

# Specific Performance in the Civil Law: Mediating Between Inconsistent Principles Inherited from a Roman-Canonical Tradition via the French *Astreinte* and the Québec Injunction

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Résumé de l'article

Traditionnellement en droit civil l'inexécution d'une obligation contractuelle se résout en dommages-intérêts. Ce principe a son origine dans le droit romain de l'époque classique qui s'allie à l'adage *Nemo praecise cogi potest ad factum*. Cependant, dans la période postclassique l'influence des cours ecclésiastiques et de la notion de *fidei laesio* s'est imposée sur la primauté traditionnelle des dommages-intérêts. Par conséquent, les cours séculières, inspirées par la règle *pacta sunt servanda* du droit canonique, forçaient souvent le débiteur à exécuter son obligation contractuelle. L'auteur soumet que les dommages-intérêts et l'exécution en nature sont deux recours inconciliables au niveau conceptuel. Le plein effet du principe *nemo praecise* est d'interdire tout acte contraignant le débiteur à exécuter son obligation, que cette contrainte soit morale ou physique. *Pacta sunt servanda*, par contre, soutient que ce qui est promis doit être respecté, même s'il faut avoir recours à la force.

En France, l'*astreinte* — une sanction comminatoire imposée au débiteur faute de se soumettre à une ordonnance judiciaire — est le moyen de forcer le débiteur à exécuter son obligation. Elle est utilisée à cette fin, même si l'exécution de l'obligation en nature n'est pas précisément prévue dans le *Code civil*.

Au Québec, les cours se sont attardées à admettre l'exécution en nature dans le contexte des obligations contractuelles. La cause de cette hésitation trouve son fondement dans le Code, puisque le *Code civil du Bas-Canada*, en termes voisins du *Code civil* français, exprime la suprématie des dommages-intérêts à l'article 1065. Or, cette situation changera avec la réorientation du droit substantif affectée par le nouveau *Code civil du Québec*. Ce nouveau régime légal permettra aux tribunaux québécois de sanctionner l'exécution en nature d'une façon plus efficace que leurs homologues français. En effet, grâce à l'injonction, un tribunal peut contraindre physiquement un débiteur récalcitrant.

Quoique l'injonction trouve ses origines dans la *common law* l'auteur maintient qu'elle n'est pas incompatible avec le droit des obligations du Québec. Toute incompatibilité perçue dans le domaine contractuel provient du fait que les dommages-intérêts et l'exécution en nature sont de prime abord des recours inconciliables.

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# Specific Performance in the Civil Law : Mediating Between Inconsistent Principles Inherited from a Roman-Canonical Tradition via the French *Astreinte* and the Québec Injunction

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## ABSTRACT

*Traditionally, inexecution of a contractual obligation in the civil law gives rise to an award in damages. This principle stems from Roman law of the classical period, which held to the maxim Nemo praecise cogi potest ad factum. In the post-classical period, however, the influence of ecclesiastical courts and the Christian notion of fidei laesio imposed itself on the classical pre-eminence of damages. Consequently, contractual obligations were often specifically enforced by secular courts based on the pacta sunt servanda doctrine of the canon law. Yet damages and specific performance, it is argued, are from the outset conceptually irreconcilable remedies. The full import of the nemo praecise principle prohibits all acts compelling the debtor to perform, whether such compulsion be physical or one of conscience. Pacta sunt servanda, on the other hand, maintains that that which has been promised should be performed, by force if necessary.*

*In France, the mechanism of astreinte — a comminatory fine imposed on the debtor upon his failure to comply with a court order — is used to specifically*

## RÉSUMÉ

*Traditionnellement en droit civil l'inexécution d'une obligation contractuelle se résout en dommages-intérêts. Ce principe a son origine dans le droit romain de l'époque classique qui s'allie à l'adage Nemo praecise cogi potest ad factum. Cependant, dans la période postclassique l'influence des cours ecclésiastiques et de la notion de fidei laesio s'est imposée sur la primauté traditionnelle des dommages-intérêts. Par conséquent, les cours séculières, inspirées par la règle pacta sunt servanda du droit canonique, forçaient souvent le débiteur à exécuter son obligation contractuelle. L'auteur soumet que les dommages-intérêts et l'exécution en nature sont deux recours inconciliables au niveau conceptuel. Le plein effet du principe nemo praecise est d'interdire tout acte contraignant le débiteur à exécuter son obligation, que cette contrainte soit morale ou physique. Pacta sunt servanda, par contre, soutient que ce qui est promis doit être respecté, même s'il faut avoir recours à la force.*

*En France, l'astreinte — une sanction comminatoire imposée au débiteur*

*enforce contractual obligations. This is done despite the fact that execution in kind is not expressly sanctioned by the Code civil.*

*In Québec, courts have been slow to acknowledge the suitability of specific performance in the context of contractual obligations. The source of such hesitation is codally rooted, as the Civil Code of Lower Canada, in terms similar to the French Code civil, enunciates the supremacy of damages at article 1065. But this situation will change with the arrival of the new Civil Code of Québec. With this reorientation of the substantive law, Québec courts will be procedurally better equipped to enforce specific performance than their French counterparts. In essence, via the injunction, a court may physically compel a recalcitrant debtor.*

*Despite its common law origins, the author contends that the injunction is not incompatible with the law of obligations in Québec. Any perceived incompatibility in the realm of contract law arises from the initial irreconcilability of damages and specific performance.*

*faute de se soumettre à une ordonnance judiciaire — est le moyen de forcer le débiteur à exécuter son obligation. Elle est utilisée à cette fin, même si l'exécution de l'obligation en nature n'est pas précisément prévue dans le Code civil.*

*Au Québec, les cours se sont attardées à admettre l'exécution en nature dans le contexte des obligations contractuelles. La cause de cette hésitation trouve son fondement dans le Code, puisque le Code civil du Bas-Canada, en termes voisins du Code civil français, exprime la suprématie des dommages-intérêts à l'article 1065. Or, cette situation changera avec la réorientation du droit substantif affectée par le nouveau Code civil du Québec. Ce nouveau régime légal permettra aux tribunaux québécois de sanctionner l'exécution en nature d'une façon plus efficace que leurs homologues français. En effet, grâce à l'injonction, un tribunal peut contraindre physiquement un débiteur récalcitrant.*

*Quoique l'injonction trouve ses origines dans la common law l'auteur maintient qu'elle n'est pas incompatible avec le droit des obligations du Québec. Toute incompatibilité perçue dans le domaine contractuel provient du fait que les dommages-intérêts et l'exécution en nature sont de prime abord des recours inconciliables.*

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## TABLE OF CONTENTS

Introduction .....	517
I. The Status of Specific Performance at Roman Law .....	518
A. The Classical Period (27 B.C.—A.D. 234) .....	518
B. The Post-Classical Period (A.D. 235—A.D. 565) .....	520
1. The Christian Roots of Specific Performance .....	520

2. The Influence of <i>Fidei Laesio</i> on Roman Law.....	521
C. Medieval Roman Law .....	523
II. Specific Performance in France : Roman-Canonical Roots .....	524
A. Before Pothier.....	524
B. Pothier's Formulation of Specific Performance .....	525
III. Identification of the Problem : Damages and Specific Performance as Incompatible Remedies .....	527
IV. The French Position Before the Jurisprudential Development of <i>Astreinte</i> : The Pre-Eminence of Damages .....	528
V. The Birth of the <i>Astreinte</i> as a Mechanism for Specifically Enforcing Obligations To Do and Not To Do.....	529
A. The Early Years : 1804 to 1959.....	529
B. The Purely Commminatory Nature of the <i>Astreinte</i> Recognized : 1959 to 1972 .....	532
C. The Legislative Enactment of 1972 and Its Outcome.....	533
D. The <i>Astreinte</i> 's Domain of Application.....	535
1. Enforcing Judgments Ordering Specific Performance .....	535
2. <i>Astreinte</i> in the Context of Provisional Relief : The <i>Procédure de Référé</i> .....	536
VI. Assessment of the <i>Astreinte</i> as a Mechanism for Enforcing Specific Performance of Obligations To Do and Not To Do.....	538
VII. Arrival of the Injunction in Québec.....	540
A. The First Stage : 1667 to 1896.....	540
B. The Second Stage : 1897 to 1965 .....	543
1. The Injunction as a Means of Specifically Enforcing Obligations To Do and Not To Do .....	544
C. The Third Stage : 1966 to the Present Day .....	548
D. Change in the Horizon : The New <i>Civil Code of Québec</i> .....	552
Conclusion.....	553

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## INTRODUCTION

Some doctrinal writers have criticized the procedure through which Québec courts can sanction forced execution of a contractual obligation — the injunction. They have argued that the injunction represents an anomaly in Québec law stemming from the fact that it is a non-civilian procedure adopted from the English jurisdiction of Equity as developed by the Court of Chancery in the fifteenth century. Such a direct transplant of a foreign legal doctrine, it has been suggested, offends both the structural and substantive coherence of Québec private law.<sup>1</sup> Professor Ghislain Massé states the problem in the following terms : “[...]”

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1. See G. MASSÉ, *L'injonction et le droit privé québécois, une mésalliance*, LL.M. Thesis, Université de Montréal, 1978; and *Id.*, “L'exécution des obligations via l'astreinte française et l'injonction québécoise”, (1984) *R. du B.* 659.

l'injonction avait été conçue pour s'intégrer dans un système juridique totalement étranger aux structures du droit civil, et plus particulièrement, à la théorie générale des obligations".<sup>2</sup>

Perhaps in the field of procedure such an analysis makes perfect sense in light of Mr. Justice Holmes' insightful remark that "the life of the law has not been logic : it has been experience".<sup>3</sup> But if this be the case, it should be possible to explain through an historical study of a legal principle what logic itself cannot. There is, after all, a certain exegetical logic which is unique to history. Hence by endeavouring to do that which Gaius himself was renowned for doing — tracing things to their origin — it may be possible to cast a new analytical framework from which to reevaluate the relationship between the injunction and specific performance in Québec civil law.

In more precise terms, my objective will be threefold. First, to illustrate that the doctrine of specific performance was unknown to classical Roman law. Only after its contact with canon law did the civilian tradition become acquainted with the idea of execution in kind as a recourse for breach of a contractual obligation. In light of this, specific performance should not be seen as a genuinely civilian principle, but rather as a superimposed canonical doctrine. Consequently, there arises a tension between two principles which are conceptually irreconcilable. On the one hand, the canonical influence of the civil law sanctifies a contractual promise and gives primacy to its execution : *pacta sunt servanda*.<sup>4</sup> Yet on the other hand, the traditional Roman law preference for damages is strongly voiced in the well-known maxim *Nemo praecise cogi potest ad factum*. A mechanism is evidently needed to mediate between these opposing tendencies. The second part of this paper will examine one such solution : the French *astreinte*. In the third part we will turn to the ambivalent solution offered by Québec law via the injunction. After reviewing the historical evolution of the injunctive procedure in Québec, it will be argued that the English origins of the injunction are not the source of inconsistency in Québec civil law, for the inconsistency underlies the very law itself as expressed in articles 1065-66 C.C.L.C. The injunction merely serves as a way of choosing between two contradictory principles. And in so doing, it accentuates and rearticulates the original problem. In this regard, the relevant provisions of the new *Civil Code of Québec* will be examined, focusing on their capacity to resolve the existing quandary in the law.

## I. THE STATUS OF SPECIFIC PERFORMANCE AT ROMAN LAW

### A. THE CLASSICAL PERIOD (27 B.C.—A.D. 234)

Although it is not an undisputed fact, it can be stated with relative certainty that specific performance did not exist in Roman law during the classical period.<sup>5</sup> Sir Edward Fry has put it in these terms :

2. *Id.*, "L'exécution des obligations ...", p. 666.

3. O.W. HOLMES, *The Common Law*, Boston, Little, Brown & Co., 1991, p. 1.

4. See M. TANCELIN, *Des obligations*, Montréal, Wilson & Lafleur Sorej Ltée, 1984, pp. 363-64.

5. See W.W. BUCKLAND, *Equity in Roman Law*, London, University of London Press, 1911, p. 40; W.W. BUCKLAND & A. D. McNAIR, *Roman Law and Common Law : A Comparison in Outline*, Cambridge, Cambridge University Press, 1965, p. 412; and J. P. DAWSON, "Specific Performance in France and Germany", (1959) 57 *Michigan L. Rev.* 495, p. 496. For a contrary view see PROUDFOOT, "Specific Performance in Roman Law", (1894) 15 *Can. L. Times* 257.

It is certain that the Roman Law gave title to damages as the sole right resulting from default in performance, and did not enforce specific performance directly or in any other manner than by giving such right to damages. It held to the maxim "*Nemo potest praecise cogi ad factum*".<sup>6</sup>

A well respected scholar of Roman law has also observed that :

Lorsque le débiteur ne s'exécute pas volontairement, le moyen de contrainte dont dispose normalement le créancier, c'est l'action en justice. Or, comme dans le droit classique, toutes les condamnations sont pécuniaires (Gaius, 4,48), l'action du créancier ne tend directement à lui procurer la prestation due, que quand la dette est une dette d'argent. Dans tous les autres cas, l'action procurait uniquement au créancier le montant d'une condamnation pécuniaire, qui représentait pour lui l'équivalent de la prestation due, c'est-à-dire une indemnité ou des dommages et intérêts.<sup>7</sup>

The authority for such a proposition lies in a passage of Gaius' *Institutes* :

The condemnation clause of all formulas has reference to the pecuniary value of the property. Therefore if we claim any corporeal property, for instance, land, a slave, a garment, or gold or silver, the judge condemns the party against whom the suit was brought not to deliver the very thing itself, *as was formerly the practice*,<sup>8</sup> but its estimated value in money.<sup>9</sup>

If Gaius be taken as representing the orthodox position, there are nevertheless statements made by other jurists of the classical period which would appear to contradict him. Paulus, for instance, tells us that "If property which was sold is neither transferred nor delivered, the vendor can be compelled to transfer or deliver it".<sup>10</sup> This would mean that an unexecuted contract of sale could be specifically enforced against the debtor *manu militari*. But the validity of such an interpretation has been met with much scepticism. Many scholars, in fact, have come to the conclusion that Paulus' opinion is an anomaly.<sup>11</sup>

Another jurist whose comments challenge the orthodox position is Ulpian. In reference to a promise made to perform funeral rites, Ulpian suggests

6. Sir E. FRY, *A Treatise on the Specific Performance of Contracts*, 2nd ed., London, Stevens & Sons, 1881, p. 3.

7. G. CORNIL, *Droit romain : Aperçu historique sommaire*, Bruxelles, Imprimerie médicale et scientifique, 1921, pp. 257-258.

8. The italics are mine. Gaius' reference to the availability of specific performance in former times must be read in its proper historical context. It refers to the situation in pre-Republican Rome, before there were state-organized courts. At the time of the Twelve Tables, for instance, the private self-help system of justice that existed allowed "a debtor who defaulted in paying a money judgment [to] be killed or enslaved by the judgment creditor. If the dispute related to a specific asset detained by the defendant, the owner after establishing his ownership was free to use force to seize it" (J.P. DAWSON, *loc. cit.*, note 5, p. 497).

9. GAIUS, *Institutes*, 4.48, S.P. SCOTT (trans.), New York, AMS Press Inc., 1973, vol. 1, p. 193.

10. PAULUS, *Opinions*, 1.13.4, S.P. SCOTT, *id.*, p. 264.

11. Buckland has suggested that Paulus' statement "must not be taken as meaning that, even in the classical law, there might be a *condemnatio ad ipsam rem*" (*Equity in Roman Law*, *op. cit.*, note 5, p. 41). In *Roman Law and Common Law : A Comparison in Outline*, he offers an explanation to justify such a conclusion : "There is a text of Paul which might mean that actual delivery might in classical law be compelled under a sale, but this would conflict with all the other evidence, and it probably means no more than that non-delivery or non-*mancipatio*, as the case might be, would be ground for an action, with no reference to the method of enforcement" (*op. cit.*, note 5, p. 413).

that an interdict could be issued by the praetor to force the debtor to fulfil his obligation.<sup>12</sup> But this was an *extra ordinem* procedure, "chiefly employed in connection with those matters more directly under the surveillance and protection of the public authority, [and] in connection with religious matters".<sup>13</sup> The non-performance of these obligations only resulted in a monetary condemnation pursuant to a regular trial, without any compulsion to perform.<sup>14</sup> Thus, even the interdict, being little more than a hortatory instrument, was clearly subordinate to the principle of damages in the classical period.

## B. THE POST-CLASSICAL PERIOD (A.D. 235–A.D. 565)

In the post classical period there is clear evidence that specific performance had become an accepted recourse for a creditor of an obligation. There appear to be two reasons for this development. First, the *formulae* or *ordinaria judicia* system of procedure came to be replaced by that of *extraordinaria judicia*.<sup>15</sup> This meant that procedures such as the interdict, which had previously occupied the position of an *extra ordinem* remedy, began to represent the ordinary course of conduct in imperial courts. Secondly, as the influence of ecclesiastical courts grew,<sup>16</sup> the Christian ethos started to permeate the imperial administration of justice.<sup>17</sup>

### 1. The Christian Roots of Specific Performance

The first trace of the competence which ecclesiastical courts were to enjoy is found in Pliny's letter to Trajan in the second century. *Inter alia*, Pliny writes that the Christians "[bind] themselves by a solemn oath [...] never to falsify their word (*ne fidem fallerent*) [...]"<sup>18</sup> Hence, the jurisdiction of ecclesiastical

12. *Digest*, 11.7.14.2, S.P. SCOTT, *op. cit.*, note 9, vol. 4, p. 91:

Mela says that if a testator directs anyone to attend to his funeral and he does not do so after having received money for that purpose, an action on the ground of fraud shall be granted against him; nevertheless, I think, that he can be compelled to conduct the funeral under the extraordinary authority of the Praetor.

13. ORTOLAN, *The History of Roman Law*, I.T. PRICHARD & D. NASMITH (trans.), London, Butterworths, 1871, p. 689.

14. Dawson has observed: "In general, it seems quite clear that disobedience of an interdict led to a standard trial and *money judgment*, despite the strong language in which the interdicts were often cast" (emphasis added) (*loc. cit.*, note 5, p. 499).

15. Ortolan tells us that this change started to take on a definitive character in the third century: "A constitution of this prince [Diocletian], dated A.D. 294, made that which had hitherto been extraordinary, the ordinary procedure throughout the provinces. At a later date this was extended to the whole empire, the formula system thus gave way to the *judicia extraordinaria*" (*op. cit.*, note 13, p. 691).

16. For a brief sketch of the situation in France, see Charles S. LOBINGER, "Lex Christiana", (1931-32) 20 *Georgetown L.J.* 1 – 160, p. 8. It is interesting to observe the judicial power possessed by the Church. "King Chlotaire I's edict of 560", Lobinger observes, "directed bishops, in the king's absence, to reprove judges for unjust decisions and provision was made for correction upon further inquiry".

17. Christian courts began to firmly establish themselves in Europe after Constantine granted bishops judicial authority in their courts in 320. See A.A. TREVER, *History of Ancient Civilization: The Roman World*, New York, Harcourt, Brace & Co., 1939, p. 719.

18. *Id.*, p. 716.

courts was based on the idea of breach of faith (*fidei laesio*).<sup>19</sup> All promises made under a pledge of faith (*fidei interpositio*) were the subject-matter proper of an ecclesiastical court. "The man who pledges his faith", after all, as Pollock and Maitland explain, "pawns his Christianity, puts his hopes of salvation in the hand of another".<sup>20</sup> To breach a promise made under oath was therefore to sin, and only Church courts were competent to adjudicate in matters of faith. The sanction meted out in such cases was no less than excommunication itself. This being the case, it would be trite to point out that specific performance enjoyed a primacy in canon law which it did not know in classical Roman law.<sup>21</sup>

## 2. The Influence of *Fidei Laesio* on Roman Law

With the codification of Justinian, specific performance became part of the corpus of Roman law. But this new addition to the classical position was not without its difficulties and ambiguities. In fact, it could be said that the tension between damages and specific performance which underlies the *Corpus Juris Civilis* is the same one which plagues the modern law of obligations in both France and Québec.

The influence of Christian thinking and the notion of *fidei laesio* can be seen in many parts of the *Corpus Juris*. In the *Code*, for instance, Justinian wonders how a judge can be so stupid (*stultum*) as to accept the view of the classical jurists who suggest that the appropriate remedy in a case where a defendant is obliged to free a slave is one of damages.<sup>22</sup> Actual performance was to be the standard in the future.

Then we come to a text from Ulpian in the *Digest* which clearly illustrates to what extent the codifiers were conscious of the social ethos of the day. It relates to an action brought by an owner to recover property wrongfully detained. Ulpian had given the standard response of the classical jurists: the appropriate remedy was one for damages. But the compilers made an addition to Ulpian's text

19. For a more elaborate explanation of the notion of *fidei laesio* see Sir E. FRY, "Specific Performance and *Laesio fidei*", (1889) 19 *Law Quarterly Rev.* 235.

20. Sir F. POLLOCK & F.W. MAITLAND, *The History of English Law, before the Time of Edward I*, vol. 1, 2nd ed., Cambridge, Cambridge University Press, 1898, p. 128.

21. This was the case not only in continental Europe, but also in England. Before the Court of Chancery developed its doctrine of specific performance, the idea was alive and thriving in the ecclesiastical courts of England from the thirteenth to fifteenth centuries. See R.H. HELMHOLZ, *Canon Law and the Law of England*, London, The Hambledon Press, 1987, p. 263:

The Church's general jurisdiction over the sins of laymen gave rise to this litigation [breach of a sworn undertaking]. It was a sin to violate one's sworn promise. And the canon law held that one could be obliged, under pain of excommunication, to complete his promise.

In the Consistory Court of Hereford, for example, it is not uncommon to find decisions such as the one following, rendered in 1497: "And the judge ordered [the defendant] to observe this promise and faith before the aforesaid day under pain of major excommunication" (*id.*, p. 281).

22. JUSTINIAN, *Code*, 7.4.17, S.P. SCOTT, *op. cit.*, note 9, vol. 14, pp. 121-122:

We, in disposing of this controversy, are surprised to learn that the judge, who had jurisdiction of the case aforesaid, did not require the heir not to surrender the slave but only to pay his value, as such a fault offers an occasion for a dispute. Wherefore, if such a question should arise, We think that no judge would be so foolish as to render a decision of this description.



whose effect was to permit an owner to have property transferred to him *manu militari* if it were still in the possession of the defendant.<sup>23</sup> It is evident here that in an effort to accommodate the increasing preference for specific performance as fuelled by the Christian ethic, classical sources were discretely modified.<sup>24</sup>

There remains, however, a certain reticence in Justinian's acceptance of specific performance. While willing to grant execution in kind with respect to certain obligations, he remains steadfast in denying it for others. There is, for instance, a text from Celsus included in the *Digest* which makes little sense in light of classical authorities,<sup>25</sup> but which the compilers did not hesitate to cite. It states that obligations to do result in a judgement for damages in case of inexecution.<sup>26</sup> From this distinction stem the basic limitations to specific performance carried down to this day.

Further evidence of this distinction between obligations to give and obligations to do or not to do can be found in the *Institutes* of Justinian. At 3.15.7 we find the following statement :

Not only can property be the object of a stipulation, but *deeds*, also as where *We stipulate for some act to be performed or not performed*; and it is best to add a penalty to stipulations of this kind, so that the amount involved in the stipulation may not be uncertain [...] therefore, where anyone stipulates for something *to be done*, a penalty ought to be added thus : "If it is not done in this way, do you agree to pay ten *aurei* by way of penalty".<sup>27</sup>

Similarly, at 4.6.32 of the *Institutes*, the same point is articulated in more emphatic language :

A judge under all circumstances, as far as it is possible, should be careful to render a judgment *for a definite sum of money or for a certain article*, although the amount involved in the action in [*sic*] undetermined.<sup>28</sup>

23. *Digest*, 6.1.68, S.P. SCOTT, *op. cit.*, note 9, vol. 3, pp. 218-219. I reproduce the text in its entirety, placing parentheses around the interpolated passage.

Where a person is ordered to surrender property and does not obey the order of court, stating that he is unable to do so; [*if, indeed, he has the property, possession shall be forcibly transferred from him on application to the judge, and the only decision to be rendered in the matter is with reference to the profits.*]

If, however, he is unable to deliver the property, and has acted fraudulently to avoid doing so, he must be ordered to pay as much as his adversary swears to, without any limitation; but where he is unable to deliver the property, and did not act fraudulently to avoid doing so, he can be ordered to pay no more than what it is worth; that is to say, the amount of the interest of his adversary. This is the general principle, and applies to all matters where property is to be delivered by order of court, whether interdicts or actions *in rem* or *in personam* are involved.

24. See J.P. DAWSON, *loc. cit.*, note 5.

25. This is the case because there appears to have been no distinction between obligations to do or to give in the classical period. Dawson writes that "the general principle of praetorian procedure at the time he [Celsus] wrote was that *all* obligations were translated into money judgments, whether they involved doing, not doing, surrendering, specific property or anything else" (*loc. cit.*, note 5, p. 501).

26. *Digest*, 42.1.13.1, S.P. SCOTT, *op. cit.*, note 9, vol. 9, p. 232 :

[...] If he fails to do this, judgment will be rendered against him for a certain sum of money, for the reason that he did not do what he promised, as happens in all kinds of obligations which relate to the performance of certain acts.

27. JUSTINIAN, *Institutes*, 3.15.7, S.P. SCOTT, *op. cit.*, note 9, vol. 2, pp. 112-113. The emphasis is mine.

28. *Id.*, 4.6.32, p. 154. Emphasis has been added.

It is clear from these two passages that under the late Empire specific performance was awarded in cases involving an obligation to give or deliver a certain thing. But where the obligation was one to do or not to do, the creditor was limited to the classical Roman law remedy of damages.<sup>29</sup> The justification for this limitation, however, finds no clear enunciation in the *Corpus Juris*. It was only in the Middle Ages that the glossators grounded it in the maxim *nemo praecise cogi potest ad factum*.

### C. MEDIEVAL ROMAN LAW

After a five hundred year dormancy, the study of Roman law was resumed in Bologna shortly before 1100. The Bolognese Renaissance was marked by a fervent effort to reestablish the hegemony of Roman law in Europe. For our purposes, the fourteenth century is significant. During this period, the glossators Baldus and Bartolus<sup>30</sup> developed the authoritative distinction between obligations to give and obligations to do or not to do based on the *nemo praecise* rule. In the latter case, inexecution inevitably resulted in a judgment for damages because it was considered that to hold otherwise would be to subject the debtor to a kind of servitude (*quaedam species servitutis*).<sup>31</sup> In this way, the influence of the canonical concept of *fidei laesio* was limited to obligations to give by the glossators, for it was believed that this represented the orthodox position at Roman law.

Despite the glossators' attempts to circumscribe the availability of specific performance, the growing influence of canon law and ecclesiastical courts<sup>32</sup> in Europe challenged the strict application of the *nemo praecise* doctrine. Although the competence of Church courts was limited to matters of faith, since breaching one's oath was considered a sin, contractual disputes were inevitably resolved in ecclesiastical tribunals. This meant that the usual remedy for a contractual breach, irrespective of the nature of the obligation,<sup>33</sup> became specific performance.<sup>34</sup> One

29. Georges Cornil perspicuously describes the situation in the post-classical period in these terms :

Le jugement de condamnation n'a plus, dans la procédure extraordinaire, le caractère d'une condamnation nécessairement pécuniaire. Toutes les fois que l'action, réelle ou personnelle, tend à faire livrer, restituer ou représenter *certam pecuniam vel rem*, le juge prononce une *condemnatio in ipsam rem* (Justinien, *a.529 : C.7,45,14 ; J.4,6§32*). Par contre la condamnation conserve le caractère de *condemnatio pecuniaria*, lorsque l'action tend à obtenir une omission ou l'accomplissement d'un fait qui ne porte point sur une *certa res* (*D.42,1,13§1 ; J.3,15§7*) (*op. cit.*, note 7, p. 476).

30. Bartolus framed the principle in clear terms. I reproduce it in the original Latin as cited in RIPERT & BOULANGER, *Traité de droit civil*, t. 2, Paris, Librairie générale de droit et de jurisprudence, 1957, n° 1609, p. 587 : "*Quando est in obligatione rem dari, quis praecise compellitur : in obligationibus autem facti quis non praecise compellitur, sed libertur solvendo interesse*".

31. Baldus, commentary on *Code*, 4.49, as cited in Dawson, *loc. cit.*, note 5, p. 504.

32. As Pollock and Maitland point out, by the thirteenth century "[t]he whole of western Europe was subject to the jurisdiction of one tribunal of last resort, the Roman *curia*" (*op. cit.*, note 20, p. 114).

33. An ecclesiastical court did not distinguish between obligations to give and obligations to do or not to do. Once a pledge of faith had been made, the doctrine of *pacta sunt servanda* accentuated the consensual nature of a contract. Consequently, few formalities obstructed a creditor from obtaining actual performance of a promise made to him by his debtor.

34. More specific authority for this proposition can be found in the *Decretals of Gregory IX*. Under the title of *De pactis*, in Chapter 3, we find a pronouncement to the effect that

example will serve as a good illustration of the extent to which specific performance was the dominant remedy for inexecution of contractual obligations in ecclesiastical courts. If after entering into a marriage contract one of the parties refused to honour his or her promise, the party refusing "might be sentenced by the Ecclesiastical Court to celebrate the marriage *in facie ecclesiae* accordingly, and for refusal to obey might be excommunicated and imprisoned [...] until he or she submitted to obey the Ordinary".<sup>35</sup>

## II. SPECIFIC PERFORMANCE IN FRANCE : ROMAN-CANONICAL ROOTS

### A. BEFORE POTHIER

As Ortolan tells us, the first traces of the works of Justinian in France are found in the early twelfth century. More particularly, they appear in the canonical texts composed by St. Ives (1032-1115), bishop of Chartres (1092).<sup>36</sup> Prior to this, the *pays de droit écrit* in the south followed pre-Justinian Roman law, based primarily on the *Code of Theodosius II* (A.D. 438). It is not an insignificant factor that the works of Justinian first appear in France embedded within the corpus of canonical texts. Where Roman law and canon law are juxtaposed in this way, it is fair to assume that some cross-pollination occurred. Inevitably, as the legal history of France bears out, canonical notions relating to specific performance strongly influenced the civil law.

Soon after the rediscovery of Roman law in Bologna by Irnerius and the work of the early glossators, the *Corpus Juris Civilis* was introduced in France. It came to replace the pre-Justinian law of the *Theodosian Code* in the south. In the north, *pays de coutume*, Roman law also took on a significant role. It complemented local customary law by stepping in whenever the latter was deficient.<sup>37</sup>

Roman law, however, was not the only legal actor vying for control in France. Ecclesiastical courts were not a novel thing for the French, but by the twelfth century they exercised a wide jurisdictional competence. In the domain of contracts, as Professor Lemieux observed, they monopolized the field :

Contracter, c'est promettre et engager sa foi. Les serments étaient apposés par des notaires apostoliques aux contrats; les contrats tombaient donc dans la compétence ecclésiastique par connexité. Dans tout procès, il y a injustice, c'est-à-dire péché; le juge du péché est le juge ecclésiastique.<sup>38</sup>

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whatever is promised should indeed be fulfilled : "*Studiose agendum est ut ea, quae promittuntur, opere compleantur*" (*Decretals of Gregory IX*, 1.25.3). This canon is said to have been made in 600; it was published in 1234. See J. DODD, *A History of Canon Law*, Oxford, Parker & Co., 1884, p. 147; and Sir E. FRY, *op. cit.*, note 6, p. 8.

35. Sir E. FRY, *op. cit.*, note 6, p. 7.

36. ORTOLAN, *op. cit.*, note 13, pp. 524-526.

37. See R. LEMIEUX, *Les origines du droit franco-canadien*, Montréal, Librairie de droit et de jurisprudence, 1901, p. 38 : "Souvent il arrivait qu'avec la coutume, des cas particuliers restaient sans solution — alors on avait recours au droit romain, comme droit supplétif". As well, at 39, note : "Toute la France, toute l'Europe se débattait sous l'empire des coutumes [au 11<sup>e</sup> et 12<sup>e</sup> siècles]. [...] Mais quand le droit romain se leva, au réveil de la société, dans le 12<sup>e</sup> siècle, il se leva comme l'aurore de la civilisation européenne. Le Nord et le Midi acceptèrent sa lumière renaissante". See also ORTOLAN, *op. cit.*, note 13, p. 550.

38. R. LEMIEUX, *id.*, p. 114.

Thus, in cases of inexecution of contractual obligations, it was only natural for French ecclesiastical courts to give primacy to the canonical doctrine of specific performance.

As the monarchy gained strength in France, though, royal courts began to challenge the previously accepted authority of church courts. The struggle was a long one, but the King's courts eventually emerged as the final victors during the reign of Louis XIV.<sup>39</sup> Yet despite their victory, ecclesiastical courts left a distinct and indelible mark on the secular courts of the period.<sup>40</sup> With respect to obligations to give, for instance, there was no hesitation to grant an order compelling the debtor to surrender a particular asset.<sup>41</sup> To this extent, the French position was no different from that espoused by Roman law in the late Empire and by the Bolognese glossators of the fourteenth century. As for obligations to do or not to do, however, a distinction was drawn between promises that were made under oath and those that were not. If a promise to perform or not perform a certain act had been secured by an oath, then the royal courts would award specific performance as a remedy for inexecution.<sup>42</sup> And before the law of 22 July 1867 deprived them of any recourse against the debtor's person, French courts could enforce their orders through the sanction of imprisonment. If, on the other hand, such a promise had not been secured by an oath, then the creditor had to settle for damages. This clearly represents a more nuanced approach than the *nemo praecise* rule would have been prepared to admit. It is without a doubt a natural outcome of the influence exerted by canonical doctrines on French civil courts.

## B. POTHIER'S FORMULATION OF SPECIFIC PERFORMANCE

The modern French doctrine of specific performance stems directly from the work of Pothier. It is his synthesis of the diverse elements present in French law in the eighteenth century — classical and medieval Roman law as well

39. With respect to contracts, the pledge of faith came to be looked upon as an accessory to the contract. Hence, where competence in this domain once lay with ecclesiastical courts, it now came to reside with the royal courts. Lemieux informs us that: "On décida que le serment ainsi ajouté au contrat n'était qu'un accessoire, et que le juge civil compétent pour connaître du principal, l'était aussi pour connaître l'accessoire" (*id.*, p. 116).

40. This was reinforced by the fact that clerical counsel trained in the science of jurisprudence served the royal courts of appeal, the *Parlements*. The Ordinance of 1579, for example, fixed such counsel at forty for the *Parlement de Paris* (*id.*, p. 159).

41. See A. d'ESPEISSE, *Oeuvres*, t. 1, Toulouse, J. Duplex, 1778, pp. 41-42, citing several French authors and a decision of the *Parlement de Paris* of 18 December 1557. Decisions awarding specific performance in the context of contractual obligations to give can be witnessed in the *Parlement de Paris* throughout the sixteenth and seventeenth centuries.

42. See J. PAPON, *Recueil d'arrests notables des cours souveraines de France*, t. 10, Paris, 1622, tit. 1, n° 3: "Par disposition de droit commun, celui qui est obligé de faire quelque chose, n'est précisément tenu au fait par luy promis et n'y peut estre contraint (citing CELSUS: see *supra*, note 26); toutefois si telle promesse est jurée, il y sera précisément contraint" (citing decrees of the *Parlement de Grenoble* of 12 September 1460, and of the *Parlement de Paris* of 11 July 1585). This is clearly a hybrid solution. It modifies the "orthodox" Roman law position as formulated by the medieval glossators by allowing forced execution of an obligation to do or not to do when the promise giving rise to such an obligation has been made under oath. The *nemo praecise* rule contemplated by Baldus & Bartolus permitted specific performance only within the context of an obligation to give.

as French custom — that served as the basis for codification in 1804. In fact, the concept of specific performance as it exists in the *Code Napoléon* is simply a reproduction of Pothier's formulation of the doctrine.

In defining specific performance, Pothier basically adopted the position originally articulated by the medieval glossators Baldus and Bartolus: obligations to give a certain thing were specifically enforceable; those involving an obligation to do resulted in damages, for *Nemo potest praecise cogi ad factum*. Similarly, obligations not to do were also limited to an award of damages unless that which had been done in breach of such an obligation could be undone without the involvement of the debtor. If this were possible, then the debtor would be responsible for the costs incurred by the creditor in this regard.<sup>43</sup> In this way, Pothier limited the scope of specific performance which had been previously acknowledged by the *Parlements* across France. To a large extent, this reasserted the primacy of damages as a remedy for inexecution of a contractual obligation, since forced execution was limited to the narrow class of obligations to give. But the concept of execution in kind had not been eliminated from the corpus of French law; it only occupied a less prominent position because no acceptable mechanism existed to compel a debtor to perform without acting on his person. As long as physical compulsion remained the only means through which a debtor could be forced to perform, French law denied specific relief on the grounds that it was violent and therefore necessarily defective.<sup>44</sup>

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43. POTHIER, *Traité des obligations*, §§ 156-158, as found in *Oeuvres de Pothier*, t. 2, 2nd ed., by M. BUGNET, Paris, H. Plon, Cosse et Marshall, 1861, p. 75:

156. Lorsque la chose due est un corps certain, et que le débiteur, condamné par sentence à donner la chose, a cette chose en sa possession, le juge, sur le requis du créancier, doit lui permettre de la saisir, et de s'en mettre en possession; et il ne suffit pas au débiteur d'offrir, en ce cas, les dommages et intérêts résultant de l'inexécution de son obligation.

157. Lorsque quelqu'un s'est obligé à faire quelque chose, cette obligation ne donne pas au créancier le droit de contraindre le débiteur précisément à faire ce qu'il s'est obligé de faire, mais seulement celui de le faire condamner en ses dommages et intérêts, faute d'avoir satisfait à son obligation.

C'est en cette obligation de dommages et intérêts, que se résolvent toutes les obligations de faire quelque chose; car *Nemo potest praecise cogi ad factum*.

158. Lorsque quelqu'un s'est obligé à ne pas faire quelque chose, le droit que donne cette obligation au créancier, est celui de poursuivre en justice le débiteur, en cas de contravention à son obligation, pour le faire condamner aux dommages et intérêts résultant de la contravention.

Si ce qu'il s'était obligé de ne pas faire, et qu'il a fait au préjudice de son obligation, est quelque chose qui puisse se détruire, le créancier peut aussi conclure contre son débiteur à la destruction [à ses dépens].

44. Ripert and Boulanger have put it in these terms:

Lorsque l'obligation a pour objet un travail ou un ouvrage, c'est-à-dire un acte ou une série d'actes, et que le débiteur refuse de les accomplir, l'exécution forcée est impossible: "*Nemo praecise cogi potest ad factum*", dit un vieil adage. *La raison en est que l'exécution obtenue par force serait presque toujours défectueuse et surtout qu'elle exigerait l'emploi de moyens violents, contraires à la liberté individuelle* (emphasis added) (*op. cit.*, note 30, n° 1609, p. 587).

### III. IDENTIFICATION OF THE PROBLEM : DAMAGES AND SPECIFIC PERFORMANCE AS INCOMPATIBLE REMEDIES

So long as forced execution was limited to obligations to give, the principle enunciated by the *nemo praecise* rule remained intact. So long as an ascertained asset could be seized by the creditor without requiring the debtor to act, whether passively or actively, there was no apparent intrusion into the sphere of damages. This state of affairs, however, was not to be tolerated for very long. The influence of ecclesiastical courts in France had left its distinct imprint on the French legal system. Within a decade after the promulgation of the *Code Napoléon*, French courts began to reassert the primacy of specific performance through a judicially developed doctrine : the *astreinte*. Their reasoning was that if the debtor could be persuaded to perform his obligation, regardless of its nature, through a mechanism of indirect compulsion, then this would somehow not offend the strictures of the *nemo praecise* principle. Yet it seems that this suggestion is but wishful thinking. Although the idea of indirect compulsion via the monetary penalties inflicted by the *astreinte* reflects judicial creativity, it nonetheless offends the very premise motivating the *nemo praecise* doctrine : no one can be compelled to specifically perform an act. Whether such performance be secured by indirect compulsion, as opposed to direct physical compulsion, is surely irrelevant. Indirect compulsion only finesses the problem by offering a more palatable alternative to the liberal-democratic mind. In essence, it is just as repulsive to condemn someone to execute his promise by threatening him with a monetary penalty as it is to threaten him with imprisonment. In both cases, performance has been secured by inducing the debtor to act in a way which may be contrary to his will.

The codal provisions governing the availability of execution in kind in Québec are much the same as their French counterparts.<sup>45</sup> Yet the mechanism used to achieve this is different from that used in France. In Québec, if specific performance is available at all, it is through injunctive relief that the creditor compels his debtor to perform. Far from being an illogical mechanism of enforcement, as some civilian doctrinal writers have suggested, it could be argued that if a court's intention is to secure specific performance of an obligation, direct compulsion via an injunction coupled with a contempt of court sanction is ultimately more effective.

What has to be emphasized here is that the only true civilian remedy for breach of a contractual obligation is damages. Any effort to work in a notion of specific performance into the civil law theory of obligations will by its very nature violate the *nemo praecise* rationale animating the primacy of damages at Roman law. If, on the other hand, more scope is to be given to the canonical concept of *fidei laesio* which stresses the sanctity of the promise made under oath, then all efforts to protect the individual from compulsion would appear to be nugatory and inconsistent with the original objective of specifically enforcing a promise. In short, there is an inherent incompatibility between the idea of *pacta sunt servanda* and *Nemo praecise potest cogi ad factum*. If one is preferred over the other, then the consequences which flow from it cannot be logically denied. To this extent, all arguments that the injunction in Québec private law violates the basic principles of civil law in the field of obligations must be answered in the following manner : The concept of Pothier is at odds with the classical civilian espousal of damages. Thus, the

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45. Cf. article 1065-66 C.C.L.C. and article 1142-44 of the French *Code civil*.

inconsistencies plaguing the Québec injunction should not be seen as the product of an invidious common law influence, because they arise out of the very inconsistency which lies at the root of all attempts to superimpose execution in kind on the principle of damages. The two principles are hardly complementary; they are conceptually irreconcilable.

With this in mind, let us now turn to an examination of the mechanism which French courts have used to acknowledge the primacy of specific performance in their law before engaging in an analysis of the position in Québec as represented by the injunction.

#### IV. THE FRENCH POSITION BEFORE THE JURISPRUDENTIAL DEVELOPMENT OF *ASTREINTE*: THE PRE-EMINENCE OF DAMAGES

Article 1134 of the French *Code civil* asserts the legally binding nature of a contractual obligation: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites". Although this may be broadly interpreted to affirm the sanctity of a promise which would thereby warrant execution in kind as opposed to damages, article 1142 explicitly denies any such contention: "Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur". Yet it should be noted that the two articles which follow permit a creditor to obtain specific performance at the expense of his debtor when such performance can be procured from a third party.<sup>46</sup>

Given that this is the case, it may be argued that the French Civil Code favours execution in kind. But this fails to recognize the historical and contextual realities which underlie the Code. Two observations need to be made in this regard. First, the *Code Napoléon* was heavily influenced by the writings of Pothier, which clearly affirmed the primacy of damages.<sup>47</sup> Furthermore, the doctrinal position also recognized the supremacy of damages. The distinguished Professor Esmein eloquently stated the point in 1903:

En principe, les juges, saisis d'une demande contre un débiteur qui n'a pas exécuté et qui ne sollicite pas de délais de grâce (art. 1244), n'ont qu'une chose à faire: reconnaître le droit du demandeur, s'il est bien fondé, et prononcer en sa faveur une condamnation à des dommages-intérêts représentant tout le préjudice qu'il a éprouvé faute d'exécution en temps utile. Une fois cette condamnation prononcée, la tâche des juges est terminée et leur pouvoir est épuisé.<sup>48</sup>

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46. Art. 1143: Néanmoins le créancier a le droit de demander que ce qui aurait été fait par contravention à l'engagement, soit détruit; et il peut se faire autoriser à le détruire aux dépens du débiteur, sans préjudice des dommages et intérêts s'il y a lieu.

Art. 1144: Le créancier peut aussi, en cas d'inexécution, être autorisé à faire exécuter lui-même l'obligation aux dépens du débiteur.

47. See J.P. POTHIER, *op. cit.*, note 43. Perhaps, however, §146 of the same work has misled some to believe the contrary because it seems to imply that a judge can exhort the party in default to perform within a certain time limit before pronouncing an award of damages: "[...] Le juge, sur cette demande [une demande en justice], prescrit un certain temps dans lequel le débiteur sera tenu de faire ce qu'il a promis; et faute par lui de le faire dans ledit temps, il le condamne aux dépens, dommages et intérêts. [...]". But it must be noted that a judge's giving a debtor time to perform his obligation serves merely a hortatory purpose. Nowhere does Pothier suggest that a judge's order can be coupled with a sanction to compel the defaulting party to act. In light of this, it cannot be persuasively submitted that the primacy of damages has been dislodged by specific performance.

48. M.A. ESMEIN, "L'Origine et la logique de la jurisprudence en matière d'astreintes", (1903) 2 R.T.D.C. 5, p. 9.

Secondly, the pre-eminence of damages as codified in article 1142 is in no way derogated from by the possibility of third party execution at the cost of the debtor via articles 1143-44. The motivating principle behind article 1142 is the *nemo praecise* rule. Hence, to the extent that a promise can be fulfilled by someone other than the promisor himself, the principle remains intact.<sup>49</sup>

Needless to say, this state of affairs was not very appealing to the French legal mind which had been so strongly influenced by the ecclesiastical notion of *fidei laesio*. As it has been previously illustrated, the *Parlements* across France during the *Ancien Régime* acknowledged that promises made under oath could be specifically enforced. Yet now the new Civil Code seemed to deprive judges of the power to issue orders to this effect. This was further reinforced by the law of 22 July 1867 which abolished imprisonment for default in civil obligations and in effect dismissed the possibility of any judicial order acting against the body of the defendant.<sup>50</sup>

## V. THE BIRTH OF THE *ASTREINTE* AS A MECHANISM FOR SPECIFICALLY ENFORCING OBLIGATIONS TO DO AND NOT TO DO

### A. THE EARLY YEARS : 1804 TO 1959

The first traces of the *astreinte* can be found in the decade following the codification of 1804. The first cases did not arise in a contractual context and thus did not implicate article 1142. Nonetheless, as the judicially developed doctrine grew, it came to affect all areas of French law, including the field of obligations. Initially, the *astreinte* was simply an anticipated damages condemnation against the debtor for a fixed sum of money. If he did not perform his promise within the delay granted by the judge, then he would be liable for the amount previously assessed. As M<sup>re</sup> Jacques Boré explains : “[L]e juge, par faveur pour le débiteur, lui accordait un délai de grâce, en fixant par avance de façon définitive les dommages-intérêts qu’il supporterait en cas d’inexécution”.<sup>51</sup> This amount represented the foreseeable prejudice to be suffered by the creditor due to the debtor’s inexecution. In the 1830s, however, French courts modified their approach somewhat. Rather than determining in advance the amount of damages to be paid in case of inexecution, judges acquired the habit of fixing amounts “à tant par jour de retard en les

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49. Some complained, however, that such a “restrictive” interpretation of article 1142 made contractual promises to do or not to do nugatory because it allowed the debtor to escape performing his promise by prohibiting a court from using any measure of compulsion against him. For example, in “Contrats et obligations”, *Juris-classeur civil*, articles 1136-1145, fasc. 1, by P. SIMLER, n° 104, we find the following comment : “Une position dogmatique assez largement répandue parmi les auteurs classiques avait conduit ceux-ci à prendre au pied de la lettre la formule de l’article 1142 et à exclure de façon systématique toute mesure d’exécution forcée d’une obligation de faire, pour n’accorder au créancier qu’une satisfaction imparfaitement équivalente sous forme de dommages et intérêts”. Yet statements such as these seem to forget that this was precisely the objective of article 1142. To allow any constraint to be exercised against the debtor, whether direct or indirect, would in pith and substance offend the principle articulated by the *nemo praecise* rule.

50. See H., L. and J. MAZEAUD, *Leçons de droit civil*, t. 2, vol. 1, 8th ed., by F. CHABAS, Paris, Montchrestien, 1991, pp. 1027-1028.

51. J. BORÉ, “Astreintes”, in *Répertoire de droit civil*, 2nd ed., Dalloz, n° 9.



grossissant pour effrayer le débiteur, sauf à les réviser une fois l'exécution obtenue [ou non obtenue]".<sup>52</sup>

Two things are noteworthy concerning this latter development with respect to the provisional *astreinte*. First, by a decision in 1834, the *Cour de cassation* admitted that an *astreinte* could be issued without regard to the prejudice to be suffered by the creditor, and even in the absence of all prejudice.<sup>53</sup> But when the time came to liquidate a provisional *astreinte*, a court was nevertheless obliged to restrict itself to the actual injury suffered by the creditor; it could not award the amount which it had arbitrarily fixed in advance as a form of punitive penalty.<sup>54</sup> On more than one occasion this point was adamantly reaffirmed by the *Cour de cassation*.<sup>55</sup> This essentially diminished the effectiveness of the *astreinte*'s comminatory aspect. If a judge's threat was revocable and necessarily limited to the creditor's injury upon liquidation, what incentive was there for the debtor to promptly perform? Intimidating a debtor with an *astreinte* was no more persuasive than intimidating him with damages. It was, to put it bluntly, an empty threat.

The second point worth noting is that despite its apparently innocuous nature, the *astreinte* attracted the assiduous criticism of French doctrinal writers. Perhaps their hostility was fuelled by the realization that in spite of assurances by the *Cour de cassation* as to the non-punitive nature of the *astreinte*, judges were almost always inclined to overvalue the creditor's actual prejudice when liquidating an *astreinte*. As well, when an *astreinte* was issued against an uninformed debtor, he would be under the misguided impression that non-performance would translate into a penalty. Although this would evidently support the intended comminatory character of the *astreinte*, it clearly had no basis in French law.<sup>56</sup> Arbitrary penalties for disobeying a judicial order were nowhere sanctioned. In fact, they violated a basic principle inherited from the Revolution: *nulla poena sine lege*.

In light of these criticisms, there was a growing need to provide a principled justification for the hydra that judicial creativity had given birth to. In epic style, Professor Esmein put forth a tenuous but tenable theory at the beginning of this century. Essentially, his argument was that the *astreinte* should not be seen as an award of damages, but rather, as a sanction to an order given by a judge. It is

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52. *Ibid.*

53. Cass. Req., 29 janvier 1834, *D.P.*, 1834.I.81.

54. There were some decisions rendered which would appear to suggest the contrary: that a provisional *astreinte* could be liquidated without regard to the real prejudice suffered by the creditor as a result of his debtor's default. These holdings, however, are not representative of the line of reasoning in the jurisprudence *constante*. The essential theme of the *Cour de cassation*'s jurisprudence prior to 1959 is well articulated by M<sup>re</sup> Boré: "[...] la Cour de cassation considèrerait que l'*astreinte* provisoire, qui, lors de son *prononcé* est une mesure de *contrainte*, entièrement distincte des dommages-intérêts, [...] se convertissait, lors de sa *liquidation*, en *dommages-intérêts* légaux, réparant le *préjudice réel* causé au créancier par l'exécution différée ou par l'inexécution de l'obligation. La liquidation de l'*astreinte* n'était pas autre chose qu'une liquidation de dommages-intérêts" (*loc. cit.*, note 51, n° 13).

55. The first emphatic rejection by the *Cour de cassation* of the idea that damages could be granted which had no relationship to compensable loss (*i.e.*, punitive damages) occurred in 1927: Cass. civ., 14 mars 1927, *D.H.*, 1927.274. Its position was reaffirmed again in 1953 and 1955: Cass. civ., 27 février 1953, *S.*, 1953.I.196; Cass. civ., 27 octobre 1955, *Bull. civ.*, II, 463.

56. Esmein epigrammatically observes: "Trouve-t-on, dans le Code civil ou dans le Code de procédure civile, quelques traces de ce système? Aucune" (*loc. cit.*, note 48, p. 9).

a penalty punishing the debtor's disobedience; it does not aim at compensating the creditor's injury.

To support his contentions, Esmein advances the following proposition. A judge's authority, he claims, involves two elements: *jurisdictio* and *imperium*. The prior consists of the authority to administer justice by pronouncing on the cases before him. The latter consists of making all the necessary orders to ensure that justice is carried out and that his decisions are not empty exhortations. There is a serious counterargument with which Esmein must contend, however — the Revolution has displaced the notion of judicial *imperium* from the *droit commun*. After all, the legislative decrees of the 16th to the 24th of August 1790 restricted the Parlements' powers to deciding the controversy in question.<sup>57</sup> But Esmein claims that judicial *imperium* has survived the Revolution, and offers two grounds of proof. First, a statement from a prominent magistrate writing in 1810, Henrion de Pansey, which blandly reiterates Esmein's own thesis without any circumspection: "L'autorité judiciaire se compose de deux éléments, la juridiction et le commandement".<sup>58</sup> From this, Esmein hastily infers that "La tradition n'est donc pas interrompue; le juge peut encore *donner des ordres, prescrire et défendre*, d'après Henrion de Pansey".<sup>59</sup> His second ground of proof is equally unsatisfying. It lies in an obscure article of the *Code de procédure civile* which gives a judge the power to control courtroom proceedings by issuing injunctions if need be.<sup>60</sup> From this limited authority to make orders, Esmein derives a general judicial power to issue injunctions and make orders. In this way, he is able to conclude that French courts are entitled to compel debtors to comply with their orders "par des dommages-intérêts coercitifs et comminatoires".<sup>61</sup>

Esmein's theory is without question not very convincing, but given the need to somehow justify a procedure which courts in France had used for nearly a century, scepticism was no match for credulity. Certainly the most disturbing aspect of his scheme was the nebulous distinction between damages designed to compensate and those designed to coerce performance. How can damages fall into the latter category and not be punitive, something which Esmein's stance would want to deny? And assuming for a moment that this is possible, how are "dommages-intérêts employés comme moyen de contrainte" at all threatening? Until the Cour de cassation came out of the closet in 1959 to admit that an *astreinte*, in order to be effective had to divorce itself from the idea of compensatory damages, lower courts asserted its menacing force by resorting to an exaggerated evaluation of the prejudice suffered by the creditor upon liquidation of the *astreinte*.<sup>62</sup>

57. See J. BRODEUR, "The Injunction in French Jurisprudence", (1939-40) 14 *Tulane L. Rev.* 211, p. 212.

58. As cited in M.A. ESMEIN, *loc. cit.*, note 48, p. 49.

59. *Id.*, p. 50.

60. Article 1036 *Code de procédure civile*: "Les tribunaux, suivant la gravité des circonstances, pourront, dans les causes dont ils sont saisis, prononcer, même d'office, des injonctions, supprimer des écrits, les déclarer calomnieux et ordonner l'impression et l'affiche de leurs jugements".

61. M.A. ESMEIN, *loc. cit.*, note 48, p. 52.

62. The *Cour de cassation* refused to reverse several cases in which some substantial prejudice was proven, but where the total damages awarded were suspiciously high. See, for instance, Cass. civ., 2 février 1955, *Bull. civ.*, I, 50; Cass. civ., 7 juin 1956, *Bull. civ.*, II, 213. In Cass. civ., 17 février 1956, *Bull. civ.*, IV, 125 the Court refused to reverse the lower court's holding, even though part of the sum awarded was for the debtor's "mauvaise foi". Doctrinal writers were quick

## B. THE PURELY COMMINATORY NATURE OF THE *ASTREINTE* RECOGNIZED : 1959 TO 1972

A jurisprudential breakthrough was made in 1959 when the *Cour de cassation* clearly distinguished between damages and *astreinte*. The prior was now categorically classified as compensatory, the latter as comminatory and punitive. The *ratio* is worth citing in its entirety :

[...] l'astreinte provisoire, mesure de contrainte entièrement distincte des dommages-intérêts, et qui n'est en définitive qu'un moyen de vaincre la résistance opposée à l'exécution d'une condamnation, n'a pas pour objet de compenser le dommage né du retard et est normalement liquidée en fonction de la gravité de la faute du débiteur récalcitrant et de ses facultés. [...] <sup>63</sup>

As the passage indicates, however, it was only the provisional *astreinte* that was liberated from all ties with the notion of damages. The definitive *astreinte*, for no apparently logical reason, remained shackled to damages until the legislative reform of 1972. <sup>64</sup>

In no insignificant terms, this breakthrough was responsible for the revival of specific performance. Soon, it was to reoccupy the prominent position that it had acquired in French law before the codification of 1804. But what factors made this redefinition of the provisional *astreinte* so potent as to be able to diminish the primacy of damages? The answer is simple, although not necessarily coherent with the letter and spirit of the Civil Code. A judge was now permitted to intimidate a debtor into performing his promise with a monetary penalty which had no relationship to the prejudice suffered by the creditor. This inevitably reduced the scope of the *nemo praecise* rule, since article 1142 came to be seen as only prohibiting the use of physical force. Let me suggest, however, that this violates any meaningful reading of the maxim *Nemo praecise potest cogi ad factum*, which was intended to prohibit all forms of compulsion against the debtor's will, whether direct or indirect, on his person or on his property.

This broad interpretation of the *nemo praecise* principle is supported by the articles of the Civil Code dealing with the effect of obligations to do or not to do (articles 1142-44). <sup>65</sup> Although articles 1143-44 allowed a creditor to obtain specific performance if the promise was subject to execution by a third party, in no case did it contemplate compelling the debtor himself to perform. As Esmein has quite aptly observed : "Mais, qu'on le remarque bien, il n'y a là [articles 1143-44] aucune pression exercée sur la volonté du débiteur [...]". <sup>66</sup> In light of this, it is cor-

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to recognize this evidently punitive capacity of judicial discretion. "La doctrine unanime reconnaissait d'ailleurs que la marge d'appréciation dont dispose le juge du fond pour fixer les dommages-intérêts lui permettait, s'il le voulait, d'imprimer à cette liquidation un 'parfum d'astreinte' et de tenir compte de la faute commise par le débiteur qui s'était refusé à exécuter en nature" (J. BORÉ, *loc. cit.*, note 51, n° 15).

63. Cass. civ., 1<sup>re</sup>, 20 octobre 1959, *D.*, 1959.537.

64. The *Cour de cassation* did its best to maintain an arbitrary and artificial distinction between provisional and definitive *astreintes*. Although both are identical in nature, the Court dogmatically asserted that a definitive *astreinte* "est destinée à réparer le préjudice pouvant résulter du retard à exécuter les décisions judiciaires." See Cass. civ., 1<sup>re</sup>, 17 février 1965, *Bull. civ.*, I, n° 139.

65. See *infra*, section IV and note 46.

66. M.A. EISMEIN, *loc. cit.*, note 48, p. 10.

rect to suggest that the view of the classical authors, following the view expressed by Pothier, was correct in maintaining that damages were the primary remedy of the *droit commun* since 1804. There was, after all, no express authority in the Code for using coercion as a method to obtain performance of an obligation to do or not to do.<sup>67</sup> Quite to the contrary, by codifying the *nemo praecise* rule, article 1142 explicitly denied any such recourse.

The point to be made once again is that damages and specific performance are from the very outset incompatible remedies. Once the leap of faith has been made into the domain of execution in kind, there is no turning back to quaint rationalizations designed to fetter the binding nature of a promise. Damages are premised on non-compulsion of the debtor to perform; specific performance, if it is to be efficacious, demands exactly the opposite — compulsion on the debtor's will. Whether this be done by acting on his property or his person is an academic question since both avenues are essentially comminatory. In fact, if the primacy of specific performance is vigorously professed, then a court must have the ultimate power to impress its desire on the debtor by threatening him with imprisonment. And in this respect, the Québec injunction, with its sanction of incarceration by means of contempt of court proceedings, is in the final analysis more effective than the French *astreinte*. The scenario has been cast in colourful language by one American writer :

If the defendant cared to refuse to perform, no one could do anything about it. The Anglo-American injunction and its eventual contempt proceedings has one trump card that no defendant can beat — jail. The French courts, with no such power, can only watch while the defendant thumbs his nose at the judges.<sup>68</sup>

### C. THE LEGISLATIVE ENACTMENT OF 1972 AND ITS OUTCOME

In 1972 the French legislature finally took the initiative to grant official recognition to the hitherto judicially articulated doctrine of *astreinte*. By the *Loi n° 72-626 du 5 juillet 1972* which entered into effect on 16 September 1972, the provisional and definitive *astreinte* were enacted into French law and put on equal footing with each other. Both were declared to be distinct from damages and left to the discretion of the judge seized to assess.<sup>69</sup> The nature and function of the *astreinte* in modern French law are worth examining in order to better understand how it serves as the mechanism for specifically enforcing promises.

The initial question posed by French doctrinal writers was to what extent a debtor could be compelled to perform. The general principle is well pre-

67. It was only within the context of an obligation to give or deliver that the Code made provision for execution through *manu militari*. With respect to a contract of sale, for example, article 1610 states that : "Si le vendeur manque à faire la délivrance dans le temps convenu entre les parties, l'acquéreur pourra, à son choix, demander la résolution de la vente, ou sa mise en possession, si le retard ne vient que du fait du vendeur" (emphasis added).

68. J. BRODEUR, *loc. cit.*, note 57, p. 216.

69. I reproduce the two most relevant articles of the *Loi du 5 juillet 1972* pertaining to the *astreinte* in civil matters.

Art. 5. Les tribunaux peuvent, même d'office, ordonner une *astreinte* pour assurer l'exécution de leurs décisions.

Art. 6. L'*astreinte* est indépendante des dommages-intérêts. Elle est provisoire ou définitive. L'*astreinte* doit être considérée comme provisoire, à moins que le juge n'ait précisé son caractère définitif.

sented by the Mazeaud brothers : "L'exécution en nature est toujours possible, sauf lorsque, exigeant le concours personnel du débiteur, elle aboutirait à une pression intolérable sur la volonté de celui-ci".<sup>70</sup> Note that specific performance is not *ab initio* prohibited when the debtor's personal participation is required to execute the obligation, but rather, only when such participation intolerably constrains his will. The next issue then becomes one of determining what constitutes "une pression intolérable sur la volonté du débiteur". The orthodox position in France today is that the *nemo praecise* rule, as codified in article 1142 of the Civil Code, only prohibits physical compulsion.<sup>71</sup> Hence, as the Mazeauds explain, a pecuniary fine in the form of an *astreinte* is a perfectly acceptable method of coercion :

Aussi bien, à notre avis l'article 1142 fait-il obstacle seulement à une condamnation à la contrainte physique sur le débiteur pour l'obliger à s'exécuter personnellement. Il n'empêche pas le juge de prononcer en vertu de son *imperium*, une *injonction*, au besoin assortie d'une *astreinte*.<sup>72</sup>

Anything short of physical compulsion is not considered to be a violation of the debtor's liberty. Thus, the *astreinte*, being an indirect vehicle of compulsion acting on the debtor's property, is not seen as falling within the censure expressed by article 1142.

In this way, the scope of the *nemo praecise* principle has been reduced. So greatly reduced, in fact, that what was once a substantive prohibition has now become a hollow pronouncement of form. As Professor Jeandidier has put it, the *nemo praecise* maxim is little more than a residual "soupape de sûreté". Practically all obligations to do and not to do, even those involving a strongly personal participation on behalf of the debtor, can be sanctioned with an *astreinte*. It is no accident that just two months before the law of 5 July 1972 was passed, the *Cour de cassation* felt confident enough about the definitive role that specific performance was to play in French law in the future that it emphatically reaffirmed what was by this point a practical reality : a court's primary function, to the extent possible, is to give the creditor that which he has been promised or that which has been taken from him without just cause in law, not its equivalent in money damages.<sup>73</sup>

70. H., L. et J. MAZEAUD, *op. cit.*, note 50, p. 1027.

71. This idea finds various expressions in the doctrine. P. Simler contends that this is the real import of the *nemo praecise* rule and that all non-physical compulsion is permitted by article 1142 :

Aucune coercition physique ne peut donc être mise en œuvre à l'encontre d'un débiteur récalcitrant pour le contraindre à s'exécuter. C'est ce qu'exprime l'adage "*Nemo potest praecise cogi ad factum*" : Nul ne peut être contraint à l'accomplissement direct d'un fait. [...] Dès lors que l'intégrité et la liberté physique sont hors de cause, tout autre moyen de contrainte tendant à obtenir l'exécution forcée peut et même doit être mise en œuvre, si le créancier le requiert (*loc. cit.*, note 49, n<sup>os</sup> 102 & 105).

W. JEANDIDIER, in "L'exécution forcée des obligations contractuelles de faire", (1976) 74 R.T.D.C. 700, p. 703 frames the restriction contained in article 1142 in terms of "brutal compulsion" : "Le Code n'a pas banni, sans distinction, la pression sur le débiteur; seuls sont interdits les procédés d'exécution brutaux, impliquant une atteinte inadmissible à la personne humaine".

72. H., L. and J. MAZEAUD, *op. cit.*, note 50, n<sup>o</sup> 935, p. 1032.

73. Cass. civ., 2<sup>e</sup>, 9 mai 1972, J.C.P., 1972.IV.164. The principle of *restitutio in integrum* was applied. It flows from the argument made by many French doctrinal writers that an award of damages only compensates for prejudice suffered; it does not efface the wrong done as is the case with execution in kind.

Execution in kind was here to stay.<sup>74</sup> And through the mechanism of *astreinte*, courts could enforce their judgments granting the creditor performance *in specie* by threatening the debtor with monetary penalties until he no longer had the will to resist.

#### D. THE *ASTREINTE*'S DOMAIN OF APPLICATION

##### 1. Enforcing Judgments Ordering Specific Performance

One of the most important uses of the *astreinte* is in the field of contractual obligations. When the debtor fails to execute his promise to do or not to do, the creditor may have judgment rendered against him. Almost invariably, such judgments will be coupled with an *astreinte* ordering the debtor to perform within a certain period of time or face a stipulated fine<sup>75</sup> over and above the damages sustained by the creditor upon liquidation of the *astreinte*. If the *astreinte* is provisional, it will state the penalty to be calculated for each day that performance is late; if it is definitive, it will state the total fine to be borne by the debtor upon failure to comply with the judgment. The penalty specified in a provisional *astreinte*, unlike that in a definitive *astreinte*, is subject to reevaluation at the time of liquidation.

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74. Much ink has been spilt by doctrinal writers in the latter half of this century in an effort to reassert the primacy of specific performance. Although many of the arguments advanced are persuasive, their fundamental flaw is that they assume, without much discussion, that the Civil Code supports such a proposition. I was, however, able to find one frank admission that this is not the case. The Mazeaud brothers, under the section bearing the title *Droit d'exiger une condamnation en nature*, grudgingly confess that "Le principe [d'exécution en nature] est d'évidence. Il importe peu qu'il ne soit pas énoncé par le Code en une forme générale" (emphasis added). See H., L. and J. MAZEAUD, *Traité de la responsabilité civile*, t. 3, 6th ed., Paris, Montchrestien, 1978, n° 2304, p. 616. One would hardly expect to find such a statement in a civilian text. It is more akin to the common law inductive approach to legal reasoning. Nevertheless, once this leap of faith is made, it is then not difficult to unearth a provision of the Civil Code which at least implicitly alludes to the primacy of specific performance for inexecution of a contractual obligation. Scholars have found such support in article 1134 which merely states that a contract has the force of law between the contracting parties: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites". From this, it has been argued that "Le principe de la force obligatoire des contrats justifie que le débiteur d'une obligation de faire ou de ne pas faire l'exécute en nature, *in specie*, et que le juge, au besoin, l'y contraigne". See P. FOUCHARD, "L'injonction judiciaire et l'exécution en nature: Éléments de droit français", (1989) 20 *R.G.D.* 31, p. 34.

With this presumption underlying their reasoning, writers have exalted the paramountcy of specific performance without remorse. Professor Jeandidier insists that "une indemnité pécuniaire ne remplacera jamais le fait promis" and that *pacta sunt servanda* dictates "respect de la parole donnée" (*loc. cit.*, note 71, pp. 702 and 706). Along the same lines, Simler goes as far as suggesting that only "absolute impossibility" should temper a creditor's right to specific performance: "La vocation de toute obligation est, de par sa définition, d'être exécutée de la manière exacte dont elle a été contractée. [...] Seules devraient inéluctablement faire échec à ces principes, corollaires de la force obligatoire du contrat, les hypothèses d'impossibilité absolue d'exécution en nature" (*loc. cit.*, note 49, n° 101).

75. This fine is awarded to the creditor under the rubric of a "peine privée". Although the text of the *Loi du 5 juillet 1972* has no express provision to this effect, this had been the accepted position since the Senate, for reasons of public order, rejected the National Assembly's proposal that such fines be shared between the creditor and the state.

Through this process, a judge endeavours to “vaincre la résistance d’un débiteur récalcitrant, et de l’amener à exécuter une décision de justice”.<sup>76</sup> Two points should be noted. First, despite the generally accepted idea that an *astreinte* is a subsidiary process that the judge uses “à défaut de [...] tout autre mode efficace d’obtenir paiement”,<sup>77</sup> modern jurisprudence has effectively dispensed with this restriction, issuing *astreintes* where it would have been possible to obtain execution through different means.<sup>78</sup> This essentially means that where a court could have used articles 1143 or 1144 to allow a creditor to obtain execution by a third party at the debtor’s expense, it nonetheless showed little reluctance in ordering the debtor himself to perform the act promised by threatening him with an *astreinte*. Secondly, although older decisions<sup>79</sup> and doctrine refused to extend the menace of an *astreinte* to obligations contracted *intuitu personae*, modern jurisprudence and doctrine<sup>80</sup> show fewer hesitations in admitting it under these circumstances. The jurisprudence, for example, has shown a willingness to use an *astreinte* to oblige “une compagnie d’électricité à rétablir chez un abonné le courant qu’elle avait abusivement coupé, [...] un ouvrier à exécuter un travail, [...] et] un employeur à réintégrer un délégué du personnel illégalement congédié”.<sup>81</sup>

## 2. *Astreinte* in the Context of Provisional Relief: The *Procédure de Référé*

Much like an interlocutory injunction in Québec and Canadian common law jurisdictions, the *procédure de référé* is designed to provide the party seeking it provisional relief pending final disposition of his claim by a court.<sup>82</sup> Its origins

76. H., L. and J. MAZEAUD, *op. cit.*, note 50, n° 940, p. 1037.

77. Cass. com., 17 avril 1956, *J.C.P.*, 1956.9330.

78. See H., L. and J. MAZEAUD, *op. cit.*, note 50, n° 947, p. 1041.

79. See, for instance, the famous case involving the painter Rosa Bonheur in which the *Cour d’appel de Paris* refused to issue an *astreinte* to oblige her to finish a portrait: Paris, 4 juillet 1865, *D.P.*, 1865.II.201. Generally speaking, where the obligation has been one pertaining to an artistic or intellectual endeavour, a court has been more inclined to award damages than specific performance: See Cass. civ., 14 mars 1900, *D.P.*, 1900.I.497. This would more than likely also be the position adopted by a French court today. All the doctrinal writers are in agreement on this point! See P. FOUCARD, *loc. cit.*, note 74, p. 46; and JEANDIDIER, *loc. cit.*, note 71, p. 718.

80. The doctrine appears to be inconsistent on this point. While most agree that obligations contracted *intuitu personae* should not be subject to an *astreinte*, there is disagreement as to the scope of this exclusion. Some fear that interpreting it too broadly could resurrect the *nemo praecise* rule to its earlier stature; others fear that interpreting it too narrowly will leave it no effective ambit of application. Thus, we have, on the one hand, the orthodox declaration that article 1142 shows a preference for damages only in the context of “obligations qui supposent nécessairement un fait personnel du débiteur parce qu’elles ont été contractées *intuitu personae*” (H., L. and J. MAZEAUD, *op. cit.*, note 50, p. 1032). Yet on the other hand, we discover that this limitation is so plagued with ambiguity that we have little choice, as Simler suggests, but to leave it to the discretion of judicial prudence: “Au total, le domaine dans lequel toute contrainte, qu’elle soit directe ou indirecte, doit être exclue à l’encontre du débiteur d’une obligation de faire, et ou [*sic*], partant, l’article 1142 doit être littéralement appliqué, paraît imprécis. [...] Il faut s’en remettre, semble-t-il, à l’appréciation souveraine du juge” (*loc. cit.*, note 49, n° 117).

81. This assortment of holdings is cited in H., L. and J. MAZEAUD, *op. cit.*, note 50, n° 948, p. 1042.

82. I owe my understanding of the *procédure de référé* to an excellent discussion of the topic by Henry Solus and Roger Perrot. See H. SOLUS & R. PERROT, *Droit judiciaire privé*, t. 3, Paris, Sirey, 1991, pp. 1055 *et seq.*

lie in the seventeenth century where it first appeared in the jurisprudence of the *Châtelet de Paris* as a result of the practical necessities dictated by a slow and usually inefficient litigation process. The first text governing the procedure emerged in 1685.<sup>83</sup> In effect, it gave the *lieutenant civil du Prévôt de Paris* the power “à l’effet d’ordonner que les parties comparâtront le jour-même pour y être entendues et, par lui, ordonnées ce qu’il estimera juste”.<sup>84</sup> In 1806, the *Code de procédure civile* codified the *référé* and declared the presidents of civil courts of first instance competent “de statuer en référé dans les cas d’urgence ou lorsque l’exécution d’un titre exécutoire se heurtait à une difficulté d’exécution”.<sup>85</sup> Today, the *procédure de référé* is codified at article 484 of the *Nouveau code de procédure civile*.<sup>86</sup>

One of the main issues which surrounded the *référé* in this century was whether it could be coupled with an *astreinte*. The question provoked lively debate from both pro and con camps before it was definitively resolved by the *Cour de cassation* in 1950. In a decision of the *Section sociale de la Chambre civile*, the Court held that “le juge des référés [...] saisi pour vaincre la résistance apportée à un jugement antérieur [...] a qualité pour prononcer une astreinte”.<sup>87</sup> This position was granted express legislative approval in 1971 by the *Décret n° 71-740 du 9 septembre 1971*. It forms part of the present *Nouveau code de procédure civile* at article 491(1) which states that “Le juge statuant en référé peut prononcer des condamnations à des astreintes”.<sup>88</sup>

The second significant advance with respect to the *référé* was made by the *Décret n° 73-1122 du 17 décembre 1973* which extended the availability of a *référé* beyond the traditional “cas d’urgence où aucune contention sérieuse ne se présente”. It was therefore now possible to obtain a “référé sous astreinte” in order to prevent an imminent injury or to stop a manifestly illegal activity.<sup>89</sup> This recourse was made even more potent in 1987 by allowing a judge to grant an *ordonnance de référé* despite the existence of a serious contention with respect to the obligation in question.<sup>90</sup> In light of this addition, all interlocutory measures ordered via the *référé*, even those pertaining to issues of strong contention, could be sanctioned with a provisional or definitive *astreinte*.

The final development which has helped to define the modern *procédure de référé* occurred in 1985 when the French legislature expanded the scope

83. *Praticien du Châtelet de Paris*, Paris, Laurent-Prault, 1773, titre 9, c. 1, 824.

84. H. SOLUS & R. PERROT, *op. cit.*, note 82, p. 1057.

85. Articles 806 to 811 of the old *Code de procédure civile* as cited in *ibid.*

86. Art. 484: L’ordonnance de référé est une décision provisoire rendue à la demande d’une partie, l’autre présente ou appelée, dans les cas où la loi confère à un juge qui n’est pas saisi du principal le pouvoir d’ordonner immédiatement les mesures nécessaires.

87. Cass. civ., 28 mars 1950, *D.*, 1953.377. This decision reversed an earlier position adopted by the Court in 1898 denying that this was possible.

88. It has been held that a judge making a *référé* ruling can, on the basis of article 491(1), issue both provisional and definitive *astreintes* to assure the execution of his decisions. See, for example, Cass. civ., 2<sup>e</sup>, 4 mai 1977, *Bull. civ.*, II, 81.

89. Now codified in article 809 of the nouveau *Code de procédure civile* which states, *inter alia*, that a *référé* may be issued “soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite”.

90. *Décret n° 87-434 du 17 juin 1987* added this phrase to article 809(1) of the nouveau *Code de procédure civile*: “même en présence d’une contestation sérieuse”.



of the “référé-provision” to include obligations to do.<sup>91</sup> The *référé-provision* is a procedure by which a court may, within the context of an obligation not seriously disputed, grant a creditor “une somme à valoir sur le montant définitif de la condamnation qui sera prononcée par le juge du fond”.<sup>92</sup> Under the new law, a debtor could be ordered to perform his obligation provisionally “même s’ils s’agit d’une obligation de faire”. The implications of this are far-reaching. Simply put, a creditor is entitled to obtain a provisional but executory judgment against his debtor, forcing the latter, through the menace of an *astreinte* if necessary, to specifically perform his promise. And the requisite interest to make such a petition is acquired by anyone who is the creditor of a non-seriously contested obligation to do. The existence of the obligation need not be definitively established at law; that it not be seriously contested is sufficient.<sup>93</sup> “[I]l est donc désormais possible”, as Solus and Perrot explain, “de demander au juge des référés d’enjoindre à un débiteur, au besoin sous astreinte, la livraison d’une chose ou l’exécution d’une prestation de service”.<sup>94</sup>

## VI. ASSESSMENT OF THE *ASTREINTE* AS A MECHANISM FOR ENFORCING THE SPECIFIC PERFORMANCE OF OBLIGATIONS TO DO AND NOT TO DO

If the *nemo praecise* rule means anything, it must surely mean that man is the master of his will. Therefore, to distinguish between “pression sur la personne du débiteur” and “pression sur la volonté du débiteur” as has been done in France is an academic exercise designed to make the menacing compulsion represented by the *astreinte* more palatable to advocates of individual liberty. If the full import of the maxim *Nemo praecise potest cogi ad factum* is accepted, no compulsion is permissible against the debtor to induce him to perform, whether it be direct or indirect. In essence, “pression sur la volonté du débiteur” translates into “violence sur sa volonté”, which for all practical purposes is equivalent to “violence sur sa personne”. Consequently, in order to accept specific performance as the primary remedy for obligations to do or not to do, the *nemo praecise* principle must be set aside. Attempts to finesse the rule by claiming that it is applicable only with respect to obligations contracted *intuitu personae* create the kind of ambiguities that have been discussed previously. Once the supremacy of the promised word is averred, then all notions of protecting individual liberty by awarding money damages in those cases which require it become mere ritual. In fact, it seems that the only real

91. The *Décret n° 85-1330 du 17 décembre 1985* added the following phrase to article 809 of the *nouveau Code de procédure civile*: “ou ordonner l’exécution de l’obligation même s’il s’agit d’une obligation de faire”.

92. H. SOLUS & R. PERROT, *op. cit.*, note 82, p. 1094.

93. For the sake of clarity, I reproduce article 809 of the *nouveau Code de procédure civile* in its entirety.

Art. 809. Le président peut toujours, même en présence d’une contestation sérieuse, prescrire en référé les mesures conservatoires ou de remise en état qui s’imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite.

Dans les cas où l’existence de l’obligation n’est pas sérieusement contestable, il peut accorder une provision au créancier ou ordonner l’exécution de l’obligation même s’il s’agit d’une obligation de faire.

94. H. SOLUS & R. PERROT, *op. cit.*, note 82, n° 1296, p. 1097.

reason why French courts and authors have felt obliged to admit the appropriateness of damages in certain circumstances is so as not to render articles 1142 of the Civil Code completely meaningless.<sup>95</sup> As Esmein has observed, “[I]l fallait bien laisser quelque application vraie à l’article 1142 du Code civil. Il fallait bien trouver quelques hypothèses où, comme le veut la loi, l’obligation de faire se résout nécessairement en dommages-intérêts”.<sup>96</sup>

Clearly, then, maintaining a regime which avows specific performance as the principle remedy for inexecution of contractual obligations offends the *nemo praecise* rule at its most fundamental level. What, after all, is left of the notion of individual liberty if one accepts Jeandidier’s view that “le juge ne devrait pas automatiquement exclure le recours aux astreintes tant que l’exécution en nature ne créerait pas une véritable servitude?”<sup>97</sup> What does “le souci de ne pas aliéner la liberté de la partie récalcitrante”<sup>98</sup> mean within a system which allows a provisional and definitive *astreinte* to be issued at both the interlocutory and judgment level in order to scare, compel, induce, frighten and cajole the debtor into performing? Nothing! The notion of individual liberty has been rendered purely formal.

What, then, is necessary to render the French system of enforcing specific performance more coherent? A total dissociation from the *nemo praecise* rule. With its strictures out of the way, the real issue could be squarely addressed — how to give a court effective and plenary power to enforce its orders. Admittedly, the *astreinte* is effective and for the most part achieves the desired results. But it is ultimately *ineffective* because it does not have the capacity to act on a contemptuous debtor *in personam*. Take, for example, a debtor who is insolvent and therefore remains unphased by the monetary penalty pronounced against him via the *astreinte*. Assume also, for the sake of argument, that this debtor is fully capable of performing the act which he promised. Under these circumstances, the present state of French law would have no alternative but to throw up its hands and recognize its impotence. This, however, would not be the case if it were equipped with an injunction similar to that in Québec. Breach of an injunctive order in Québec translates into a contempt of court proceeding whose ultimate sanction is imprisonment. Few are those who can resist such compulsion.

The sanction of imprisonment in a civil context is an idea that offends modern sensibilities. Yet it is the logical consequence of the *pacta sunt servanda* doctrine espoused by civilian authors and its efficacy cannot be denied. A fact pattern offered by the Mazeaud brothers clearly illustrates the advantages of the Québec injunctive procedure in comparison with the French doctrine of *astreinte* :

Un acteur s’est, par exemple, engagé à ne pas paraître sur une scène. Il se prépare néanmoins à y jouer, comme en font foi les affiches. Rien ne serait plus facile à son directeur que de s’y opposer, en s’emparant de sa personne ou en l’empêchant de

95. P. FOUCHARD, *loc. cit.*, note 74, p. 45, in an effort to confer some sense to article 1142 makes a statement which contradicts his own earlier remarks concerning the supremacy of execution in kind :

En particulier, et même si elle est sollicitée, il [le juge] n’imposera pas l’exécution en nature d’une obligation de faire s’il estime :

— qu’elle est inappropriée, car la satisfaction du créancier peut être obtenue d’une manière plus efficace par une condamnation pécuniaire.

96. M.A. EISMEIN, *loc. cit.*, note 48, p. 18.

97. W. JEANDIDIER, *loc. cit.*, note 71, p. 719.

98. *Id.*, pp. 723-24.

pénétrer dans le théâtre. Le tribunal ne peut cependant autoriser de tels moyens, car ils porteraient atteinte à la liberté individuelle. En décidant que les obligations de ne pas faire se résolvent en dommages-intérêts, l'article 1142 signifie précisément que les mesures de contrainte sur la personne ne doivent pas être employées pour parvenir à l'exécution en nature des obligations de ne pas faire et que, si elles sont seules possibles, le créancier doit se contenter d'un équivalent.<sup>99</sup>

If such a situation were to arise in Québec, a Superior Court judge would have the power to issue a prohibitive injunction against the actor. Upon refusing to comply, he could be physically compelled to honour his promise.

One final observation needs to be made with respect to the *astreinte* before turning to an examination of the injunction in Québec. It is the "peine privée" aspect of the *astreinte*. The penalties assessed against the debtor, once liquidated, are awarded to the creditor. This makes little sense. If the purpose of an *astreinte* is to compel the debtor to perform his promise by strengthening a court's authority to exact performance, why should the fines go to the creditor? In other words, if an *astreinte* is an expression of judicial *imperium*, then it is illogical to award the creditor anything more than the amount representing the prejudice he has actually suffered. If inexecution is an affront to public order, then all fines whose purpose it is to deter such an affront should accrue to the public purse. This is the perspective motivating similar fines in Canada.<sup>100</sup>

## VII. ARRIVAL OF THE INJUNCTION IN QUÉBEC

### A. THE FIRST STAGE : 1667 TO 1896<sup>101</sup>

Among other things, the reign of Louis XIV witnessed the codification of civil procedure by the *Ordonnance de 1667*. This law was extended to New France in 1678 upon its registration at the Conseil Supérieur de Québec. Although the *Ordonnance de 1667* was replaced in France by Napoléon's *Code de procédure civile* in 1806, it remained in force in Québec until the first *Code of Civil Procedure* replaced it in 1867. After the Conquest and the *Royal Proclamation of 1763*, it was temporarily set aside as French law in Québec was replaced by English civil and criminal law. But by virtue of the *Québec Act, 1774*, French civil law and hence the *Ordonnance de 1667* were reestablished in Québec. Nevertheless, pursuant to the Royal Proclamation, judicial organization in the province had been recast according to the British model by Governor Murray in 1774. This structure was to remain untouched by the provisions of the Québec Act. Consequently, the British

99. H., L. and J. MAZEAUD, *op. cit.*, note 74, n° 2313, pp. 628-629.

100. In Québec, this issue is governed by *An Act Respecting the Payment of Fines*, R.S.Q. c. P-2, art. 5, which provides that fines collected pursuant to the statute form part of the consolidated revenue fund and are consequently transmitted to the *ministère des Finances*. More specifically, in a decision of the Québec Court of Appeal, Gendreau J.A. made the following remark concerning fines arising out of contempt of court proceedings: "Le requérant en outrage n'est qu'un auxiliaire de la justice qui met un processus en marche. La procédure de mise en route de l'enquête sur la commission de l'outrage par la violation de l'injonction et sa punition éventuelle, n'appartient pas à celui qui l'initie; tout au plus, est-il concerné par la procédure" (*C.T.C.U.M. v. P.G. Québec*, [1987] R.D.J. 199, p. 204).

101. The historical outline contained in this section is indebted to the work of Alain Prujiner. See A. PRUJINER, "Origines historiques de l'injonction en droit québécois", (1979) 20 *C. de D.* 249.

institutions introduced into Québec law made it necessary for procedure to adapt accordingly, which effectively meant that English law was to profoundly influence the development of procedural law in the province after the Conquest.

In 1857, under the impetus of Georges Étienne Cartier, codification of the substantive and procedural law of Lower Canada was undertaken by a three-man commission comprised of three Superior Court judges : Caron, Day and Morin. The new *Code de procédure civile* became law in 1867. Despite the Code's overall success, it contained a lacuna which soon manifested itself to both practitioners and judges. Simply put, it was the absence of interlocutory measures which could be taken to assure the efficacy of a final judgment. There was, as Professor Prujiner has observed, "[une] absence de dispositions permettant au juge d'essayer de contrôler certains comportements des parties pendant l'instance".<sup>102</sup> In England, this problem was addressed through the mechanism of the interlocutory injunction; in France, the *procédure de référé*, which had emerged in 1685, served essentially the same function.<sup>103</sup> But in Québec there was no provision in the new Code conferring upon a judge the power to make adequate interim orders. Although the injunction could have filled this hiatus, its Equitable origins seem to have militated against its adoption by the codifiers.

One of the first jurists to direct his attention to this gap in Québec procedural law was Gonzalve Doutre. Looking for a way to solve the problem, Doutre stumbled upon article 209 of the 1825 *Code de procédure de la Louisiane* which recognized the English-style injunction as an "acte conservatoire". Thereafter, Doutre became an advocate of the injunction in Québec. Writing in 1867, he remarked that "Cette lacune dans le Code est regrettable et il est à espérer qu'avant peu, le bref d'injonction viendra la combler et compléter les mesures provisionnelles affectées par le Code".<sup>104</sup>

It should be noted at this point that the need for an injunction in Québec civil law at the end of the nineteenth century was based solely on a desire to remedy a procedural defect at the interlocutory level. There was no conceptual appreciation, not even an inchoate one, that an injunction might serve as a means to enforce specific performance of a contractual obligation. Ghislain Massé has appropriately characterized the situation in the following terms :

De ceux qui, au siècle dernier, se sont faits les promoteurs de l'injonction, aucun ne la destinait à dénouer l'impasse dans laquelle se trouvaient les tribunaux face à l'exécution spécifique des obligations de faire et de ne pas faire. Leur démarche visait essentiellement à combler une lacune du droit procédural : l'impossibilité d'empêcher qu'un plaideur puisse, par ses agissements pendant l'instance, porter atteinte au droit que son adversaire désire faire sanctionner. L'injonction, dans son rôle provisoire (*interlocutory injunction*), s'avérait être, à leurs yeux, l'instrument approprié pour résoudre cette difficulté.<sup>105</sup>

Yet this should not suggest that the injunction is somehow incompatible with specific performance. It is, in fact, ultimately the most effective means to coerce the debtor to respect his promise. Any incompatibility which arises has deeper roots; it lies in the primacy which the civil law has traditionally attached to the remedy of damages as expressed by the *nemo praecise* principle.

102. *Id.*, p. 255.

103. This procedure is described in greater detail in section V.D.2 dealing with the *ordonnance de référé*.

104. G. DOUTRE, *Les lois de la procédure civile*, t. 2, Montréal, Sénecal, 1867, p. 279.

105. G. MASSÉ, "L'exécution des obligations ...", *loc. cit.*, note 1, p. 669.

Before the legislature acknowledged the injunction in Québec law, the courts unsuccessfully took it upon themselves to do so. In 1875, the Court of Queen's Bench endeavoured to do this by equating an injunction with the writ of *mandamus* whose existence in Québec law was not questioned.<sup>106</sup> This reasoning was subsequently rejected by the Chief Justice of the Superior Court, William Colim Meredith.<sup>107</sup> After a thorough analysis of the nature of the injunction, Meredith C.J. concluded that "[...] however much we may regret it, we cannot, in an *ordinary action* between private individuals in *Lower Canada*, coerce either of them by the *English remedy* known as a writ of injunction".<sup>108</sup>

The time was now ripe for the legislature to intervene, and it did so in 1878.<sup>109</sup> But the new law was hardly an example of felicitous drafting. Its most important shortcoming was that it did not squarely address its supposed *raison d'être*: the need to equip judges with an effective means of granting interlocutory relief. Instead, a principal action in injunction was created within which an interlocutory injunction had to operate. Thus, no provisional relief could be sought unless the principal remedy was a final or permanent injunction.<sup>110</sup>

The principal action in injunction which the new law created was limited to six cases. Among them was included the case in which "une personne fait une chose en violation d'un contrat écrit ou d'une convention écrite".<sup>111</sup> Furthermore, being limited to "enjoignant de suspendre" in these cases, it was clear that the legislature had only envisioned a prohibitive injunction. Moreover, from the very outset the courts made it clear that the new injunctive procedure was an exceptional recourse; it was to be interpreted narrowly in light of the restrictive common law criteria which governed its application. As Papineau J. stated in an 1879 decision of the Superior Court concerning the issuance of an interlocutory injunction: "Ce remède n'est accordé que dans les cas où il n'y en a pas d'autres en vertu de la loi, et où le tort appréhendé serait irréparable".<sup>112</sup> Hence, although it was possible to interpret the new law as allowing a judge to grant an injunction ordering a contractual debtor to specifically perform an obligation not to do, the restrictive common law shroud which enveloped the Québec prohibitive injunction made any such possibility illusory. But as I have already alluded to throughout this paper, the apparent obstacles which accompany the adoption of an Equitable English remedy by Québec civil law are mere decoys. That the common law rules surrounding the injunction accord a preference to money damages cannot be

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106. *Bourgoin v. M.N.C.R.*, (1875) 19 L.C.J. 57 (Q.B.). Per TASCHEREAU J. at 65: "S'il existe [l'injonction], la procédure est inattaquable; s'il n'existe pas, voyons s'il n'est pas l'équivalent du bref de *mandamus* dont l'existence en ce pays ne fait aucun doute". Antoine-Aimé Dorion C.J. at 60 then neatly collapsed the distinction between the two: "Our Code contains special provisions in reference to writs of *mandamus*, and writs of injunction are substantially the same as writs of *mandamus*, the one being generally used to command the performance of some obligation, and the other to prevent the execution of some unlawful act, and both may be said to be included in the provisions concerning writs of *mandamus*".

107. See *Carter v. Breakey*, (1877) 3 R.J.Q. 113 (S.C.).

108. *Id.*, p. 129.

109. *Acte pourvoyant à ce que le bref d'injonction puisse être obtenu en certains cas, et réglant la procédure à cette fin*, S.Q. 1877-78, 41 Vict., c. 14. It was integrated into the *Code of Civil Procedure* in 1888.

110. *Id.*, as per article 8.

111. *Id.*, per article 1(3).

112. *Mallette v. City of Montreal*, (1880) 24 L.C.J. 264 (S.C.).

denied. But to argue that this is why the injunction makes specific performance a subsidiary remedy is to miss the mark, for the real inhibiting factor lies elsewhere: the irreconcilable tension between damages and specific performance.

## B. THE SECOND STAGE : 1897 TO 1965

In 1897, the new *Code of Civil Procedure* expanded the scope of the prohibitive interlocutory injunction based in large part on the law of California.<sup>113</sup> Rather than delineating specific instances in which interlocutory injunctive relief was available, the legislature enacted a regime based on the common law criteria of “serious or irreparable harm” and protecting the efficacy of final judgment.<sup>114</sup> Although the new Code placed an emphasis on the interlocutory injunction, it nevertheless somewhat cryptically left the permanent injunction intact.<sup>115</sup> But neither the doctrine nor the jurisprudence showed a real willingness to use the injunction as a mechanism to enforce the specific performance of obligations not to do. Their attitude fluctuated between ambivalence and hostility. It was inconsistent at the best of times.

113. The relevant section of the Code is article 957. It stipulates as follows :

Art. 957. Un juge de la Cour supérieure peut accorder une ordonnance d’injonction interlocutoire, dans chacun des cas suivants :

1. Lors de l’émission du bref d’assignation :

- a) Lorsqu’il appert de la requête que le demandeur a droit au remède demandé, et que ce remède consiste en tout ou en partie à empêcher la commission ou la continuation d’une action ou opération, soit pour un temps, soit pour toujours;
- b) Lorsque la commission ou la continuation d’une action ou opération causerait des dégradations, ou un tort sérieux ou irréparable.

2. Au cours d’une instance :

- a) Lorsque la commission ou la continuation d’une action ou opération pendant l’instance causerait des dégradations, ou un tort sérieux ou irréparable;
- b) Lorsque la partie adverse fait ou est sur le point de faire un acte attentatoire aux droits du demandeur ou aux dispositions de la loi touchant l’objet de la demande, qui est de nature à rendre le jugement inefficace.

114. These two criteria appear to have done more harm than good as far as limiting the common law influence on the Québec injunction. If the judiciary in Québec had been bold enough to read article 957 generously, it would have been able to distance the Québec interlocutory injunction from its common law counterpart. This would have greatly facilitated the use of the permanent injunction as a means of enforcing contractual obligations not to do by freeing courts from formal common law constraints when applying the injunction to substantive Québec law. But judicial creativity was not the hallmark of the day, and Québec courts felt more secure in mimicking the jurisprudence of Anglo-Canadian jurisdictions. In this way, certain rules of Equity which were nowhere articulated in the Code made their way into Québec law. For instance, the idea that an injunction is not available when money damages will do, a principle applying only with respect to a final injunction in common law jurisdictions, was jurisprudentially acknowledged as applying to interlocutory injunctions in Québec: see *Poulos v. Scroggie*, (1903) 6 R.P. 1; also *Canada Newspaper Syndicate v. Montreal News*, (1907) 9 R.P. 78.

115. Allusion to the continued existence of the permanent injunction was made in article 968 of the 1897 Code which provided that : “Le jugement final adjuge sur les conclusions de la requête, ainsi que sur le mérite de l’action. Si le jugement est en faveur du requérant, il prononce les injonctions requises [...]” (emphasis added).

## 1. The Injunction as a Means of Specifically Enforcing Obligations To Do and Not To do

Articles 1065-66 C.C.L.C. are the *Québec* equivalents of articles 1142-44 of the French *Code civil*. They state the following :

Art. 1065 Every obligation renders the debtor liable in damages in case of breach of it on his part. The creditor may, *in cases which admit of it*, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense; [...] (emphasis added)

Art. 1066 The creditor, without prejudice to his claim for damages, may require also, that any thing which has been done in breach of the obligation shall be undone, *if the nature of the case will permit*; and the court may order this to be effected by its officers, or authorize the injured party to do it, at the expense of the other. (emphasis added)

A natural reading of the two sections suggests, unlike Baudouin<sup>116</sup> and Tancelin<sup>117</sup> would have us believe, that the primary remedy for inexecution will be damages. It is only "in cases which admit of it" that specific performance *may* be sought by the creditor. As the permissive verb "may" indicates, the creditor is in no way obliged to do so, since the default regime, as the first sentence of article 1065 clearly demonstrates, is that of damages.

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116. See J.-L. BAUDOUIN, *Les obligations*, 3rd ed., Montréal, Les Éditions Yvon Blais Inc., 1989, n° 679, p. 404, where the author writes : "Les articles 1065 et 1066 C.c. rédigés en des termes différents des articles 1142, 1143 et 1144 du *Code Napoléon*, reconnaissent le droit à l'exécution en nature, le plaçant apparemment sur le même pied que le recours en dommages, mais limitent son exercice aux 'cas qui le permettent...'. Although I agree with Baudouin that the wording of articles 1065-66 C.C.L.C. and articles 1142-44 C.N. is not identical, I am not prepared to say that the practical import of this is to make the Québec provisions any different than their French counterparts. In support of this contention I note Professor Massé's comment that "Les articles 1065 et 1066 du code québécois reprennent, en effet, la substance des articles 1142, 1143 et 1144 du code français; s'il y a quelques différences, elles résident, au dire des rédacteurs eux-mêmes, dans le style ou l'arrangement et non pas au niveau des principes" (*loc. cit.*, note 105, p. 666). Given that articles 1142 C.N. states that "Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur"; and given that the source of this article stems from Pothier who affirmed the medieval glossators position that only obligations to give could give rise to specific performance, it seems self-evident that the first sentence of article 1065 C.C.L.C. was intended to articulate the primacy of damages. Subsidiarily, it provides that specific performance "may" be demanded by the creditor "in cases which admit of it". I note with interest that this is the interpretation which Baudouin himself appears to have formerly advocated. In "L'Exécution spécifique des contrats en droit québécois", (1958-59) 5 *McGill L.J.* 108, J.-L. BAUDOUIN states at p. 110 : "L'expression 'dans les cas qui le permettent' se rapporte uniquement à l'exécution spécifique et semble limiter son champ d'application et la subordonner indirectement aux dommages-intérêts possibles dans tous les cas" (emphasis added).

117. M. TANCELIN, *op. cit.*, note 4, n° 708, p. 422, states that : "L'article 1065 C.c. est manifestement inspiré par la tradition civiliste puisque l'exécution de l'obligation même est mise sur un pied d'égalité avec l'exécution par équivalent, à la seule restriction évidente des cas qui le permettent". For the reasons already outlined in note 116, Tancelin's interpretation does violence to the natural reading of article 1065 of the Code. Furthermore, his statement assumes that specific performance is consistent with the civilian tradition. Yet it seems that such an assumption has as its starting point the canonical doctrine of *pacta sunt servanda*, an idea which classical Roman law would hardly be comfortable with.

What, then, is meant by the phrase “in cases which admit of it”? I suggest that it is simply a shorthand form for the *nemo praecise* rule. Like in France, doctrinal writers in Québec have traditionally defined the rule rigorously. Mignault and Faribault define the basic rule as being one which denies the creditor recourse to execution in kind when the obligation is one that can only be performed by the debtor himself,<sup>118</sup> and when physical violence against the debtor would be required to compel him to act against his will.<sup>119</sup> Following Pothier, some authors have stated the rule even more categorically, denying all forms of compulsion on the debtor to induce him to perform. This “classical” position has been articulated in these terms :

Toutes les obligations de faire ou de ne pas faire quelque chose ne donnent point au créancier le droit de contraindre le débiteur précisément à faire ce qu’il s’est obligé de faire mais elles se résolvent en dommages-intérêts si le débiteur ne satisfait pas à son obligation.<sup>120</sup>

If, on the other hand, an obligation to do or not to do can be performed by a third party, then the creditor is entitled to seek specific performance.<sup>121</sup>

As articles 1065 and 1066 illustrate, the relationship between damages and specific performance is a delicate one. On the one hand, specific performance is a permissible remedy for a creditor to pursue; yet on the other hand, specific performance which would in any way compel the debtor himself to execute his promise is seen as an impermissible recourse. This tension has its root in Roman law itself, which came to recognize specific performance only after canonical doctrines, with respect to the sanctity of the spoken word, left their mark on the law

118. Courts have been particularly hostile to personal service contracts. The leading case in this area is a Supreme Court decision : *Dupré Quarries Ltd. v. Dupré*, [1934] S.C.R. 528. Rinfret J., speaking *per curiam* at p. 531, states :

Mais le contrat de louage de service, à cause du caractère personnel des obligations qu’il comporte, ne se prête pas à une condamnation à l’exécution spécifique. [...] L’appelante ne pouvait être physiquement contrainte à garder l’intimé à son service; pas plus que l’intimé ne pouvait être contraint à rester au service de l’appelante. Il y a là une question de volonté et de liberté humaine contre lesquelles l’exécution directe est impuissante”.

This holding has been consistently followed by Québec courts. See, for example *Lajoie v. Canup*, [1954] C.S. 341.

119. P.-B. MIGNAULT, *Le Droit civil canadien*, t. 5, Montréal, Librairie de droit et de jurisprudence, 1901, p. 406, describes the two criteria in these terms :

— Elle [l’exécution forcée de l’obligation] ne l’est pas [possible] lorsque le fait promis est de telle nature qu’il ne peut être exécuté utilement pour le créancier, qu’autant que c’est le débiteur qui l’accomplit en personne. [...]

— Il en est de même lorsque l’exécution effective de l’obligation n’est possible qu’à la condition d’exercer des violences physiques sur la personne du débiteur.

The jurisprudence of the period supports this position. With respect to obligations to do, see *Lombard v. Varennes*, (1921) 32 B.R. 164, where Lamothe C.J. states at p. 166 : “Une cour de justice ne peut, par injonction, forcer un défendeur à faire un acte quelconque. Sous le droit actuel, encore plus que sous l’ancien droit, le *cogere ad factum* répugne. L’exécution d’une ordonnance de ce genre ne peut se faire qu’au moyen de violence physique sur la personne”. *Pitre v. Association athlétique d’amateurs nationale*, (1910) 20 B.R. 41 applies the same principle to an obligation not to do.

120. H. BEAUBIEN, *Traité sur les Lois civiles du Bas-Canada*, vol. 2, Montréal, 1832, p. 193.

121. See, for example, *Boudreault v. Cie hydraulique de St-Felicien*, (1923) 36 B.R. 455.



of the late Empire. Unlike Christian courts which went as far as specifically enforcing a promise to marry through the sanction of excommunication, civil courts drew the line at promises to give. The *nemo praecise* principle denied a civil court *all* means of compulsion or persuasion which had the effect of acting on the debtor's will, whether directly through actual physical compulsion, or indirectly through money penalties similar to those represented by the modern French doctrine of *astreinte*. Seen in this light, the elements at work in articles 1065-66 of the Civil Code can be better understood. While allowing a creditor, through the *imperium* of the court to force a debtor to specifically perform, the Code denies all forms of compulsion to achieve this end. But there is an apparent contradiction at work here, for how can a court compel a debtor to perform an obligation to do or not to do when it is in effect denied all requisite means of coercion?

This tension manifests itself in the jurisprudence of the period. While it is undoubtedly true that it was exacerbated by the common law criteria which courts refused to dissociate from the Québec injunction, this impediment is only indicative of the greater dilemma which plagues article 1065: how to balance two incompatible remedies. Paradoxically enough, it seems that by carrying into Québec private law the dogmatic preference which the common law showed for damages,<sup>122</sup> Québec courts were unconsciously affirming the primacy of money damages so characteristic of Roman law. Could it be that the Québec injunction is more "civilian" than modern writers have cared to admit?

But Québec courts, like their French counterparts, soon began to show more of a willingness to grant specific performance. To enforce their decisions, they inevitably resorted to the injunction. The "in cases which admit of it" portion of article 1065 began to play a greater role in the mind of Québec jurists. A slow but gradual rediscovery of the canonical *pacta sunt servanda* doctrine which had received limited recognition in the 1867 codification of article 1065 worked itself to the forefront. Strong evidence of this can be found in a line of jurisprudence beginning in 1921 and continuing right up to the coming-into-force of the new

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122. I cite three decisions which squarely asserted the exceptional nature of specific performance in Québec law. *Town of Grand'Mère v. Hydraulique de Grand'Mère*, (1908) 17 B.R. 83. Cross J. writes at 93 (emphasis added): "In general, it is true, the failure to perform an obligation is resolved into a responsibility in damages. *The cases in which specific performance can be demanded are exceptions to the rule [...]*". *Central Railway Co. of Canada v. Wills*, (1913) 23 B.R. 126, confirmed by the Privy Council in (1915) 24 B.R. 102. *Per Gervais J.A.* at p. 151 (emphasis added): "Because, in our law, as we have had occasion to learn, and in contradistinction to the common law of England, there can be no such thing as 'specific performance' of the obligation to do or not to do. [...] *In this province, the rule is that non-execution of obligations resolves itself into damages*, in pursuance of article 1065 c.c.". Even as late as 1957, the Court of Appeal, *per* Casey J., Bissonnette and Owen JJ. concurring, suggests in no unclear terms that specific performance is available to a creditor only if damages will not do:

Petitioner submits that when there is a breach of an obligation, specific performance is the rule and damages the exception; also that an injunction should be refused only when the recourse in damages is equally as beneficial as would be specific performance.

I cannot accept these propositions. So far as the first is concerned, I am satisfied that the converse is a more accurate statement of our law; with respect to the second, I think it more correct to say that *an injunction should not be granted unless it be shown that the loss or injury complained of cannot be made good by pecuniary condemnation* (emphasis added) (*Guaranteed Pure Milk Co. v. Patry*, [1957] B.R. 54, p. 56).

*Code of Civil Procedure*. First, Martin J.'s strong dissent in *Lombard v. Varennes* attempted to limit the restricting influence of the *nemo praecise* rule on the injunction. His acerbic and uncompromising tone is worth noting :

Much is said about restraining personal liberty and the hallowed character of the subject against whose sacred body no acts of physical force should be used to execute a judgment. [...] I do not believe it is the law of this country that a man can with impunity do what he solemnly obliged himself not to do and when the party whose rights are so unjustly affected by such wrongful act of the other contracting party being persisted in, applies to the proper Court for an order enjoining the defendant from continuing to do what he bound himself not to do, I do not believe it lies in the mouth of such defendant to say the Court cannot give any such order because its enforcement and execution would do him violence and interfere with the sanctity of his personal liberty.<sup>123</sup>

In the same year, the Supreme Court affirmed a decision of the Québec Court of King's Bench granting a permanent prohibitive injunction ordering a pulp mill to stop emitting nauseous odours and fumes into the environment.<sup>124</sup> Although Duff J. has been criticized for refusing to dissociate the Québec injunction from its common law equivalent,<sup>125</sup> the Supreme Court decision is significant in that it accepts the injunction as an appropriate mechanism through which a court can enforce its decisions. Québec courts interpreted this to mean that a prohibitive injunction could be issued against a debtor of an obligation not to do without violating the *nemo praecise* principle. The Court of King's Bench developed this argument in *Québec County Railway Co. v. Montcalm Land Co.*,<sup>126</sup> where it held that a judgment condemning a debtor to do something is not susceptible of execution "sans autoriser le créancier à suppléer au défaut de la partie condamnée",<sup>127</sup> but observing in *obiter* that :

Le cas serait différent s'il s'agissait, comme dans la cause de *Brown v. Paper Co.*, d'une obligation de ne pas faire. Quand l'obligation est de ne pas faire, si la partie condamnée fait ce que le tribunal lui a défendu de faire, elle peut être punie pour sa désobéissance ou, si l'on veut, pour son mépris de l'injonction du tribunal. On peut alors faire prononcer contre elle la contrainte par corps [...] Mais quand l'obligation en est une de faire, il ne peut être question de contrainte par corps, ce qui serait l'emprisonnement pour dette, sans compter que la contrainte par corps ne procurerait par l'exécution de l'obligation même. *Nemo potest praecise cogi ad factum*.<sup>128</sup>

Even though such reasoning seems rather artificial, it was followed by Québec courts which were by now more open to suggestions that a debtor should be held

123. (1921) 32 B.R. 165, pp. 169-70. Martin J.'s comments are reserved to obligations not to do because, as it should be recalled, the 1897 *Code of Civil Procedure* only authorized a court to grant prohibitive injunctions.

124. *Canada Paper Co. v. Brown*, (1922) 63 S.C.R. 243; aff'd (1921) 31 B.R. 507.

125. *Id.*, at p. 252, for example, Duff J. implies that an injunction is available to a creditor only when damages are an insufficient remedy : "Where the injury to the plaintiff's legal rights is small and is capable of being estimated in money, and can be adequately compensated by a money payment [...] the court may find and properly find in these circumstances a reason for declining to interfere by exercising its powers *in personam*".

126. (1928) 46 B.R. 262.

127. *Id.*, as *per* the headnote.

128. *Id.*, pp. 266-67 (TELLIER J.).

to his word and not simply liable in damages.<sup>129</sup> Professor Massé has depicted the mood of the day in a fitting sentence : “[L’]injonction émise contre un débiteur afin de le contraindre à exécuter son obligation de ne pas faire ne contrarie pas le principe de la liberté individuelle”.<sup>130</sup>

### C. THE THIRD STAGE : 1966 TO THE PRESENT DAY

Prior to the enactment of the new *Code of Civil Procedure*, there was lively debate as to whether the mandatory injunction existed in Québec law.<sup>131</sup> All such concerns became a thing of the past, though, when the current Code came into force in September of 1966. Article 751 offers the following definition of the injunction :

An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.

It was now possible, at least procedurally, for a court to resort to an injunction to enforce both obligations to do and not to do. But the courts have for the most part resisted this temptation.<sup>132</sup> In fact, in some instances they have even attempted to renounce their earlier position, claiming that an injunction cannot be used to enforce an obligation not to do.<sup>133</sup>

The breakthrough, however, came in the 1980 Québec Court of Appeal decision in *Crawford v. Fitch*.<sup>134</sup> The Court granted the plaintiff’s demand for a permanent mandatory injunction as a means to protect a proprietary right of way. More significantly, though, the Court of Appeal, after consulting the Commissioners’ Report,<sup>135</sup> concluded that the mandatory injunction in article 751

129. See, for instance, *Sternlieb v. Cain*, [1962] B.R. 440 where the court held *per Tremblay C.J.* that : “L’obligation de l’appelant est une obligation de ne pas faire. Les intimés demandent l’exécution de l’obligation même. C’est un cas qui le permet, puisque nous pouvons ordonner à un justiciable de ne pas poser un acte”.

130. G. MASSÉ, *loc. cit.*, note 105, p. 679.

131. See C.-A. SHEPPARD, “Do Mandatory Injunctions Exist in Québec Law?”, (1963) 9 *McGill L.J.* 41; R. THIBAUDEAU, “L’injonction mandatoire”, (1963) 23 *R. du B.* 460; and P. CUTLER, “Mandatory Injunctions in the Province of Québec”, (1963) 23 *R. du B.* 471.

132. See *Tremblay v. Université de Sherbrooke*, [1973] C.S. 999, where the court reiterated a strict *nemo praecise* rule forbidding all compulsion against the debtor of an obligation to do. I cite the operative part of the headnote : “Un débiteur ne saurait être condamné à l’exécution effective d’une obligation de faire qu’à condition que le fait promis puisse être utilement exécuté par une autre personne que le débiteur[.]”

133. See *Teinturier Québec Inc. v. Lauzon*, [1967] B.R. 41. This was a 3 to 2 decision, however — Choquette and Salvais JJ. dissenting sharply. Furthermore, the case represents an older era of jurisprudence. There would appear to be little, or I should say much less, hesitation today to grant a prohibitive injunction in order to compel a debtor to perform an obligation not to do.

134. [1980] C.A. 583.

135. The Commissioners’ observations with respect to article 751 of the 1965 C.C.P. make it clear that the mandatory injunction is a procedure which is to serve the substantive law concerning the specific enforcement of obligations to do as governed by article 1065 C.C.L.C. See *Commissioners’ Report, Code of Civil Procedure*, article 751 (to be found in Bill 20 (1st reading), 4th Sess., 27th Leg. Qué., 1965, at 154a), where the following comments are made concerning mandatory injunctions :

C.C.P. was not an exceptional recourse. As Turgeon J. put it, “[C]e [l’injonction mandatoire] n’est pas un recours de caractère exceptionnel. C’est un recours mis à la disposition des justiciables pour faire respecter un droit”.<sup>136</sup> The importance of this decision is twofold. First, it directly contradicts the common law notion that an injunction is an exceptional remedy, to be granted only when damages are an insufficient means of compensating a party. In other words, the Court of Appeal appears to have paved the road for distinguishing between procedure and substantive law. And by classifying the injunction as belonging to the former category, the Court indicates that it is to serve the ends of substantive law and not vice versa. In this way, the injunctive procedure in Québec is to dissociate itself from the restrictive criteria which have limited its application out of a concern for preserving substantive common law principles pertaining to the nature of remedial recourse.<sup>137</sup>

The second thing worth noting is that *Crawford v. Fitch*, by asserting that an injunction is simply a means which a party can employ “pour faire respecter un droit”, implicitly sanctions, and in not so many words actually encourages a change of judicial attitude with respect to specifically enforcing obligations to do. The hint has been gradually seized by Superior Court judges. In *Propriétés Cité Concordia v. Banque Royale du Canada*,<sup>138</sup> for instance, Hurtubise J. granted the

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The first question concerned the definition of injunctions : should the *Code of Civil Procedure* recognize the so-called ‘mandatory injunction’ which commands to do something and provides for the cases where it may be ordered? Because this question is intimately bound up with that of the sanction for obligations to do, which derives from substantive law, it seems that it is not up to the Code of Procedure to cover this completely. [...] Thus the so-called mandatory injunction will undoubtedly be possible, *but it will be left to the prudence and wisdom of the judges to appreciate each case, taking into account of course the rules of substantive law which must apply* (emphasis added).

This approach endeavours to dissociate the mandatory injunction from the restrictive common law rules which would otherwise plague its existence. The question, therefore, now becomes one of determining the substantive law position on the matter. But this task is hardly an easy one given the conflicting principles which article 1065 C.C.L.C. codifies.

136. *Crawford v. Fitch*, *supra*, note 134, p. 585.

137. It should be noted that to this extent, *Crawford v. Fitch* challenges the Supreme Court’s decision in *Trudel v. Clairol of Canada Inc.*, [1975] 2 S.C.R. 236, where the Court held at p. 246, *per* Pigeon J., that

Article 752 of the *Code of Civil Procedure* states that one may demand an injunction by action. The circumstances in which one may do so are not specified. Consequently it is a matter of a discretionary power to be exercised having in mind the principles established in common law jurisdictions, since this is a remedy taken from them.

But given the present state of Québec law, I suggest that it is highly unlikely that the Supreme Court would reverse the position advocated by the Court of Appeal if the opportunity arose. To do so would not only overturn *Crawford v. Fitch*, but also a series of subsequent appellate cases which have affirmed its reasoning. See *Royal Bank of Canada v. Propriétés Cité Concordia Ltée*, [1983] R.D.J. 524 (C.A. Qué.); and *Société Coinamatic v. Armstrong*, [1984] C.A. 23.

138. [1981] C.S. 812; *aff’d* by the Court of Appeal in [1983] R.D.J. 524. Although Montgomery J.A.’s ambivalent remark at 528 that there is “no express rule of substantive law that applies in the present case” may be seen as reverting back to an older jurisprudence which relies on substantive common law rules to limit the availability of an injunction with respect to obligations to do, such an interpretation is expressly ruled out by the next sentence, where Montgomery J.A. adds : “In my opinion, they [the principles commonly observed in England] are *merely rules of prudence*, at least in this province” (emphasis added).

plaintiff's request for a mandatory interlocutory injunction, thereby forcing the Royal Bank to continue providing services in accordance with its contract. His reasoning is revealing :

Il nous faut donc nous tourner vers le droit substantif pour vérifier si oui ou non ce recours est ouvert à la requérante. En réalité, cet article 751 C.P.[C.] nous renvoie aux principes généraux des articles 1065 et 1066 du Code civil [...] [L]es principes du droit substantif, à notre avis, ne s'opposent pas à l'exécution spécifique en nature d'une obligation de faire. [...] Notons encore que si l'injonction tire son origine du *common law* dont on peut s'inspirer, il ne faut pas confondre la procédure et le fond ni l'exécution spécifique en nature de l'article 1065 C.C. avec le *specific performance* du droit anglais.<sup>139</sup>

This holding expressly rejects Benoît J.'s earlier decision to the effect that a mandatory injunction was inappropriate under these circumstances because "[l]es tribunaux ne peuvent s'immiscer dans de tels services personnels".<sup>140</sup> Given that Hurtubise J.'s holding was affirmed by the Court of Appeal,<sup>141</sup> it can be safely said that Benoît J.'s reasoning belongs to a jurisprudence of the past.<sup>142</sup>

In the domain of permanent mandatory injunctions, the jurisprudence has adopted a similar attitude, showing a greater willingness to use the injunctive procedure as a means of specifically enforcing obligations to do. One of the clearest enunciations of this new judicial attitude was offered by the Superior Court in *Cie de Construction Belcourt v. Golden Griddle Pancake House Ltd.*,<sup>143</sup> where the defendant was ordered to reopen a restaurant which it had ceased to operate due to insufficient revenue. In issuing the injunction, Steinberg J. construed the phrase "in cases which admit of it" in article 1065 C.C.L.C. as obliging "the presiding magistrate to make this second and subjective determination having regard to the nature of the act, the personality and capacity of the debtor and the enforceability of the proposed order".<sup>144</sup>

139. *Id.*, pp. 815-816 (HURTUBISE J.C.S.).

140. *Propriétés Cité Concordia Ltée v. Banque Royale du Canada*, [1980] C.S. 118, p. 128 (BENOÎT J.).

141. See *supra*, note 138.

142. The more restrictive approach to granting interlocutory injunctions in a contractual context based on traditional common law criteria can be witnessed in *Côté v. Fortin*, [1979] R.P. 218 (C.S.). There, Harvey J. at p. 222 sets down the following guideline :

Une jurisprudence constante [...] démontre que l'injonction interlocutoire est un remède exceptionnel qui ne doit être accordé que s'il n'y a pas d'autre recours approprié. Dès qu'une action en dommages-intérêts est possible [...] l'injonction interlocutoire doit être rejetée.

143. *Cie Construction Belcourt v. Golden Griddle Pancake House Ltd.*, [1988] R.J.Q. 716 (S.C.) [hereinafter *Belcourt*]. There are similar decisions which predate this one. See *Loews Hotel Montreal Inc. v. Concordia City Properties Ltd.*, S.C. Mtl., n° 500-05-012189-799, 2 August 1976; *LaSalle Automobile Inc. v. Chrysler Canada Ltée*, C.A. Mtl., n° 500-09-000336-72, 23 February 1974. Some decisions, however, while showing a greater willingness to grant specific performance and enforce it through an injunction, have nonetheless been hesitant in completely divorcing the injunctive procedure from its Equitable roots. In *Brasserie Labatt Ltée v. Ville de Montréal*, [1987] R.J.Q. 1141 (S.C.), for example, Lévesque J. found it appropriate to consider whether the party petitioning for a permanent injunction had come to court with "clean hands".

144. *Belcourt*, *id.*, p. 725. It is interesting to observe the degree of acceptance which the injunction has been accorded by Québec courts. In one case, the Superior Court went as far as suggesting that in some circumstances an injunction might be the *only* appropriate remedy avail-

But despite the gradual trend in the jurisprudence to perceive the injunction as an acceptable means of coercing performance by a debtor of a contractual obligation to do or not to do, one pivotal question has remained unanswered : Does any form of coercion not fly in the face of the *nemo praecise* principle which article 1065 C.C.L.C. codifies? The case law does not address this issue. It simply assumes that the injunction is an acceptable way of enforcing a creditor's rights, leaving it to the "prudence and wisdom" of the presiding judge to determine whether the facts of the case at hand will permit such recourse. But how is a prohibitive or mandatory injunction, whether permanent or interlocutory, consistent with the maxim *Nemo praecise potest cogi ad factum*? Writing in 1867, Henry Beaubien maintained that :

L'effet de l'obligation qu'une personne contracte de faire ou ne pas faire quelque chose se réduit en dommages-intérêts faute d'exécution de l'obligation après qu'elle a été mise en demeure de le faire. Le juge sur cette demande prescrit un certain temps dans lequel le débiteur sera tenu de faire ce qu'il a promis, et faute par lui de le faire dans le temps il le condamne aux dépens, dommages-intérêts.<sup>145</sup>

Read in this way, article 1065 C.C.L.C. is incompatible with all forms of compulsion against the debtor. If the debtor's participation is in any way necessary to fulfil the obligation, then a court cannot compel him to do so. To argue that compulsion is inappropriate only in *intuitu personae* contracts just refines the problem. It loses sight of the fact that the *nemo praecise* rule was intended to reinforce the primacy of damages, a remedy which is more compatible with the civil law principles inherited from Rome than the consensualism grafted on to the law of obligations as a consequence of canonical influence.

What, then, is the solution to this impasse? It seems to me that an outright disavowal of the non-compulsion principle would bestow more coherence on the law. In this way, the notion of specific performance could be squarely placed in a position of superiority *vis-à-vis* damages. The only limiting factor which a court need take cognizance of is the extent to which the debtor is able to effectively perform his obligation in kind. The standard should be one geared to take account of practical constraints and obstacles. In short, efficacious performance should be a court's measuring stick, not blanket prohibitions based on the sanctity of the debtor's person. If consensualism is the source of contractual obligations in Québec, then the doctrine of *pacta sunt servanda* dictates that a debtor perform his obligation without flagging individual liberty as a mitigating factor.

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able to a creditor : *Restaurant Jasmo Inc. v. Drouin*, [1986] R.J.Q. 435. This case is symptomatic of the diminished importance which courts in Québec have conferred on the *nemo praecise* rule. Nevertheless, both doctrine and jurisprudence have been less bold than their French counterparts (see above, section V.D.1), and remain unwilling to actually force an *individual* to specifically perform his obligation. The line has been drawn at corporate bodies which have no personal identity. Steinberg J. (*Belcourt, supra*) offers the orthodox explanation for this reticence : "The abhorrence of the coercion that may be required to compel the athlete to compete, or the musician to perform and the operation of the small one man business should not be extended to encompass an order to compel the performance of obligations by moral persons who by their magnitude transcend the will of one person".

145. *Traité sur les Lois civiles du Bas-Canada, op. cit.*, note 120, p. 192 (emphasis added).

#### D. CHANGE IN THE HORIZON : THE NEW *CIVIL CODE OF QUÉBEC*<sup>146</sup>

The drafters of the *Civil Code of Québec* appear to have recognized the uneasy tension between damages and specific performance in the *Civil Code of Lower of Canada*, and a clear attempt has been made to realign the relationship between the two. To begin with, the new Code places a stronger emphasis on the idea of consensualism as the fundamental characteristic of contractual obligations. Article 1385 states that “A contract is formed by the *sole exchange of consents* between parties having the capacity to contract [...]”<sup>147</sup> Moreover, article 1590 alludes to the emergence of a new normative order in the law — one which gives a creditor “the right to demand that the obligation be performed in full, properly and without delay”. In the realm of contracts, this means ensuring that that which was promised be performed: *pacta sunt servanda*. This is in stark contrast to article 1065 C.C.L.C., which declares that “Every obligation renders the debtor liable in damages in case of breach of it on his part”. Hence, despite the use of traditional terms in article 1601 of the *Civil Code of Québec*, where we are told that “A creditor may, *in cases which admit of it*, demand that the debtor be forced to make specific performance of the obligation”,<sup>148</sup> article 1590 makes it clear that the expression “in cases which admit of it” does not amount to a wholesale endorsement of the *nemo praecise* principle. Consequently, the pre-eminence of damages in the law of contractual obligations is not embraced by this Code. Instead, an effort is made to assert the primacy of execution in kind.

Where the restriction articulated in article 1601 C.C.Q. operates so as to deny a creditor specific performance from the debtor himself, then recourse may be had to article 1602, whereby the “creditor may [without seeking a court’s prior permission<sup>149</sup>] perform the obligation or cause it to be performed at the expense of the debtor”. This provision is to be contrasted with the second part of article 1065 C.C.L.C., which provides that the creditor must seek court *authorization* in order to execute an obligation at the debtor’s expense. More importantly, however, articles 1601 and 1602 are situated within the *pacta sunt servanda* doctrine enunciated by article 1590 of the new Code. In light of this fact, the phrase “in cases which admit of it” in article 1601 of the *Civil Code of Québec*, although inescapably coloured by the *nemo praecise* restriction, cannot be read as prohibiting all forms of compulsion on the debtor of an obligation to do or not to do<sup>150</sup> in deference to performance by equivalence. Therefore, article 1601’s scope of

146. The relevant provisions in the *Civil Code of Québec* are articles 1385, 1590, 1601-03, & 1607.

147. The emphasis is mine. Contrast this with article 984 C.C.L.C., where consent is simply listed as one of four necessary elements of a valid contract.

148. Article 1601 *Civil Code of Québec*. The emphasis is mine.

149. The only contingency expressed in article 1602(2) *Civil Code of Québec* is that requiring the creditor — except where the defaulting party is in default by operation of law or by the terms of the contract itself — to notify the debtor of his wish to avail himself of such recourse in the judicial or extrajudicial demand putting him in default.

150. I take article 1601 *Civil Code of Québec* to apply to both obligations to do and not to do even though it is silent in this regard, because to suggest the contrary would mean that obligations not to do are only caught by article 1603. If this were the case, the result would be somewhat incongruous since article 1603 only covers those cases where a tangible mass has been erected by the debtor, in violation of an obligation not to do, and the creditor seeks authorization to destroy or remove the thing at the debtor’s expense.

application should, as a matter of interpretation, be broader than its article 1065 counterpart in the *Civil Code of Lower Canada*. This is brought to bear by the fact that article 1601 itself speaks of the debtor's being "forced" to make specific performance. Furthermore, damages are not expressly addressed until article 1607, where the Code gives a creditor a claim in damages for material injury resulting from the debtor's default. Unlike article 1065 C.C.L.C., though, article 1607 C.C.Q. merely states that a creditor is "entitled to damages", not that his principal claim is one for damages. It would appear from this that the legislator has made a conscious choice to diminish the scope of damages.

If a court is in tune with the spirit of the new Code, it will redirect its attention from the issue of impermissible compulsion to that of how to secure effective performance of that which was promised by the debtor in the first place. In so redefining the problem, it will soon come to realize that the injunction, far from being incompatible in a civilian jurisdiction, is the most potent tool at its disposal for implementing the *pacta sunt servanda* doctrine sanctioned by the *Civil Code of Québec*. The result is bound to be a more felicitous one than that achieved under the old law.

### CONCLUSION

The first part of this paper attempted to show that at Roman law the primary remedy for breach of a contractual obligation was damages. It was only through the influence of canon law and ecclesiastical courts that the civil law became acquainted with the idea of specific performance. As a result of this cross-pollination, two competing remedies have found their way into the French *Code civil* and the *Civil Code of Lower Canada*. On the one hand, the primacy of damages is affirmed through the medieval adage *Nemo praecise potest cogi ad factum* which prohibits all forms of compulsion on the debtor in order to make him perform. Yet on the other hand, specific performance is sanctioned by the *pacta sunt servanda* doctrine inherited from canonical sources.<sup>151</sup> The French, through the mechanism of *astreinte*, have mediated between these two conflicting remedies by allowing a court to specifically enforce obligations to do or not to do via punitive money penalties designed to compel the debtor to perform. Although in most instances the *astreinte* has been effective, I submit that it is conceptually incoherent<sup>152</sup> and ultimately ineffective because it cannot act upon the person of the debtor.

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151. Profesor Prujiner has described the tension in French law in terms which are equally applicable to Québec :

À l'époque l'existence même d'un droit à l'exécution en nature était contestée par l'adage *Nemo praecise potest cogi ad factum* dont l'influence en France est attestée par son intégration au *Code civil* français. *Pacta sunt servanda* continua cependant à y inspirer les juges et les auteurs qui rétablirent progressivement, au XIX<sup>e</sup> siècle, la primauté de l'exécution en nature" (A. PRUJINER, "L'injonction, voie d'exécution forcée des obligations de faire", (1989) 20 *R.G.D.* 51, p. 53).

152. I wish to reiterate my disagreement with statements such as the following by Massé : "Que la somme d'argent à déboursier soit strictement une indemnité correspondant au préjudice causé, ou encore une amende à caractère pénal, cela n'affecte pas la conformité du mécanisme avec le principe de la liberté individuelle, mais uniquement le degré d'efficacité de la contrainte" (*loc. cit.*, note 105, p. 687). Compulsion, as I have argued, whether direct or indirect, offends the principle of individual liberty. It is compulsion which offends liberty, not the means through which compulsion is applied.



In Québec, the jurisprudence of the 1980s has undoubtedly relativized the idea that no one can be forced to act against his will in order to specifically perform his promise. But there has been no clear break with the *nemo praecise* rule, and this has made it extremely difficult for Québec courts to assert the primacy of specific performance. The text of article 1065 C.C.L.C. has been the chief source of the problem. It is only with the clearer formulation of principle found in the new *Civil Code of Québec* that we can expect many of the interpretive problems which have heretofore prevented the evolution of a jurisprudence *constante* to be resolved.

As far as the "English" nature of the injunction is concerned, it is true that it has complicated matters by importing "foreign" rules of law into the general theory of obligations. But if the reasoning of *Crawford v. Fitch*<sup>153</sup> is faithfully applied, then this problem will eventually disappear. For those, however, who still find the injunction offensive to civilian sensibilities militating against physical compulsion,<sup>154</sup> I offer two consoling remarks. First, the contempt of court proceeding envisioned by the *Code of Civil Procedure* allows a judge to subject the breaching party to either a fine or imprisonment,<sup>155</sup> the objective being to have the court order respected, not to punish the debtor *per se*. And secondly, the principle applied in contempt proceedings is a *strictissimi juris* one based on the criminal law standard requiring proof of *mens rea* beyond a reasonable doubt.<sup>156</sup> Hence, the debtor's liberty is adequately protected while at the same time having regard for the creditor's rights.

In the final analysis, then, one cannot help but conclude that the injunction is a more effective means of securing specific performance than the French *astreinte*.

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153. *Supra*, note 134.

154. Physical compulsion is presently possible in Québec where it is specifically sanctioned by law. For its application in the field of labour law, see *Alvetta-Comeau v. Association des professeurs de Lignery*, S.C. Mtl., n° 500-05-003494-836, 10 June 1987, as summarized in J.E. 87-807. It has also been applied with respect to articles 83 and 83.2 of the *Charte des droits et libertés de la personne*. See *Commission des droits de la personne du Québec v. Société d'électrolyse et de chimie Alcan*, [1987] R.L. 277, where the Québec Court of Appeal issued a permanent mandatory injunction ordering that a plaintiff who had lost his employment be reinstated. I note here with interest that even English law, despite its fixation with damages, has found it appropriate to grant an injunction in order to specifically enforce an *intuitu personae* contractual obligation. See the two famous cases of *Lumley v. Wagner*, (1852) 42 All E.R. 687 (Ch. D.) and *Warner Brothers Pictures v. Nelson*, [1937] K.B. 209. Compare *Lombard v. Varennes*, *supra*, note 119 which denied similar recourse in Québec.

155. Article 761 C.C.P. states that :

Any person named or described in an order of injunction, who infringes or refuses to obey it, and any person not described therein who knowingly contravenes it, is guilty of contempt of court and may be condemned to a *fine* not exceeding fifty thousand dollars, *with or without imprisonment* for a period up to one year, and without prejudice to recover damages. Such penalties may be repeatedly inflicted until the contravening party obeys the injunction (emphasis added). [...]

156. See *Imperial Oil v. Tanguay*, [1971] C.A. 109.