibility of granting interdict in such a case is very strong compared with the other cases. In Iraqi civil law, the case is different, for specific performance as a remedy for breach of the obligation to refrain from doing something, is a matter of right and not a matter of discretion. Nevertheless it may be subject to the court's discretionary power more than the other positive character of the remedy, i.e. "to do or to give something", because specific performance as a remedy is based, on wrongs which need to be examined by the court. However, ordering the debtor not to do something, is not a discretionary remedy, for the grounds of granting and refusing the remedy are the same in both the positive and negative aspects of this remedy.

CONCLUSION

1-Specific implement should and must be isolated from any influence of the adequacy test, for if there is any influence by such a principle, specific implement becomes a remedy of a different nature, one which will not be granted readily. Also, the criterion by which damages can be tested as adequate or inadequate is not settled in one rule. It depends on the circumstances in each case. In addition, the principle of adequacy carries with it another test, which is the test of uniqueness.

2-If the adequacy test and the uniqueness test interfere in the principles of specific

implement and are accepted as a principle governing the grant or refusal of the remedy, specific implement will become an equitable, exceptional, extraordinary and discretionary remedy.

3-Damages in addition to specific implement are granted whenever there is dissatisfaction with the performance of the contract, where the creditor, "the buyer", has suffered loss or has been deprived of benefit by reason of the debtor's fault.

4-Damages as an alternative remedy to specific implement are not ordered, unless there are grounds for doing so.

5-The decision to refuse specific implement and grant damages alternatively is based on equitable grounds besides other legal grounds. However, granting specific implement should not be a matter of discretion, but of legal grounds.

6-Interdict is entirely subject to the court's discretionary power in Scots law. Therefore, it is a discretionary, equitable, and extraordinary remedy. It is of different nature from specific implement. On the contrary, specific performance for breach of an obligation to refrain from doing something in Iraqi civil law, is specific performance. There is no difference between it and specific performance as a remedy for breach of an obligation to do or to give something.

FOOT-NOTES

1-G.Jones & W.Goodhart, Specific Performance. op.cit. p.

2-Spencer L. Blaylock J.R. "specific performance of chattels contract". North Carolina L.Rev. vol:34, 1956, pp.551-559.

3-John P. Dawson, Specific Performance in France & Germany, Mich.L.Rev. vol:57, 1959, p.532.

4-Ibid.

5-Prof. Corbin, pp.507-509, cited by M.T.Van Hecke, "Changing Emphases in Specific Performance", North Carolina L.Rev. vol:40.1961, p.13.

6-Ashton v. Carrigan (1871) L.R.13 ER. 76; Beswick v. Beswick (1968) A.C. 58; Swiss Bank Corpn. v. Lloyds Bank Ltd. (1980) 2All E.R. 419,426 affirmed (1981) All E.R. 449; see also for more details, Chitty, Contract. General principles, vol.1 London, Stewart & maxwell, 1983, at p.980; Fry, Specific Performance, op.cit. §.1612.

7-Buxton v. Lister (1746) 3Atk. 383, 384; Re Schwabcher (1908) 98L.T. 127; Cud v. Rutter (1719) 1P.Wms.570; Chinn v. Hochstrasser (1979) Ch. 447; Duncuft v. Albrecht (1841) 12Sim. 189; Srilanka Omnibus Co. v. Perera (1952) A.C. 76; Odessa Tramways Co. v. Mendel (1878) 8Ch.D. 235.

8-Adderly v. Dixon (1824) 1Sim & st. 607 at p.610 per Leach V-C.; Wilson v. Northampton & Banbury Junction Rly. Co. (1874) 9Ch. App.279 at p.284.

9-Hart v.Herwig (1873) 8Ch. App. 860.

10-Chitty, Contract, op.cit. p.980.

11-Buxton v. Lister, supra; Cheale v. Kenward (1858) 3De G & J. 27; Cud v. Rutter, supra; Chinn v. Hochstrasser, supra; Pau On v. Lau Yiu Long (1980) A.C. 614; Langen & Wind Ltd. v. Bell (1972) Ch.685; Srilanka Omnibus Co., Supra; Stray v. Russell (1859) 1E. & E. 888; Hawkins v. Maltby(1867) L.R. 3Ch. App. 188, 194; Poole v. Middleton (1861) 29Beav. 646.

12-Harnett v. Yielding (1805) 2Sch. & Lef. 549, at p.553; see also other cases, such as; Mc Intosh v. Dalwood (No.4) (1930) 30S.R. (N.S.W.) 415; Evans Marshall & Co. Ltd. v. Bertola S.A. (1973) 1W.L.R. 349 at p.379.

13-New Brunswick & Canada Ry. and Land Co. v. Muggeridge (1859) 62E.R. 263 at p.267.

14-Ibid.

15-Spry, Equitable Remedies, op.cit. p.62.

16-Ibid.

17-Ibid. at p. 63.

18-Evans Marshall &co. Ltd. v. Bertola S.A., supra, 349 at p. 380; Adderly v. Dixon, supra, at pp.610-612; Beswick v. Beswick, supra, at pp.97-98.

- 19-Sharpe R.J. Injunction & Specific performance, op.cit. p.280.
- 20-Ibid. at p.282.
- 21-Ibid.
- 22-Fry, Specific Performance, op.cit. p.30; see also, Doloret v. Rothschild (1824) 57E.R. 233; Dyster v. Rondall & Sons (1926) 1Ch. 932; Sharpe R.J. Injunction & Specific performance, op.cit. p.283.
- 23-(1985) 1Lloyd's Rep. 370.
- 24-Supra, at p.378.
- 25-(1983) 2Lloyd's Rep. 509.
- 26-Supra, at p. 521.
- 27-Ibid.
- 28-Falcke v. Gray (1859) 4Drew 651; ReWait, supra, at p.639, Lord Atkin; compare, Verral v. Great Yarmouth Borough Council (1981) Q.B. 202.
- 29-Buxton v. Lister, supra; Pau On v. Lau Yiu Long (1980) A.C. 614; Stray v. Russell (1859) 29Beav. 646; Adderley v. Dixon, supra, at p.610 per Leach V-C; Wilson v. Northampton & Banbury Junction Rly Co. (1874) 9Ch. App. 279 at p.284.
- 30-The Oro Chief (1983) 2Lloyd's Rep. 509 at p.521, per Staughton J.
- 31-Supra.
- 32-Supra.
- 33-Supra.
- 34-(1982) 2Lloyd's Rep. 336.
- 35-The Stena Nautica (No.2) (1982) 2Lloyd's Rep. 336 at p.348 per Lord Justice May.
- 36-Sale of Goods Act 1979, Sec. 52.
- 37-The Stena Nautica (No.2) supra, at p.347 per Lord Denning.
- 38-The Stena Nautica, supra, at p.348 per Lord Justice May.
- 39-Ibid.
- 40-(1975) 1Lloyd's Rep. 465.
- 41-Societe Des Industries Metallurgiques S.A.v.The Bronox Engineering Co. Ltd. (1975) 1Lloyd's Rep. 465, at p.468 per Lord Edmund Davies.
- 42-Re Wait, supra, at p.630 per Lord Atkin.
- 43-Societe Des Industries, supra, at p.469 per Lord Justice Buckley.
- 44-(1927) 1K.B.649 at pp.660-661 Wright J.
- 45-Behnke v. Bede Shipping Co. Ltd., supra.
- 46-(1873) 8Ch. App. 860 at p.864.
- 47-Supra, at p.866.
- 48-The "Stena Nautica" (No.2), supra, at p.343, per Parker J.
- 49-Supra.
- 50-The "Stena Nautica", supra, at p.347.

- 51-The "Stena Nautica" (No.2), supra, at p.348 per Lord Justice May; see also, Evans Marshall & Co. Ltd. v. Bertola S.A., supra.
- 52-The "Stena Nautica" supra, at p. 348.
- 53-Stewart v. Kennedy , supra, at p.10 per Lord Watson.
- 54-Ibid.
- 55-Seaforth Trs. v. Macaulay (1844) 7D. 180, at p.181 per Lord Justice-Clerk; also p.182 per Lord Medwy N.
- 56-Moore v. Paterson, supra.
- 57-Supra, at p.351 per Lord Shand.
- 58-Moore v. Paterson, supra.
- 59-Stewart v. Kennedy, supra, at p.5. Lord Herschell.
- 60-Stewart v Kennedy, supra,at pp.9-10, per Lord Watson.
- 61-Ibid, at p.10.
- 62-Stewart v. Kennedy, supra, at p.11 Lord Macnaghten.
- 63-Ante. at pp. 194-200.
- 64-Stewart v. Kennedy, supra, at p.10.
- 65-Davidson v. Macpherson (1892-1893) 30S.L.R. 2, at p.6.
- 66-Ibid.
- 67-Ibid.
- 68-Davidson v. Macpherson, supra, at p.6 per Lord Young.
- 69-Ibid.
- 70-Ante. at p. 200
- 71-Davidson v. Macpherson, supra, at p. 6.
- 72-supra.
- 73-Article 246 (1) of Iraqi Civil Code; Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. at pp.255-256.
- 74-Al-shalqani, Ahmad Abdul fattah, Principles of the remedy for breach of contract, op.cit. at p.590; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.35.
- 75-See for more details, Sullttan, Anwar, the principles of obligation, op.cit. pp.46-47; Al-sanhoori, Abdul razzaq, Commentary on civil, vol.2 op.cit. pp.764-765; Egyptian Court of Cassation decision, civil cassation, 22, April, 1943, Omar's Collection, 4, No.51, p.137; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. pp.36-37.
- 76-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.38; Al-sanhoori, Abdul razzaq, Commentary on civil law, vol. 2, op.cit. 761; also see, Egyptian Court of Cassation decision, civil cassation, 12, June 1952, Publication of Cassation Court judgments, 3, No.187, at p.1187; Civil Cassation, December, 1948, Omar's Collection 5, No. 352, at p.682.
- 77-Ante. at pp. 45-47.

78-post at p. 218; compare also, pp.214-215.

79-G.Jones & W.Goodhart, Specific Performance, op.cit. p.231.

80-Sale of Goods Act 1979, Sec. 11(5); Duncan v. Leith (1957) S.L.T. 46; For more details concerning rejection of the goods, see, J.J.Gow, Mercantile and Industrial law, supra, at pp.227-231; D.M.Walker, Civil Remedies, supra, at pp.661-668; Sale of Goods Act 1979, Sec. 11 (2).

81-J.J.Gow, Mercantile & Industrial law, supra, at p. 219.

82-Sale of Goods Act 1979, Sec. 52.

83-J.J.Gow, Mercantile & Industrial law, supra, p.201; an exception is found to this rule, which is, if the seller has sold the goods and delivered them to the purchaser, when the seller's remedy is for the price, he then cannot claim damages. see, Black v. Incorporation of Bakers, Glasgow (1867) 6M. 136 at p.142 per Lord President.

84-D.M.Walker, Civil Remedies. supra, at p.285.

85-(1863) 2M. 88, at p.93.

86-D.M.Walker, the law of Damages in Scotland, Edinburgh, 1955, at p.484.

87-(1860) 22D. 665, per Lord Cowan at pp.671-672.

88-(1973) 3All ER. 897.

89-(1982) Ch. 197.

90-(1877) 6 Ch. 153.

91-(1863) 11WR. 589.

92-D.M.Walker, Damages, op.cit. p.484.

93-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. pp.24, 27.

94-Article 169 (2) of Iraqi Civil Code, provides, "Damages are an appropriate remedy for every obligation arises from the contract, whether it is an obligation to transfer property or benefit or any other real right, or an obligation to do or not to do something, and they are comprise the loss that the creditor has suffered and the profit he has missed, providing that damages must be the natural result of non-performance of the obligation by the debtor, or his delay in performance".

95-Articles, 246 (1, 2), 168 of Civil Code; also, Ante, at pp. 89-94; 100-105; 111-115; 117-123.

96-For more details as regards defective goods and the guarantee that the seller should offer to the purchaser against any defect, Al-amiri, Sa'doun, Commentary on Sale and Lease contracts, op.cit. pp. 147-150; Taha, Ghani Hassoun, Commentary on the specific contracts, supra, at pp.304-328; Murqus, Sulayman, Commentary on the specific contracts, op.cit, para, 222; Al-sanhoori, Abdul razzaq, Commentary on civil law, the sale contract, vol. 4, op.cit. para, 374; Ante, at pp. 123-124; see also, the Iraqi Court of Cassation judgment, on 21/11/1953, No.1709/1953, Judiciary Journal, No. 2, 1953.

97-Taha, Ghani Hassoun, Commentary on the specific contracts, the sale contract, op.cit.

pp.254-256.

98-Unlawful Enrichment is fully considered in the following works: Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.1, op.cit. pp.1122-1186; Al-hakeem, Abdul majid, Commentary on civil law. vol.1, op.cit. pp.615-632; Al-saddah, Abdul muna'im Faraj, Sources of obligation , 1979, at pp.713-732.

99-Taha, Ghani Hassoun, Commentary on the specific contracts, op.cit. p.277.

100-It provides "Damages are appropriate remedy for any obligation under the contract, whether is an obligation to transfer property or benefit or any other real right, or an obligation to do or not to do something.....".

101-Al-hakeem, Abdul majid, Commentary on civil law, vol.1, op.cit.p.428; compare the Iraqi Court of Cassation judiciary, vol:4, at pp.401-402, cited by Al-hakeem, Abdul majid, Commentary on civil law, vol.1, supra, at p.428.

102-Compare between Articles 177 (2), 248 (2) of Iraqi Civil Code.

103-Stewart v.Kennedy, at p.10, per Lord Watson.

104-Sale of Goods Act 1979, Sec.52.

105-Stewart v. Kennedy, Supra.

106-Ibid, see also, Petrie v. Forsyth (1874) 2R. 214; MacArthur v. Lawson, supra; Fail v. Wilson (1899) 36 S.L.R. 941; Sinclair Caithness Co. (1898) 25R. 703.

107-Moore v. Paterson, supra, at p.351 per Lord Shand.

108-Davidson v. Macpherson, supra, per Lord Young, at p.6.

109-Moore v. Paterson, supra, per Lord Shand at p.351.

110-Stewart v. Kennedy, per Lord Watson at p.10.

111-Supra at p.5, per Lord Herschell.

112-Ibid, at p.91.

113-Davidson v. Macpherson, supra at p.6.

114-Union Electric Co. Ltd. v. Holman & Co. (1913) S.C. 954. per the Lord President, at p.958; compare also, Sutherland v. Montrose Shipbuilding Co., supra, per Lord Cowan.

115-D.M.Walker, Damages, op.cit. p.483.

116-(1889) 30S.L.T. 2, 5.

117-D.M.Walker, Damages, op.cit. p.86.

118-(1911) S.C. 458.

119-Summerlee Iron Co. v. Caledonian Ry. (1911) S.C. 458, at p.461.

120-Summerlee Iron Co. v. Caledonian, supra at p.461.

121-D.M.Walker, Damages. supra, p.480.

122-(1881) 9R. 337.

123-(1890) 17R. (H.L.) 1 per Lord Watson at p.10.

124-Stewart v. Kenndy, supra, at p.10.

- 125-(1877) 4R. 1134, at p.1138.
- 126-Grahame v. Magistrate of Kirkcaldy (1882) 9R. (H.L.) 91; Wilson V. Pottinger (1908) S.C. 580; Ante. at pp. 95-100.
- 127-Summerlee Iron Co. Ltd. v. Caledonian Ry, supra.; ante, at pp.214-215.
- 128-Stewart v. Kennedy, supra; see also, I.D.Macphail, Sheriff Court practice, 1st ed., Edinburgh, W. Green & Son Ltd., 1988, p.710.
- 129-McKellar v. Dallas's Ltd., supra.
- 130-Summerlee Iron Co. v. Caledonian, supra; Rottanburg v. Duncan (1896) 24R.34.
- 131-(1900) 2F. 904.
- 132-Harvey v. Smith (1904) 6F. 511.
- 133-Marqus, Sulayman, op.cit. pp.596-597; see also, Article 168 of Civil Code; compare also, Article 547 (2) of Civil Code; Al-jundi, Bushra, Features of the debtor's liability, op.cit, p.19.
- 134-See for more details, Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, op.cit. pp.764-766; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. pp.36-38; Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. pp15-16; Egyptian Court of Cassation decision, civil cassation, 22, April, 1943, Omar Collection, 4, No: 51, p.137.
- 135-Al-dhanoon Hasan Ali, The general theory of obligation, op.cit. para.31; Isma'iel, Ghanim, the principles of the obligation, op.cit. at p.79 foot-note (1).
- 136-Sullttan, Anwar, the principles of the obligation, op.cit. p.42.
- 137-Iraqi Court of Cassation judgment, No.247/86/87, on 31/3/1987.
- 138-Khattab, Dhea Sheet, Judiciary Technique Baghdad, 1984, at p.188.
- 139-Al-a'llam, Abdul rahman, Commentary on Iraqi civil procedurs rules, op.cit. p.251.
- 140-Al-hakeem, Abdul majid, Commentary on civil law, vol.2, op.cit. p.25; Al-sanhoori Abdul razzaq, Commentary on civil law, vol. 2. op.cit. p763.
- 141-Al-sanhoori, Abdul razzaq, Commentary on civil law, supra at pp.760-761; Egyptian Court of Cassation decision, civil cassation, 12/ June/1952, Publication of Court of Cassation, 3, No.187, at p.1187.
- 142-Hay's Trs.v.Young (1877) 4R. 398, 401 per Lord Ormidale.
- 143-Kelso School Board v. Hunter. (1874) 2R. 228.
- 144-Ibid.
- 145-Ibid.
- 146-Kelso School Board v. Hunter, supra.
- 147-S. Scott Robinson, The Law of Interdict, London, Edinburgh, Butterworths, 1978, p.2.
- 148-(1877) 4R. 398, 402, per Lord Gifford.
- 149-Gavin v. Ayrshire County Council (1950) S.C. 197, 207, per Lord President Cooper.
- 150-Kelso School Board v. Hunter, supra; White v. Dickson (1881) 8R. 896, 901; Inverurie Magistrate v.Sorrie (1956) S.C. 175.

- 151-Sanderson v. Geddes (1874) 1R. 1198; see also, Jack v. Begg (1875) 3R. 35, 43 per Lord Gifford.
- 152-Ben Nevis Distillery Co. v. N.B.Aluminium Co. (1948) S.C. 592.
- 153-Hay's Trs.v.Young, supra.
- 154-Kelso School Board v. Hunter, supra.
- 155-Ibid.
- 156-Earl of Crawford v. Paton (1911) S.C. 1017, 1028 per Lord Salvesen.
- 157-Kelso School Board v. Hunter, supra.
- 158-Winans v. Macrae (1885) 12R. 1051, 1063, per Lord Young.
- 159-Hay's Trs v. Young, supra, at p.402, per Lord Gifford.
- 160-Winans v. Macrae, supra, at p.1063, per Lord Young.
- 161-Kelso School Board v. Hunter, supra.
- 162-Ibid.
- 163-Hay's Trs. v. Young, supra, at p.402 per Lord Gifford.
- 164-Ben Nevis Distillery Co. v. N.B.Aluminium Co., supra.
- 165-Hay's Trs v. Young, supra.
- 166-post. at pp. 230-232.
- 167-Article 252 of Iraqi Civil Code.
- 168-Articles 250, 251, 252 of Iraqi Civil Code considering specific performance in Iraqi civil law.
- 169-See the concept of the obligation to refrain from doing something, in Al-jeelawi, Ali, The financial Threat, op.cit. p.382; Murqus, Sulayman, the principles of the obligation, supra, p.91; Al-bakri, Abdul baqi, Commentary on civil law, supra, pp.57-59.
- 170-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.29; Abdul baqi Abdul fattah, lessons in obligations, op.cit. at p.53.
- 171-Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, op.cit. p.797.
- 172-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.59; Murqus, Sulayman, Commentary on civil aw, op.cit. p.587.
- 173-Al-jundi, Bushra, Features of the debtor's liability, opcit, at pp.16-17.
- 174-Article 252 of Iraqi Civil Code.
- 175-Al-jundi, Bushra, Features of the debtor's liability, supra, at p.17.
- 176-Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.58.
- 177-Al-jeelawi, Ali, Penalty or Financial threat, supra, at p.382; Al-bakri, Abdul baqi, Commentary on civil law, op.cit. p.58; Al-jundi, Bushra, Features of the debtor's liability, supra, at p18.
- 178-Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, op.cit.pp.797-798; Abdul baqi, Abdul fattah, lessons in obligations, op.cit. pp.53-54; Murqus, Sulayman, Commentary on civil law, op.cit. pp.587-588.

- 179-Al-sanhoori, Abdul razzaq, Commentary on civil law, vol:2, op.cit. pp.797-798.
- 180-Al-bakri, Abdul baqi, Commentary on civil law, supra, p.58, (foot-note (1))
- 181-Al-jundi, Bushra, Features of the debtor's liability, supra, at p.17 (foot-note (1)).
- 182-Al-bakri, Abdul baqi, Commentary on civil law, supra, at p.58 (foot-note (1))
- 183-see the opinion of Prof. Al-sanhoori, Abdul razzaq, Commentary on civil law, vol.2, pp.797-799.
- 184-Article 212 of Egyptian Civil Code. Its counterpart in Iraqi Civil Code is Article 252.
- 185-Al-jundi, Bushra, features of the debtor's liability, supra.
- 186-Al-sanhoori, Abdul razzaq, Commentary on civil law, vol:2 op.cit. pp.796,797,798,799.
- 187-Article 240 of Iraqi Criminal Code, No (111) of 1969.
- 188-Al-naddawi, Adam & Mubarak, Sa'eed Abdul kareem, Commentary on the law of execution, op.cit. p.91; Hafidh, Ali Mudhafar, Commentary on execution Law, op.cit. pp.91-92; Mubarak, Sa'eed Abdul kareem, Commentary on execution law, op.cit. pp.170-172.
- 189-Al-bakri, Abdul baqi, Commentary on civil law, supra, at p.59.
- 190-Ibid.
- 191-Article 246 of Civil Code; see also Abdul, fattah Abdul baqi, Lessons in obligations, op.cit. p54.
- 192-Al-sanhoori, Abdul razzaq, Commentary on civil law, vol. 2, op.cit. p.797 foot-note (2).
- 193-Hay's Trs. v. Young, supra. at p, 401, per LordOrmidale; Inverurie Magistrate v. Sorrie (1956) S.C. 184, 185, per Lord Blades.
- 194-Gavin v. Ayrshire County Council (1950) S.C. 197, 207, per Lord President Cooper.
- 195-Hay Trs. v. Young, per Lord Gifford at p.402.
- 196-Inverurie Magistrate v.Sorrie (1959) S.C. 175, 179, per Lord Justice-Clerk Thomson.
- 197-Shepherd v. Menzies (1900) 2F. 443; Don v N.B.Ry (1878) 5R. 972; Southern Bowling Club v. Ross (1902) 4F. 405; West v. Aberdeen Harbour Commrs. (1876) 4R. 207.
- 198-D.M.Walker, Civil Remedies, op.cit. p227.
- 199-S.Scott Robinson, The law of Interdict, op.cit. p.126; see also, D.M.Walker, Civil Remedies, Op.cit. p.233.
- 200-Earl of Crawford v. Paton, supra, at p.1026 per Lord Dundas.
- 201-Stewart v. kenndy, supra.
- 202-Hay's Trs. V. Young, supra, 402, per lord Gifford.
- 203-Hay's Trs v. Young, supra, at p.401 per Lord Ormidale; Inverurie Magistrate v. Sorrie, supra, per Lord Blades at pp.184-185.
- 204-Edgar v. City of Glasgow Friendly Society (1914) 2S.L.T. 408; Begg v. Jack, supra; Place v.West Highland Rly (1895) 7F. 477; Glen v. Caledonian Ry (1868) 6M. 797.
- 205-Wilson v. Shepherd (1913) S.C. 300 at p.306, per Lord Salveson.
- 206-Warraned v. Watson (1906) 8F. 1098, at p.1100.
- 207-Shepherd v. Menzies, supra; West v. Aberdeen Harbour commrs, supra; Southern

- Bowling Club v. Ross, *supra*; Gillespie v. Lucas & Aird (1893) 20R. 1035.
- 208-Warraned v. Watson, *supra*, per Lord Maclaren at p.1100.
- 209-Inverurie Magistrate v. Sorrie, *supra*, per Lord Justice-Clerk Thomson, at p.179.
- 210-Maclure v. Maclure (1911) S.C. 200 at p.206.
- 211-(1885) 12R. 1051 at p.1065.
- 212-(1897) 25R. 74.
- 213-Toni Tyres Ltd. v. Palmer Tyre Ltd. (1905) 7F. 477; Farquhar & Gill v. Aberdeen Magistrate (1912) S.C. 1294; Wallace-James v. Montgomerie & Co. (1899) 2F. 107 at p.114; Colquhoun & Cameron v. Mackenzie (1894) 22R. 23, at p.25.
- 214-(1884) 12R. 362.
- 215-Gavin v. Ayrshire County Council, *supra*, at pp.207-208. compare the cases such as, Kirkwood's Trs v. Leth (1889) 16 R. 255 at p.259 per L.P. Inglis; Trotter v. Farnie (1831) 5W. & S. 649 (1832) 10S. 423; Pedie v. Swinton (1839) McL & Rob. 1018.
- 216-Gavin v. Ayrshire County Council, *supra*, at p.209 per Lord President Cooper.
- 217-Dickson v. Dickie (1863) 1M.1157.
- 218-Colquhoun v. Paton (1859) 21D. 996, 1001 per Lord Cowan.
- 219-D.M.Walker, Civil Remedies, *op.cit.* p.261.
- 220-Sale of Goods Act 1979, Sec. 41 (1); see also, D.M.Walker, Civil Remedies, *supra*.
- 221-Inverurie Magistrate v. Sorrie, *supra*, at p.181, per Lord Patrick.
- 222-Hay's Trs. v. Young, *supra*.
- 223-Bass, Ratcliff & Gretton v. Laidlaw (1908) 16S.L.T. 660.
- 224-Thomson v. Robertson (1888) 15R.880.
- 225-Ante. at p. 221
- 226-Ante at pp. 79-84.
- 227-Ante, at p. 31.
- 228-Ante. at p. 83.
- 229-Article 177 (1) of Iraqi Civil Code.
- 230-Article 178 of Iraqi Civil Code.
- 231-Ante at pp. 120-121; 232-233.
- 232-Al-hakeem, Abdul majid, Commentary on civil law, vol:1, *op.cit.*p.403.
- 233-Al-hakeem, Abdul majid, Commentary on civil law, *supra*.

CHAPTER FIVE

JURISDICTION AND PROCEDURES

Introduction

An action of specific implement is brought to determine whether it is an appropriate remedy. To raise an action of specific implement in the court, certain steps and procedures are required, which affect both the existence and the validity of the remedy. Two fundamental issues will be considered, namely:

Section one: Jurisdiction.

Section Two: Procedures

Section one: Jurisdiction

The court which hears the action of specific implement should consider the competency of its jurisdiction. Two categories of courts will be considered in dealing with the jurisdiction, namely:

Sub-section:1-The Court of First Instance.

Sub-section:2-The High Court.

Sub-Section: 1-The Court of First Instance

An action of specific implement is usually amenable to the jurisdiction of the Sheriff Court and Court of First Instance in Iraq, unless circumstances stipulate otherwise. The court may have privative jurisdiction towards the action of specific implement in certain cases. The Court of Session may also act as a Court of First Instance. However, in this study, it will not be considered in detail. The study is devoted to examining the Sheriff Court and the Court of First Instance as follows:

1-Sheriff Court in Scotland.

2-Court of First Instance in Iraq.

1-The Sheriff Court in Scotland

The Sheriff Court's civil jurisdiction is wide.⁽¹⁾ Actions for damages or debt are within the court's jurisdiction without any upper pecuniary limit.⁽²⁾ In addition, the

Sheriff Court has privative jurisdiction in all causes if the value of the causes does not exceed £1500 exclusive of expenses and interest. Such a cause must be brought to the Sheriff Court only, and it is not subject to the review of the Court of Session,⁽³⁾ The Sheriff Court's jurisdiction in such a case is considered exclusive and its decision is final, according to statute.⁽⁴⁾ However such cases are now brought as summary causes,⁽⁵⁾ and the provisions on appeal in regard to such causes apply to them. Under them a case appealed to the Sheriff principal can be further appealed to the Outer house of the Court of Session on point of law if the Sheriff principal gives leave.

The Sheriff Court privative jurisdiction is subject to one exception, provided by S.26 of Court of Session Act 1988, which permits the summary trial by the Lord Ordinary of the Court of Session on any dispute or question not affecting the status of any person which might competently be the subject of any cause in the Outer House, or which might competently have been the subject of any such cause but for the provision of S.7 of the 1907 Act.

The issue of how the value of the cause is to be determined, is fully considered in the undernoted works.⁽⁶⁾

To what extent can the remedy of specific implement be granted within the court's privative jurisdiction?

The court can grant specific implement in an action of sale of goods, for when the action is within the court's privative jurisdiction, there is no reason why the court cannot grant specific implement if there are no equitable circumstances or grounds of law stand against granting it.

Civil Jurisdiction and Judgment Act 1982, in Sched.8, Rule 2 (1) provides that "a person who has no fixed residence may be sued in a court within whose jurisdiction he is personally cited". Furthermore, Rule 2(2) provides that "in matters relating to a contract, a person may be sued in the court for the place of performance of the obligation in question". In comparing the above Rule and Sec. 6 of Sheriff Courts (Scotland) Act 1907, which provides "Any action competent in the Sheriff Court may

be brought within the jurisdiction of the Sheriff: (f-) where the action relates to a contract the place of execution or performance of which is within the jurisdiction, and the defender is personally cited.", the difference is clear, for "Under Sched.8 rule 2(2) the Sheriff has Jurisdiction over the defender if the place of performance of the particular contractual obligation which gives rise to the pursuer's claim is situated within the Sheriffdom, and rule 2 (2) does not require personal citation of the defender within the jurisdiction".⁽⁷⁾ However, there has been no consideration as to where the contract was made either in S. 6 of the Sheriff Courts (Scotland) Act 1907, or in rule 2 (2) of Civil Jurisdiction and Judgment Act 1982

Where the action relates to non-performance, the action should be raised in the Sheriff Court in whose jurisdiction performance ought to have been made.⁽⁸⁾ It is submitted, therefore, that the Sheriff Court in such a case may order specific implement if the contract, for instance, is for sale of goods, for the Sheriff Court has jurisdiction in respect of any action relating to the contract which seems in many means, either to enforce the contract or to compel damages for non-performance, or for an action in order to declare the meaning of that contract.⁽⁹⁾

According to Civil Jurisdiction and Judgment Act 1982 Sched. 8 rule 1 domicile is the principal ground of jurisdiction. It provides that, "persons shall be sued in the courts for the place where they are domiciled". It has been stated,⁽¹⁰⁾ that, "For the purpose of the 1982 Act, it is vital to appreciate that domicile is accorded a meaning entirely different from that which it has in Scots law when referred to as a ground of jurisdiction in status actions (i.e., the country or territory where a person has his permanent home). In the 1982 Act domicile has its continental European meaning of something approximating to habitual residence".

If an action for delivery of goods has been brought to the Sheriff Court by a pursuer who is resident within the Sheriffdom, the Sheriff Court shall examine all conditions relating to the defender's residence and to the remedy sought. Specific implement will be granted if it is an appropriate remedy. If the remedy of specific implement is inapplicable, damages will be compelled alternatively.

The Sheriff Court, which parties have agreed is to have jurisdiction to settle disputes which have arisen or which may arise in connection with a particular legal relationship, will have exclusive jurisdiction,⁽¹¹⁾ with certain exceptions.⁽¹²⁾ Also the court has jurisdiction over the defender when the movable property is situated within the Sheriffdom, according to Sched. 8 rule. 2 (9) of Civil Jurisdiction and Judgment Act 1982. The court may proceed on actions of specific implement or damages. Thus, the pursuer has no choice but to raise his action against the defender whether in the Sheriff Court for the place where the defender is domiciled in Scotland, or in the court for the place of implement of the obligation in question. The pursuer may also sue the defender, in a court within whose jurisdiction he, (the defender), is personally cited, if he has no fixed place of residence.⁽¹³⁾ If the debtor is not domiciled in Scotland or in another parts of the United kindom, it is provided,⁽¹⁴⁾ that he is sued in the courts; (a-) where any of his movables property has been arrested, or; (b-) the situation of his immovable property in which he has benefical interest.

By rule (15), certain sub-rules have been provided for;

1-In case of the defender being one of many defenders, he is sued in the court for the place where any one of them is domiciled.⁽¹⁵⁾

2-In case of counterclaim arising from the same contract, the court which has jurisdiction over such an action is the court in which the original claim is pending.⁽¹⁶⁾

Where the defender is domiciled in England or Wales, he is, in this case and according to sched 4 Article (5), subject to the Scottish Court's jurisdiction, if what is sought to be performed is a contract, and if Scotland is the place of implement of that contract.⁽¹⁷⁾ If the defender is domiciled neither in Scotland nor in the United kingdom but within another E.E.C. member state, by Sched. 1 Article 5 (1) the Scottish Court would have jurisdiction if what is sought to be performed is a contract where Scotland is the place of its performance.

As domicile represents the basis of the jurisdiction, it assumes a great importance. It has been said that "domicile for the purpose of the Act has now statutory meaning

differing widely from its long established meaning in Scots law".⁽¹⁸⁾

According to Sec. 41 (2,3,4), an individual is domiciled in the United Kingdom if (a)- "he is resident in the United Kingdom, (b)-the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom". Under Sec. 41 (6), where a defender has been resident in the United Kingdom or in a particular part of the United Kingdom for a period of time not less than three months or more than three months, "Sub-section 3 (b) shall be presumed to be fulfilled unless the contrary is proved". This means "unless the contrary be shown, he "the individual" is presumed to have a substantial connection with the United Kingdom and with that part".⁽¹⁹⁾

Thus, the Sheriff Court's jurisdiction under Civil Jurisdiction and Judgments Act 1982 is either to grant damages or to compel performance of the contract, for an action relating to a contract, could be an action for specific implement or an action for damages or other actions.⁽²⁰⁾ Further, the defender might be ordered by the Sheriff Court to perform his obligation specifically, or he might be ordered to pay damages alternatively, where he has no fixed residence, but he has been cited personally.⁽²¹⁾

When a defender is domiciled in a Sheriffdom with more than one Sheriff Court district the pursuer may seek to sue him in any court of that Sheriffdom; but a Sheriff Clerk may decline to cite a defender domiciled in another court district, and the Sheriff at a particular court is entitled to exercise a discretion whether to issue a warrant of citation if the defender is more suitably amenable to another court of the Sheriffdom.⁽²²⁾

In terms of Rule 2(3) of Sched. 8, "a person who is not domiciled in the United Kingdom may be sued in the courts of any place where (i) any movable property belonging to him has been arrested. This rule is applicable to defenders who are not domiciled in the United Kingdom. Thus, the Sheriff Court will have jurisdiction over a defender if the moveable property is arrested within the Sheriffdom."⁽²³⁾

The effect of arrestment to found jurisdiction, it has been suggested, "is only to

subject the defender to jurisdiction of the court in the particular action in which it is used".⁽²⁴⁾ If the pursuer desires to retain the subject to be available for satisfaction of any decree which he may obtain against the defender, he must obtain and use a warrant for arrestment on the dependence of the action.⁽²⁵⁾

The pursuer in any action has the choice of forum. He has the right to bring his action either in the Sheriff Court or in the Court of Session (The Outer House), and vice versa. Further the Sheriff Court may remit the case to the Court of Session and vice versa. In a recent case, the pursuer's choice of forum has been confirmed. In MacIntosh v. British Railway's Board, the pursuer brought his action to the Lord Ordinary instead of the Sheriff Court. The Lord Ordinary remitted the case to the Sheriff Court. It was held that "(4)-although the Lord Ordinary had had regard to the practical and procedural advantages of the action remaining in the Court of Session he had placed too much reliance on the factors of smallness and simplicity and had not given proper regard to the pursuer's right to choose the forum in which to pursue his claim, and that he had accordingly misdirected himself in law..".⁽²⁶⁾

It was stated,⁽²⁷⁾ that "Parliament has deprived the Court of Session of jurisdiction in cases which are within the privative jurisdiction in the Sheriff Court, but in all other cases there is concurrent jurisdiction. The pursuer is entitled to avail himself of the jurisdiction of whichever court he finds more convenient or appropriate to his own circumstances. It is not for the court to deprive him of his choice on grounds which could apply generally to every case of that type."

The Sheriff Court may be competent not only as a Court of First Instance, but may act as a Court of Appeal in certain conditions. The competency of appeals from the Sheriff to the Sheriff Principal is regulated by the provision of S.27 of 1907 Act. An appeal to the Sheriff Principal is competent without leave, against all final judgments of the Sheriff. ⁽²⁸⁾ Thus an interluctor making an order *ad factum praestandum* may be appealed without leave to the Sheriff Principal.⁽²⁹⁾ Such orders include an order to make consignment,⁽³⁰⁾ and an award of interim access to which an order for delivery is attached.⁽³¹⁾

Where a statute empowers a Sheriff to make a certain order and does not describe procedures, the ordinary form in the Sheriff Court will apply, which is that there should be an appeal from the Sheriff to the Sheriff Principal.⁽³²⁾ Thus a Sheriff Principal may entertain an appeal against a recall of arrestment by the Sheriff.⁽³³⁾ Also, an appeal is competent without leave against an interlocutor which is incompetent in the sense that the Sheriff had no power or right to pronounce it.⁽³⁴⁾

2-Court of First Instance in Iraq

The court, according to the Civil Procedure Code,⁽³⁵⁾ has jurisdiction over actions of different nature.⁽³⁶⁾ These actions take two forms, namely:

First: Actions subject to review by the the Court of Appeal, as a Court of Cassation not as a Court of Appeal.

Secondly: Actions subject to the Court of Appeal and the Court of Cassation.

First:- Actions subject to review by the Court of Appeal.

It has been established that many actions are subject to the jurisdiction of Court of First Instance in Iraq. They are as follow:

1-Actions relating to movables and debts up to 500 Dinars.⁽³⁷⁾ These actions of such value of cause are subject to review by the Court of Appeal as a Court of Cassation.⁽³⁸⁾ If the value of the cause is more than 500 Dinars but less than 1000 Dinars, the action then is subject to review by the Court of Cassation without being reviewed by the Court of Appeal.⁽³⁹⁾

2-Actions of due instalments up to 500 Dinars.⁽³⁴⁾

Secondly:-Actions subject to review by the Court of Appeal and the Court of Cassation, namely:

1-Whenever the value of the cause is more than 1000 Dinars, the action is subject to the Court of Appeal review and the Court of Cassation review.⁽⁴¹⁾

2-All bankruptcy actions.⁽⁴²⁾

The value of the cause of the action plays role in the competency of the court. To

know whether the action is subject to the Court of Appeal alone or to the Appeal and the Court of Cassation together. How the value of the cause is determined, and in which circumstances the value of the cause will be considered and estimated, are fundamental questions in relation to the competent jurisdiction.

Iraqi civil procedures law has clarified the case of the value of the cause, and a general rule has been established to consider such a case. The value of the cause of any action has to be considered in accordance with the original petition at the time of raising the action.⁽⁴³⁾ Any later change in the action or any alteration to the procedures thereafter, has no effect on the initial competency of the action in the court. Unfortunately, Iraqi jurisprudence and civil procedures law are totally silent on whether interests and expenses are excluded or included. It is submitted, however, that the interests and expenses are excluded in general, but in exceptional cases should be included, such as, if the nature of the dispute requires it. Nevertheless, it is preferable to leave the question of the nature of the dispute, and whether interests and expenses constitute part of the disputed sum, to the court's discretionary power.

The importance of considering the value of the cause is to state the fee of the competent court and to decide whether the action is reviewed by the Court of Appeal or the Court of Cassation.⁽⁴⁴⁾

It is questionable whether the Court of First Instance privative jurisdiction is competent. All the Court of First Instance decisions, by virtue of civil procedure law, are either under review by the Court of Appeal or the Court of Cassation.⁽⁴⁵⁾ If the value of the cause is less than 500 Dinars, the action is subject to review by the Court of Appeal. If, on the other hand, it is more than 500 Dinars, it is reviewed by the Court of Cassation Court. It seems then that the court has no privative jurisdiction.

The jurisdiction of the Court of First Instance is very wide and covers different actions. One of these is the action of remedy of specific performance. In considering the case of specific performance by the Court of First Instance, it should be taken into consideration that the remedy is an ordinary legal remedy.⁽⁴⁶⁾ It is compelled

whenever performance of the obligation is possible,⁽⁴⁷⁾ regardless of whether the obligation is to pay sum of money or to deliver movables. The court, according to the civil procedure law, has jurisdiction as regards all actions relating to debt or movables up to 500 Dinars. Thus, the court can grant the remedy of specific performance. The same is applied to actions of instalments, actions of possession,⁽⁴⁸⁾ and actions of interdiction of an insolvent debtor.⁽⁴⁹⁾

The Court's jurisdiction is also competent over actions where the value of the cause is over 1000 Dinars, or actions of bankruptcy and liquidation. These kinds of action are subject to review by the Court of Appeal as appellate court, and subject to review by the Court of Cassation thereafter.⁽⁵⁰⁾ It is submitted, however, that the court in these actions will grant specific performance if it is an appropriate remedy. It has the jurisdiction to do so.

As a general rule that the jurisdiction is based on domicile.⁽⁵¹⁾ However, domicile, according to Iraqi Civil Code, in Article 24, "is the place where a person resides whether permanently or temporarily. A person may have more than one domicile at the same time". Thus, in an action for movables or due debt, where the defendant is an individual, the competent court for reviewing such an action is the court where the defendant is domiciled.⁽⁵²⁾ If the defendant is a corporate body, or under liquidation, the action should be brought in the court for the place where the main branch is situated.⁽⁵³⁾ If there are many defendants to the action, the competent court is the court where one of them is domiciled. The plaintiff can choose one of them to raise his action.⁽⁵⁴⁾

The court's jurisdiction over immovables is competent according to Article 36 of Iraqi Civil Procedures Code. Further, in an action relating to a contract, the action should be brought in the court for the place where the obligation has to be performed, or in the court which has been agreed to be competent.⁽⁵⁵⁾ or in the court for the place where the contract was made.⁽⁵⁶⁾ Furthermore, if the defendant is a bankrupt debtor, the action in such a case should be brought in the court for the place where the merchant's place of business is situated.⁽⁵⁷⁾ If he has several places of business the

action should be brought in the court for the place where his main or central place for business is situated.⁽⁵⁸⁾

Where the defendant is not domiciled in Iraq and has no residence there, the action is raised in the court for the place where the plaintiff is domiciled.⁽⁵⁹⁾ However, if the plaintiff has no residence in Iraqi territory, the action should be raised in one of the Iraqi courts situated in Baghdad.⁽⁶⁰⁾

Comment

In comparing the two systems i.e., (Iraqi and Scots) regarding the jurisdiction of the Court of First Instance and the Sheriff Court, the following issues arise:

1-As regards the matter of privative jurisdiction.

The Court of First Instance in Iraq has no privative jurisdiction. It could be considered as a defect in the Iraqi Civil Procedures Code which should be seriously taken into consideration, for the court should have its own independent character, at least in few certain cases. Depriving the court of any privative jurisdiction renders its decisions reliant on the higher court in every case, which overburdens the higher court.

On the contrary, the matter of privative jurisdiction is well settled and very well established in the Sheriff Court in Scotland. In this respect, therefore, Scots law is more practical than Iraqi law.

2-In Scots law if the value of the cause is less than £1500, the action will not be reviewed by the Court of Session subject to statutory provisions regulating summary cause appeals.⁽⁶¹⁾ While in Iraqi civil procedure law, if the value of the cause is less than 500 Dinars the action will not be excluded from review by the higher court.⁽⁶²⁾ Also, if the value of the cause is more than 1000 Dinars the actions is subject to the review of the Court of Appeal and the Court of Cassation.

3-As regards specific performance,⁽⁶³⁾ the Court of First Instance and the Sheriff Court have competent jurisdiction over actions whether to grant or to refuse the remedy. The differences in considering the remedy of specific implement if they exist,

might be found in a very details between the two systems which cannot be considered in this work. Nevertheless, there is one matter relating to the jurisdiction of the two courts which is the competent jurisdiction over a contract or related to a contract, especially the place where the obligation was made. The action should be raised either in the court for the place where the contract was made or where it has to be performed, in accordance with Article 37 (1) of Civil Procedures Code. While in Scots law, the action should be raised in the court for the place of performance of the contract.⁽⁶⁴⁾ Thus, according to Scots law no consideration is given to the place in which the contract is made.⁽⁶⁵⁾

The practical consequences of this inconsistency between the two systems in this particular case are:

1-The Iraqi law is more flexible, because the action can be brought either in the court for the place where the contract was made or in the court for the place where the contract has to be performed.

2-The plaintiff is free to raise the action in different courts and is not restricted to the court for the place where the contract has to be performed. This difference between the two systems reflects the jurisdiction of each court.

Finally, one major difference between the Sheriff Court and the Court of First Instance is that the Sherif court (Sheriff principal) may exercise jurisdiction as an appellate court, where as the Court of First Instance has no such competent jurisdiction.

Sub-section 2: The High Court

In Scotland the judgment of the inferior court may or may not be amenable to review by the higher court, in accordance with the circumstances of the action and the value of the cause. In Iraqi procedure law the action is amenable to the jurisdiction of the higher courts, which are the Court of Appeal and the Court of Cassation. In this study, I will avoid considering the Court of Cassation as a supreme court, and concentrate on the Court of Appeal, in order to achieve a more concentrated study and useful comparison.

For the same reason, I shall not refer to the House of Lords. Similarly, the study will concentrate on the Court of Session as a high court of Appeal not as a Court of First Instance, which will be considered only briefly. The Sheriff Principal also is considered as an appellate court, although this has already been examined briefly.⁽⁶⁶⁾

1-Court of Session in Scotland.

2-Appeal Court in Iraq.

1-The Court of Session

The Court of Session is the superior civil court in Scotland. It "is likewise both a Court of First Instance and a Court of Appeal".⁽⁶⁷⁾ It has jurisdiction over actions founded on contracts and obligations, "whether bilateral as in the case of contracts, or unilateral; and whether for implement or for damages in respect of breach of contract, or refusal to fulfil a unilateral obligation, as well as actions of damages founded on delict or injury, may be brought in either court irrespective of the sum concluded for, unless it is under £25 (now £1500)".⁽⁶⁸⁾ The Court of Session has power to grant remedy in whatever form may be necessary for the redress of wrong and for making rights effectual ⁽⁶⁹⁾ Further, petitory actions, whatever their object, for instance actions for delivery of goods, and actions to enforce implement of the contract,⁽⁷⁰⁾ are competent either in the Court of Session or in the Sheriff Court. Thus, the Court of Session has jurisdiction in respect of contracts which are made or to be performed, within Scotland is the *locus contractus* or the *locus solutionis*, and, where there is no other ground of amenability, the defender is cited in Scotland.⁽⁷¹⁾

In exercising its original jurisdiction, the Court of Session acts in certain cases as a Court of First instance.⁽⁷²⁾ An ordinary action may be brought before a Lord Ordinary. The jurisdiction of a Lord Ordinary is almost exclusively original. By virtue of his original jurisdiction, he is a judge of first instance in cases above (£1500) in value.⁽⁷³⁾ The judgment of a Lord Ordinary, if not brought under review within the time fixed by statute, has the authority of a judgment of the court, but is not a precedent binding the Inner House.⁽⁷⁴⁾

The Court of Session has power to order remedy in whatever form may be

important and necessary to make rights effective.⁽⁷⁵⁾ Furthermore, it exercises its jurisdiction in many ways, such as, declaratory, possessory, protective, suspensive, and petitory or rescissory. Thus, in petitory actions,⁽⁷⁶⁾ the action could be for a decree *ad factum praestandum* to enforce performance of the contract, or an action for payment of money, as in damages.⁽⁷⁷⁾ Also, the court has jurisdiction in respect of the subject-matter as long as the value of the cause exceeds £1500,⁽⁷⁸⁾ and the defender is, or can be made, subject to its jurisdiction.⁽⁷⁹⁾ The defender is subject to the court's jurisdiction if he is resident in Scotland,⁽⁸⁰⁾ or, when the nature and circumstances of residence indicate that he has a substantial connection with Scotland.⁽⁸¹⁾ Residence in Scotland for three months is enough to indicate a substantial connection.⁽⁸²⁾ Thus the Court of Session has jurisdiction in every kind of action or proceeding, particularly, all petitory actions.⁽⁸³⁾ In addition, movable property situated within Scotland is amenable to the jurisdiction of the court,⁽⁸⁴⁾ within the circumstances of the value of the cause.

The arrestment of movable property establishes jurisdiction in all petitory actions. Arrestment on the dependence of an action in the court proceeds on a warrant contained in the summons, ⁽⁸⁵⁾ and may be recalled or restricted by the court.⁽⁸⁶⁾ Also, the court jurisdiction is competent in actions of damages for breach of contract or actions for implement of contract or for delict.⁽⁸⁷⁾

It seems, that the court's jurisdiction over the action for the remedy of specific implement is competent. The defender is subject to the jurisdiction of the court, where the above circumstances exist.

The Court of Session as a Supreme Civil Court in Scotland, exercises an appellate jurisdiction by virtue of which it can review on the merits certain of its own decisions, the decisions of lower civil courts, including the Sheriff Court.⁽⁸⁸⁾

Before considering the competency of appeal to the Court of Session, it should be remembered that the pursuer has the choice of forum in the appeal level similar to the choice of forum in the first stage. Thus he may bring the action to the Sheriff principal or to the Court of Session, and vice versa.

The competency of appeal to the Court of Session is regulated by Sec. 28 of the 1907 Act, such as, final judgment,⁽⁸⁹⁾ interlocutory judgments appealable without leave,⁽⁹⁰⁾ interlocutory judgment appealable with leave.⁽⁹¹⁾ Further, the Court of Session has power to review by way of appeal, reduction,⁽⁹²⁾ or suspension,⁽⁹³⁾ the proceedings of inferior courts and tribunals, including the Sheriff Court, and may set aside any incompetent or irregular proceedings,⁽⁹⁴⁾ and may regulate any failure by the court to exercise jurisdiction.⁽⁹⁵⁾ The interlocutor complained of is regarded by the appellate court as valid until it is shown that there is reason for altering it.⁽⁹⁶⁾

The Court of Session after exercising its competent jurisdiction in relation to the action under review, should follow certain proceedings. The court rehears the case.⁽⁹⁷⁾ It means that "the appellate court considers the pleadings, productions and other documents which were before the court below, including any notes of evidence, and any additional materials properly before the appellate court itself; hears the submissions of the parties, which may be on any matter relative to any of the interlocutors pronounced in the case; and reaches its own decision, altering or recalling the interlocutor or interlocutors complained of if, on full consideration, it concludes that the court below was wrong".⁽⁹⁸⁾ Also, it questions the fact and the credibility of the witnesses in certain categories of decisions.⁽⁹⁹⁾ It will be reluctant to do so generally, because the Court of Appeal places an emphasis on the value of seeing and hearing the witnesses. It also exercises, a judicial discretion, for the appellate court may intervene if it is satisfied that the judge did not exercise his discretion at all,⁽¹⁰⁰⁾ or, if he misdirected himself in law while exercising his discretion,⁽¹⁰¹⁾ or, he misunderstood or misused the evidence or the material facts before him,⁽¹⁰²⁾ or failed to take into account some relevant considerations.⁽¹⁰³⁾ Furthermore, an assessment of damages that have been judged by the inferior court will be considered too.⁽¹⁰⁴⁾ Accordingly, if a final judgment of the Sheriff Court, where leave is required for appeal has been brought to the Court of Session as the appellate court,⁽¹⁰⁵⁾ the above circumstances,⁽¹⁰⁶⁾ shall be taken into account to reconsider the inferior court's

judgment. The appellate court after rehearing and questioning the facts of the case, may reach a decision which differs from that of the inferior court. In Higgins v. I&C.M.Smith (Whiteinch) Ltd.,⁽¹⁰⁷⁾ the House of Lords dismissed the appeal, on the ground that "Where there were concurrent findings of fact in the courts below, generally the House of Lords would interfere with those findings only where it could be shown that both courts had clearly been wrong". Lord Jauncey of Tullichettle, stated,⁽¹⁰⁸⁾ that "this is a salutary principle whose purpose is to prevent this house, as the ultimate court of appeal, from being flooded with cases which depend not upon important questions of law but upon pure questions of facts". It appears that most successful appeals turn on point of law than fact. Finally, specific implement within the circumstances of the case will be granted if it is an appropriate remedy, or it may be refused by the court within its satisfaction and within the grounds for refusing the remedy.

2-The Court of Appeal in Iraq

The Court of Appeal has jurisdiction when the value of the cause is over 1000 Dinars. Furthermore, the Court of First Instance decisions as regards bankruptcy actions and liquidations are amenable to the jurisdiction of the Court of Appeal.⁽¹⁰⁹⁾

Action cannot be brought to the Court of Appeal directly before consideration by the Court of First Instance,⁽¹¹⁰⁾ for the Court of Appeal main task is to review the decisions of the Court of First Instance and whether to recall or change or amend such decisions.⁽¹¹¹⁾ Thus, the court cannot exercise jurisdiction as a Court of First Instance. The Court of Appeal may exercise jurisdiction as a Court of Cassation in certain kinds of actions, namely:

- 1-Actions of debt and movables up to 500 Dinars.
- 2-Actions of due instalments up to 500 Dinars.
- 3-Action of division of common property, "movable and imovable property", whatever the value of the cause is.

If the action is reviewed by the Court of Appeal, the court will examine the matter

of law and of fact to reach the right conclusion. (112)

To what extent is the jurisdiction of the Court of Appeal competent to order or to refuse the remedy of specific performance?

The Court of Appeal may exercise jurisdiction of either Appellate Court or Court of Cassation. The difference between the two cases is that matters of law and matters of fact concerning the case will be considered, in the former case, while in the latter case only matters of law will be considered.(113)

The Court of First Instance judgment must be final in order to be reviewed by the Court of Appeal,(114) as that judgment is appealable without leave, and appeal is available to every party as matter of right. Reviewing the case by the Court of Appeal transfers the whole disputed case, but it is restricted only to the judgment and the points complained of.(115) It was held,(116) that the submission to the Court of Appeal is only restricted to the final judgment, while if there is no final judgment no appeal can take place.

The parties to the action are entitled to submit new evidence to support their claim,(117) even if this new evidence and proofs have not been submitted before. It has been stated by the Court of Cassation, that the appeal is not only to know whether or not the final judgment of the Court of First Instance is legal and valid, but to transfer the case to a higher court, so that court may rely on a new investigation to pronounce its judgment.(118) Nevertheless, neither party can apply for a new claim or action or introduce a third party to the previous one in front of the Court of Appeal, unless it has been claimed or introduced in front of the Court of First Instance.(119)

The Court of Appeal rehears the case. It listens to the respondent's claim and his application and reconsiders his evidence and defence against the judgment of the Court of First Instance under review.

The judgment of the Court is either to confirm the final judgment of the Court of First Instance, to recall , or to amend it.(120) When the Court of Appeal confirms that the judgment under review is legal and valid, the defendant will then be forced to fulfil

his obligation. While, if the Court of Appeal recalled the judgment of the Court of First Instance, the defendant is no longer under obligation to fulfil.

The court has jurisdiction to compel or to reject the remedy of specific performance, for the court has jurisdiction over actions of movables and debts where the value of the cause is more than 1000 Dinars, or actions relating to bankruptcy regardless of the value of the cause, and actions of liquidation. If specific performance is an appropriate remedy, the Court of Appeal will compel the party to perform his obligation.⁽¹²¹⁾ Nevertheless, many actions cannot be appealed, but they can be cassated, such as, if the value of the cause is more than 500 Dinars but less than 1000 Dinars.⁽¹²²⁾ Also, the judgments of the Court of First Instance in actions where the value of the cause is more than 1000 Dinars, provided that, the action is not brought for appeal by the party against whom the decree has been granted, such action will be reviewed automatically by the Court of Cassation.⁽¹²³⁾ The Court of Appeal has no jurisdiction over such action, because the court cannot intervene in any action, unless the action is brought for review. Therefore, the Court of Appeal cannot impose or reject the remedy of specific performance in such action within the above circumstances.

Comment

The Court of Session in Scotland and the Court of Appeal in Iraq have something in common, which is the jurisdiction of the Appellate Court. The Court of Session jurisdiction is not competent over actions where the value of the cause is less than £1500, while the Court of Appeal in Iraq has such jurisdiction, but it acts as a Court of Cassation in certain circumstances. Also, the jurisdiction of the Court of Appeal in Iraq is competent over actions where the value of the cause is more than 1000 Dinars. In such cases the court exercises jurisdiction as Appellate Court.

The Court of Session jurisdiction is competent if the value of the cause is over £1500 in accordance with the circumstances those have been provided for by Sec. 28 of 1907 Act.

Actions, where the value of the cause is more than 500 Dinars but less than 1000 Dinars are not subject to the jurisdiction of the Court of Appeal. They are directly subject to the jurisdiction of the Court of Cassation. The jurisdiction of the Court of Session in Scotland is regarded as competent where the value of the cause exceeds £1500 within the circumstances of appeal to the Court of Session by Sec.28 of 1907 Act.

Concerning the right to appeal, in Iraqi civil procedure law leave is not required by the Court of Appeal or the Court of Cassation. It is a matter of right to the party against whom the decree is granted, whereas in Scots law, leave is required.

Regarding the granting and refusing the remedy of specific implement, the Court of Session in Scotland, and the Court of Appeal in Iraq are consistent, because whenever the action is subject to the court's jurisdiction, neither court will hesitate to compel the remedy or to reject it within the circumstances of granting and refusing the remedy. The major difference between the two courts is, that the Court of Appeal cannot act as a Court of First Instance, while the Court of Session can do so. Also, the Court of Session is the Supreme Civil Court in Scotland, while the Supreme Court in Iraq is not the Court of Appeal, but is the Court of Cassation.

Section Two: Procedures

The action should be brought into the court under certain requirements. Those procedural steps are crucial to obtaining a decree of specific implement. Further, the judgment "decree" of specific implement is pronounced in the light of these proceedings. The decree must be enforced against the defender, which might then be combined with imprisonment if the refusal of the defender is met. These proceedings will be considered fully in relation to the Scots Sheriff Court and the Iraqi Court of First Instance, while the procedures of the action under the High Court i.e. (the Court of Session or the Court of Appeal) will be avoided.

In general, procedures will be dealt with as follows:

Sub-section:1:-Proceedings of the action of specific implement

Sub-section:2:-The Judgment "decree" of specific implement.

Sub-section:3:-Enforcement of the decree of specific implement.

Sub-section: 1-Proceedings of the action of specific implement

Commencement of the action of specific implement and pleadings play a substantial role in the action as a whole, for the initial writ or the summons is the first important step to be taken into consideration by the pursuer. All the essential elements should be included, otherwise the action will be rejected and the remedy will be refused.

Raising an action in accordance with the procedural rules has major influence on the action itself, and subsequently on the remedy of specific implement thereafter. Proceedings of the action will be examined as follows:

1-Proceedings of the action for specific implement in Scots law.

2-Proceedings of the action for specific performance in Iraqi civil law.

1-Proceedings of the action of specific implement in Scots law

An action *ad factum praestandum* is brought to enforce the performance by the defender of an act other than payment of money.⁽¹²⁴⁾ Further, an action at the seller instance for implement of the contract by payment of the price, with payment of damages as an alternative, is, competent.⁽¹²⁵⁾

The action must be brought to the court as a summary cause, unless there is craved in addition, or as an alternative, to a decree *ad factum praestandum*, a decree for payment of money exceeding £1500 in amount (exclusive of interest and expenses).⁽¹²⁶⁾ On the contrary an action *ad factum praestandum* is brought to the court as an ordinary cause, if there is craved in addition or as an alternative to it, a decree for payment of money exceeding £1500 in amount.

It seems that an action *ad factum praestandum* is brought as a summary cause action, in two cases:

1-If the action is applied for without any alternative or additional crave for payment of money.

2-If the action is applied for with an alternative or additional crave for money

payment not exceeding £1500 in amount, exclusive of interest and expenses.

The action, therefore should be traced within the procedures of the two cause rules, i.e. (ordinary cause and summary cause) as follows:

1-Action for Specific implement as an ordinary cause:

The essential requirement to bring an action of specific implement in the Sheriff Court is the initial writ, by virtue of the Ordinary Cause Rules under rule 3 (1), which provides, "All ordinary causes shall be commenced by initial writ as nearly as may be in accordance with form A as set out...". It is defined by S.3 (K) of the Sheriff Courts (Scotland) Act 1907 as "the statement of claim petition, note of appeal or other document by which the action is initiated". It must contain a statement, in numbered paragraphs, of the facts which form the grounds of the action. The statement is known as *condescendence*. This statement sets out the factual basis of the claim ⁽¹²⁷⁾ The following statements are also required in the initial writ; (1)-the heading which identifies the court; (2)-the description, which identifies the pleading; (3)-the instance which identifies the parties; (4)-the *crave* which specifies the claim, and; (5)-the *pleas-in-law*, which are the legal proposition which justify the claim being granted.

Whenever possible, the full name and the correct designation of each party should be stated in the instance.⁽¹²⁸⁾ If the name and the designation of the party who sues or to be sued, are not set forth in the instance, the instance in such a case, will not be in proper form and the action may be held to be incompetent.⁽¹²⁹⁾

Thus, once it has been decided that an ordinary action should be raised in the Sheriff Court, it is necessary in the first instance to select the Sheriff Court in which the action is to be raised.⁽¹³⁰⁾

The choice of the Sheriffdom in which it is proposed to raise the action will be determined by the relevant rules of the jurisdiction.⁽¹³¹⁾

Another essential requirement to commence the action is the service of the initial writ.⁽¹³²⁾ It is a proceeding considered to give the defender sufficient notice of the writ and an opportunity to intimate an intention to defend.⁽¹³³⁾ Service on the

defender, however, proceeds on a warrant of citation issued from the court in question.⁽¹³⁴⁾

The warrant is usually a printed form attached to the initial writ.⁽¹³⁵⁾ The period of notice which must be inserted in the warrant and the form of citation according to rule 7 (1) which provides that subject to rule 11 and the power of the Sheriff to shorten or extend the periods of notice have been given to the defender; (a): 14 days when the defender is resident or has a place of business within the U.K., the Isle of Man, the Channel Islands or the Republic of Ireland; (b): 28 days when the defender is resident or has a place of business outwith the U.K, the Isle of Man, the Channel Islands or the Republic of Ireland but is resident or has a place of business elsewhere in Europe; (c): 42 days when the defender is resident or has a place of business outside Europe.

The significance of due service of the initial writ is that it apprises the defender of the nature of the proceedings against him and gives an opportunity to lodge a notice of intention to defend if he wishes.⁽¹³⁶⁾

In fact, the topic of procedure is a large and complicated one and it is not proposed to examine it in detail here. Consideration will be limited to those aspects of the topic which are effectual in the context of specific implement, particularly the crave, the condescendence, and other certain procedures, as follows:

The crave

The initial writ consists of a crave,⁽¹³⁷⁾ which plays a fundamental role in the decree of specific implement. The crave for a decree *ad factum praestandum* must be stated and framed in unambiguous terms which clearly specify what is to be done.⁽¹³⁸⁾ It sets forth what is to be done by the court, which must be definite and specific.⁽¹³⁹⁾ In addition, if the demand is for performance of the contract, it must state in what way it is to be done.⁽¹⁴⁰⁾

Because a decree *ad factum praestandum* must be issued in unambiguous terms, it will not be pronounced by the Sheriff Court unless its terms are precise. The defender needs to be left in no doubt as to the exact obligation which he should fulfil.⁽¹⁴¹⁾ It

can be concluded that when the crave is indefinite, vague or ambiguous, a decree of specific implement cannot be issued, because the defender; first, will not know how to comply with such a decree; secondly, the court should not accept such a crave, as it leads to an indefinite and vague decree. It was stated,⁽¹⁴²⁾ that the decree "must be an ordinary decree of court,...., and so a decree which can be obeyed by some specific act done on the part of the defender". Further, the court has to bear in mind the consequences of the decree of specific implement,⁽¹⁴³⁾ as the defender should be left in no doubt regarding the obligation he has to perform,⁽¹⁴⁴⁾ otherwise he may unfairly, be exposed to penal consequences.

The considerable importance of the crave in, and its fundamental influence on a decree of specific implement is, that the precision, the accuracy and specification of the decree of specific implement which is required in such a decree mostly depends on the precision and the accuracy of the crave, for the court shall not pronounce a decree of specific implement except in terms of such precision as will leave the defender without any doubt regarding what he should perform.⁽¹⁴⁵⁾

The crave may be framed for delivery,⁽¹⁴⁶⁾ In Merchants Facilities (Glasgow) Ltd. v. Keenan,⁽¹⁴⁷⁾ the pursuer raised an action against the defender. The pursuers craved the court to grant them a decree of delivery of one convertible suite and one display cabinet, and craved also to grant warrant to officers of the court to search for such articles. The pursuers also craved the court for decree against the defender for payment of a sum of £10 1s. 6d. It was held by the Sheriff Court that "in an action for delivery in the Sheriff Court it was competent at Common Law to grant warrant to search at the sametime as granting decree". Thus, the pursuers who seek delivery may crave both delivery and a warrant to officers of court to search and take possession of the goods stated and specified in the crave. If the pursuer only craves delivery however, a search warrant is not prayed, and where there is no alternative conclusion, imprisonment is the only way by which he can enforce the decree.⁽¹⁴⁸⁾

The crave setsforth "the specific decree, warrant, or order asked".⁽¹⁴⁹⁾ It "should

ask neither too little nor too much".⁽¹⁵⁰⁾ Furthermore, "It is advisable where possible to crave all the requisite remedies in a single action".⁽¹⁵¹⁾ Further, the pursuer's solicitor may combine any number of craves to secure the decree which his client requires to protect or to enforce his right,⁽¹⁵²⁾ for an alternative crave for damages is usually desirable to be added lest the decree of specific implement is refused in the exercise of the court's discretion, or lest compliance with the crave for specific implement becomes impossible during the dependence of the action.⁽¹⁵³⁾

In Mc keller v. Dallas's Ltd.,⁽¹⁵⁴⁾ it was held "(2) that the fact that in the original action the pursuers had included the ordinary conclusion for damages did not constitute an election to take their remedy in that form so as to bar them from insisting on specific implement". In Mackay v. Campbell,⁽¹⁵⁵⁾ the defender was not entitled to avoid the grant of a decree in terms of the primary crave, and the pursuer was entitled to a decree of specific implement despite the lodging of the minute. If for instance an action craving (1) delivery and (2) failing delivery, damages, the Sheriff Court may enforce delivery as craved within a specified period, under certification that on his refusal to do so decree will be pronounced in terms of the alternative crave.⁽¹⁵⁶⁾ If the defender does not comply with the court's order, the pursuer may minute that the defender has failed to implement the order, and the Sheriff Court may grant decree in terms of the alternative crave.⁽¹⁵⁷⁾

Suppose that the defender does not fulfil the decree on the primary crave after it is pronounced by the court. What should be done to compel him to obey the decree?

It was noticed,⁽¹⁵⁸⁾ that the pursuer in such a case "may move for decree in terms of the alternative crave". Further, it was held,⁽¹⁵⁹⁾ "that upon the grant of decree in terms of the second conclusion, the seller would be personally barred from proceeding to enforce the original decree for payment; and decree granted in terms of the second and third conclusions". A crave for delivery, however, could be competent, but it is not so, if the contracting parties agreed upon the method by which the goods should be repossessed in case of the defender's failure to fulfil the contract.⁽¹⁶⁰⁾ Furthermore, it

was held competent to have a joint and several craves in an action for delivery.⁽¹⁶¹⁾

The Sheriff may allow the pursuer to amend the crave so as to seek remedy different from the one originally craved.⁽¹⁶²⁾ It is in the Sheriff Court's discretionary power to permit amendment, but it has to consider whether amendment is directed to determine the real question in controversy.⁽¹⁶³⁾ Thus, in Summerlee Iron Co. Ltd.v.Caledonian Ry.⁽¹⁶⁴⁾ a crave for damages may be added alternatively to a crave for specific implement. Nevertheless, even if an amendment is competent, it may be refused in the interests of justice.⁽¹⁶⁵⁾ The pursuer may also crave damages either alternatively or additionally.⁽¹⁶⁶⁾ The court then normally fixes a specified period within which delivery will be made.⁽¹⁶⁷⁾ The cause, it was said, "is continued so that the order for delivery may be intimated to the defender and he may be given an opportunity to implement it".⁽¹⁶⁸⁾

What if delivery has not been made within the specified time. The pursuer is entitled to move for decree for the alternative crave which is payment of a sum of money.⁽¹⁶⁹⁾ Further, in Summary Cause Rules, rule (71) provides; "in an action for delivery the court may, when granting decree, grant warrant to search for and take possession of the goods and to open shut and lock fast places. This warrant shall only apply to premises occupied by the defender and may only be executed after the expiry of a charge following upon the decree for delivery".

To consider the influence of the crave as a procedural step upon granting or refusing specific implement, it should be noted, that the crave for a decree of specific implement should be precise and unambiguous and specify precisely what should be done, for it was pointed out,⁽¹⁷⁰⁾ that "A conclusion for implement of a contract is a conclusion for nothing, unless it states in what way the contract is to be implemented". In addition, the crave was considered ambiguous by Lord Justice-Clerk,⁽¹⁷¹⁾ unless these words "and that by entering into possession of the premises and paying the rent when due", were added. Lord Neaves stated,⁽¹⁷²⁾ in the same case, that in his opinion the "original summons was bad for want of specification". And, "the true objection to the summons was its not pointing out in a clear and practical manner what

the pursuer sought".⁽¹⁷³⁾ Therefore, "No one could venture to enforce a decree, if he obtained it, in terms so vague and indefinite".⁽¹⁷⁴⁾ Thus, the ambiguity of the crave, in one way or the other, affects the decree of specific implement itself and leads to an ambiguous decree which cannot be fulfilled. Further, in Middleton v. Leslie,⁽¹⁷⁵⁾ it was noticed, that "in pronouncing decree *ad factum praestandum*, the court has to bear in mind the consequences and sanctions of such a decree. Failure to implement such a decree exposes a defaulter to the penalty of imprisonment which it is in the power of the pursuer to put in force". Also, a decree which is indefinite or vague or ambiguous is unenforceable.⁽¹⁷⁶⁾ Thus the Lord President,⁽¹⁷⁷⁾ thinks that "in the case of decrees ...which may expose a defender to a penal consequences, it is right that the court should so express the decree that the defender shall be in no doubt regarding the obligation he has to discharge". Also, in Munro v. Liquidator of Balnagown Estate Co.,⁽¹⁷⁸⁾ it was observed, that "it is impossible:.....to pronounce any decree *ad factum praestandum* which is not absolutely precise in every particular, both as to time and as to place".

Finally, it is submitted, that an indefinite, ambiguous and vague crave is another reason which can be added to the grounds for refusing specific implement. The court will reject the petition of the pursuer by reason of ambiguity and vagueness of the crave, and thereby he, "the pursuer", will lose his right to the remedy of specific implement.

The condescendence

In accordance with the initial writ requirements, the condescendence is also essential statement. It is not less important than the crave. It is a statement of the material facts on which the pursuer founds the claim which he has formulated in the crave.⁽¹⁷⁹⁾ The pursuer should therefor set forth in the condescendence his title,⁽¹⁸⁰⁾ and should set forth the circumstances in which he is compelled to assert it.⁽¹⁸¹⁾

The condescendence must fulfil two essential functions:

"1-It must state the facts which, if true, are such as to justify, or entitle the pursuer to decree in terms of his crave.

2-It must give fair notice to the defender of the case which he has to meet".(182)

Black (183) has simplified the case of condescence, by saying, "Suppose the action for implement of a contract or for damages for breach of contract. You obviously begin by describing the contract. If it is an oral contract, you should give full details who said what to whom. If it is in writing, simply give the date of document (or documents) in which it is embodied and a very brief description of the nature of the contract".

The condescence may be altered by amendment,(184) or by adjustment,(185) but it has been suggested that, "to frame them only after a careful appreciation of the relevant facts and law, so that they will require the minimum of subsequent alteration".(186) It has been pointed out, that "...the primary consideration in drafting is that it is the function of written pleadings to enable the parties and the court to ascertain with precision those matters on which the parties are at issue and those on which they are agreed, and thus to arrive at the question which the parties wish decided. Thus, in an action of damages for breach of contract or negligence, the condescence will set out the relationship between the parties and a chronological narrative of the facts".(187) In accordance with Sections (41-46) and Article 52 of Sched 1 of the Civil Jurisdiction and Judgment Act 1982, it is necessary and essential to state paragraph 1 or 2 according to O.C.R., (a):the domicile of the defender. (b):the grounds of Jurisdiction.(188)

The initial writ must also contain averments about any agreement which the pursuer has reason to believe may exist prorogating jurisdiction over the subject-matter of the cause to another court; and any proceedings which he has reason to believe may be pending before another court involving the same cause of action and between the same parties as those named in the initial writ.(189)

plea-in-law

Each party is required to include in his pleadings, after his statement of facts, a note of his plea-in-law, stated in consecutively numbered sentences.⁽¹⁹⁰⁾ When read together with facts averred in the statements of facts, the plea-in-law should substantiate the party's right to the remedy he seeks or his entitlement to decree of dismissal or absolvitor. It is a statement of the legal grounds upon which the pursuer is entitled to the remedy set forth in the crave.⁽¹⁹¹⁾ There should be at least one plea-in-law addressed to every substantive part of the crave.⁽¹⁹²⁾ The plea-in-law focus the legal issue in the action, and the decree of the court is expressed in its interlocutor by sustaining or repelling them.⁽¹⁹³⁾

The plea stated should therefore be those which have a direct bearing on the case or upon the mode of proof by which it contended that the court should arrive at its decision.⁽¹⁹⁴⁾

Defence

It like the initial writ, begins by stating the name of the Sheriffdom and the place of sitting of the court.

The answer must be framed in paragraphs corresponding to the paragraphs of the condescendence.⁽¹⁹⁵⁾ In each paragraph the defender must answer every statement of fact made by the pursuer in the corresponding paragraph of the condescendence.⁽¹⁹⁶⁾ He must add any averments which he intends to prove. "He is obliged to respond to each averment by the pursuer in one of three ways: by admitting it, or denying it, or stating that the matter is not known and not admitted".⁽¹⁹⁷⁾ The defender's averments, must be relevant and specific.⁽¹⁹⁸⁾

The plea-in-law for the defender fall into two categories, (1): preliminary pleas,⁽¹⁹⁹⁾ and (2): pleas on the merits.⁽²⁰⁰⁾

Where the defender wishes to put forward a substantial case of defence in answer to the pursuer's averments, the defender's answer, having dealt with the pursuer's averments, goes on to state by averments by way of explanation of facts which the

defender intends to prove.(201)

He must give notice of any statutory defence on which he wishes to rely.(202)
Thus the defender's averments must be specific and relevant.(203) If particular averments are held to be irrelevant or lacking in specification, they will be excluded from probation.(204)

2-Action for specific implement as a summary cause:

An action for specific implement as a Summary cause is commenced by summons. Rule (1) of Summary Cause Rules, provides that "a summons may be in one of the forms A to I. These forms are appended to the Summary Cause Rules".

The various forms cover different types of action and include all the common categories of summary cause.(205)

Summons comprises the following essential elements:

- 1-The heading must name the court in which the action is brought.
- 2-The names and designation of the parties.
- 3-The remedy sought or claim made by the pursuer must be stated with reference to statement of claim.
- 4-The defender must be informed where and when he should appear to answer the claim with a warning that, should he fail to appear, decree in absence may be granted against him.(206)
- 5-The summons should state that the pursuer is authorised to serve a copy of the summons on the defender not less than appropriate number of days before the appearance date.
- 6-There should be a statement, if the court requires to hear evidence, a date will be fixed for that purpose, and that parties are authorised to cite witnesses to attend on that date to give evidence.
- 7-There should be a statement that the summons is warrant for arrestment on the dependence or arrestment to found jurisdiction if either is appropriate.

8-The pursuer's solicitor's name and address must be shown on the principal summons.

The suggested form of summons in an action for delivery is in Form D.⁽²⁰⁷⁾ The pursuer may seek payment as an alternative to delivery, in which case the court normally fixes a specified period within which delivery has to be made. The cause is continued so that the order for delivery may be intimated to the defender and he may be given an opportunity to implement it. The continuation may be to a specific date after the expiry of the period within which delivery is to be made, or it may be *sin die* in which case the pursuer may have the cause called again by means of an incidental application.⁽²⁰⁸⁾ If delivery has not been made within the specified time, the pursuer may then move for decree for the alternative sum.

The pursuer may ask the court to grant a warrant to search for and take possession of the goods of which delivery is sought. Such a warrant applies only to premises occupied by the defender and may be executed only after the expiry of a charge following upon decree for delivery.⁽²⁰⁹⁾

According to Rule 2 (1), "There shall be appended or annexed to the summons a statement of claim containing a concise statement of the facts which form the ground of action including, where appropriate, a note of the nature of any contract founded upon or any relevant statutory provisions. Without prejudice to the foregoing generality, where the cause arises from the supply of goods or services, the date or dates on which they were supplied shall be specified". It has been suggested that, including the phrase "any relevant statutory provision" in the rule, must amount to a statement of law.⁽²¹⁰⁾ Further "in practice in anything other than the simplest type of case it is desirable, as being of assistance to the defender and to the court, for the pursuer to state the legal as well as the factual basis of his claim".⁽²¹¹⁾

Domicile must be also specified by the statement of claim in accordance with S.41-46 and Article 52 of Sched. 1 of Civil Jurisdiction and Judgment Act 1982.⁽²¹²⁾ Also, the ground of jurisdiction of the court must be specified.⁽²¹³⁾

Rule 3(1) provides that " the summons shall be signed by the Sheriff Clerk "with certain condition".⁽²¹⁴⁾ Rule 3 (2) provides that the signed summons shall be warrant for service on the defender.....", and "When necessary provisions are included in the summons it shall be warrant (a): for arrestment on the dependence..., (b): for arrestment to found jurisdiction.

A statement of claim must contain "averments about agreement which the pursuer has reason to believe may exist prorogating jurisdiction over the subject matter of the cause to another court.⁽²¹⁵⁾ And " averments about any proceedings which the pursuer has reason to believe may be pending before court involving the same cause of action and between the same parties as those named in the initial writ".⁽²¹⁶⁾

Alteration of summons or statements of claim is permitted no later than seven days before the date fixed for the diet of proof, but the Sheriff may grant the motion "at such time thereafter as he in special circumstances may allow". The word alteration in the rule includes what would be described as amendment or adjustment in ordinary cause procedures".⁽²¹⁷⁾

The period of notice in Summary cause actions are stated in Rule 4(1). They are the same as those in Ordinary cause actions.

According to Rule 5, "citation shall be given in Form J and the certificate of citation shall be in Form K and the said forms shall be annexed or attached to the summons or a copy thereof...".

If the defender intends to defend the action he must state at first calling or at a continuation thereof.⁽²¹⁸⁾ He is entitled to lodge a counterclaim, but must normally do so at the first calling or a continuation thereof.⁽²¹⁹⁾

2-Proceedings of the action for specific performance in Iraqi

civil law

The first step for any action to be brought to the court, is the process of commencement of the action by petition,⁽²²⁰⁾ according to Article 44 of Iraqi Civil Procedure Code, which provides: "Every action must be commenced by initial writ,".

It is a written form submitted by the claimant to the court. Thus an action should be brought to the court by a written application, called a petition.⁽²²¹⁾

The plaintiff must submit the petition to the court and must submit as many copies as there are defendants. He must also provide a list of the documents and proofs he may rely on in his claim. He must sign every copy,⁽²²²⁾ in order to serve citation of the defendant, for non citation of the defendant of the petition is regarded a defect substantially affects his defence.⁽²²³⁾

The petition consists of many elements, such as the name of the court in which the action is brought,⁽²²⁴⁾ the date of raising the action,⁽²²⁵⁾ and the name of the plaintiff and the defendant with their occupation and their residence.⁽²²⁶⁾ The most important statements are the crave,⁽²²⁷⁾ and the subject-matter of the action.⁽²²⁸⁾

The defendant must address his claim and petition to the court which has competent jurisdiction. However, if he brings his action to an incompetent court, such a court must transfer the action to the competent court.⁽²²⁹⁾

Regarding the name and occupation and the residence of the plaintiff and defendant, it is very important to include these statements in the petition, for it makes the task easy for the court, especially in citation.⁽²³⁰⁾ Under Article 45 of Iraqi Civil Code "1: A special domicile may be elected for the performance of a specific act; 2:-A domicile elected for the performance of a legal act shall be deemed to be the domicile in so far as all matters relating to such act are concerned, including the procedure for enforcement by legal means unless the election of domicile is expressly limited to certain acts, excluding others; 3:-The elected domicile must be evidenced by writing".

The crave and the subject-matter of the action in Iraqi civil procedures law play a substantial role as to whether the plaintiff is entitled to obtain what he has claimed. It is submitted that the subject-matter is the request of the plaintiff from his petition. It is the right that the plaintiff endeavours to protect and to obtain thereafter. Moreover, it establishes whether there is such a right in such an action. It is to force the defendant to do something or to refrain from doing something.⁽²³¹⁾

The subject-matter of the action sets forth what the court is required to do. It is essential to the court to know what is the subject of the action, for on that basis, the court is able to determine the disputed case. Thus, Iraqi Court of Cassation once held,⁽²³²⁾ that ".....the petition is ambiguous to some extent, so the court of merits should have ordered the plaintiffs to specify their subject-matter sufficiently and precisely. The decision which will be pronounced must solve and end the dispute between the two parties, and should be able to be executed thereafter".

The subject-matter of the action represents a fundamental element in any action. Thus, the court must decide within the limits of what the applicant, "the plaintiff", has demanded in his petition.⁽²³³⁾ The plaintiff should remove any ambiguity or vagueness from his petition.⁽²³⁴⁾ If there is any ambiguity or vagueness in such a petition, the whole judgment will be affected.

Since the statement of a subject-matter is substantial statement of the petition, it is submitted, however, that vagueness and ambiguity can constitute a factor for misleading the court in the process of pronouncing the decree of specific performance. Therefore, the court shall not take the risk of judging the case with an ambiguous and indefinite subject-matter. Possibly, the court will reject the action of an ambiguous subject-matter, for it was laid down that the petition, which does not include the subject-matter, is null.⁽²³⁵⁾ The problem here is not a matter of vacancy of the petition from any subject-matter, but it is a matter of ambiguity and vagueness of the subject-matter. The court, as has already been said,⁽²³⁶⁾ has the power to order the plaintiff to make his prayer clear. Nevertheless, under Article 59 of Iraqi Civil Procedures Code the parties to the action can neither increase nor alter the subject-matter of the action,⁽²³⁷⁾ except in the case of incidental requirements.⁽²³⁸⁾ Thus, the Court of Cassation held,⁽²³⁹⁾ that, having the plaintiff altered his subject-matter from demanding a certain sum of money to demanding the validity of the contract of sale instead, is considered a major alteration in the subject-matter of the action. Therefore, the action should be rejected. Whereas, the crave, i.e., "the plaintiff demands" it is

said, is the plaintiff's request to enforce the defendant either to do or not to do something.⁽²⁴⁰⁾

Another substantial statement is included in the petition. The statement of facts, evidence, the requirements of the plaintiff, and the pleadings. The element of fact is the cause (i.e., the material causes) by which the dispute has occurred. Thus, for instance if the subject matter of the action is the contract, or delict, or unlawful enrichment,...etc., the plaintiff must refer in his petition, to these facts, in which he believes the defendant has breached his obligation.⁽²⁴¹⁾

The evidence which the plaintiff wishes to use to prove his case must be included. It may be a written or oral evidence. The plaintiff can choose any evidence he thinks may assist him to prove his claim. He may also submit the evidence at any stage.⁽²⁴²⁾

The plaintiff requirements statement is, the court's order, which the pursuer aims to obtain, in order to oblige the defendant to perform what he has undertaken to do or not to do. He may add to his previous claim the expenses of his action.

The plaintiff should rely on a basis of law in his action to obtain a judgment in his favour. Such a basis differs from one dispute to another. Thus, when the action is based on delict or breach of contract,...etc., the plaintiff must rely heavily on provisions of law which treat breach of contract or liability...etc. and which support his claim, by which the defendant is responsible for his act.

All the statements and details in the petition, are to serve one other purpose. It is to let the defendant have a clear idea of the action to prepare his defence against it.⁽²⁴³⁾

To what extent do the crave and the subject-matter of the action overlap?

The crave and the subject matter as has already been considered, play a substantial role in the petition.⁽²⁴⁴⁾ They have more than one thing common. For instance, the subject-matter of the action should be fully taken into consideration by the plaintiff. The limitations of such subject-matter should also be determined in the petition in order to include and to cover all the requirements of the plaintiff.⁽²⁴⁵⁾ It should also, inform the defendant to let him prepare his defence, and to enable the court to know what should be done.⁽²⁴⁶⁾

The court cannot accept a petition which lacks a crave or a subject matter, because Article 50 of Iraqi Civil Procedures Code provides, "If there is mistake or lack of one of the essential elements in the petition,....., unless the plaintiff amends such a mistake within a reasonable period, the petition is regarded null by the court's decision".

It was argued whether the "the plaintiff's claims", means the subject-matter of the action, or the demands by the plaintiff. Iraqi civil procedure law jurisprudence and scholars,⁽²⁴⁷⁾ concurred that the said phrase means the subject-matter of the action. Nevertheless, if that statement is dropped from the petition, the action shall be rejected until the statement is amended or added. The same may occur with the crave. It is submitted that to apply to the court, a petition without the statement of what the plaintiff wishes to have, despite announcing and declaring the subject-matter of his action, is unacceptable and inapplicable. However, sometimes due to the nature of action, the plaintiff cannot state the subject matter of his action, for instance, in the action of usurpation.⁽²⁴⁸⁾ Whereas, the plaintiff cannot raise a petition without crave. Subsequently, it is submitted that the subject-matter of the action and the demands of the plaintiff complement each other.

Specific performance is affected by an ambiguous or vague crave or by action with vague or indefinite or ambiguous subject-matter, because, first; the action will be rejected unless these statements are included in the petition, secondly; as the Court of Cassation decided,⁽²⁴⁹⁾ that "the petition to a certain extent is ambiguous, so that the court of merits should have ordered the plaintiffs to specify their action and to determine the subject-matter precisely and specifically, for the decision which will be granted should be able to end and solve the dispute and able to be executed thereafter". Further, the court is restricted to what the plaintiff has demanded in his petition, if such demand is ambiguous and indefinite, the court may insist on him to specify and to clarify his crave,⁽²⁵⁰⁾ otherwise, the court shall reject the action. Furthermore, an ambiguous crave or subject-matter leads to an ambiguous decree. Thus, the court cannot grant the plaintiff more than he has craved for in his petition.⁽²⁵¹⁾ If the case is

so, how can the court examine an action with an ambiguous or vague or indefinite crave or subject-matter? Surely it cannot do so,⁽²⁵²⁾ for as has already been explained, that if the contracting party applied for damages instead of specific performance, the court cannot reject this application and insist on him having specific performance and vice-versa, unless it is known to be impossible, or there is exceptional hardship or undue difficulty to do so.⁽²⁵³⁾

It can be concluded that, whenever the subject-matter of the action or the crave itself is ambiguous or indefinite, the court can reject the action but before rejecting it, the plaintiff should be asked to correct and to amend or specify his crave or subject-matter, otherwise specific performance cannot be granted.

The plaintiff is entitled, however, to amend the crave,⁽²⁵⁴⁾ by adding to the original petition all expenses and expenditures which have been incurred at all the stages of the action, beginning with the Court of First Instance until the appeal stage, except the stage of cassation. Also, the case of incidental requirements,⁽²⁵⁵⁾ could be a very good example for amending the plaintiff's demands in his action.

Comment

1-Iraqi law and Scots law are consistent as regards, raising the action whether by initial writ or summons in Scots law, or by petition in Iraqi law. A party applying for a decree of specific implement in both systems must form his crave in unambiguous terms which clearly states what the court should do.

2-Ambiguity and vagueness of the initial writ or the summons generally and the crave particularly, are reasons in both systems to reject the whole action, and may constitute a reason to reject the decree of specific implement itself. Therefore, the ambiguous and indefinite crave which leads to an ambiguous decree can be regarded as a reason for refusing specific implement in Iraqi and Scots systems.

3-Iraqi civil procedures law includes an additional statement which is the case of the subject-matter of the action. This statement can be combined with the crave. They

complement each other in representing the whole requirements of the plaintiff. While in Scots law, the crave should be sufficient to show what is to be done, is well established and settled by the Scots judiciary and scholars.

4-In Scots law the value of the cause and whether the action is brought with or without additional crave for damages, decides the nature of the court rules for raising the action, and therefore, different rules of procedures may be followed, whereas in Iraqi law, such division in the action and the procedural rules is not found.

Sub-section: 2:The judgment; "decree" of specific implement

Pronouncing a decree of specific implement against the party in breach is the aim of the aggrieved party, and the result of examining the action by the court. To obtain effective decree, many circumstances should be taken into consideration. The judgment will be considered in Scots and Iraqi systems respectively as follows:

1-Decree of specific implement in Scots law

According to rule 89 of the Ordinary Cause Rules, "(1) the Sheriff shall append to all interlocutors, except those of a formal nature, a note setting out the grounds upon which he has proceeded and in his final interlocutor on the merits he shall set out his findings in fact and in law separately:..."

(2) where an interlocutor with note appended there to is pronounced by the Sheriff otherwise than in presence of the parties, the Sheriff Clerk shall forthwith provide the parties with a copy of such interlocutor.....".

The fundamental issue is that the decree should be specific,⁽²⁵⁶⁾ for the contracting party, who is subject to such a decree, may incur a penalty of imprisonment if he fails to comply, and has the right to know precisely what he must do. Thus, such a decree will not be pronounced on an ambiguous and vague conclusion.⁽²⁵⁷⁾ It should specify precisely what the defender should do.⁽²⁵⁸⁾

The decree must dispose of the whole of craves of the initial writ and any counterclaim. A decree may be pronounced in one of four types:

(1):granting decree deciding the merits of the action in favour of the pursuer.

(2):granting a similar decree in favour of the defender.

(3):granting a decree of dismissal in favour of the defender.

(4):granting a mixed decree i.e.(decree of condemnor, absolvitor, and dismissal).(259)

The interlocutor must record accurately the order orally pronounced by the Sheriff from the bench, otherwise parties would leave the court under erroneous impression as to the terms of the interlocutor which was to be signed.(260) If it appears before the Sheriff signs the interlocutor, that order was incorrect, he may pronounce an interlocutor in different terms, only in exceptional circumstances.(261)

The judgment should be pronounced with the least possible delay after hearing the parties,(262) because long delays in pronouncing a decree can be regarded as a reason for disquiet and suspicion among the litigants who lose; and those who win the case may find that they have been deprived of equity and justice far too long.(263)

A decree in favour of the pursuer must keep within the craves of the initial writ. If such a decree goes beyond these craves, for instance, by giving decree for a larger sum than craved by the pursuer, the decree may be set aside.(264)

In Middleton v. Leslie,(265) it was observed that "in pronouncing decree *ad factum praestandum* the court has to bear in mind the consequences and sanctions of such a decree. Failure to implement such a decree exposes the defender to the penalty of imprisonment which it is in the power of the pursuer to put in force. I therefore think that in the case of decrees which may be thus enforced, or which expose a defender to penal consequences, it is right that the court should so express the decree that the defender shall be in no doubt regarding the obligation he has to discharge".

In Macdonald v. Mackessack,(266) a landlord raised a petition for warrant to sequestrate and sell the tenant's effects for rent past due, in a Sheriff Court. In addition, the landlord sought for an order on the tenant to replenish the farm if necessary. The Sheriff Court ordered the sale and the sale having exhausted the subject, the landlord moved for another order to restock, then for a decree of summary

ejection and warrant. The Sheriff Court accordingly granted warrant for summary ejection. It was held by the Court of Session, that "as the Sheriff had not fixed a time within which the restocking must be carried out, the tenant was not in default and that the decree of reduction of the warrant to reject fell in consequences to be pronounced".

The decree, must offer the defender a reasonable time to perform. If, however, the defender has delayed in performing the decree, such delay does not justify the court in suspending a charge in doing so.⁽²⁶⁷⁾

The extent to which the court can pronounce a decree for specific implement and whether or not such a decree can be amended or recalled by the court, are important issues.

The court may refuse to grant a decree of specific implement upon certain grounds which have already been fully considered.⁽²⁶⁸⁾ The decree will not be pronounced unless the court is fully satisfied that the remedy should be decreed. There is no doubt that the remedy is a legal one.⁽²⁶⁹⁾ Nevertheless, it was stated,⁽²⁷⁰⁾ that ".....a superior court having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course". How the court's discretionary power can be justified in granting or in refusing a legal remedy such as specific implement, is a questionable matter.

It has been submitted, that "there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights".⁽²⁷¹⁾ Furthermore, Lord Reid examined the problem in the case of White & Carter (Councils) Ltd. v. McGregor,⁽²⁷²⁾ and observed that there is some general equitable principle or element of public policy which requires some limitation of the innocent party's contractual right. The court thereby might not permit the enforcement of a legal right by such a party if he has no legitimate interest. It was stated,⁽²⁷³⁾ that, "Even where implement is possible, I do not doubt that the court.....has inherent power to refuse the legal remedy upon equitable grounds". Thus, the decree of specific implement will not be ordered if it is

impossible to enforce performance of the obligation and if compliance with it is impossible.⁽²⁷⁴⁾ Also, it must be rejected if performance of the contract would cause exceptional hardship.⁽²⁷⁵⁾ The court will examine the circumstances surrounding the performance of the contract within its discretion. It was held,⁽²⁷⁶⁾ that "it was not for the person seeking to enforce an obligation to aver that there were no circumstances which might lead the court to decline to enforce their legal right". If, however, the defender considers that there are grounds on which the discretionary powers of the court should be exercised, he should state averments and plea in his defence which is related to these grounds.⁽²⁷⁷⁾

Regarding the issue of whether a decree of specific implement can be recalled or amended....etc. When a seller A has agreed to sell a specific article to a buyer B, a contract of sale is concluded between them. The buyer B has the remedy of specific implement,⁽²⁷⁸⁾ where the seller refuses to fulfil his obligation. Thus, the same is applied if the seller so delays that it cannot be known whether a good title can be given to the subject of sale.⁽²⁷⁹⁾

Suppose, that a decree of specific implement has been pronounced by the court, but the goods perished or were destroyed by either the seller's fault or the buyer's fault or by reason beyond their control, after pronouncing the decree.

The Sheriff in his final interlocutor on the merits is directed to set out his findings in facts and findings in law separately, and to append to the interlocutor a note setting out the grounds upon which he has proceeded.⁽²⁸⁰⁾ If an interlocutor is not framed in accordance with the above rule, the Court of Appeal may remit the case back to the Sheriff Court to recall the interlocutor and issue another one instead.⁽²⁸¹⁾ The basis of the findings in fact is the oral evidence which the Sheriff heard and the written and oral evidence which he has examined.⁽²⁸²⁾ The seller in the case of specific goods may bear liability of risk. Whereas, if one of the contracting parties is at fault and the destruction of the goods is due to that fault, he is held liable in damages.⁽²⁸³⁾

Such a decree is unenforceable,⁽²⁸⁴⁾ for performing the obligation specifically has become impossible whatever the reason is, whether by the seller's or the buyer's fault

or by reason beyond their control. Thus the seller cannot perform what he has undertaken to do.⁽²⁸⁵⁾

Interlocutors should be examined by parties' solicitors as soon as they are issued by the court, and they should apply immediately for the correction of any incidental or clerical errors.⁽²⁸⁶⁾ The Sheriff then should authenticate any correction, although lack of authentication will not render the interlocutor invalid.⁽²⁸⁷⁾ The parties should be intimated of the correction by the Sheriff.⁽²⁸⁸⁾

It is doubtful,⁽²⁸⁹⁾ whether the Sheriff Court holds the same power regarding the alteration in substance of interlocutor which is pronounced by the Sheriff, as the Court of Session has to amend or recall its own interlocutor.⁽²⁹⁰⁾ It was laid down that such correction could only be made before extract.⁽²⁹¹⁾ Although, the problem in the above case is, that the decree is unenforceable, because the subject matter either no longer exists or it has been so damaged that the purchaser will not be satisfied with it.

It has been argued, that it is doubtful whether the court holds such power in such a case. Thus "It seems clear that the Sheriff Court cannot *ex proprio motu* and without prior intimation to the parties correct any error other than a clerical or incidental error, in an interlocutor which has been issued and seen by the parties".⁽²⁹²⁾ Macphail suggested that the reported examples of recall and amendment of interlocutors by the Inner House are reliable guides to practice in the Sheriff Court.⁽²⁹³⁾ Nevertheless, it has been stated that it is difficult, "to ground a practical objection to the Sheriff's making a correction of which he appears *de recenti* and concent of the parties in circumstances analogous of a reported Court of Session decision".⁽²⁹⁴⁾

When the court is deprived of such power, it must not expect that its judgment will be respected and obeyed by the defender, because, it is impossible to perform.

There is no error in such a decree in the above case, but the problem is in the goods, which have to be delivered to the buyer by virtue of the judgment. They do not exist any more.

It is the obligation of every party to the action against or in respect of, whom the

decree is pronounced by the court to obey, unless and until it is recalled, reduced, or varied.⁽²⁹⁵⁾ If, however, a party "buyer" for instance, has been affected by the interlocutor believing that interlocutor is irregular or even void, he should seek remedy at once by way either of appeal, reduction or suspension, he must not assume that he may disregard such interlocutor with impunity.⁽²⁹⁶⁾

It may be relied on the case of Scott v. Mill's Trs.,⁽²⁹⁷⁾ where an interlocutor was pronounced with out knowing the fact that one of the parties to the action had died. The Court of Session repeated the interlocutor to suit the new circumstances. The Sheriff Court may do the same and it "would be entitled to follow the same course" where there is similar situation, as Dobie suggested.⁽²⁹⁸⁾ Thus, the court could be empowered to amend or recall or revise its decision if the destruction of the goods happened after pronouncing the decree.

2-The judgment; "decree of specific performance" in Iraqi law

The court must pronounce its judgment as soon as the hearing of the parties ends, either on the same day, or at least within fifteen days.⁽²⁹⁹⁾ The decision should be signed by the judge.⁽³⁰⁰⁾ The decision after being pronounced should be specific, definite, and unambiguous, otherwise:

1-The defendant, may disobey such a decree, not because he intends to do so, but because he does not know how to comply with it.

2-The judgment will not be executed entirely, because it is ambiguous and the Execution Administration Office should inquire of the court how to solve the ambiguity and vagueness in the judgment. Also, as has already been considered, an ambiguous crave may lead to an ambiguous judgment. Therefore, the crave must be framed clearly and specifically, to obtain a definite and specific judgment, which is decisively ends the dispute, and can be executed.⁽³⁰¹⁾ Furthermore, an ambiguous decree cannot be executed by the Execution Administration Office, because it does not know how to put it into practice. In that case the Execution Administration Office cannot enforce the

defendant to perform the decree. The Execution Administration Office in such circumstances should ask the court itself about the ambiguous part of its decree,⁽³⁰²⁾ without prejudice to the execution of the definite and specific parts of the judgment.⁽³⁰³⁾

A clerical or incidental error will not affect the judgment's validity. Nevertheless, it should be corrected by the same court, by which the decree was pronounced,⁽³⁰⁴⁾ in accordance with the application of the parties or even one of them.⁽³⁰⁵⁾ The parties to the action should be intimated regarding the correction by the court.⁽³⁰⁶⁾

If the court omits to consider some of the plaintiff's demands, for instance, if the lawyer's expenses are not included in the decision, or if damages are not included despite the plaintiff's crave, the decree may be challenged in the same court. The court's decree of whether the challenge is or is not acceptable, is subject to review by the Court of Cassation within seven days, beginning the day following the applicant is being intimated of the decision.⁽³⁰⁷⁾

The court, in pronouncing the decree of specific performance, uses its competent power.

To what extent does the court have discretionary power in granting or refusing specific performance? Does it have the power to recall or to amend its judgment, if after pronouncing it, the goods have perished or were destroyed, without the knowledge of the court, and with or without fault by either party ?

As regards the court's discretionary power towards specific performance, the court has such power, but in a very restricted respect, because specific performance is a legal, ordinary, and not equitable remedy.⁽³⁰⁸⁾ Nevertheless, the court's discretionary power appears heavily in two cases, for instance, impossibility to perform the obligation specifically,⁽³⁰⁹⁾ and where there is exceptional hardship and undue difficulty in doing so.⁽³¹⁰⁾ However, involving such a discretion would not alter or change the nature of the remedy. If specific performance is possible, the court has no discretionary power to refuse it.⁽³¹¹⁾ The defendant will not hesitate to prove to the court that specific performance is extremely difficult or exceptionally hard for him, by

producing evidence or by pleading that specific performance is rendered impossible by the plaintiff's fault.⁽³¹²⁾ The court, after examining all these pleas within its discretionary power, decides whether the decree of specific performance can or cannot be issued. The judgment should be justified and should be grounded logically ⁽³¹³⁾ and sufficiently.⁽³¹⁴⁾ It should include all of the reasons on which the judgment is based.⁽³¹⁵⁾

As regards the court's power to recall or amend its judgment if circumstances have changed after pronouncing the judgment, Article 160 (3) of Iraqi Civil Procedures Code provides, that the judgment of the court, is considered valid and operative, unless it is recalled or amended by the court itself or it is reviewed by a higher court, in accordance with the methods laid down by the law.

If after pronouncing the decree of specific performance, the goods or the subject matter have perished, performance of the obligation "the decree" becomes impossible. Under Article 160 (3) of Iraqi Civil Procedures Code the court has the power to recall the decree or to amend it. If the court does not amend it or does not have the power to recall its decree, it should not expect that its judgment will be fulfilled, bearing in mind that the consequence of not performing the court's decree, is imprisonment. The court must be careful in considering the defendant as a refusing party. Nevertheless, the party cannot be regarded as a contemnor, when it is impossible to perform the decree. The, consequences of non-performance or non-execution of the judgment depend on the reason for non-performance of the contract or the decree, for example, whose fault is it, that performance of the decree has been rendered impossible?

In accordance with Article 168 of Iraqi Civil Code, if the reason for impossibility of performance is beyond the debtor's control, he is not liable towards the other party. Thus, if after the judgment is pronounced, the goods have perished by reason beyond the debtor's control, the court will recall the judgment.

If it is proved that the goods were destroyed at the time of making the sale contract, the contract is void, by virtue of Articles 127 (1), 128 (1) of Civil Code. The decree in

all the above cases is unenforceable, and the court should recall its judgment or amend it within the new circumstances.

Comment

1-In Scots law, the judgment cannot be granted ambiguously, because the party against whom the decree is pronounced does not know how to comply with it, and thus he may be exposed to imprisonment.

The Iraqi civil procedures law deals with the matter similarly, and the defendant may be exposed to the same penal consequences, but unfortunately, the Iraqi court and the Iraqi civil procedures law have announced that error can be committed by the court in pronouncing the decree. In addition, the judgment by the Iraqi Courts may sometimes be ambiguous to a degree that the Execution Administration Office cannot even understand how such decree can be executed and enforced against the defendant. Scots law is more effective than Iraqi civil procedures law in this respect for the following reasons:

(1)-Granting an ambiguous and indefinite decree may lead to another dispute. Thus, instead of ending the dispute and solving the problem, another dispute will arise.

(2)-The consequences of not performing the court's decree of specific implement may expose the refusing party to imprisonment. The refusing party therefore may be exposed to imprisonment in Iraqi civil law more often than in Scots law, because the ambiguous decree leads to ambiguous and unfair consequences.

(3)-If Scots law is favourable in this particular case, however, Iraqi law is more flexible, for if there is ambiguity and vagueness in the decree, the court may clarify the ambiguity or vagueness.

2-The court's discretionary power in the two systems is restricted. Nevertheless, it appears to have strong effect when grounds such as impossibility and exceptional hardship involved. Thus the court's discretionary power plays a substantial role in refusing the remedy of specific implement where the defendant "defender" claims that

the fault of the plaintiff "pursuer" is behind the impossibility or the exceptional hardship to perform the obligation.

3- The Iraqi Court when circumstances change after the decree is pronounced, has the power to recall or to amend the decree more than Scots Court, for Iraqi Civil Procedures Code specifies, that the court can recall or amend its decree, whereas, there is doubt among Scots scholars whether the Sheriff Court does have such power to the same degree as the Court of Session has as regards the alteration in substance of the interlocutors. However, it has been suggested that, the courts in Scotland have power to recall or to amend the judgment if new circumstances have emerged.

Sub-Section 3-Enforcement of the decree of specific implement

After the decree of specific implement is pronounced, it should be performed and enforced against the refusing party. Enforcement of the decree may not be easy sometimes, for circumstances may arise, or the refusing party is of a special nature, and cannot be imprisoned, so that specific performance cannot be enforced. Enforcement of the decree in Scots law in this study will be considered only as an Ordinary Cause. Enforcement of the decree will be examined in Scots and Iraqi laws respectively as follows:

1-Enforcement of the decree of specific implement in Scots law

Under rule 90 of O.C.R., implementation of a decree, interlocutor or other order of the court depends on the issue of an extract containing details of the decree or otherwise, and a warrant for the execution of the diligence.

An extract of a decree in a defended cause may be issued after the expiry of 14 days from the date of decree unless:

- (1)- an appeal has been marked; or
- (2)- an application for leave to appeal has been marked; or
- (3)-the Sheriff has allowed extract to be applied for and issued earlier; or
- (4)-the Sheriff has reserved the question of expenses.

In framing the crave of the writ,⁽³¹⁶⁾ the method of implement asked for by the

pursuer, must be specifically and precisely stated.⁽³¹⁷⁾ Therefore, the ambiguous crave may affect the decree and its performance.⁽³¹⁸⁾ Furthermore, "it is generally a good objection to an action for specific implement that the decree, if pronounced could not possibly be enforced".⁽³¹⁹⁾

Obedience to a decree of specific implement can only be compelled by imprisonment of the defender who refuses to comply with such a decree.⁽³²⁰⁾ Nevertheless, no person can be imprisoned on account of his failure to comply with a decree of specific implement, except in accordance with the provisions of Sec. 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

A party who has obtained a decree of specific implement is invested with a power to enforce the refusing defender to perform and to obtain a warrant for his imprisonment.⁽³²¹⁾ Such a party, "the pursuer", makes an application to the court which pronounced the decree.⁽³²²⁾ Thus a warrant for imprisonment may be granted after the court is satisfied that the defender, i.e., "against whom the decree of specific implement was granted", refuses to obey and comply with the decree.⁽³²³⁾ It was pointed out,⁽³²⁴⁾ that the applicant must convince the court that the respondent has refused to comply with such a decree. If the warrant for imprisonment has been granted, it should be then limited for a period not exceeding six months.⁽³²⁵⁾ Where the court is satisfied that the respondent has obeyed and complied with the decree, the court must order his release immediately.⁽³²⁶⁾ The applicant, however, is responsible, as soon as he is satisfied that the respondent has complied with the decree, to inform the court "the Sheriff-Clerk".⁽³²⁷⁾ Many issues now may arise, for example:

1-What is the solution if a corporate body refuses to comply with a decree?

2-What if the decree can be performed through someone else or the agency of others?

3-Can the court recall a decree after pronouncing it, and in lieu of granting warrant for imprisonment, make an order for damages?

It was stated,⁽³²⁸⁾ that, "it would seem that where the defender is a corporate

body, which cannot be imprisoned, an action concluding for performance by such a defender of some act which cannot be performed vicariously conclusion for damages in the event of non-performance be added". Furthermore, in Lochgelly Iron & Coal Co. v. North British Rly. Co.,⁽³²⁹⁾ Lord Kinnear noted, that "It is true that a decree against a railway company could not in any case be enforced by imprisonment".⁽³³⁰⁾ Further, "...the court will never pronounce such a decree except in terms which shew to the defender a certain specific thing which he is to do within a definite time, and his failure to obey the order to do such specific thing within such definite time will enable the pursuer who has obtained it to enforce obedience by imprisonment".⁽³³¹⁾ He also speaks of "...a decree which, although it professes to be for specific performance, could not be carried into execution by any process of law".⁽³³²⁾ Thus, it can be concluded from Lord Kinnear's dictum that, generally it is doubtful whether to order a decree of specific implement against a company or a corporate body, because it is incompetent, although there are exceptional cases.⁽³³³⁾

The case of Gall v. Loyal Glenbogie Lodge,⁽³³⁴⁾ is the best example for non-enforceability of a decree of specific implement in the case of a corporate body. It was held,⁽³³⁵⁾ that "a petition to the Sheriff to enforce an order by a Superior Court of a society directing one of its branches to reinstate a certain person.....was incompetent.....in respect that a decree to such effect could not be enforced, and that the Sheriff was therefore not bound to pronounce it". Lord Trayner, in supporting the judgment, pointed out,⁽³³⁶⁾ that "The Sheriff could not.....enforce his own order, if the respondents refused obedience to it". And, "he is not bound to pronounce any decree which may be disobeyed without his having the means of enforcing obedience to it".⁽³³⁷⁾ Furthermore, "the Sheriff's decree could be enforced by imprisonment of the whole members of the respondent's lodge is out of the question".⁽³³⁸⁾ Nevertheless, enforcement of a decree of specific implement would be competent in two ways, namely:

1-In the case of non-compliance by the respondent, the court can empower its

officials to do some act equivalent.⁽³³⁹⁾ Thus, a Clerk of the court, for instance, was authorised to sign a conveyance on behalf of the refusing party.

2-If the act in question could be done by officials, such as pronouncing the decree against the directors.⁽³⁴⁰⁾

It is submitted that, unless it is impossible to perform the obligation or when exceptional hardship involved, the court has the power and the means to enforce its judgment even if the refusing party is a corporate body, not by imprisonment of the whole members of the company or the director, but by ordering the company or the corporate body to pay a penalty for non-compliance with the decree, either daily, weekly, or monthly. Also, the penalty should be increased in accordance with the unjustifiable attitude of the corporate body's representatives.

Performance of the decree through others cannot always be achieved, so that, the court will try to find any possibility of performance of the decree by the respondent even through agents or others. Gloag argued that,⁽³⁴¹⁾ that "In such a case the object of the decree is to give the defender an opportunity to obtemper it". Alternatively the court has the power to recall the decree and make an order for such payment by the respondent as appears to the court to be just and equitable in the circumstances.⁽³⁴²⁾ The court may sometimes authorise the pursuer to perform the obligation at the defender's expense.⁽³⁴³⁾ It seems that the court will take every possible step to enforce the decree of specific implement. If, for instance, the decree is for delivery of corporeal movables, a warrant to officers of court to search any premises in the occupation of the respondent, may be granted by the court.⁽³⁴⁴⁾ If any are found in such premises, they will be delivered to the applicant.⁽³⁴⁵⁾

It appears that the enforceability of a decree of specific implement is very flexible to a degree which affects the existence of the remedy itself. For instance, imprisonment is not operated to extinguish the obligation under the decree, and the applicant is not liable to aliment the respondent while in prison.⁽³⁴⁶⁾ Thus the obligation remains even though the debtor or the refusing party is imprisoned. Nevertheless, imprisonment itself, is not the case, but the relation between the decree of specific implement and

imprisonment, for it was pointed out,⁽³⁴⁷⁾ that "As the only method of compelling obedience to a decree *ad factum praestandum* is the imprisonment," of the refusing party. Furthermore, as has already been seen a corporate body or company cannot be enforced to perform specifically, because they cannot be imprisoned,⁽³⁴⁸⁾ except in a few cases and within specific circumstances.⁽³⁴⁹⁾ In addition, even if the refusing party is imprisoned, it is not more than six months.⁽³⁵⁰⁾ If he still refuses to comply with the decree of specific implement damages would be ordered alternatively. The court may recall the decree and make an order for payment by the respondent, in lieu of granting warrant for imprisonment, as if it appears to the court to be equitable and just.⁽³⁵¹⁾ Moreover, it has been noticed that "it is generally a good objection to an action for specific implement that the decree, if pronounced, could not possibly be enforced".⁽³⁵²⁾ Suppose a corporate body or a company, A has sold specific goods to a buyer, B. B having fulfilled all his obligations against A, has the right to a decree of specific implement.⁽³⁵³⁾ A as a company it cannot be imprisoned,⁽³⁵⁴⁾ if it refuses to comply with the decree.

The court, where the decree is for delivery of corporeal movables, may grant a warrant to officers of the court to search any premises in the occupation of the respondent, "the company", and to take possession of and deliver to the applicant, "the purchaser", of such movables which may be found in such premises. Such a warrant is deemed to include authority to search the refusing party's place for the purpose of carrying the warrant into lawful execution.⁽³⁵⁵⁾ Suppose, further, that the officers could not find the subject-matter or the goods had perished or were destroyed for any reason. Ordering the company to perform specifically in such circumstances is out of the question, because it is impossible. The company as a party in breach cannot be imprisoned.⁽³⁵⁶⁾ Damages are the alternative in such a case, for the court may in lieu of granting warrant for imprisonment, recall the decree and make an order for payment.⁽³⁵⁷⁾ Also the court makes such an order as appears to be just and equitable in the circumstances.⁽³⁵⁸⁾

It seems that the company can avoid performing specifically if it intends to. The only way to oblige the refusing company to perform the decree of specific implement, is by ordering it to pay penalty for any refusal or delay in delivering the goods sold to the purchaser, unless there are certain exceptional circumstances against such performance.⁽³⁵⁹⁾

Another issue may arise, which is the possibility of enforcement of the decree of specific implement through others, such as agents.

If the principal has refused to deliver the goods to the purchaser, and the goods have been discovered with the agent by the court, there can be no doubt that the agent is obliged to hand them over to the purchaser.⁽³⁶⁰⁾ If the seller, is presumed to have hidden the goods, the court will search his premises to find them,⁽³⁶¹⁾ and may imprison him for not performing the decree, but not more than six months. Suppose after all these means, the seller does not comply with the court's order. The court will take the other step, which is to recall the decree, and may order payment in lieu of granting warrant for imprisonment.⁽³⁶²⁾

2-Enforcement of the judgment "decree" of specific performance

in Iraqi civil law

A creditor who has obtained a decree of specific performance, has obtained automatically the power to enforce the debtor to fulfil his right, for acquiring that right requires the performance by the debtor of his obligation.⁽³⁶³⁾ If the debtor does not respect or perform willingly what he has undertaken to do, the Execution Administration Office will intervene to imprison the refusing debtor after citing him.⁽³⁶⁴⁾ Imprisonment of the refusing debtor is the final means that the Execution Administration Office should employ to compel the party to comply with the decree.⁽³⁶⁵⁾ Furthermore, imprisonment of the debtor should take place by a decision of either a judge who acts as an executor or a judge of the Court of First Instance, with the creditor's application for such imprisonment.⁽³⁶⁶⁾ Nevertheless, imprisonment of

the refusing debtor, does not extinguish his obligation or prevent the confiscation on his property.⁽³⁶⁷⁾

Imprisonment of the debtor must not be more for than four months.⁽³⁶⁸⁾ The creditor, however, can ask the Execution Administration Office to release the debtor even if he is not paid or has not obtained his debt.⁽³⁶⁹⁾ The creditor is not responsible for informing the Execution Administration Office as to whether the debtor has performed the decree. This is the responsibility of the officer of the prison, to which the debtor is sent..⁽³⁷⁰⁾ He must release him as soon as the decree is fulfilled.⁽³⁷¹⁾

Sometimes the debtor cannot be imprisoned, for instance the debtor is as a corporate body, so it is questionable whether the court's decree is enforceable.

The corporate body cannot be imprisoned, but this is not an obstacle to the execution of the decree of specific performance, for there is no distinction between an individual and a corporate body when they become debtors. If the debtor, whether a corporate body or an individual, undertakes to deliver goods to the creditor, he is obliged to do so in two ways, namely:

1-The goods are by virtue of a debt as a fungible goods.⁽³⁷²⁾ When the creditor applies to the Execution Administration Office with a copy of the court's decision, and it includes an order to oblige the debtor to perform, i.e., "to give something by either measuring, weighting, of counting", the Execution Administration Office should inform the debtor to give what he has been asked for *per se*. If he refuses to comply and still has the same goods or something else which may replace the subject matter of his obligation,⁽³⁷³⁾ the Execution Administration Office confiscates the goods and deliver them to the applicant "the creditor".⁽³⁷⁴⁾ If the goods cannot be found with the debtor, the creditor is permitted to buy similar goods at the debtor's expense, under the supervision of the Execution Administration Office.⁽³⁷⁵⁾ The debtor may be imprisoned if he has hidden his property to avoid performance.⁽³⁷⁶⁾

2-The goods are specific, i.e., "specific goods". When the goods are found with the debtor, they will be taken from him by the Execution Administration Office, and to be delivered to the creditor.⁽³⁷⁷⁾ The debtor may not be imprisoned in such a

case,⁽³⁷⁸⁾ for imprisonment is a mean should be used only to enforce the refusing debtor to fulfil the decree.

A corporate body can be compelled to perform specifically when it becomes a debtor. There is no special treatment for a corporate body as regards complying with the judgment of the court to perform specifically. In addition, according to Article 22 (First) of the Execution Code, if the debtor refuses to perform the judgment or the executive deed, with consent, the obligatory performance against him shall be achieved by the Execution Administration Office in accordance with the rules of this law. Furthermore, the obligation of the company can be executed through its legal representative such as director, or liquidator in the case of a liquidated company.⁽³⁷⁹⁾ The creditor should apply for execution of the obligation against the representative.⁽³⁸⁰⁾ Thus, there is no way for the company to avoid performance of the decree of specific performance. The director is regarded as a legal representative, and he should execute all the obligations that the company undertakes. Under Article 112 of the Companies Code the director and members of the managing committee of the company, in dealing with and exercising the company's affairs, should take the same care which is taken by them in their private affairs, provided that care should not be less than the care of a reasonable person. Furthermore, under Article 29 of the Execution Code, any one who obstructs the Execution Administration's officials in executing the obligation, is liable to compensate the applicant for any damages occasioned by reason of such refusal or obstacle, and may be punished under the law. It seems that there is no way to avoid the remedy of specific performance.

The agent cannot be enforced to execute the obligation if he rejects the representation.⁽³⁸¹⁾

It is submitted, however, that enforceability of a decree of specific performance is not affected by the fact that the debtor is as a company. The law takes no account of the fact that a company cannot be imprisoned. In addition, there is no provision which discriminates between a company or corporate body and an individual debtor.⁽³⁸²⁾

Further, the director or manager or liquidator, or whoever is in charge of the company, may be subject to punishment if he refuses or prevents or obstructs the execution of the decree.⁽³⁸³⁾ Furthermore, the corporate body must pay penalties, in accordance with Article 253 of Civil Code, which provides; "When specific performance of an obligation is not practicable, unless performed by the debtor himself, the creditor may obtain a judgment ordering the debtor to perform the obligation, and to pay penalty if he abstains from performing his obligation". This provision raises a number of questions, namely:

1-The provision has restricted performance to the debtor himself, but what if the agent or representative can perform the obligation.

2-The impression given by the provision of Article 253 of Civil Code is that it covers only the obligation to do something, and no consideration has been taken by the Code to the obligation not to do something. It seems that the provision has ignored obligations of that nature, bearing in mind, that the debtor may be subject to a penalty if he refrains from performing the obligation.⁽³⁸⁴⁾

If the debtor refrains from delivering the specific goods and the Execution Administration officials cannot obtain them for one reason or another and there is no other property to be confiscated by the Execution Administration Office, he must pay penalty. In addition, he should pay greater penalty if he continues his unjustifiable attitude. Is it fair and just not to impose a penalty on such a debtor, merely because his obligation is to give something, but, not to impose any penalty on him when his obligation is not to do something. Unless circumstances prevent him from performance of his obligation specifically, such as impossibility or exceptional hardship or undue difficulty, the debtor should be compelled to pay penalty until he fulfils the decree of the court.

According to the above statement, the agent or the representative could be ordered to perform specifically and could be ordered to pay a penalty if he fails to perform the obligation. For if he fails to perform he has been instructed by his principal not to do

so, otherwise, he has no interest not to perform the obligation, but he must perform the obligation specifically.⁽³⁸⁵⁾ Whereas, in the case of an obligation not to do something, that kind of obligation can be performed specifically,⁽³⁸⁶⁾ and the debtor who continues to breach his obligation may be subject to penalties.⁽³⁸⁷⁾ Thus, the company or the corporate body can be ordered to perform specifically, and cannot avoid it just because the corporate body cannot be imprisoned, as imprisonment is not fundamental matter in the remedy of specific performance in Iraqi civil law.

Comment

1-Enforcement of the court's decree in performing specifically, cannot occur easily sometimes, but some other times, a decree of specific implement cannot be executed in Scots law, if the debtor is a corporate body or a company, because a corporate body cannot be imprisoned. However, practice has shown that this dilemma can be avoided. Nevertheless, execution of a decree of specific implement is affected despite that, for it cannot always be used successfully to overcome the corporate body's refusal to perform the decree.

In Iraqi civil law, the case is different, for there is no difference between an individual and a company or corporate body concerning execution of a decree of specific performance. Nevertheless, the difference between Scots and Iraqi laws has been minimised by the means adopted to solve that dilemma, such as empowering the court's officials to do equivalent act, or the act could be done by the corporate body's officials. In addition, Iraqi law has one more effective principle, namely, to order the refusing debtor to pay penalty until he performs the decree of specific performance. Also, a director or a liquidator may be imprisoned if he obstructs the execution of the decree. It seems that all these means render Iraqi civil law more effective than Scots law in enforcing the decree of specific performance.

2-Iraqi and Scots laws are consistent in relation to the searching of a debtor's premises before imprisonment. If the subject matter is found with the debtor, there is no need for imprisonment. However, if there is a suspicion that the party has refused

to perform the decree without any legal reason, he may be imprisoned for four months under Iraqi civil law, and six months in Scots law. In Iraqi law, he should pay penalty which may be increased in accordance with the debtor's unjustifiable attitude and within the court's discretionary power.

3-rendering specific implement impossible by any reason whatsoever, in both laws, gives the court the opportunity to consider the alternative, which is damages, unless the reason for impossibility is either the creditor's "the buyer's" fault or a reason beyond the debtor's control, so that no damages can be decreed. Thus, the court can amend or recall the judgement in both Iraq and Scotland, when something serious, which affects the execution of the decree, takes place.

CONCLUSION

1-The action of specific implement has no special consideration under the competent jurisdiction of the court. It is similar to any other action relating to movables. However, in Scots, law it may be subject to different court rules. It depends on the value of the cause, and subsequently different jurisdiction and procedures should be considered.

When the court examines the case, it considers the circumstances of whether the case is subject to its jurisdiction or to another court's jurisdiction. The court considers the subject of the action. Thus, if the action is accepted as a competent one under the court's jurisdiction, specific implement may be decreed.

Specific implement cannot be decreed and will be rejected even after being granted if it is pronounced by a court which its jurisdiction over the action is incompetent.

2-Specific implement at the first stage of the action could be regarded as a procedural remedy, for in the case of commencement of such action all means of accuracy and precision are required. Furthermore, ignoring or even neglecting these elements leads to reject the remedy.

3-Ambiguity and vagueness in the decree itself affects the enforceability of the

decree and consequently may lead to either recalling the decree or amending it.

4-The surrounding circumstances affect the enforceability of the decree to a certain extent, and may lead to recall the decree and grant damages instead.

FOOT-NOTES

- 1-D.M.Walker, The Scots Legal System , 5th ed., Edinburgh, 1981, p.252.
- 2-Grant Committee Rep. chap . 4; D.M.Walker, The Scots legal system, supra, at p.252.
- 3-Sheriff Court (Scotland) Act 1979 (privative Jurisdiction &summary cause) order 1988 (No. 1993), made under the Sheriff Courts (Scotland)Act 1979 (C.58) S.14 (amended by the law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (C.55), Sched.3., raises the limits of the privative jurisdiction of the Sheriff Court and the Summary cause from £500 & £1000 respectively to £1500.
- 4-Act 1907, Sec. 7, as amended by Act 1913, Sched. 1; Act 1971, Sched.2, Sec. 1, 1976 No. 900; Law Reform (Miscellaneous Provisions) Scotland Act 1980, Sched. 3; Dickson & Walker v. John Mitchell & Co. (1910) S.C. 139.
- 5-S.26 of the Court of Session Act 1988.
- 6-Macphail, Sheriff Court practice, supra, at pp.39-43; W.J.Lewis, Sheriff Court Practice , 8th. ed., Edinburgh, 1939 at pp.51-56.
- 7-Macphail, Sheriff Court Practice, op.cit. p.122.
- 8-D.B.White, Practice & Procedure in the Sheriff's Ordinary Court, 1st ed. London, Fourmat Publishing, 1988, pp.13-15.
- 9-Robertson v. Neely (1895) 12Sh. ct. Rep. 242; Johnstone v. Strachan (1861) 23D. 758; Sinclair v. Smith (1860) 22D. 1475.
- 10-Robert Black, Civil Jurisdiction. The New Rules, Edinburgh, William Black & Sons Ltd. 1983, at p.11.
- 11-D.B.White, Practice and Procedure into the Sheriff's Ordinary Court, op.cit. pp.17-19
- 12-Sheriff Courts (Scotland) Act 1907, Sec. 6 (j).
- 13-Sched. 8, Rule, 2 (1) of Civil Jurisdiction and Judgment Act 1982.
- 14-Ibid, Sched. 8, Rule, 8, (a), (b).
- 15-Ibid, Sched. 8 Rule, 15, (a).
- 16-Ibid, Sched.8, Rule, 15, (c).
- 17-Ibid, Article (5), Rule (1) of Sched. 4.
- 18-Stanley, Scott Robinson, The law of Interdict, supra, at p.6.
- 19-Ibid.
- 20-Rule, 2 (2) of Sched. 8 of Civil Jurisdiction and Judgment Act 1982.
- 21-Ibid, Rule 2 (1) of Sched. 8 supra.
- 22-Tait v. Jonson (1891) 18R 606; Davidson v. Davidson (1891) 18R. 884.
- 23-Macphail, Sheriff Court practice, supra, at p 124.
- 24-Macphail, Sheriff Court practice, supra. at p.125.
- 25-Macphail, Sheriff Court practice, supra, at pp.349-364; compare, Sutherlands of Peterhead (Road Hualiers) Ltd.v.Allard Hewson & Co. Ltd.(1972) S.L.T.(Notes) 83.

- 26-MacIntosh v. British Railways Board (NO.1) 1990 S.L.T. p.637.
- 27-MacIntosh v. British Railways Board, *supra*, per Lord President Hope at p. 640.
- 28-Sec. 27 of the Sheriff Court (Scotland) Act 1907.
- 29-Sec.27 (B) of the Sheriff Court (Scotland) 1907 Act.
- 30-Mackenzie v. Balerno Paper Mill Co. (1883) 10R 1147; see also, Macphail, *Sheriff Court practice*, *supra*, at p.369; Dobie, Style for the use in the Sheriff Court in Scotland , Edinburgh, Glasgow, and London, 1951, p.331.
- 31-Thomson v. Thomson (1979) S.L.T. (Sh.Ct.) 11
- 32-Swan v. Kirk (1932) S.L.T. (Sh. Ct.) 9.
- 33-Nowat v. Kerr (1977) S.L.T. (Sh. Ct.) 62.
- 34-Mckenzie v. Jhon R. Wyatt (Musical Enterprises) Ltd. (1974) S.L.T. (Sh. Ct.) 8; L.A. v. Johnston (1983) S.L.T. 290 at p.p.293-294.; Hardy v. Robinson (1985) S.T.L (Sh. Ct.) 40; Appleyard (Aberdeen) Ltd.v.Morrison (1979) S.L.T.(Sh.CT.) 65.
- 35-No: 83, of 1969.
- 36-Al-naddawi, Adam W. & Mubarak Sa'eed Abdul kareem, *Commentary on Iraqi civil procedures law*, *supra*, p.85.
- 37-Dinar is an Iraqi currency. The value of the dinar is, one Dinar equal to approximately two pounds as an official price under the Iraqi Central Bank policy. However, the price of the Dinar at the present time in the black market is, one Dinar equal to 1/3 of the pound sterling.
- 38-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil Procedures law 1978, pp.150-152.
- 39-Al-naddawi, Adam W., *Civil procedures law*, *op.cit.* at pp.85-86.
- 40-Ibid.
- 41-Khattab, Dhea Sheet, Commentary on civil procedures law, Baghdad, 1973, at p.302; Al-kishtaini, Sa'doun Naji, *Commentary on Iraqi civil procedures law* *supra*, at p.360.
- 42-Al-naddawi, Adam W. *Civil procedures law*, *op.cit.* p.376
- 43-Article 77 of Iraqi Civil Procedures Code, No.83, of 1969; Al- a'llam, Abdul rahman, *Commentary on Iraqi civil procedures rules*, *op.cit.* p.172.
- 44-The Iraqi Court of Cassation judgment, No:218/General Committee/ 1971, on 31/7/1971, Judicial Publication vol.3, the 2nd year, at p.100.
- 45-Al-naddawi, Adam W. *Civil procedures law*, *supra*. at pp.85-88.
- 46-Article 246 of Iraqi Civil Code; Ante, at pp. 44-45.
- 47-Article 246 (1) of Iraqi Civil Code.
- 48-The Iraqi Court of Cassation decision 1970, on 10/2/1970, Judicial Publication, 1st issue, the 1st year, 1970 at pp.9-10.
- 49-Al-naddawi, Adam W. *civil procedures law*, *op.cit.* p.87; see also Article 271 of Civil Code as regards Insolvency.
- 50-Al-naddawi, Adam W. *Civil procedures law*, *supra*, at p.89.
- 51-Article 37 of Civil Procedure Code.

- 52-Articles 304, 303, 37, of Civil Procedure Code.
- 53-Article 106 of Civil Procedure Code.
- 54-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi Civil Procedure law, op.cit. at p165.
- 55-Article 106 of Procedure Code.
- 56-Al-kishtaini, sa'doun Naji, Commentary on Iraqi civil procedures law, supra, at p.165.
- 57-Article 39 (1) of Civil Procedures Code; see also Article 44 of Civil Code; Murci, Mohammad Kamel, Commentary, supra, at p.346; Al-baz, Saleem, Commentary on the Book of the Rules, 3rd ed. 1923, op.cit. p.31.
- 58-Article 39 (1) of Civil Procedures Code; Al-a'llam, Abdul rahman, Commentary on Iraqi civil procedures rules, supra, at p.210.
- 59-Al-kishtaini Sa'doun Naji, Commentary on Iraqi civil procedures law, Supra, at p. 166.
- 60-Supra; Compare also, Article 150 of Civil Code.
- 61-Ante, at p. 247.
- 62-Ante, at pp. 253-254.
- 63-It is called specific implement in Scots law.
- 64-Sheriff Courts (Scotland) Act 1907, Sec. 6 (f); Lewis, Sheriff Court practice, supra, at pp.56-57; Dobie, Sheriff Court practice, Edinburgh 1986, at p.76.
- 65-Pirie v. warden (1867) 5M.497; Dobie, Sheriff Court practice, op.cit. p.76.
- 66-Ante.at pp. 251-252.
- 67-D.M.Walker, Scots legal system, supra, at p.254.
- 68-AE.J.G. Mackay, The practice of the Court of Session, Edinburgh, 1877. pp.229-230; as regards the value of the case and privative jurisdiction of the Sheriff Court, see post. p. 247.
- 69-G.R. Thomson & J.T.Middleton, Manual of Court of Session Procedures, Edinburgh, W. Green & Son Ltd. 1937, p. 29.
- 70-Ibid.
- 71-Dallas & Co. v. M'Ardle (1940) S.C. 481.
- 72-David Maxwell, The practice of the Court of Session, 1st ed., Edinburgh, 1980, at p.77.
- 73-Act 1907(C.51)S.7, am. by Act 1971(C.58)S.31, S.1.1976, No.900.
- 74-Kennedy v.Kennedy 12R. 775; Robertson's Trs v. Nicholson (1888) 15R. 914.
- 75-David Maxwell, Court of Session practice, supra, at p.99
- 76-As regards definition of petitory actions, see, Erskine, IV.1. 47; Stair, Institution, IV, 21, 1-6.
- 77-David Maxwell, Session Court practice, op.cit. p.100.
- 78-See the discussion concerning the value of the cause, David Maxwell, Court of Session practice, supra, at p.79; Macphail, Sheriff Court practice, op.cit. pp. 39-34; Lewis, Sheriff Court practice, supra, at pp.20-25.
- 79-Under Civil Jurisdiction and Judgment Act 1982
- 80-Sec.41,(3) (a) of Civil Jurisdiction and Judgment Act 1982.

81-Sec.41,(3) (b) of Civil Jurisdiction and Judgment Act 1982.

82-Ibid.

83-David Maxwell, the Court of Session practice, op.cit. p. 103.

84-Jones v. Samuel (1862) 24D. 319, 322; Todd v. Armour (1882) 9R. 901. see also, Mackay, Practice of the Court of Session, op.cit. pp.172-173.

85-Macphail, Sheriff Court practice, supra, at pp.357-358.

86-Macphail, Sheriff Court practice, supra, at pp.361-362.

87-Longwood v. Hope (1865) 3M. 1049; Lindsay v. L. & N.W.Rwy (1855) 18D. 62; Clemens v. Macaulay (1866) 4M. 583.

88-D.Maxwell, the Court of Session practice, supra, at p. 125

89-Sec. 28 of 1907 Act; Sec. 3 (h) of 1907 Act; see for more details about final judgment, Machpail, Sheriff Court practice,op.cit. pp.603-606.

90-Sec. 28 (1) 1907 Act.

91-Sec. 28 (1) d. 1907 Act.

92-Macphail, Sheriff Court Practice, op.cit. p.594

93-Supra, at p.593.

94-Lord Advocate v. Jhonston (1983) S.L.T. 290

95-Caledonian Ry v. Cochran's (1897) 24R. 855; Penny v. Scott (1894) 22R. 5.

96-Macphail, Sheriff Court practice, supra, at p.632.

97-Ibid.

98-Ibid.

99-Clarke v. Edinburgh & District Tramways Co. (1919) S.C. (H.L.) 35 at p.37, per Lord Dunfermline; Performing Right Society v. Rangers F.C. Suporters' Clup Greenock (1947) S.C. 49; Thomas v. Thomas (1947) S.C. (H.L.) 45, at p.54, per Lord Thankerton; see also, Millars of Falkirk v. Turpie (1976) S.L.T. (Notes) 66.

100-For more details see, Macphail, Sheriff Court practice, op.cit. pp. 635-637 and the cases he has considered.

101-Macphail, Sheriff Court Practice, op.cit. p.636.

102-Supra.

103-Supra.

104-Purdie v. Williame & Sons (1914) S.C. 477; Blaire v. F.J.C. Lilley (Marine) Ltd. (1981) S.L.T. 90; Barker v. Murdoch (1979) S.L.T. 145 at pp.146-147.

105-Interlocutors granting or refusing interdict (interim or final), making an order *ad factum praestandum*, the above are among the interlocutors of which leave is required for appeal to the Court of Session, see Macphail, Sheriff Court practice, supra, at pp.629-630.

106-Sec. 28 of Act 1907.

107-Higgins v. J.&C.M.Smith (Whiteinch) Ltd. (1990) S.L.T. 663

108-Higgins v. J.&C.M.Smith, Supra, at p.665

- 109-Articles 34, 185 of Iraqi Civil Procedures Code.
- 110-Al-a'llam, Abdul rahman, Commentary on civil procedures rules, vol.1, op.cit, at p.180.
- 111-Abul wafa, Ahmad, Theory of Principles, op.cit. p.415.
- 112-Al-naddawi, Adam W. Civil procedures law, supra, at p.366; Al-a'llam, Abdul rahman, Commentary on civil procedures rules, op.cit. 180.
- 113-Al-naddawi, Adam W. Civil procedures law, supra, at pp.381-385.
- 114-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi Civil Procedure law, op.cit. p.372.
- 115-Article 192 (2) of Civil Procedures Code.
- 116-The iraqi Court of Cassation Judgment, No.6, Appellate, 1970, on 3/10/1970, Judicial Publication, the 3rd issue, the 4th year, at p.131.; the Court of Cassation Judgment, No.165, Civil, 1974 on 24/11/1971, Judicial Publication, the 2nd issue, the 2nd year, at p.18.
- 117-Article 192 (2) Civil Procedures Code.
- 118-the Court of Cassation Judgment, No.131,civil, 1974, on 9/10/1974, Judicial Publication, the 4th issue, the 5th year at p.185; Judgment, No.153, civil, 1973, on 19/12/1973, Judicial Publication, the 4th issue, the 4th year, at p.34.
- 119-Article 192 (1) Civil Procedures Code.
- 120-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, supra.pp.381-382.
- 121-Article 246 of Iraqi Civil Code.
- 122-Articles 203, 35 of Civil Procedures Code.
- 123-Al-naddawi, Adam W. Civil procedures law, supra, at p.350.
- 124-White & Carter (Councils) Ltd. v. McGregor (1962) S.C. (H.L.) 1 per Lord Morton of Henryton, p.16.
- 125-R.S.Leigh & Co. v. Berger & Co. (1958) S.L.T. (Sh.Ct.) 21; Bosco Design Services Ltd. v. Plastic Sealant Services Ltd.(1979) S.C. 189.
- 126-S.35 (1) (c) of 1971 Act.
- 127-Macphail, Sheriff Court practice, supra. p.302; D.B.White, Practice & Procedure into the Sheriff's Ordinary Court, op.cit. p.26.
- 128-Macphail, Sheriff Court practice, supra, at p.295.
- 129-Kay v. Morrison's Reps. (1984) S.L.T. 175.
- 130-Ibid.
- 131-Ibid.
- 132-Macphail, Sheriff Court practice, supra, at p. 214.
- 133-Ibid.
- 134-Macphail,Sheriff Court practice, supra, at pp.213-217.
- 135-Ibid, at p.215.
- 136-Corstorphine v.Kasten (1898) 1F 287 per Lord Adam at p.296; MaGraddie v.Clark

- (1966) S.L.T. (Sh. Ct.) 36.
- 137-Macphail, Sheriff Court Practice, op.cit. pp.297-302; Dobie, Sheriff Court practice, op.cit. pp.103-106.
- 138-W.J.Lewis, Sheriff Court practice, supra st p.81.
- 139-Supra.
- 140-Supra.
- 141-Hendry v. Marshall (1878) 5R. 687.
- 142-Supra, at p.802, per Lord P. Robertson.
- 143-Middleton v. Leslie, supr, per Lord P. Robertson, at p.802.
- 144-Ibid.
- 145-Fleming & Ferguson v. Paisely Mags. (1948) S.C. 547; see also, Munro v. Liquidator of Balnagown Estates (1949) S.C. 49, per Lord P. Cooper at p.55.
- 146-Macphail, Sheriff Court practice, op.cit. p.709.
- 147-(1967) S.L.T. (sh.ct.) 65.
- 148-Dobie, Sheriff Court practice, op.cit. p.497.
- 149-O.C.R. Appendix, form A.
- 150-Macphail, Sheriff Court practice, supra, at p.297.
- 151-Ibid.
- 152-Ibid.
- 153-Summerlee Iron Co. Ltd. v. Caledonian Ry. (1911) S.C. 458.
- 154-(1928) S.C. 503.
- 155-(1967) S.C. (H.L.) 53.
- 156-Macphail, Sheriff Court practice, op.cit. p.233
- 157-Wilkinson v. Wilkinson (1963) 79 Sh.Ct Rep. 47; compare also, Macphail. Sheriff Court practice, supra, at p.233.
- 158-Macphail, Sheriff Court practice, op.cit. p.709.
- 159-Bosco Design Services Ltd. v. Plastic Sealant Services Ltd (1979) S.C. 189.
- 160-Bell Bros. (H.P.) Ltd. v Hamilton (1945) 62Sh.Ct. Rep. 31; Bruce Bros. (Glasgow) Ltd. v. Mc Vittie (1943) 62Sh.Ct. Rep. 20.
- 161-Young's Exrx. v. Armour (1957) S.L.T. (Sh.Ct.) 42; Sinclair v. Gardner (1915) 32Sh.Ct. Rep. 211.
- 162-O.C.R. Rule, 64 (1), (a).
- 163-Dobie, Sheriff Court practice, op.cit. p.234.
- 164-(1911) S.C. 458.
- 165-Macphail, Sheriff Court practice, supra, at p.324.
- 166-Summerlee Iron Co. Ltd. v. Caledonian Ry. supra.; Macphail, op.cit. p.709; as regards alternative crave for damages see D.M.Walker, Civil Remedies, supra, at p.282.
- 167-Macphail, Sheriff Court practice, supra, at p.855.

- 168-Ibid, at p.856.
- 169-Ibid.
- 170-Robertson v. Cockburn, supra.
- 171-Supra.
- 172-Robertson v. Cockburn, supra, at p.24.
- 173-Robertson v. Cockburn, supra, at p.24, per Lord Neaves.
- 174-Ibid, at p.24 per Lord Ormidale.
- 175-(1892) 19R. 801 per Lord President Robertson at p.802.
- 176-Robertson v. Cockburn, supra.
- 177-Middleton v. Leslie, supra, at p.802.
- 178-(1949) S.C. 49 per Lord President at p.55.
- 179-Macphail, Sheriff Court practice, supra, at p.302.
- 180-Kilmarnock Mags. v. Mather (1869) 7M. 54; Hutchison v. Ferrier (1846) 8D. 1228; Micro System (Scotland) Ltd. v. Electro-Physiological Instrument Ltd. (1971) S.C. 140; Fraser v. Church of Scotland General Trs. (1988) S.L.T. 692 at p.697.
- 181-Macphail, Sheriff Court practice, supra, at p.302.
- 182-Robert Black, An Introduction to Written Pleading , Edinburgh, William Blackwood & Sons Ltd., 1982, at p. 11.
- 183-Robert Black, Introduction to written pleading, supra, at p. 12
- 184-Macphail, Sheriff Court practice, supra, at pp.317-345
- 185-Macphail, Sheriff Court practice, supra, at p.255.
- 186-Ibid, at p.302.
- 187-Ibid, at p.303
- 188-Robert Black, Style for Avering Jurisdiction Under Civil Jurisdiction & Judgment 1982 Act" 1987 S.L.T.(News) 1.at pp.1-4;
- 189-O.C.R. r 3(2), (3); Robert Black, Introduction to written pleading. op.cit. at p.19.
- 190-Macphail, Sheriff Court practice, supra, at p.304.
- 191-Macphail, Sheriff Court practice, supra, at p.287.
- 192-Ibid, at pp.288, 304.
- 193-O.C.R. r.(44).
- 194-O.C.R. r (45).
- 195-Macphail, Sheriff Court Practice, op.cit. p.307; compare, Robert Black, Introduction to Written Pleading, op.cit.at p.21.
- 196-Macphail, Sheriff Court practice, supra, at p.310.
- 197-Robert Black, Introduction to written pleading, supra, at p.26; Macphail, Sheriff Court practice, supra, 310.
- 198-Macphail, Sheriff Court practice, op.cit. 310.
- 199-Macphail, Sheriff Court practice, supra, at pp.812-813.

- 200-Ibid. at p.812.
- 201-Ibid. at p.308.
- 202-Moffat v. Marconi Space and Defence System Ltd., (1975) S.L.T. (Notes) 60.
- 203-Macphail, Sheriff Court practice, supra, at pp.277-283.
- 204-Macphail, Sheriff Court practice, supra, at pp.264, 432.
- 205-Ibid. at p.855.
- 206-S.C.R. r.93.
- 207-S.C.R. r.73
- 208-Macphail, Sheriff Court practice, supra, at p.814.
- 209-Ibid.
- 210-S.C.R. r.2 (4) (a) as added by the 1986 A.S.
- 211-S.C.R. r.2 (4) (b) as added by the 1986 A.S.
- 212-S.C.R. r.3 (1) (b).
- 213-S.C.R. r.2 (2).
- 214-S.C.R. r.2 (3).
- 215-Macphail, Sheriff Court practice, supra, at p.817, (he quoted Sheriff Principal Caplan, in Visionhire Ltd. v. Dick Kilmarnock. Sh.Ct. September, 18, 1984 (unreported case).
- 216-S.C.R. r.20.
- 217-S.C.R. r.21.
- 218-S.C.R. r.20.
- 219-S.C.R. r.21
- 220-The Court of Cassation decision, No.1953, on 19/10/1957, cited by, Al-a'llam, Abdul rahman, Commentary on Iraqi procedures rules, op.cit. p234.
- 221-Article 46 of Civil Procedure Code.
- 222-Article 47/1 of Civil Procedure Code.
- 223-The Court of Cassation Judgment, No.1438,1439, civil, 1973, on 2/3/1974, Judicial Publication, the 1st issue, the 5th year.
- 224-Abul Wafa, Ahmad, principles of rules, op.cit. p457; Al-a'llam, Abdul rahman, Commentary on Iraqi civil procedures rules, op.cit. p.248.
- 225-Al-naddawi, Adam W. Civil procedures law, op.cit. p.152; Al-a'llam, Abdul rahman, Commentary, supra, at p.248.
- 226-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, supra, at p.183; Al-a'llam, Abdul rahman, Commentary on Iraqi civil procedures rules, supra, at p.249.
- 227-Al-naddawi, Adam W. Civil procedures law, op.cit. pp.153-155; Al-a'llam, Abdul rahman, Commentary on iraqi civil procedures rules, vol.1, supra, at pp.249-252; see also, the Court of Cassation judgment, No.1736, 1947 on 1/11/1947, cited by Al-a'llam, Abdul rahman, Commentary on Civil Procedures Rules, vol.1. op.cit. p252; the Court of Cassation decision No.783, 958, on 26/5/1958, cited by Al-a'llam, Abdul rahman, Commentary on Iraqi

civil procedures rules, *supra*, at pp.252-253.

228-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, *op.cit.* p.184; the Iraqi Court of Cassation decision, No.894, real right, 1972, on 17/8/1972, Judicial Publication, the 3rd issue, the 3rd year, at p.134; Al-a'llam, Abdul rahman, Commentary on Iraqi civil procedures rules, *supra*, at p.251.

229-Article 78 of Civil Procedure Code; Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedure law, *op.cit.* at p.145.

230-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedure law, *Supra*, at p.183.

231-Al-naddawi, Adam W. Civil procedures law, *op.cit.* p.153.

232-Iraqi Court of Cassation judgment, No.247/86, on 31/3/1987, cited by Al-nddawi, Adam W. Civil procedures law, *supra*. at p.145.

233-Khattab, Dhea Sheet, The Judiciary Technique, *supra*, at p.188.

234-Iraqi Court of Cassation judgment, No.247/86/87, on, 31/3/1987, cited by Al-naddawi, Adam W. Civil proceduers law, *supra*, at p.154.

235-Khattab, Dhea Sheet, the Judiciary technique, *supra*, at p.188; Al-a'llam Abdul rahman, Commentary on Iraqic ivil procedures rules, *supra*, at p.251.

236-The Court of Cassation judgment, *supra*.

237-The Court of Cassation decision, No. 21181/1961/ on 15/2/1961, Judicial Journal, the 3rd & 4th issue, 1961, at pp.664-665; The Court of Cassation decision, No. 569/1965, on, 3/8/1965, Iraqi Court of Cassation Judiciary, vol. 3, at p.283.

238-Article 59 of Civil Procedures Code.

239-Iraqi Court of Cassation decision, No. 894/real right/1972, on, 17/8/1972, Judicial Publication, *supra*.

240-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, *op.cit.* p.184; Al-naddawi, Adam W. Civil procedures law, *supra*, at p.156.

241-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, *supra*, at p.184.

242-Article 92 of Civil Procedure Code.

243-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, *supra*, at p.185.

244-Ante. at pp. 276-277; Article 44 of Iraqi Civil Procedures Code.

245-Al-naddawi, Adam W. Civil procedures law, *supra*, at p.155.

246-Al-a'llam, Abdul rahman, Commentary on civil procedures rules, *op.cit.* p.251.

247-Al-quadhi, Muner, Commentary on the civil and commerical procedures law, Baghdad, 1957, at p.83; Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, *op.cit.* pp.188-189; Al-nahi, Salah al-Deen, Commentary on civil and commercial procedures law, vol. 2, Baghdad,1962, at p.420; Al-naddawi, Adam W. Civil procedures law, *op.cit.* p.160 foot-note (1).

248-For more details see, Al-qudhi, Muner, Commentary on civil and commercial procedures law, *supra*, at p.14; Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law,

supra, at p.188-189.

249-Iraqi Court of Cassation decision, No.247/86/87, on, 31/3/1987, cited by Al-naddawi, Adam W. Civil procedures law, Commentary on civil procedure law, supra, p.154 foot-note (2)

250-Khattab, Dhea Sheet, Judiciary technique, supra, at p.188.

251-Iraqi Cour of Cassation judgment, No.257/1971, on, 1/12/1971, Judicial Publication, 4th issue, the 2nd year, september, 1973, at p.123.

252-Al-kishtaini, Sa'doun Naji, Commentary on Iraqi civil procedures law, op.cit. p.189; compare, Al-naddawi, Adam W. Civil procedures law, supra at p.160.

253-Ante. pp. 89-94; 100-105.

254-Al-a'llam, Abdul rahman, Commentary on Iraqi civil procedures rules, supra, at p.234; Al-kishtaini Sa'doun Naji, Commentary on Iraqi civil procedures law, op.cit. pp.185,188-189.

255-Article 59 of Civil Procedures Code.

256-Robertson v. Cockburn, supra, per Lord Justice-Clerk Moncrieff at p.23; Marshall V. Callander and Trossachs Hydropothic Co. Ltd. (1896) 24R. 33 per Lord President at p.34.

257-Gloag, Contract, supra, at p.661.

258-Middleton v. Leslie, supra, per Lord President Cooper, at p. 802.

259-Macphail, Sheriff Court practice, op.cit. at pp.582-584.

260-Tolland v. William Reid (Sports) Ltd., (1970) S.L.T. (Notes) 19.

261-CF.Re Barrell Enterprises (1973) 1W.L.T. 19 at pp.23-24.; Pittalis v. Shrefettin (1986) Q.B. 868.

262-O.C.R. Rule (88).

263-Macphail, Sheriff Court practice, op.cit. p.578.

264-Ibid, at p.584.

265-(1892) 19R. 801 per Lord President Cooper, at p.802.

266-(1888) 16R. 168.

267-Mc Kellar v. Dallas's Ltd., supra.

268-Ante, pp. 84-89; 95-100; 106-111.

669-Stewart v. Kennedy, supra, per Lord Watson at p.9; see also, ante, at pp.39-40.

270-Grahame v. Kirkcaldy Magistrate (1882) 9R (H.L) 91; see also, Stewart v. Kennedy, supra, per Lord Watson at p.10; White & Carter (Councils) Ltd. v. Mc Gregor (1962) S.C. (H.L.) 1.

271-Grahame v. Kirkcaldy, supra, at pp. 91-92 per Lord Watson.

272-White & Carter (Councils) Ltd. v. Mc Gregor, supra.

273-Stewart v. Kennedy, supra, per Lord Watson at p. 10.

274-Rudman v. Jay (1908) S.C. 552; Mc Kellar v. Dallas's Ltd , supra; Mac Arthur v. Lawson, supra, at p. 1136; Sinclair v. Caithness Flagston Co. (1898) 25R. 703; see also,

ante, at pp.84-89.

275-Davidson v. Macpherson, supra; Grahame v. Kirkcaldy Magistrate, supra; Wilson v. Pottinger (1908) S.C. 580; ante, at pp.95-100.

276-Salaried Staff London Loan Co. Ltd.v.Swears and Wells Ltd. (1985) S.L.T. 326.

277-Salaried Staff London Loan Co. Ltd.v.Swears and Wells Ltd., supra.

278-Sale of Goods Act 1979, Sec. 52; Sutherland v. Montrose Shipbuilding Co., supra, at p.667; Aurdal v. Estrella (1916) S.C. 882; Behnke v. Bede Shipping Co., supra; Purves v. Brock (1867) 5M. 1003; Munro v. Balnagowan Estates Co. (1949) S.C. 49.

279-D.M.Walker, Civil Remedies supra, at p.748, "concerning the land property".

280-O.C.R. Rule 89 (1).

281-Mackay v. Mackenzie (1894) 21R. 894; Glasgow Gas-Light Co. v. Glasgow Working Men's Total Abstinence Society (1866) 4M. 1041; Melrose v. Spalding (1868) 6M. 952.

282-James Y. Keanie Ltd. v. Maycrete Sales Ltd. (1949) S.L.T. (Notes) 28.

283-Gloag & Henderson, Introduction to the law of Scotland, op.cit. p.205-206.

284-post, at p. 291.

285-In accordance with the definition of specific implement, the purchaser should obtain what he has contracted for. If the subject matter "the goods" have perished or are destroyed, obtaining the same goods become impossible. see also, D.M.Walker, Civil Remedies, supra, at p.276; Gloag, Contract, op.cit. p.655; Stair, I, 17, 19; Bell, Principles, supra, Sec. 29.

286-Macphail, Sheriff Court practice, supra, at p.205.

287-Clark & Macdonald v. Bain (1895) 23R. 102.

288-Macphail, Sheriff Court practice, supra, at p.205.

289-Dobie, Sheriff Court practice, op.cit. p.248; Macphail, Sheriff Court practice, supra, at pp.205-206.

290-Bruce v. Bruce (1945) S.C. 353; Forth Bridge Rwy. Co. v. Incorp. of Guidry of Dunfermline (1910) S.C. 316; see for further details, Macphail, Sheriff Court practice, supra, at p.1096.

291-Hutchison (1965) S.C. 240 at p.242.

292-White v. Mc Ewen's Trs (1873) 11M, 602.

293-Macphail, Sheriff Court practice, op.cit. at p.205.

294-Ibid. at p.206.

295-Ibid.

296-Isaacs v. Robertson (1985) 1A.C. 97; Hadkinson v. Hadkinson (1952) P. 285, per Lord Romer L.J. at p.288.

297-Scott v. Mill's Trs. (1923) S.C. 709.

298-Dobie, Sheriff Court practice, supra, at p.249.

299-Article 156 of Iraqi Civil Procedures Code; see also, Al-a'llam, Abdul rahman, Commentary on Iraqi civil procedures rules, vol:2, supra, at p. 141; Al-kishtaini, Sa'doun

Naji, Commentary on Iraqi civil procedures law, *supra*, at p.301; Al-naddawi, Adam W. Civil procedures law, *op.cit.* pp.332-333.

300-Iraqi Court of Cassation decision, No.2889/1982/1988, on 12/4/1988, cited by Al-naddawi, Adam W., Civil procedures law, *op.cit.* p.335; The Court of Cassation judgment, No.281/ 1952, on 26/4/1952, cited by, Al-a'llam Abdul rahman, Commentary on Iraqi civil procedures rules, vol:2, *op.cit.* p.145.

301-The Court of Cassation judgment, No. 246/86/87, on 31/3/1987, cited by Al-naddawi, Adam W. Civil procedures law, *op.cit.* p.154-155.

302-Article 10 of Iraqi Execution Code, No. 45, of 1980; Khattab, Dhea Sheet, Judiciary technique, *op.cit.* p. 276; Al-naddawi, Adam W. Civil procedures law, *op.cit.* p.348.

303-Al-naddawi, Adam W. Civil procedures law, *op.cit.* p.348.

304-Article 167 of Civil Procedures Code.

305-Al-naddawi, Adam W. Civil procedures law, *supra*, at p. 347; see also, Article 167 of Civil Procedures Code.

306-Article 167 of Civil Procedures Code.

307-Article 216 of Civil Procedures Code. see also Al-naddawi Adam W. Civil procedures law, *supra*, at pp.347-348.

308-Ante, at pp.45-47.

309-In relation to the impossibility of performing the obligation, see, Al-bakri, Abdul baqi, Commentary on Iraqi civil law, *op.cit.* pp.35-36; ante, pp. 89-94.

310-Article 146 (2) of Iraqi Civil Code; Sullttan, Anwar, Principles of the obligation, *supra*, at p.52; Al-bakri, Abdul baqi, Commentary on Iraqi civil law, *op.cit.* pp.36-37.

311-Article 146 (1) of Civil Code.

312-If the defendant has proved so, he may get rid of specific performance; compare, Article 168 of Civil Code.

313-Abul wafa Ahmad, Principles of the Rules, *op.cit.* p.283; Al-naddawi, Adam W. Civil procedures law, *op.cit.* p.339.

314-Raghib, Wajdi, *op.cit.* at p.378.

315-Article 159 of Civil Procedures Code.

316-Ante. at pp. 266-267.

317-Robertson v. Cockburn, *supra*; Middleton v. Leslie, *supra*.

318-Ante, p. 267.

319-Gloag, Contract. *op.cit.* at p.659.

320-Lochelly Iron & Coal Co. Ltd. v. North British Ry. Co. (1913) 1S.L.T. 405, per Lord Kinnear at p.414.

321-Gloag, Contract, *supra*, at p.661; see also, Grahame Stewart, Diligence, *op.cit.* p.709.

322-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec.1 (1) (i).

323-Supra.

- 324-Dobie, Sheriff Court practice, *supra*, at p.284.
- 325-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (1) (i).
- 326-Macphail, Sheriff Court practice, *op.cit.* p.711.
- 327-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (1) (ii).
- 328-Gloag, Contract, *supra* at p.659.
- 329-(1913) 1S.L.T. 405, per Lord Kinnear at p.414.
- 330-Ibid.
- 331-Ibid.
- 332-Lochgelly Iron & Coal Co. v. North British Rly. Co., *supra*, per Lord Kinnear at p.414.
- 333-Supra.
- 334-(1900) 2F 1187.
- 335-Gall v. Loyal Glenbogie Lodge, *supra*.
- 336-Supra at p.1191.
- 337-Ibid.
- 338-Ibid.
- 339-Whyte v. Whyte (1913) 2S.L.T. 85.
- 340-Dalaney v. Edinburgh Children's Aid Society (1889) 16R. 753
- 341-Gloag, Contract, *op.cit.* p.661.
- 342-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (1).
- 343-Davidson v. Macpherson, *supra*; D.M.Walker, Civil Remedies, *op.cit.* p.483.
- 344-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (2).
- 345-Ibid.
- 346-Ibid, Sec. 1 (1) (iii).
- 347-Gloag, Contract *op.cit.* p.659.
- 348-Ante, at p.14
- 349-Ante, at pp. 292-293.
- 350-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (1) (i).
- 351-Ibid, Sec. 1 (2).
- 352-Gloag, *supra*.
- 353-Sale of Goods Act. 1979, Sec. 52; compare also, Sutherland v. Montrose Shipbuilding Co., *supra*, at p.671; Aurdal v. Estrella (1916) S.C. 882.
- 354-Ante. at p. 14; Gloag, Contract, *supra*, at pp. 659-660.
- 355-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (2) (3).
- 356-Ante, at pp. 14; 292.
- 357-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (2) (3).
- 358-Ibid, Sec. 1 (2).
- 359-Ante, at pp. 84-89; 95-100; 106-111.
- 360-In accordance with the rules and principles of agency and the obligations of the agent

towards the principal and the third party; see, J.J.Gow, *Mercantile and Industrial law*, op.cit. pp. 527-530; Gloag, *Contract*, supra, at pp.153-154.

361-Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, Sec. 1 (i) (3).

362-Ibid, 1940, Sec. 1 (2).

363-Al-naddawi, Adam W. & Mubarak, Sa'eed Abdul kareem, *Commentary on execution law*, supra, at p.74.

364-Hafidh, Ali Mudhafar, *Commentary on execution law*, supra, at pp.69-70; Mubarak, Sa'eed Abdul kareem, *The principles of the execution law*, supra, pp.389-390; Al-naddawi Adam W. & Mubarak, Sa'eed Abdul kareem, *Commentary on execution law*, supra, at p.79.

365-See for the conditions of imprisonment of the debtor, Mubarak, Sa'eed Abdul kareem, *The principles of the execution law*, op.cit. pp. 387-403; Al-naddawi Adam W. & Mubarak Sa'eed Abdul kareem, *Commentary on Execution law*, supra at p.98; Articles 42, 48, 49 of Execution Code; Iraqi Court of Cassation judgment, No.192/Execution/76, on 18/4/1976, No.1, 7th year, 1976, at p.201.

366-Articles 40, 4 (2, 6/fifthly) of Execution Code; the Court of Cassation decision, No.822/Execution/1961, on, 28/11/1961, cited by Mubarak, Sa'eed Abdul kareem, *The principles of the execution law*, supra at p.288 foot-note (3).

367-Article 45 of Execution Code; see also, Hafidh, Ali Mudhafar, *Commentary on execution law*, supra, at p.274.

368-Article 43 of Execution Code.

369-Hafidh, Ali Mudhafar, *Commentary on execution law*, supra, at p.286.

370-Articles 46 (1), 47 (2) of Execution Code.

371-Ibid.

372-Article 64 (1) of Civil Code considering the fungible things.

373-Fungibles are things, which can be replaced one by another in payment and which it is customary in trade to estimate by numbers, measures, volume or weight, see Article 46 (1) of Civil Code.

374-Al-naddawi, Adam W. & Mubarak, Sa'eed Abdul kareem, *Commentary on execution law*, op.cit. p.88; Mubarak, Sa'eed Abdul kareem, *The principles of the execution law*, supra, at p.166; Hafidh, Ali Mudhafar, *Commentary on execution law*, op.cit. p.86.

375-The Court of Cassation decision, No.155/procedures/944, on 15/11/1944; see also, Mubarak, Sa'eed Abdul kareem, *The principles of the execution law*, supra, at p.165.

376-Hafidh, Ali Mudhafar, *Commentary on execution law*, op.cit. p.85.

377-Article 246 (1) of Civil Code; Al-naddawi, Adam W. & Mubarak, Sa'eed Abdul kareem, *Commentary on Execution law*, op.cit. p.88; see also for more details, Mubarak, Sa'eed Abdul kareem, *The principles of the execution law*, supra, at pp.166-167.

378-the Court of Cassation decision, No.280/Execution/ 969, on 4/6/1969.

379-Al-naddawi, Adam W. & Mubarak, Sa'eed Abdul kareem, Commentary on execution law, supra, at p.67; see also, Article 159 (secondly) of Company Code, No.36, of 1983; Ridha, Muoafaq Hasan, Companies law, supra, at p.189.

380-Ibid.

381-Al-naddawi, Adam W. & Mubarak, Sa'eed Abdulkareem, Commentary on exeution law, op.cit. p.66.

382-Under the Execution Code, or the Civil Code, or even the Company Code.

383-Article 29 of Execution Code.

384-Al-jeelawi, Ali, "The financial Threat or the financial penalty", Legal and Political Sciences Journal, issued by Faculty of Law and Politics, Baghdad University, Nos.1, 2, 1986, at p.381.

385-Ante, at pp. 13; 44-45; compare, Article, 246 of Iraqi Civil Code.

386-Article 252 of Civil Code; the Court of Cassation Court decision No. 802/Execution/959, on 14/11/1959; the Court of Cassation decision No.772/Execution/966, on, 17/6/1967; see also for more details, Hafidh, Ali Mudhafar, Commentary on execution law, op.cit. pp.91-92; Article 252 of Civil Code.

387-Al-jeelawi, Ali, Threat or Financial Penalty, op.cit. p.382; Murqus, Sulayman, Commentary on Civil law, op.cit. p.91.

CONCLUSION

Specific implement as a remedy for breach of the contract, whether with respect to sale of goods or hire purchase or sale of land....etc., plays a leading role in the remedies system. It is the contracting party's means of obtaining the subject-matter he has contracted for.

The concept and the definition of the remedy of specific implement is based on specific and certain grounds, First; the goods must be specific or ascertained and Secondly; the aggrieved party must apply for the remedy. These constitute the legal grounds of the remedy and give it its nature and concept as an ordinary, legal remedy, as distinct from a discretionary, equitable remedy. Thus the remedy is not a discretionary or equitable one. The court's discretion is extremely restricted, and it could be said that it does not exist where there are no equitable grounds or grounds of law against granting it.

Both Iraqi and Scots law grant the remedy of specific implement. Is it an essential remedy? What are the consequences of not having such a remedy?

Specific implement is an order against the party in breach of his obligation, ordering him to perform what he has undertaken precisely and accurately. Thus, it is considered as essential to achieving a satisfactory outcome for the contracting party. Further, specific implement satisfies the requirements of the contracting party more than damages, for giving the aggrieved party damages, and leaving him without the goods, will not achieve the same consequences as compelling the delivery of the goods to him.

Specific implement is available to the aggrieved party as a matter of legal right. It means that it is granted whenever it is possible. Nevertheless the remedy may be rendered inappropriate when the party in breach of his obligation raises a claim of impossibility, exceptional hardship, or breach of contract, because the remedy is then subject to the court's discretionary power, and it may or may not be granted, according to that discretion. The effect is that the aggrieved party loses confidence in the

efficiency of the remedy of specific implement.

The aggrieved party prefers specific implement rather than damages, for specific implement gives him delivery of the goods he has contracted for if he is a purchaser, and gives the aggrieved party, in general, what he has contracted for.

Damages, sometimes, are ordered in substitution for the remedy of specific implement under specific circumstances. Can the remedies system survive and be effective enough without the remedy of specific implement? What would such a hypothesis mean to the aggrieved party?

A legal system which had no remedy of specific implement would suffer the following consequences.

1-If damages are the only remedy the aggrieved party can obtain, then a purchaser may have his compensation, but not the goods for which he contracted. His primary need may be for the goods and not for the money. His situation may be desperate.

2-The need for the goods sold by the aggrieved party in certain circumstances reflects the necessity of ordering the refusing party to deliver them rather than to pay damages. Otherwise the situation of the aggrieved party will become extremely bad, especially if he is in immediate need.

3-The seller may take advantage of non-performance of the obligation specifically by refusing to deliver the goods sold to the aggrieved party, if he finds selling them to another buyer is beneficial to him. Damages will be ordered against him, but damages cannot compensate the aggrieved buyer who is desperate to have these goods.

It seems that the buyer will suffer economically without the remedy of specific implement, because that is the only remedy which will give him what he contracted for, i.e., the goods.

Again the buyer may face a problem of repetition of his predicament, the seller being more likely to breach the contract again when he knows that he will not be compelled to deliver the goods to the purchaser. So, he may breach the contract

whenever he finds a chance to sell at a better price.

4-Disregard of specific implement as a remedy for breach of contract for sale of goods, may affect the seller himself. If, for instance, the purchaser knows that he is not compelled to take delivery of the goods sold, he may breach the contract whenever he finds an opportunity to buy at a lower price.

Specific implement in Scots and Iraqi systems seems to be settled on the point that the remedy of specific implement is an ordinary legal right to the aggrieved party. That may save the aggrieved party from the unjustified and wrongful and illegal refusal to perform by the party in breach, bearing in mind, that the seller in Scots law is not entitled to obtain specific implement.

Is the remedy effective enough to hold the party in breach liable towards the aggrieved party?

To what extent the aggrieved party can truly benefit from the remedy of specific implement, is a matter subject to practice. It is open to a party to a contract to ask the court to order the party in breach to perform his obligation by a decree *ad factum prestandum*. Thus, specific implement is a judicial order against the refusing party to perform the obligation. In addition, the contract of sale of goods is enforceable by such a decree as long as the subject-matter is specific or ascertained according to Sec. 52 of Sale of Goods Act 1979. Consequently, specific implement, apparently is applicable to the sale of goods contract and on the refusing party to such contract. However, the problem is that the remedy may not always be applicable so readily, and the aggrieved party may not truly benefit from specific implement, by virtue of specific reasons, namely:

1-The remedy is refused when certain and specific circumstances stand against granting it. Thus, it is inconceivable that the remedy is disputed by the seller and the buyer without claiming that performance is either impossible or exceptionally hard or unduly difficult, or breach of the contract has been committed by the party who claims specific implement.

2-As soon as a claim of impossibility or hardship or breach of contract is raised by

the refusing party against the party who claims specific implement, the court's discretionary power will be involved and the remedy then subject to its discretion. It may be granted or refused in accordance with the court's opinion.

3-Considering the remedy as an ordinary legal right to the aggrieved party is not sufficient, and in practice is not effective enough to make the aggrieved party rely on it, for the remedy in one way or another is subject to the court's discretion under specific circumstances. Such discretion may deprive the party of his right to the remedy of specific implement. The aggrieved party faces the reality of the court's involvement in granting or refusing the remedy despite the fact that it is considered as an ordinary, legal right.

Despite the court's discretion in granting or refusing specific implement, the aggrieved party's hope in obtaining the remedy may be achieved, and the party in breach may be held liable if the court thinks that the remedy of specific implement is an appropriate remedy. For instance, when the refusing party claims that it is impossible or exceptionally hard for him to perform, or it is unduly difficult to fulfil his obligation, he may not be discharged by the court when the court thinks that performance of the obligation specifically is possible. It seems that the remedy is effective enough to hold the party in breach liable towards the aggrieved party. Furthermore, the remedy is considered very effective if no claim or opposition of that nature is raised against specific implement. Aboveall when the claim of impossibility or hardship or breach of contract...etc, is proved to be wrong by the pursuer, the court must grant specific implement. It has no other choice. Thus, the remedy is proved to be a legal and ordinary remedy and not a discretionary remedy.

What are the basic criteria to create a perfect system of specific implement?

Considering the remedy of specific implement as an ordinary remedy for breach of a contract for sale of goods and granting it to the aggrieved party as a matter of legal right may create a perfect and effective remedial system. That may be achieved by the following grounds.

1-Avoiding certain factors to be involved in the case of granting the remedy, such as the circumstances of *pretium affectionis* and uniqueness test. These two circumstances are changeable within the circumstances of the disputed case, and are purely discretionary matters. That may achieve the following advantages.

(1)-The remedy of specific implement becomes more effective, because the aggrieved party becomes more certain of the outcome i.e., obtaining the thing sold, for he knows that the remedy is based on certain legal grounds, and he (the aggrieved party) satisfies these grounds. He may thus rely on the remedy.

(2)-The remedy of specific implement will be granted more often because granting it is based on legal grounds rather than relying on ambiguous and vague conditions, such as the involvement of the consideration of *pretium affectionis* and the test of uniqueness. If these two considerations are involved there is no doubt that the court's discretionary power becomes wider. There is no doubt, also, that there is greater risk of denying the right of the aggrieved party in specific implement, because there is no rule or ground upon which the court may rely. The case of granting the remedy then becomes a purely discretionary matter. The result will be uncertainty of the remedy

(3)-Greater objectivity is achieved by avoiding the circumstances of *pretium affectionis* and uniqueness, since the circumstances of *pretium affectionis* and uniqueness are subject to the court's discretion "if it thinks fit". Also, the remedy which is rejected on the ground of uniqueness or *pretium affectionis* by one court may be granted by another court because there are different approaches and understandings of the case by each court, and there is different understanding of the parties' needs by each court. These circumstances are relatively changeable from one party to another and from one court to another.

2-Considering specific implement as an ordinary legal remedy, which is based on certain legal grounds, may represent a general rule which can be applied to each case carrying these elements. It becomes the criterion of solving the disputed contract whether for sale of goods or other contracts. The basic criterion to make specific

implement more effectively, is to stand on certain legal conditions rather than ambiguous, vague, unclear grounds such as the considerations of *pretium affectionis* and uniqueness.

The efficiency of the remedy of specific implement as a legal remedy is based on certain legal grounds, which may be affected to a certain extent by the fact that, "refusing the remedy of specific implement is based on equitable and legal grounds". Defining the circumstances upon which the remedy is refused is a very crucial and substantial matter. Upon the answers, depend the availability and the existence of the remedy. It may render damages superior to specific implement. Unfortunately, there is no guide to solve this problem, because it is a discretionary matter. It depends on the court's opinion of the merits of disputed cases and their surrounding circumstances.

The existence of equitable grounds for refusing the remedy of specific implement and when these apply, is the major obstacle against the remedy in Scots and Iraqi systems, because the remedy may be rejected on several occasions on the grounds that performance of the obligation is impossible or exceptionally hard or unduly difficult...etc., under the court's discretionary power. To counter, or mitigate the influence of equitable grounds on the remedy of specific implement it would be better if the court were to rely on two criteria in examining the case of refusing the remedy of specific implement for equitable reasons. These two criteria are subjective and objective criteria, i.e., "circumstances related to the disputed case, and circumstances surrounding the party in breach, his personal circumstances", by which the court could achieve better results for both parties and for performance of the obligation.

3-Disregarding the principle of "where complete justice can be achieved by granting damages, no longer specific implement is granted, and vice-versa", to be one of the principles upon which granting the remedy of specific implement is based. If the above principle is considered as one of the principles of specific implement, the following consequences will take place.

(1)-The court's discretionary power will be widely involved in examining the case of which one, damages or specific implement is most likely to achieve justice. If the

above principle is applied, then, assuming the availability of ordinary commodity, specific implement will never be granted, regardless of the existence of the grounds for granting it.

(2)-The principle of "where complete justice can be achieved by damages, specific implement will not be decreed and vice versa", leads to ignoring the real situation of the remedy of specific implement, which is that "it is not one for the court to grant if it thinks fit", in the normal circumstances.

4-The adequacy of damages test which plays a substantial role in granting and refusing the remedy of specific performance in English law, should not play any part or role in the case of specific implement in Scots and *a fortiori* in Iraqi civil law. It is based on a flexible and unclear circumstance. It is a controversial principle. It is a relative principle and changable from one case to another and from one court to another within the circumstances of the case. It is subject to the full discretion of the court, for there are no certain legal grounds to judge or to examine whether damages are or are not adequate remedy. Therefore, involving such a principle to play a role in the case of specific implement may change the concept and nature of the remedy.

5-Restricting the remedy of specific implement in Scots law to the case of an aggrieved purchaser and depriving the seller of such a right, does not represent the concept of the remedy. It does not achieve equality between the two contracting parties. Further, it does not reflect on the principle that specific implement is an ordinary legal remedy and it is a matter of legal right to the aggrieved party. It is not so at least for the seller, who may perform every obligation he has undertaken under the sale contract, but he has no opportunity to compel the purchaser who has wrongfully refused to take delivery of the goods. Refusing the remedy to the seller, may be applied to all cases in which the seller is involved, such as insolvency, bankruptcy, assignation, agency, ...etc. Thus, no insolvent seller can be granted the remedy. Further, when the seller is an assignee, or an agent,....etc, specific implement is granted against him.

Damages may be granted in addition to the remedy of specific implement when granting specific implement alone is not enough to indemnify the aggrieved party. It seems that the area which is covered by specific implement is wider than that of damages, because specific implement is granted easily and ordinarily. The case of specific implement in Scots law is different. Specific implement is restricted to the case of breach of the obligation to deliver the thing sold. If the obligation is of another nature, damages are the appropriate remedy. Also, the remedy of specific implement is granted against the seller only. It is inapplicable to the case of the aggrieved seller.

When the obligation is of a negative character, damages (not specific implement) will be granted in addition to the remedy of interdict. All the above cases, undoubtedly minimise the efficiency of the remedy of specific implement and deprive the remedy of its nature as an ordinary legal remedy covering a very wide area.

To what extent do the Scots and Iraqi laws fulfil the requirements of the above perfect system?

Scots and Iraqi systems are in accord towards; avoiding the considerations of, *pretium affectionis* and uniqueness and their consequences, the legal grounds for granting the remedy; disregarding the principle of "where complete justice can be achieved by granting damages, no longer is specific implement ordered", and its consequences, and the adequacy of damages test and its consequences. It could be said then that Specific implement in Scots and Iraqi systems have achieved to a certain extent the requirements of a perfect legal system concerning specific implement for the aggrieved party. Scots law however, does not achieve the full requirement of that perfection, for it does not confer the remedy to the aggrieved seller, and it restricts the remedy to one particular obligation, which is delivery of specific or ascertained goods. Such restriction to the remedy limits its scope or its application to wider circumstances, unlike the remedy of specific performance in Iraqi civil law.

In Scots law, despite many calls for reforms from the judiciary and scholars that the remedy of specific implement should be considered as an ordinary legal remedy, it

remains restricted to being an appropriate remedy only for one case, which is the case of delivery of specific or ascertained goods.

To give the remedy of specific implement the opportunity of being the remedy for breach of many other obligations not just the obligation of delivery of specific or ascertained goods, many steps should be taken into consideration. They are as follows.

1-Open the door to every obligant to the contract of sale for goods to claim specific implement. The remedy then will be rendered available to every aggrieved party as a matter of right, no matter who that party is.

2-Extend the remedy to include every obligation which may be performed specifically within the circumstances of the disputed case.

Specific implement as a remedy for breach of a contract for the sale of goods in Scots and Iraqi systems may learn many things from each other, namely:

(1)-Specific implement in Scots law may benefit from Iraqi civil law of specific performance in the case of avoiding the problem of *pretium affectionis* and the uniqueness test. These two cases should be ignored completely by the Scots law in order to create an ordinary legal remedy and routinely applicable right to the aggrieved party.

(2)-The refusing party may be made to pay penalties if he insists on not fulfilling his obligation wrongfully, including imprisonment under certain circumstances and on the existence of the court's discretionary power. That may help the aggrieved party to obtain his right of specific implement against the refusing party who is persisting in not doing what he has undertaken to do without any justifiable reason.

(3)-Extend the remedy of specific implement to be granted as a matter of legal right to every aggrieved party instead of restricting it to the aggrieved purchaser, and make it cover every obligation thus rendering the remedy more effective. For instance, the purchaser, is obliged to take delivery and to pay the money price while the seller is obliged to deliver the goods sold. Accordingly, the obligant has no escape from performing the obligation, and subsequently the contracting parties may feel safe and

secure towards their contracts and obligations, for every obligation will be performed specifically.

Also a perfect combination shall be concluded by putting the above hypothesis in practice between specific implement and the principle of "*Exceptio non adimpleti contractus*", for the seller or the buyer cannot insist on having specific implement unless he himself is ready and willing to fulfil his obligation under the contract. Subsequently, each obligation will be subject to the test and satisfaction of the other party under the conditions and terms of the contract, in addition to the court's supervision in cases where unjustified refusal has taken place by one of the contracting parties.

(4)-Extend the remedy of specific implement to include the case of the obligation of negative character, i.e., not to do something, and applying the remedy to it. Thus, an obligation of refraining from doing something will be subject to legal grounds rather than discretionary and equitable grounds.

Specific performance in Iraqi civil law may benefit from Specific implement in Scots law in the following cases.

1-The case of "clear, unambiguous and definite crave", for that case has been expressed so well in Scots law. It undoubtedly serves the litigants and their disputes and the court. The court becomes fully aware about what the plaintiff intends to apply for and the decree subsequently is pronounced clearly, specifying accurately what should be done by the refusing party. Otherwise the party against whom the decree is pronounced may be exposed to penal consequences unfairly as a result of the ambiguous decree.

2-The court's privative jurisdiction.

The Iraqi Court of First instance does not enjoy any privative jurisdiction. Therefore every action is reviewable by the higher court. That may deprive the Court of First Instance of any independence respecting the action examined by such a court, thus engendering reliance on the higher court in every single action, even if it is a

simple one. It would be better to give the Court of First Instance some independence by giving privative jurisdiction in certain and specific actions.

TABLE OF CASES

- Adderly v. Dixon [1824] 1Sim & St. 607.
- Aitken Campbell & Co. Ltd. v. Boullen & Gatby [1908] S.C. 490.
- Allseas International Managment Ltd. v. Panory Bulk Transport & others [1985] 1Lloyd's Rep. 370.
- Anderson & Compton v. Walls [1870] 9M. 122.
- Appleyard (Aberdeen) Ltd. v. Morrison [1979] S.L.T. (Sh.Ct.) 65.
- Arnott's Trustee v. Dorbes [1881] 9R. 89.
- Ashton v. Carrigan [1871] L.R. 13, ER. 76.
- Aurdal v. Estrella [1916] S.C. 882.
- Australia Hardwoods Proprietary Ltd. v. Railways Comr. [1961] 1WLR. 425.
- Badische Co. [1921] Ch. 331.
- Barclay v. Anderson Foundry Co. [1856] 18D. 1190.
- Barker v. Murdoch [1979] S.L.T. 145.
- Bass, Ratcliff & Gretton v. Laidlaw [1908] 16S.L.T. 660.
- Batthyany v. Bouch [1882] 50L.J. Q.B. 421.
- Beardmore v. Barry [1928] S.C. 101.
- Begg & Co. v. Jack [1876] 3R. 35.
- Behinke v. Bedeshipping Co. [1927] 1K.B. 649.
- Bell Bros. (H.P.) Ltd. v. Reynolds [1945] S.C. 213.
- Ben Nevis Distillery Co. v. N.B. Aluminium Co. [1948] S.C. 592.
- Beswick v. Beswick [1968] A.C. 58.
- Black v. Incorporation of Bakers, Glasgow [1867] 6M. 136.
- Blackburn Robbin Co. v. Allen [1918] 2K.B. 467.
- Blaire v. F.J.C. Lilley (Marine) Ltd. [1918] S.L.T. 90.
- Bosco Design Services Ltd. v. Plastic Sealant Services Ltd. [1979] S.C. 189.
- Brooke v. Hewitt [1796] 3Ves. 253.
- Bruce v. Tyley [1916] 21CLR. 277.
- Buxton v. Lister [1764] 3Atk. 383.
- Caledonian Ry. v. Cochran's [1897] 24R. 855.
- Cantiere San Roco v. Clyde Shipbuilding Co. [1923] S.C. (H.L.) 105.
- CF.Re Barrell Enterprises [1973] 1W.L.T. 19.
- Chappell v. Times Newspaper Ltd. [1975] 1WLR. 482.
- Cheale v. Kenward [1858] 3De G & J 27.

- Chinn v. Hochstrasser [1979] Ch. 447.
- Clark & Macdonald v. Bain [1895] 23R. 102.
- Clarke v. Edinburgh & District Tramways Co. [1919] S.C. (H.L.) 35.
- Clemens v. Macaulay [1866] 4M. 583.
- Cohen v. Roche [1927] 1K.B. 169
- Collard v. Carswell [1892] 19R. 987.
- Collins v. Barrowfield Oddfellow [1915] S.C. 190.
- Colquhoun & Cameron v. Mackenzie [1894] 22R. 23
- Colquhoun v. Paton [1859] 21D. 996.
- Croom & Arthur v. Stewart [1905] 7F. 563.
- Cud v. Rutter [1719] 1P. Wms. 570.
- Dalaney v. Edinburgh Children's Aid Society [1889] 16R. 753.
- Dallas & Co. v. M'Ardle [1940] S.C. 481.
- Davidson v. Davidson [1891] 18R. 884.
- Davidson v. Macpherson [1889] 30S.L.R. 2.
- Delaurier v. Wyllie [1889] 17R. 167.
- Dickson & Walker v. John Mitchell & Co. [1910] S.C. 139.
- Dickson v. Dikie [1863] 1M. 1157.
- Doloret v. Rothschild [1824] 57ER. 233.
- Dowesett v. Reid [1912] 15 C.L.R. 695
- Doyle v. East [1972] 1WLR. 1080.
- Duncan v. Leith [1957] S.L.T. (Sh. Ct.) 46.
- Duncuft v. Albrecht [1841] 12Sim. 189.
- Dunlop & Co. v. Lambert [1839] M'Lean & Rob. 663.
- Duxton v. Lister [1746] 3Atk. 383.
- Dyster v. Rondall & Sons [1926] 1Ch. 932.
- Ehrenbacher v. Kennedy [1874] 1R. 1131.
- Electric Construction Co. v. Hurry & Young [1897] 24R. 312.
- Eral of Crowford v. Paton [1911] S.C. 1017.
- Evans Marshall & Co. Ltd. v. Bertola S.A. [1973] 1WLR. 379.
- Eximenco Handles A.G. v. Partrederiet Oro chief & Levantes Maritime Corp. [1983] 2Lloyd's Rep. 509.
- Exp. Chalmers [1873] L.R. 8Ch. 289.
- Faill v. Wilson [1899] 36 S.L.R. 941
- Falcke v. Gray [1859] 4Drew. 651.
- Farquhar & Gill v. Aberdeen Magistrate [1912] S.C. 1294.

- Fleming & Ferguson v. Paisley Magistrates [1948] S.C. 547.
- Forrest v. Aramayo [1900] 83L.T.R. 335.
- Forth Bridge Rwy Co. v. Incorpn of Guidry of Dunfermline [1910] S.C. 316.
- Fothergill v. Rowland [1873] L.R. 17, Eq. 132.
- Francis v. Crowcliff Ltd. [1976] 120Sol. Jo. 353.
- Fraser v. Church of Scotland General Trs. [1988] S.L.T. 692.
- Gall v. Loyal Glenbogie Lodge of Oddfellows [1900] 2F. 1187.
- Gardiners [1908] S.C. 985.
- Gavin v. Ayrshire County Council [1950] S.C. 197.
- Gibson v. Carruthers [1841] 3M & W. 321.
- Gillespie v. Lucas & Aird [1893] 20R. 1035.
- Gillett v. Hill [1834] L.J. Ex. 145.
- Glasgow Gas-Light Co. v. Glasgow Working Men's Total Abstinence Society [1866] 4M. 1041.
- Glen v. Caledonian Ry. [1868] 6M. 797.
- Grahame v. Kirkcaldy Magistrates [1882] 9R. (H.L.) 91.
- Granor Finance v. Liquidator of Estate Ltd. [1974] S.L.T. 296.
- Hadkinson v. Hadkinson [1952] P. 285.
- Hardy v. Robinson [1958] S.L.T. (Sh.Ct.) 40.
- Harnett v. Yielding [1805] 2Sch & Lef. 549.
- Hart v. Herwig [1873] 8Ch. App. 860.
- Harvey v. Smith [1904] 6F. 511.
- Hasham v. Zenab [1960] A.C. 316.
- Hawkins v. Maltby [1867] L.R. 3Ch. App. 188.
- Hay's Trs. v. Young [1877] 4R. 398.
- Hayman & Son v. M' Lintock [1907] S.C. 936.
- Hayman v. American Cotton Oil Co. [1910] S.C. 1095.
- Hendry v. Marshall [1878] 5R. 687.
- Higgins v. J & C.M. Smith (Whiteinch) Ltd. (1990) S.L.T. 663.
- Howell v. Coupland [1879] 1 Q.B. 258.
- Hoyle v. Shaws Water Co. [1854] 17D. 83.
- Hutchinson v. Payne [1975] V. R. 175.
- Hutchison [1965] S.C. 240.
- Hutchison v. Ferrier [1846] 8D. 1228.
- Inverurie Magistrate v. Sorrie [1956] S.C. 175.
- James Y. Keanie Ltd. v. Maycrete Sales Ltd. [1949] S.L.T. (Notes) 23.

- Johnnannesburgh Municiple Council v. Stewart & Co. [1909] S.C. 860.
- Johnston v. Strachan [1861] 23D. 758.
- Jones v. Samuel [1862] 24D. 319.
- Karlshamns Oliefabriker v. East Port Navigation Corp., "The Elafi" [1981] 2Lloyd's Rep. 679. 1All E.R. 208.
- Kay v. Morrison's Reps [1984] S.L.T. 175.
- Keat v. Wallis [1953] NZLR. 563.
- Kelso School Board v. Hunter [1874] 2R. 228.
- Kilmarnocl Mags. v. Mather [1869] 7M. 54.
- Kinnear v. Brodies [1910] 3F. 450.
- Kirkwood's Trs v. Leith [1889] 16R. 255.
- Knight v. Burgess [1864] 33LJ. Ch. 727.
- Kyle v. Sim [1925] S.C. 425.
- L.A. v. Johnston [1983] S.L.T. 290.
- Laing v. Provincial Homes Investment Co. Ltd. [1909] S.C. 812.
- Langen & Wind Ltd. v. Bell [1972] Ch. 685.
- Lauire & Morewood v. Dudin & Son [1926] 1K.B. 223.
- Leggat v. Gray [1908] S.C. 67.
- Leith Heritage Co. v. Edinburgh Glass [1876] 3R. 789.
- Leitch v. Edinburgh Ice Co.& Cold Storage Co. Ltd. [1900] 2F 904.
- Lindsay v. London & N.W.Rly. Co. [1855] 18D.62.
- Lingen v. Simpson [1824] 1S. & S. 600 (pattern book).
- Liquidator of Union Club. v. Edinburgh Life Assurance [1906] 8F. 114.
- Lochgelly Iron & Coal Co. v. North British Rly. Co. [1913] 1S.L.T. 405.
- Lord Advocate v.Jhonston [1983] S.L.T. 290.
- Lowther v. Lowther [1806] 13 Ves. 95.
- MacIntosh v. British Railways Board (No.1) [1990] S.L.T. 637.
- MacIntosh v. Dalwood (No.4) [1930] 30S.R. (N.S.W.) 415.
- Mackay v. Mackenzie [1894] 21R. 894.
- Mackenzie v. Balerno Paper Co. [1883] 10R. 1147.
- Mackenzie v. Jhon R. Wyatt (Musical Enterprises) Ltd. [1974] S.L.T. (Sh.Ct.) 8.
- Macleod v. Alexander Sutherland Ltd. [1977] S.L.T. (Notes) 44.
- Maclure v. Maclure [1911] S.C. 200.
- MaGraddie v. Clark [1966] S.L.T. (Sh.Ct.) 36.
- Manchester Brewery Co. v. Coombs [1901] 2Ch. 608.
- Marshall v. Callander & Trossachs Hydropothic Co. Ltd. [1896] 24R. 33, 712.

- Martindale v. Smith [1841] 1Q.B. 389.
- Mc Arthur v. Lawson [1877] 4R. 1134.
- Mc Kellar v. Dallas's Ltd. [1928] S.C. 503
- Mc Nair v. Don [1933] 48Sh. ct. Rep. 99.
- Measures Bros Ltd. v. Measures [1910] 2Ch. 248.
- Melville v. Wemyss [1842] 4D. 385.
- Micro System (scotland) Ltd. v. Electro-Physiological Instrument Ltd. [1971] S.C.140.
- Middleton v. Leslie [1892] 19R. 801.
- Milburn [1946] S.C. 301.
- Millars of Falkirk v. Turpie [1976] S.L.T. (Notes) 66.
- Miller v. Jackson [1977] Q.B. 966.
- Miller v. Muirhead [1894] 21R. 658.
- Moffat v. Marconi Space and Defence System Ltd. [1975] S.L.T. (Notes) 60.
- Moore v. Paterson [1882] 9R. 337.
- Morgan v. Rhodes [1834] 1My & K. 431.
- Morris v. Barron [1918] A.C. 1.
- Morton v. Abercromby [1858] 20D. 362.
- Munro v. Balnagowan Estate Co. [1949] S.C. 49.
- New Brunswick & Canada Ry. & Land Co. v. Muggeridge [1859] 62ER. 263.
- Nielson's Trs. v. Snowball [1904] 7F 35.
- Nowat v. Kerr [1977] S.L.T. (Sh.Ct.) 62.
- Nutbrown v. Thornton [1883] 10Ves. 160.
- Odessa Tramways Co. v. Mendel [1878] 8Ch. D. 235.
- Pau on v. Lau Yin Long [1980] A.C. 614.
- Pedie v. Swinton [1839] McL & Rob. 1018.
- Penny v. Scott (1894) 22R. 5.
- Perbroke v. Thorpe, 3Sw. 443 N.
- Petrie v. Forsyth [1874] 2R. 214.
- Phillips v. Lamdin [1949] 2K.B. 33.
- Pirie v. Warden [1867] 5M. 497.
- Pittalis v. Shrefettin [1986] Q.B. 868.
- Place v. West Highland Rly. [1895] 7F. 477.
- Pochine & Co. v. Robinows & Majoribank [1869] 7M. 662.
- Pollock v. Macrae [1922] S.C. (H.L.) 192.
- Pommer & Thomson v. Mowat [1906] 14S.L.T. 373.

Ponder v. ponder [1932] S.C. 232.
 Poole v. Middleton [1861] 29Beav. 646.
 Powell v. Lloyd [1828] 2Y. & J. 372.
 Price v. Strange [1978] Ch. 337.
 Purves v. Brock [1867] 5M. 1003.
 Pusey v. Pusey [1684] 1Vern 273.
 Queen's Land Insurance Co. Ltd. v. Austrailian Mutual Fire Insurance Society Ltd. [1941]
 41SR. NSW. 159.
 Rephoenix Bessemer Steel Co. [1876] 4Ch. D.108.
 Re Schwabcher [1908] 98L.T. 127.
 Re Wait [1927] 1Ch. 606.
 Richmond v. Railtan [1854] 16D. 403.
 Robb v. Gow [1905] 8F. 90.
 Robert v. O'neil [1983] 1R. 47.
 Robertson v. Cockburn [1875] 3R. 21.
 Robertson v. Fleming [1861] 4Macq. 167.
 Robertson v. Neely [1895] 12Sh. Ct. Rep. 242.
 Robertson's Trs v. Nicholson [1888] 15R. 914.
 Rollo's Trs. v. Rollo [1940] S.C. 578.
 R.S.Leigh & Co. v. Berger & Co. [1958] S.L.T. (Sh.Ct.) 21.
 Rudman v. Jay [1908] S.C. 552.
 Ryner v. Grote [1916] 15M & W. 359.
 Salaried Staff London Loan Co. Ltd. v. Swears & Wells Ltd. [1985] S.L.T. 326.
 Sanderson v. Geddes [1874] 1R. 1198.
 Scott v. Mill's Trs. [1923] S.C. 726.
 Seaforth Trs. v. Macaulay [1844] 7D. 180.
 Shepherd v. Menzies [1900] 2F. 442.
 Simpson v. Bruce [1984] S.L.T. (Sh.C.t) 38.
 Sinclair v. Caithness Flagstone Co. [1898] 25R. 703.
 Sinclair v. Smith [1860] 22D. 1475.
 Societe Des Industries Metallurgiques S.A. v. The Bronox Engineering Co. Ltd. [1975]
 1Lloyd's Rep. 465.
 Somerset v. Cookson [1735] 3P. Wms. 390.
 Southern Bowling Club v. ross [1902] 4F. 405.
 Srilanka Omnibus Co. v. Perera [1952] A.C. 76.
 Stewart v. Kennedy [1890] 17R. (H.L.) 1.

- Stray v. Russell [1859] 1E. & E. 888.
- Summerlee Iron Co. v. Caledonian Ry. [1911] S.C. 458.
- Sutherlands of peterhead (Road Hauliers) Ltd. v. Allard Hewson & Co.Ltd [1972] S.L.T. (Notes) 83.
- Sutherland v. Montrose Shipbuilding Co. [1860] 22D. 665.
- Swan v. Kirk [1932] S.L.T. (Sh.Ct.) 9.
- Swiss Bank Corpn. v. Lloyds Bank Ltd. [1980] 2All E.R. 419.
- Tait v. Jonson [1891] 18R. 606.
- Taylor v. Caldwell [1863] 3B & S. 833.
- Thames Sack & Bags Co. v. Knowles & Co. Ltd. [1918] 88K.B. 585.
- The Stena Nautica (No.2) [1982] 2Lloyd's Rep. 336.
- Thomas v. Thomas [1947] S.C. (H.L.) 45.
- Thome v. Thome [1683] 2Brown's Sup. 49.
- Thomson v. Robertson [1888] 15R. 880.
- Thomson v. Thomson. [1979] S.L.T. (Sh.Ct.) 11.
- Todd v. Armour [1882] 9R. 901.
- Tolhurst v. Associated Portland Cement Manufactures Ltd. [1920] 2K.B. 660.
- Tolland v. William Reid (Sports) Ltd. [1970] S.L.T. (Notes) 19.
- Toni Tyres Ltd. v. Palmer Tyers Ltd. [1905] 7F. 477.
- Trotter v. Farnie [1831] 5W & S. 649, [1832] 10S. 423.
- Turnbull v. Mc Lean & Co. [1874] 1R. 730.
- Union Electric Co.Ltd. v. Holman & Co. [1913] S.C. 954.
- Verral v. Great Yarmouth Borough Council [1981] Q.B. 202.
- Wait & James v. Middland Bank [1926] 31Com. Cas. 172.
- Wallace-James v. Montgomerie & Co. [1899] 2F. 107.
- Warraned v. Watson [1906] 8F. 1098.
- Waterson v. Stewart [1881] 9R. 155.
- Watson v. Shankland [1871] 10M. 142.
- Watt v. Findly [1846] 8D. 529.
- Web v. Direct London & Portsmouth Ry. Co. [1852] 1De G.M. & G. 521.
- Wedgwood v. Adams [1843] 6Beav. 600.
- Weir v. Buchanan [1876] 4R. 8.
- West v. Aberdeen Harbour Commrs [1876] 4R. 207.
- White & Carter (councils) Ltd. v. Mc Gregor [1962] S.C. (H.L.) 1.
- White v. Dickson [1881] 8R. 896.
- White v. Mc Ewen's Trs [1873] 11M. 602.

Whitely Ltd v. Hilt [1918] 2K.B. 808.

Whyte v. Whyte [1913] 2S.L.T. 85.

Wilson v. Northampton & Banbury Junction Rly. Co. [1874] 9Ch. App. 279.

Wilson v. Mc Kellar [1896] 24R. 254.

Wilson v. Pottinger [1908] S.C. 580.

Wilson v. Shepherd [1913] S.C. 300.

Winans v. Mackenzie [1883] 10R. 941.

Winans v. Macrae [1885] 12R. 1051.

EGYPTIAN AND IRAQI CASES

1-EGYPTIAN CASES

Egyptian Court of Appeal judgment, on, 23/ Feb./1932, "Bar Journal", 37th issue, at p.37.

Egyptian Court of Cassation judgment, civil cassation, 12 June, 1952, Court of Cassation judgments Collection, 3, No, 187.

Egyptian Court of Cassation judgment, cassation, 3/2/1938, "Publication of the rules decided by Court of Cassation" vol, 1, at p.353, para. 59.

Egyptian Court of Cassation judgment, civil cassation, on, 12, June, 1952, "Publication of Cassation Court", (3), the 187th issue, at p.1187.

Egyptian Court of Cassation judgment, civil cassation, on, 22, April, 1943, Omar's Collection (4), issue 51, at p.137.

Egyptian Court of Cassation judgment, civil cassation, on 16th December, 1948, Omar's collection, (5), the 352nd issue, at p. 682.

Egyptian Court of Cassation judgment, No, 22, on, January, 1941, Omar's Collection, the 87th issue, at p. 294.

Egyptian Court of Cassation judgment, on, 25/12/1952, cited by, Taha, Ghani Hassoun, Commentary on specific contracts, Sale contract, at p.257.

Egyptian Mixed Appeal, on, 13 / November / 1913.

Egyptian Mixed Appeal, 20, March, 1935, Mixed, 47.

Civil Cassation, on 16th December, 1948, Omar Collection, 5, No.352, at p.682.

Egyptian Court of Cassation decision, on 23/4/1953, Publication of rules which are decided by the Court of Cassation, vol.1, at p. 355, para, 67, cited by, Tanagho, Sameer Abdul sa'ied, the contract of sale, supra, at p.343.

2-IRAQI CASES

The Court of Cassation judgment, No.204/civil/1973, on, 6/6/1973, Judicial Publication, the 2nd issue, of the 4th year, at p. 47.

The Court of Cassation judgment, No, 281/1952, on, 26/4/1952, cited by, Al-a'llam, Abdul rahman, Civil procedures rules, supra.

The Court of Cassation decision, No, 868/Execution/ 960, on, 31/4/1960.

The Court of Cassation judgment, 1970, on, 10/2/1970, Judicial Publication, the 1st issue, of the 1st year, 1970, at pp. 9-10.

The Court of Cassation judgment, No, 71/ 1970, on, 6/5/1970, Judicial Publication, 2nd issue, at p.120.

- The Court of Cassation judgment, No.3/ Execution/ 61, on, 3/4/1961.
- The Court of Cassation judgment, No.42/ Execution/ 58, on, 30/2/1958.
- The Court of Cassation judgment, No.84/Execution/ 1974, on, 9/4/1974.
- The Court of Cassation judgment, No.111/1982, on, 11/2/1982, "Judicial Publication", the 1st issue, 1982, at p.41.
- The Court of Cassation judgment, No.144/1970, on, 1/2/1970, "Judiciary Publication", the 1st issue, the 1st year, 1970, at p. 69.
- The Court of Cassation judgment, No.155/ procedures/ 944, on, 15/11/1944.
- The Court of Cassation judgment, No.192/ Execution/ 76, on, 18/4/1976, "Judiciary Publication", the 1st issue, the 17th year, 1976.
- The Court of Cassation judgment, No.213/General Committee, 1971, on, 31/7/1971, "Judicial Publication", the 3rd issue, of the 2nd year, at p. 100.
- The Court of Cassation judgment, No.232/ Execution/ 973, on, 8/9/1973.
- The Court of Cassation judgment, No.233/ 1954, on, 8/3/1954, "Judiciary Journal", 2nd issue, the 21st year, at p.109.
- The Court of Cassation judgment, No.246/86/87, on, 31/3/1987, cited by, Al-naddawi, Adam W. *supra*.
- The Court of Cassation judgment, No.247/86, on, 31/3/1987, cited by, Al-naddawi, Adam, W., "Civil procedures law", *supra*.
- The Court of Cassation judgment, No.257/1971, on, 1/12/1971, "Judicial Publication", the 4th issue, of the 2nd year, 1973, at p.123.
- The Court of Cassation judgment, No.262/ civil/ 1970, on, 27/5/1971, "Judicial Publication", 2nd issue, the 2nd year, 1970, at p.130.
- The Court of Cassation judgment, No.280/ Execution/ 969, on, 4/6/1969.
- The Court of Cassation judgment, No.326/ Execution/ 972, on, 1/10/1972.
- The Court of Cassation judgment, No.449/ Execution/ 63, on, 3/10/1963.
- The Court of Cassation judgment, No.450/ Execution/ 972, on, 15/11/1972.
- The Court of Cassation judgment, No.465/973, on, 5/11/1973, "Judicial Publication", the 4th issue, of the 4th year, at p. 61.
- The Court of Cassation judgment, No.543/1970, on, 20/5/1970, "Judiciary Journal", the 3rd issue, of the 1st year, 1970, at p. 236.
- The Court of Cassation judgment, No.543/1970, on, 20/5/1970, "Judiciary Journal", the 3rd issue, of the 25th year, 1970, at p.236.
- The Court of Cassation judgment, No.569/1965, on, 3/8/1965, "Iraqi Court of Cassation Judiciary", the 3rd issue, at p. 283.
- The Court of Cassation judgment, No.582/civil/ 958, Baghdad, on, 22/3/1958, cited by,

Bayat, Salman, Iraqi civil judiciary, supra, at p.66.

The Court of Cassation judgment, No.640, civil, 1971, on, 6/6/1971, Judicial Publication, the 2nd issue, the 2nd year, 1971, at p.106.

The Court of Cassation judgment, No.667/956, on,9/6/1956, cited by, Al- a'llam Abdul rahman, op.cit. pp.173-174.

The Court of Cassation judgment, No.772/ Execution/ 966, on, 17/6/1967.

The Court of Cassation judgment, No.783, 958, on, 26/5/1958, cited by, Al- a'llam, Abdul rahman, supra.

The Court of Cassation judgment, No.802/ Execution/ 959, on, 14/11/1959.

The Court of Cassation judgment, No.822/ Execution/ 1961, on, 28/1/1961, cited by, Mubarak, Sa'eed Abdul kareem, the principles of the Execution law, supra.

The Court of Cassation judgment, No.822/ Execution/ 1961, on, 28/11/1961.

The Court of Cassation judgment, No.894, real right, 1972, on, 17/8/1972, Judicial Publication, the 3rd issue, of the 3rd year.

The Court of Cassation judgment, No.1151, on, 2/6/1970, Judicial Publication, the 2nd issue, of the 1st year, 1970, at p. 10.

The Court of Cassation judgment, No.1709/1953, on, 21/11/1953, Judiciary Journal, the 2nd issue, 1953.

The Court of Cassation judgment, No.1733/1955, on, 29/11/1955, Judiciary Journal, the 1st issue, 1956, at p. 73.

The Court of Cassation judgment, No.1736, 1947, on, 1/11/1947, cited by Al-a'llam, Abdul rahman, supra.

The Court of Cassation judgment, No.1760/ civil/ 56/ Baghdad, on 13/11/1956, cited by Bayat, Salman, Iraqi civil judiciary, vol, 2, supra.

The Court of Cassation judgment, No.1774/1955, Baghdad, on, 29/11/1955, cited by, Bayat, Salman, Iraqi civil judiciary, vol.2, supra, at pp. 63-64.

The Court of Cassation judgment, No.1953, on, 19/10/1957, cited by, Al- a'llam, Abdul rahman, Iraqi procedures rules, vol.1, supra.

The Court of Cassation judgment, No.2345/ civil/ 956, Basrah, on, 12/1/1956, cited by, Bayat, Salman, Iraqi civil judiciary, vol.2, supra, at p.66.

The Court of Cassation judgment, No.2573, civil, 1957, Karradah, on, 12/3/1958, cited by, Bayat, Salman, Iraqi civil judiciary, vol.2, supra, at pp. 79-80.

The Court of Cassation judgment, No.2889/1982/1988, on, 12/4/1988, cited by, Al-naddawi, Adam, W. supra.

The Court of Cassation judgment, No.21181/1961, on, 15/2/1961, Judicial Publication, the 3rd & 4th issues, 1961, at pp.664-665.

The Court of Cassation judgment, No.247/86, Extended Committee, 86/87, 1987, cited by, Al-naddawi, Adam W. Civil procedures , op.cit. p154, foot-note (2).

The Court of Cassation judgment, on, 18/1/1958, cited by, Bayat, Salman, Iraqi civil judiciary, vol.2, supra.

The Court of Cassation judgment, Iraqi Court of Cassation Judiciary, the 4th issue, at pp.401-402, cited by, Al-hakeem, Abdul majid, Commentary on civil law, Sources of obligation, vol.1, supra, at p.428.

The Court of Cassation judgment, No.485/ 1957, on, 12/6/1957, cited by, Al- a'llam, Abdul rahman, Iraqi Procedures Rules, vol.2, supra, p.137.

The Court of Cassation judgment, No.118/Execution/ 1963, on, 19/3/1963, Judiciary of Court of Cassation , vol.1, of the year 1966.

The Court of Cassation judgment, No.87/1970, on, 4/2/1971, Judicial Publication, the 1st issue, the 2nd year, at p.15.

The Court of Cassation decision, No. 118/Execution/ 1963, on 19/3/1963, Judiciary of Court of Cassation, vol.1, 1966, at p.246.

The Court of Cassation decision, No.578/Execution/1961, on 13/8/1961, cited by Hafidh, Ali Mudhafar, Commentary on Execution law, supra at p.272.

The Court of Cassation judgment, No.623/civil/ 1970, on 27/5/1970/ Judicial Publication, the 2nd issue, the 1st year, 1971, at p.107.

The Court of Cassation decision, No.100/civil/1969, on 24/2/1970, Judicial Publication, the 2nd issue, the 1st year, 1971, at p.106.

The Court of Cassation decision, No.567/civil/1970, on 30/5/1970, Judicial Publication, the 2nd issue, the 1st year, 1971, at p.107.

The Court of Cassation decision, No.346/Execution/1958, on 18/6/1958, cited by Al-kalili, bakir, Application of Execution law, supra, at p.103.

The Court of Cassation judgment, No.7/civil/1972, on 23/3/1972, Judicial publication, 1st issue, the 3rd year, at p.72.

The Court of cassation decision, No.452/civil/1975, on 27/1/1970, al-ahkam al-adliyah, 1st issue, the 7th year, at p.39.

The Court of Cassation decision, No.923/civil/1966, on 24/11/1966, The Court of Cassation judiciary, vol.4, at pp.127-128.

The Court of Cassation judgement, No.772/civil/1969, on 25/9/1971, cited by, Naji Ghazi Abdul rahman, The Economical Balance of the contract, supra, at p.109.

The Court of Cassation judgment, No.109/civil/1974, on 11/9/1974, judicial Publication, the 3rd issue, the 5th year, at p.48.

The Court of Cassation decision, Nos.220, 229/Appellate/ 1970, on 29/4/1971, judicial

publication, the 2nd issue, the 2nd year, 1972, at p.102.

The Court of Cassation decision, No.102/First Instance/55, Baghdad, on 19/2/1955, cited by Bayat, Salman, Iraqi civil judiciary, vol.1, supra, at p.225.

The Court of Cassation Decisions: no.2679/1957, on 16/11/1957; No.2687/1957, on 27/1/1958; No.2014/1956, on 5/12/1956, cited by Al-'allam Abdul rahman, Iraqi procedures rules, supra, at pp. 173-174.

The Court of Cassation decision, No.117/First Instance/965, Baghdad, on 21/6/1965, Judiciary of the Court of Cassation, vol.3, 1969, at p.97.

The Court of Cassation judgment, No. 71/First Instance/ 1970, on 6/5/1970, Judicial Publication, the 2nd issue, at p.120.

The Court of Cassation decision, 1970, on 10/2/1970, Judicial Publication, the 1st issue, the 1st year, 1970, at pp.9-10.

The Court of Cassation judgment, No.6/appellate/1970, on 3/10/1970, Judicial Publication, 3rd issue, the 4th year, at p.131.

The Court of Cassation Judgment, No.165/civil/1974, on 24/11/1971, Judicial Publication, 2nd issue, the 2nd year, at p.18.

The Court of Cassation decision, No.131/civil/1974, on 9/10/1974, Judicial Publication, the 4th issue, the 5th year, at, p.185.

The Court of Cassation decision, No.153/civil/1973, on 19/12/1973, Judicial Publication, 4th issue, the 4th year, at p.34.

The Court of Cassation Judgments, Nos.1438, 1439/civil/1973, on 2/3/1974, Judicial Publication, the 1st issue, the 1st year,

BIBLIOGRAPHY

- Abdul baqi, Abdul fattah, Lessons in Principles of the Obligation , Nahdhat mussir.
- Al-a'llam, Abdul rahman, Iraqi Procedure Rules vol, 2, Al-tadhamun press, Baghdad, 1962
- Al-amiri, Sa'doun, Commentary on the Sale and Lease Contracts , 3rd ed. Al-ani press, Baghdad, 1974.
- Al-bakri, Abdul baqi, Commentary on Iraqi Civil Law, Principles of obligation, Performance of the obligation , vol, 3, Baghdad, 1979.
- Al-Dhanoon, Hasan Ali, The General Theory of Obligation , Al-hurreia press, Baghdad, 1976.
- Commentary on the Specific Contracts, Sale Contract , Baghdad, 1953.
- The General Theory of Rescission in Islamic Jurisprudence and Civil Law , 1949.
- Al-hakeem, Abdul majid, Commentary on Civil Law, vol.2, Principles of Obligation in Iraqi Civil Law , vol, 2, 3rd ed. 1977.
- Commentary on Civil Law, vol.1, Sources of Obligation in Iraqi Civil Law , vol, 1, 5th ed. Baghdad, Nadeem Press.
- Al-hilali, Ahmad Najeeb & Zaki, Hamid, Commentary on Civil law , 3rd ed. 1954.
- Al-kchatteeb, Ahmad, Interdiction of the debtor for the benefit of his creditors , Cairo, 1966.
- Al-kishtaini, Sa'doun Naji, Commentary on Iraqi Civil Procedure Law , 1978.
- Al-naddawi, Adam W. & Mubarak, Sa'eed Abdul kareem, Commentary on Execution Law , 1st ed., Mousil, 1984.
- Al-naddawi, Adam W., Civil Procedurs , 1988.
- Al-nahi Salah al-deen, Commentary on the Civil and Commercial Procedure Law , vol.2, Baghdad, 1962.
- Al-Quadhi, Muner, Commentary on the Civil and Commercial Procedure Law , Baghdad, 1957.
- Commentary on the book of Rules , vol. 1, Baghdad, 1947.
- Al-saddah, Abdul mun'im Faraj, Sources of Obligation , 1979.
- Al-sanhoori, Abdul razzaq, Brief of Commentary on Civil Law , Cairo, 1966.
- Commentary on Civil Law, Sources of Obligation , vol, 1, Cairo, Egyptian Universities Press, 1952.
- Commentary on Civil Law, Theory of Obligation , vol.2, The Egyptian Universities press, 1956.
- Commentary on Civil Law, Sale contract , vol, 4, Cairo, 1960.
- Sources of the Right in Islamic Jurisprudence , vol.1, Cairo, 1955.

- Al-sarraf, Abbass Hasan, Commentary on the Sale and Lease Contracts in Iraqi Civil Law, Baghdad, 1956.
- Commentary on the Sale Contract in Kuwaiti Civil Law , Kuwait.
- Al-windawi, Kamal Tharwat, Commentary on the Principles of the Sale Contract , 1st ed., Baghdad, 1973.
- Amin, S.H., Middle East Legal System , 1st ed., Royston Ltd., 1985.
- Amir, Hussien, The Civil Liability , 1st ed., 1956.
- Atiyah, P.S., Sale of Goods, 6th ed. 1985.
- Baeyat, Salman, Iraqi Civil Judiciary, vol, 1, 2 1962.
- Bell, Commentaries on the law of Scotland , 7th ed. 1870.
- Principles of the law of Scotland , 4th ed. 1839
- Benjamin, Sale of Goods, 3rd ed. London, Sweet & Maxwell Ltd. 1987.
- Black, Henery Campbell, Black's Dictionary, 5th ed. West Publishing Co. 1979.
- Black, Robert, Civil jurisdiction. The New Rules. Edinburgh , William Blackwood & Sons Ltd. 1983.
- An introduction to Written Pleading, Edinburgh, William Blackwood & Sons Ltd. 1982.
- Blair, Michael C., Sale of Goods Act 1979 , London, 1980.
- Brown, R., Notes & Commentaries on the Sale of Goods Act 1895 , 1st ed. Edinburgh, W. Green & Son Ltd. 1895.
- Campbell, B. Burns & John N. Quar, Commercial Law of Scotland , 3rd ed. 1960.
- Chitty, The Law of Contract. General Principles , vol, 1, London, Stewart & Maxwell, 1983.
- The law of Contract. Specific Contracts , vol.2, London, Stewart & Maxwell, 1983.
- Dobie, W. M. Jordine, Sheriff Court Practice , Edinburgh, 1986.
- Style for the Sheriff Court in Scotland , Edinburgh, Glasgow, London, 1951.
- Dobson, A.P., Sale of Goods Act and Consumer Credit , 3rd ed. London, Sweet & Maxwell, 1984.
- Erskine, John, Institute of the law of Scotland , Edinburgh, 1824.
- Fry, Specific Performance, 6th ed. Stevens 1921.
- Ghanim, Isma'iel, The Principles of the obligation , 5th ed. 1981.
- Gloag & Henderson, Introduction to the law of Scotland , 9th ed., Edinburgh, W. Green & Son Ltd. 1987.
- Gloag, The Law of Contract , 2nd ed., W. Green & Son Ltd. Edinburgh, 1929.
- Goudy, Bankruptcy, 4th ed., 1914.
- Gow, J. J., The Mercantile & Industrial Law of Scotland , 1st ed. Edinburgh, W. Green &

Son Ltd. 1964.

Hafidh, Ali Mudhafar, Commentary on Execution Law , Baghdad, 1962.

Jad, Hasan, Commentary on Iraqi Commercial Law , vol.1, Baghdad, 1940.

Jones, G. & Goodhart, W., Specific performance, 1st ed. London Butterworth, 1986.

Juma'ei, Abdul bassitt, Principles of Procedures, Al-fikir Al-arabi press, 1980

Kchattab, Dhea Sheet, Commentary on Civil Procedure Law , Baghdad, 1973.

Kchattab, Dhea Sheet, Judiciary Technique, Baghdad, 1984.

Lawson, F. H., Remedies of English Law , 2nd ed., London, Butterworth, 1980.

Lewis, W. J., Sheriff Court Practice , 8th ed. 1939.

Mackay, AE. J. G., The Practice of the Session Court , Edinburgh, 1877.

Macphail, I.D., Sheriff Court Practice , 1st ed. Edinburgh, West Green & Son Ltd. 1988.

Maxwell, David, The practice of the court of Session , 1st ed. Edinburgh, 1980.

McBryde, William W., The Law of Contract in Scotland , 1st ed. Edinburgh, W. Green & Son Ltd. 1987.

Michael Mark, Chalmers, Sale of Goods Act 1893 , 17th ed. London, Butterworths, 1975.

Mubarak, Sa'eed Abdul kareem, The Principles of the Execution Law , 3rd ed. Baghdad, 1978.

Murcey, Mohammad Kamel, Commentary on the Specific contracts, Sale & Barter , 1953.

Murqus, Sulayman, & Imam, Mohammad Ali, Contract of Sale in the new Civil Code , Nahdhat Mussir press, 1955.

Murqus, Sulyman, Commentary on Civil Law, In Obligations , 1964.

-----The Specific Contracts, vol. 1, Sale Contract , Cairo, 1968.

Naji, Ghazi Abdul rahman, The Economical Balance of the Contract during its performance , Baghdad, Legal research centre, Ministry of Justice, 1986.

Ridha, Mouafaq Hasan, The Companies Law , Baghdad, Ministry of Justice press, 1985.

Robison, S. Scott, The Law of Interdict, London, Edinburgh, Butterworth, 1987.

Shafiq, Muhsin, Commercial Law of Egypt , vol, 2, 1951.

Sharpe R.J., Injunction & Specific performance , Canada Law Book Co. Toronto, 1983.

Spry, The Equitable Remedies , 3rd ed. Sweet & Maxwell Ltd. 1948.

Stair, The Institution of the law of Scotland , The University presses of Edinburgh & Glasgow, 1981.

Stewart, Graham, The Law of Diligence , Edinburgh, William Green & Sons, 1898.

Sullttan, Anwar, & Al-a'dawi, Jalal, Brief of Commentary of the Specific Contracts , vol, 1, Cairo, 1964.

-----The Principles of Obligation , Al-nahdha Al-arabiea press, Beirut, 1980.

-----The General Theory of Obligation, vol.2, The Principles of Obligations , Dar al-ma'arif, bi-missir.

Taha, Ghani Hassoun, Commentary on Civil Law, The General Theory of Obligation, Sources of Obligation , Al-ma'arif press, Baghdad, 1971.

-----Commentary on the Specific Contracts, the Sale Contract , vol.1, Baghdad, 1970.

Tanagho, Sameer Abdul Sa'ied, The Sale Contract , Al-exanderia, 1973.

Thomson, G.R. & Middleton, J.T., Manual of the Court of Session Procedures , Edinburgh, W. Green & Sons Ltd., 1937.

Trietel, G.H., The Law of Contract , 5th ed. London, Steven & Sons, 1979.

Wali, Fat'hi, Obligatory Execution "performance" in Kuwati Law , 1978.

Walker, David M., The Law of Civil Remedies in Scotland , 1st ed. Edinburgh, West. Green & Son Ltd. 1974.

-----The Law of Damages in Scotland , Edinburgh, 1955.

-----The Scots Legal System , 5th ed., Edinburgh, 1981.

-----The Law of contracts and related obligations in Scotland , 2nd ed. London Butterworth 1985.

White, D.B., Practice & Procedures in the Sheriff's Ordinary Court, 1st ed., London, Fourmat Publishing, 1988.

Woolman, Stephen, Contracts, 1st ed. Edinburgh, W. Green & Son Ltd. 1987.

Yamulki, Akr'am & Salih, Basim Mohammad, The Commercial Law , Part two, baghdad.

TABE OF ARTICLES

Abdul bir, Mohammad Zaki, "Interdiction of the debtor in Islamic Jurisprudence", The Bar Journal, the 9th issue, the 36th year, May 1956.

Al-bakri, Abdul baqi, "Principles of Equity", Legal & Political Sciences Journal, Baghdad University, Faculty of Law & Politics, April, 1984.

Al-jeelawi, Ali, "The Penalty, or, The Financial Threat", The Legal & Political Sciences Journal, Baghdad University, Faculty of Law & Politics, vol; 5, No; 2, 1986.

Al-jundi, Bushra, "The Features of the debtors liability", The Governmental Affairs Administration Journal, No; 1, the 41th year, March, 1970.

Al-nahi, Salah aldeen, "The Companies and Liquidation", the Comparative Law Journal, the 3rd issue, the 4th year, 1970.

Al-shalqani, Ahmad Abdul fattah, "Rules of Remedies of breach of contract in English, American, and Egyptian Laws", The Governmental Affairs Administration Journal, No.3, the 14th year, July/ September, 1970.

Black, Robert, Style for Avering jurisdiction under Civil jurisdiction & judgment Act 1982, S.L.T. (News, 1-4.).

Dawson, John P., "Specific Performance in France & Germany", Mich. L. Rev., vol; 57, 1959.

Hasan, Nabil Abdul rahman, "Role of Judge in achieving the balance between rights and obligations in contracts", Journal of Equity, vol; 2, the 5th year, Baghdad, Ministry of Justice.

Hecke, M. T. Van, "Changing Emphases in specific performance", North Carolina L. Rev., vol;40, 1961.

Kronman, Antony T. "Specific Performance", The University of Chicago L. Rev., vol; 45, 1978.

Naji, Ghazi Abdul rahman, "Warranty against Disturbance and Dispossession in the sale contract in Iraqi civil Law", Comparative Law Journal, No; 2, the 9th year, Iraqi Comparative Law Association, Baghdad, 1981.

Schwartz, Alan, "Specific Performance", The Yale L.J. 89, 1979.

Shanab, Mohammad Labeeb, "Anticipated breach of contract, study in American, Egyptian and French Laws", The Legal and Economical Sciences Journal, vol; 1, the 3rd year, January, 1961.

Spencer, Blaylock J.R., "Specific Performance of chattels contract", North Carolina L. Rev., vol.34, 1956.

Thomas, S. Ulen, "The Efficiency of Specific Performance toward a unified theory of contract remedies", Michigan L.Rev., vol. 83, November, 1984.

Treitel, G.H. "Specific Performance in the Sale of goods", J.Bus. Law, 1966.

Wright, T.G. "Lecture on the Sale 1872", Journal of Jurisprudence, XVI.

Al-jundi, Bushra, "The Features of the debtors liability", The Governmental Affairs Administration Journal, No.1, the 41th year, March, 1970.

TABLE OF STATUTES

- 1-Sale of Goods Act 1979.
- 2-Law Reform (Miscellaneous) (Scotland) Act 1940.
- 3-Execution Code No: (45) of (1980).
- 4-Iraqi Civil Code No: (149) of (1951).
- 5-Egyptian Civil Code No: (131) of (1948).
- 6-Iraqi Law Reform of Legal System, No: (35) of (1977).
- 7-Bankruptcy (Scotland) Act 1985.
- 8-Insolvency Act 1986.
- 9-Iraqi Criminal Code, No: (111) of (1970).
- 10-Sheriff Court (Scotland) Act 1907.
- 11-Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.
- 12-Civil Jurisdiction and Judgment Act 1982.
- 13-Civil Procedure Code, No: (83) of (1969).
- 14-Sheriff Court Act 1971.
- 15-Evidence Code, No: (107) of (1979).