

SPECIFIC PERFORMANCE AT COMMON LAW

HISTORY AND PRESENT NATURE OF THE ACTION FOR MONEY DUE UPON SIMPLE CONTRACT

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A large volume of the daily business of the courts consists of the enforcement of contractual money claims. Despite this, there seems to be some doubt about the exact legal nature of the action for money due under contract. This is reflected by specialist treatises on contractual remedies; both *Fry on Specific Performance*¹ and *Mayne and McGregor on Damages*² omit actions for money payable by the terms of a contract, the former on the ground that they are actions for damages, the latter on the ground that they are actions for specific relief.³ This latter point of view is supported by Salmond and Williams.⁴ Other contract textbooks render little assistance: damages for breach of contract and specific performance in equity are the only remedies commonly dealt with, and no attempt is made to accommodate the action for money due upon a contract under either head. The present article will attempt to resolve this difficulty of characterization; it will, however, deal only with problems arising from the recovery of the principal sum. Problems concerning the recovery of additional sums of money as compensation for non-payment of the principal sum are excluded.⁵ *It is submitted that the action for money due under contract represents an instance of specific relief at common law.*

A number of attempts have been made to solve our problem by analytical means only. Corbin, for instance, made the following suggestion:

... in the case of a money debt . . . whether for money lent or goods sold or services rendered, a breach of the primary obligation will create an accompanying secondary obligation to pay money damages for the harm caused thereby. Suppose the case of one who is indebted in the sum of \$100 for

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¹ (6th ed., 1921) 7.

² (12th ed., 1961) 2 (1).

³ Mayne and McGregor exclude actions for the enforcement of debts on the express ground that they are not actions for damages—*ibid.* The implication surely must be that they regard such actions as aimed at obtaining a form of specific relief.

⁴ *Salmond and Williams on Contracts* (2nd ed., 1945) 577.

⁵ The simple if unsatisfactory rule of the Common Law is that no such damages can be recovered under any circumstances: *The London, Chatham and Dover Railway Company v. The South Eastern Railway Company* [1893] A.C. 429; but see *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.* [1952] 2 Q.B. 297, 306 *et seq.*

money lent, without interest. Upon failure to pay at maturity the creditor is entitled to compensation for the harm suffered [which] includes the unpaid principal sum of \$100 . . . the 'value' of the promised performance is identical in terms with that performance itself.⁶

Similarly, Fry stated:

No doubt the sum agreed to be paid will be the measure of damages, and the amount paid will be the same whether the contract be performed or broken. But in the former case the money is paid in performance of the contract: in the latter case it is paid as satisfaction for its non-performance.⁷

These suggestions could be countered by pointing out that the mere fact of lateness does not turn performance into compensation, whether money or something else be owing. Belated performance is still performance, not compensation for failure to perform. If the problem were one of analytical jurisprudence only, little more would need to be said. However, a purely analytical view is only of limited usefulness and can be misleading if its function is misconceived. As Sir Frederick Pollock reminded us,⁸ the existing law is ascertained by historical interpretation, not by some abstract analysis.

Corbin's strangely complex analysis is not without its historical parallel. The practice of pleading *indebitatus assumpsit* actions prior to the procedural reforms of the nineteenth century was based on similar ideas. Judging by the standard form in which such actions were pleaded, the plaintiff demanded, not the sum owing, but an equal amount of money as compensation for the damage resulting from the breach of the promise to pay. 'Common breach' in *indebitatus assumpsit* was alleged as follows:

. . . defendant . . . hath not as yet paid the . . . money; but the said defendant to pay him the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, To the damage of the said plaintiff of £— and therefore he brings this suit.⁹

The historical reasons for this form of pleading in *indebitatus assumpsit* lie in the sixteenth and early seventeenth centuries. *Debt sur contract* was the medieval remedy for the enforcement of debts based on informal contracts; by using this action the creditor was able to recover the debt *eo nomine* and *in numero*,¹⁰ i.e., he obtained 'what modern lawyers would regard as the enforcement of a contract'.¹¹ For a number of reasons *debt sur contract* was not regarded as a satisfactory remedy.¹² In an effort to find a more effective alternative,

⁶ Corbin on Contracts, §995.

⁷ *Op. cit.*, at 7.

⁸ 'A plea for historical interpretation' (1923) 39 *Law Quarterly Review* 163.

⁹ *Chitty on Pleading* (5th ed., 1831) vol. 2, 90 *et seq.*

¹⁰ *Chitty on Pleading*, vol. 1, 123.

¹¹ Pollock and Maitland, *History of English Law* (2nd ed., 1911) vol. 2, 211.

¹² The rules of pleading in Debt required that the plaintiff set out in great detail the transaction from which the debt had originated, and since the rules which governed pleading were extremely strict and technical, this requirement exposed the plaintiff to a substantial risk of losing an otherwise meritorious case because of trifling defects in his pleadings—*cf.* Fifoot, *History and Sources of the Common Law* (1949) at 368, n. 53. Furthermore, in debt on simple contract the defendant has an option to have the case determined by wager of law—*cf.* Thayer, 'The older modes of trial' in *Select Essays in Anglo-American Legal History*, vol. 2, 367, 386-392.

pleaders attempted to lay actions for the enforcement of contractual money claims in trespass on the case rather than in Debt. Case had only recently proved its contractual capabilities by becoming a remedy *in lieu* of Covenant in cases where Covenant was unavailing because of the absence of a sealed document.¹³ Could it not now be made a remedy *in lieu* of Debt, where Debt was unavailing because of the many obstacles placed in the plaintiff's way by the excessively technical rules prevailing in *debt sur contract*? Case *in lieu* of Debt was recognized in *Slade's Case*¹⁴ after a long struggle. Of the manifold obstacles which had to be overcome before this could happen, we shall deal with only one here: Case was akin to trespass *vi et armis* and oriented towards the recovery of damages. Recovery of the debt itself (specific relief) was felt to be outside the scope of Case (or '*assumpsit*' as the contractual version of Case had come to be called). The mood of common lawyers in the sixteenth century was such that the realization that something could not be done directly was felt to be a challenge to achieve the same thing indirectly. Evasion of legal principles by conceptual and logical versatility was the hallmark of the age and a substitute for the specific relief available in Debt was quickly found; a manipulation of the rules concerning the measure of damages in *assumpsit* produced a result which was indistinguishable in practical effect from specific relief:

It was resolved, that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt.¹⁵

Specific relief was not available in Case, but the plaintiff was allowed to recover the principal sum as damages for breach of contract. As Simpson pointed out,¹⁶ the rule just quoted and the accompanying principle, that recovery of a debt in *assumpsit* bars Debt and *vice versa*, had originated in the King's Bench and been followed there for some decades before they were accepted as good law by all the judges of England in *Slade's Case*.

The supposed distinction between recovering a debt as such and recovering an equal amount of money as damages for non-payment, was largely, if not entirely, fictitious. What the damages formula in *Slade's Case* in fact inaugurated was specific relief in *assumpsit*. It is hardly surprising that the formula was attacked as a subterfuge invented to undermine the strict requirements of *debt sur contract*:

. . . actions of the case are all *actiones, injuriarum et contra pacem* and it is not a debt certain, in reason of law, that can be recovered by those actions, but damage for the injury ensuing upon the breach of promise . . .¹⁷

¹³ Cf. Fifoot, *op. cit.*, 330 *et seq.*; Milsom, 'Not doing is no trespass' (1954) *Cambridge Law Journal* 105, 108f.

¹⁴ 4 Co. Rep. 91a; Yelv. 21; Moo. (K.B.) 433 and 667.

¹⁵ *Slade's Case* (1602) 4 Co. Rep. 91a, 94b. The same device was later introduced by statute to allow recovery of rent on demises which were not by deed—cf. 11 Geo. II, c. 19, s. XIV.

¹⁶ Simpson, 'The place of *Slade's Case* in the history of Contract' (1958) 74 *Law Quarterly Review* 381, 385.

¹⁷ *Edgcomb v. Dee* (1670) Vaughan 89, 101.

What is surprising is that there appears to be no evidence of this specific objection having been raised prior to 1670. The explanation may well be that the fictitious character of the distinction was less obvious in the sixteenth and early seventeenth centuries than it is now. Cases in which the debtor intended to wage his law were treated by the Chancery as cases in which the Common Law provided no remedy.¹⁸ This highlights the uselessness of debt on simple contract as a practical means of enforcing debts. In such a situation it made sense to say that non-payment of a debt caused the loss, in the sense of genuine damage, of the sum owing. Such a proposition would have been less justiable in a situation where an effective means of enforcing debts was readily available. Furthermore, throughout the Middle Ages the recovery of the debt itself was rarely the only, and often not even the main, object of a debt action. The consequential damages which the courts awarded in these actions were often substantial and sometimes exceeded the amount of the debt itself.¹⁹ This might well have made it easier to think of the whole action as one directed at the recovery of damages.

The damages formula in *Slade's Case* had been designed especially for the purpose of rendering debt enforcement in *assumpsit* possible. This undoubted fact led Ames to observe that *indebitatus assumpsit* merely meant the substitution of one remedy for another, not the creation of new substantive rights.²⁰ While the observation is broadly true, it must not be allowed to obscure the fact that the use of a damages formula for debt enforcement gave rise to a genuine legal problem: was this formula merely a procedural fiction from which no substantive consequences flowed, or was its significance substantive and did the law consistently subject the recovery of debts as damages to damages principles? *Taylor v. Foster*,²¹ decided by the King's Bench in 1601, might serve to illustrate the problem: The plaintiff declared in *assumpsit* that the defendant had promised to pay £100 to one J.S. to whom the plaintiff was indebted. The defendant failed to pay and the plaintiff recovered substantial damages for not having had his debt to J.S. discharged. Only a genuine damages action could justify such a result, since specific relief in such a situation would only warrant the enforcement of payment to J.S. *Taylor v. Foster*, though a perfect case for illustrating the problem, is not itself an indication that the damages formula in *Slades' Case* was to be taken literally in all circumstances. The case was to some extent anomalous since the contract provided for payment, not to the plaintiff, but to a third party.

¹⁸ A *Concise History of English Law* (5th ed., 1956) 633.

¹⁹ Pollock and Maitland, *op. cit.*, vol. 2, at 215, in particular n. 5.

²⁰ Ames, *Lectures on Legal History* (1913) 146.

²¹ (1601) Cro. Eliz. 807, pl. 8.

Indebitatus assumpsit is often described as the immediate ancestor of our modern contractual money claim.²² Assuming that the damages formula in that action was originally, and remained throughout, a matter of substance, does it follow that debt enforcement falls into the category 'damages' nowadays? It is occasionally suggested in high quarters that modern problems should be analysed and solved in deliberate disregard of their historical links with the forms of action.²³ Such suggestions are hard to reconcile with the admitted fact that the whole of the remedial system survived the abolition of the forms of action without substantial modifications; nor are they made more convincing by the gruesome metaphors in which they are sometimes couched.²⁴ If the damages formula had survived in the modern law as a matter of substance we would have to apply our complex system of rules on damages to debt enforcement wherever this system is logically extendable. The result of such extension might be illustrated by reference to the controversial decision in the House of Lords in *White and Carter (Councils) Ltd. v. McGregor*.²⁵ The sole question in that case was whether the plaintiffs, advertising agents, had earned the contractually agreed remuneration by displaying advertisements for the defendants even though the defendants had (wrongfully) repudiated the contract shortly after it was made. It was held (Lord Morton of Henryton and Lord Keith of Avonholm dissenting) that the plaintiffs were entitled to carry out the contract and claim the price. Lord Morton of Henryton based his dissenting judgment on the consideration that the plaintiffs were under a duty to mitigate their damage, and had failed to discharge it.²⁶ If an action for the enforcement of a contractual debt is a form of specific enforcement, it is rather difficult to see how it could be affected by considerations appertaining to mitigation of damage.²⁷ If, on the other hand, the damages formula is to be taken literally, mitigation principles become applicable, giving the judges something far more potent than the slender equitable control over debt enforcement which Lord Reid seemed willing to exercise only in exceptional cases.²⁸

It would be unhistorical to project our present elaborate system of principles concerning the recovery of damages into the earlier law. If this system had existed in the late sixteenth and the seventeenth century our problem would have been thrown into relief at that early

²² Cf. *Turner v. Bladin* (1951) 82 C.L.R. 463, at 474, per Williams, Fullagar and Kitto JJ.

²³ Cf. *Letang v. Cooper* [1964] 3 W.L.R. 573, at 577, per Lord Denning, M.R.

²⁴ 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred'.—*United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 29, per Lord Atkin.

²⁵ [1962] A.C. 413.

²⁶ *Ibid.*, at 433, 439.

²⁷ Cf. 'Anticipatory Breach' (1963) 2 *Adelaide Law Review* 103.

²⁸ [1962] A.C. 413, at 430 *et seq.*

time with great clarity. That period, however, seems to have known little more law on damages in *assumpsit* actions than the proposition that the *quantum* was to be ascertained in accordance with the unfettered discretion of the jury. The early cases leave little doubt that this one principle was applied to debt enforcement in *assumpsit*. Even though the amount owing might have been entirely clear, the plaintiff's case was still submitted to the jury so as to be turned by that body into a damages award. In most cases, it is true, the jury awarded the exact amount of the debt plus special damages, but it appears that they were not bound to do so.

For actions of Debt the rule had become established that the plaintiff must prove the exact sum to be owing which he had alleged as owing in his declaration. If it turned out at the trial that a lesser sum was due, then the plaintiff's action failed altogether; as Ames explained:

. . . he failed as effectually as if he had declared in detinue for the recovery of a horse and could prove only the detention of a cow.²⁹

Indebitatus assumpsit turned out to be more flexible. In *Vaux v. Mainwaring*³⁰ the inflexible rule attaching to the specific relief available in Debt was affirmed by Parker C.J.:

. . . if debt be brought on [the] contract, if it come out to be more or less, the plaintiff cannot recover, for it is a *praecipe quod reddat* so much money in particular.³¹

The Chief Justice proceeded to explain that the same rule would not prevail in *assumpsit*:

. . . *indebitatus assumpsit* is an action on the promise, and lies only because of the promise; if you bring *indebitatus assumpsit* for £10 for a horse sold, if it was sold for more or less, yet the plaintiff shall recover what it was sold for . . .³²

The report does not reveal whether the Chief Justice offered any explanation for the distinction. But if we can rely on Blackstone's testimony, the reason for the greater flexibility of *indebitatus assumpsit* was that in this action the plaintiff was not claiming the specific debt (as he did in Debt) but damages for its non-payment:

But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance on the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration.³³

Another rule which had become established in Debt was that a money claim due in instalments could not be recovered before the

²⁹ Ames, *op. cit.*, at 88.

³⁰ (1714) Fort. 197; see also *Styart v. Rowland* (1691) 1 Show. K.B. 215, pl. 147.

³¹ Fort. 198.

³² *Ibid.*

³³ *Blackstone's Commentaries*, bk. 3, 155.

due date of the last instalment.³⁴ The reason for this rule, so Ames considered,³⁵ was the conviction of medieval lawyers that the debt was an entire sum or single thing. This principle was felt to be unjust and in some cases unbearably so. It was pointed out in *Slade's Case* that a creditor entitled to annual instalments throughout his life would, on this basis, never become entitled to bring an action, no matter how gross the debtor's default.³⁶ *Assumpsit* with its damages formula again was more flexible. In *Taylor v. Foster*³⁷ the plaintiff declared in *assumpsit* that the defendant had promised to pay £50 on a specified day and another £50 at the end of the following year to one J.S., to whom the plaintiff was indebted. The consideration alleged in the declaration was that the plaintiff would marry the defendant's daughter and the action was brought for damages for non-payment of the first instalment of £50. The defendant moved that, as in Debt, the action did not lie until after the last day of payment. The Court of King's Bench rejected this objection:

. . . for true it is, that so it is in debt upon an obligation, where the entire debt is to be recovered; but not in this action, or in covenant, where damages only are to be recovered.³⁸

The rule in *Taylor v. Foster* would have been preferable to the rigid principle prevailing in Debt, had it not been for the contemporary conviction that one contract could never give rise to more than one cause of action. In *Peck v. Ambler*³⁹ Jones and Berkeley JJ. stated that after an *assumpsit* action brought upon the first default the plaintiff

shall never have another action upon another default, for the promise is determined, *et transit in rem judicatam* by the first action.⁴⁰

This proposition, that the plaintiff incapacitated himself from recovering future instalments by suing for the first default, was little better than the rigid principle which barred Debt until the last instalment had fallen due. To avoid this unfortunate result in *assumpsit* the judges in a number of cases allowed the plaintiff to recover the whole debt (*i.e.* both the instalments which were due and those which were not yet due) immediately after the first default. That this was the appropriate scope of recovery was stated by Jones and Berkeley JJ. in *Peck v. Ambler*,⁴¹ and it was so held in *Beckwith v. Nott*.⁴² As Lord Loughborough was to point out later, commenting on the decision in *Beckwith v. Nott*,

. . . the singularity of permitting the plaintiff to recover the whole sum, when only four months were in arrear, is very striking . . .⁴³

³⁴ Cf. *Hunt's Case* (1587) Owen 42.

³⁵ *Op. cit.*, at 88.

³⁶ Cf. 4 Co. Rep 92b, at 94b (No. 5).

³⁷ (1601) Cro. Eliz. 807, pl. 8; another aspect of this case has already been discussed—*supra*, n. 21.

³⁸ *Ibid.*

³⁹ (1634) 2 Dy. 113a (n. 55); S.C. in Cro. Car. 350, pl. 13, and Jones W. 329.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² (1618) 2 Dy. 113a (n. 55); S.C. in Cro. Jac. 504, pl. 16.

⁴³ *Rudder v. Price* (1791) 1 H. Bl. 547, 552.

The result may indeed have been remarkable, though there seems to be some sense in depriving a defaulting debtor of the benefit of a moratorium, granted by the creditor.⁴⁴ Whatever its desirability, the cases show that the judges were divided as to the legality of the practice exemplified by *Beckwith v. Nott*. In *Pecke v. Redman*,⁴⁵ a precedent well-known to contemporary lawyers, Redman had undertaken in 1548 to deliver to Pecke twenty quarters of barley annually during their joint lives at four shillings per quarter. Pecke alleged that Redman had defaulted for three successive years and that as a result he, Pecke, had sustained damage to the amount of thirty pounds. It was found for the plaintiff, and damages were assessed at four pounds, besides costs. The proper principle of assessment caused difficulty:

The question is, Whether the plaintiff shall recover the damages in recompense of the whole bargain as well for the time to come, as for the past, or not?⁴⁶

Although the case had originated in the King's Bench, it was debated by the judges of the Common Pleas (Brooke C.J., Saunders, Browne⁴⁷ and Staunford⁴⁸ JJ.) and two judges of the King's Bench (Portman C.J. and Whiddon J). The report is not free from ambiguity,⁴⁹ but it seems that the judges of the Common Pleas, excepting only Staunford J, considered that damages for future instalments could not be recovered:

. . . this contract, which has a continuance, cannot be intended to be recompensed in the damages assessed above, s. for the time to come, for they cannot have knowledge of what that will be.⁵⁰

Portman C.J., Whiddon and Staunford JJ., on the other hand, considered that damages for future instalments could be recovered.

Pecke v. Redman did not concern a monetary indebtedness. However, at this early stage *assumpsit* actions for money claims and *assumpsit* actions for the enforcement of other obligations were not regarded as essentially different in principle. What held for one type

⁴⁴ Many instalment contracts nowadays provide that the whole debt is to fall due in case of default. For an early example of such a default clause, see *Arbelard v. —* (1722) 8 Mod. 56, pl. 39. The defendant was to pay fifty pounds under marriage articles, payable in annual instalments of five pounds; the contract stated expressly that the whole sum was to fall due as soon as the defendant defaulted with one instalment. The court must have thought this reasonable enough, since it rejected the defendant's submission that the default clause amounted to a contractual penalty.

⁴⁵ (1556) 2 Dy. 113a.

⁴⁶ *Ibid.*

⁴⁷ In Dyer's report the name is spelt 'Brown'. There was in fact a Robert Brown, who was second baron of the Court of Exchequer in 1556. The reference in Dyer is, however, almost certainly to Humphrey Browne, a judge of the Common Pleas from 1542 to 1562. Cf. Foss, *The Judges of England* (1870) 133.

⁴⁸ The spelling in Dyer's report is 'Stamford'. The judge in question must have been William Staunford, a judge of the Common Pleas from 1554-1558. Cf. Foss, *op. cit.*, at 630.

⁴⁹ Cf. the interpretation of the decision adopted by Lord Loughborough in *Rudder v. Price* (1791) 1 H. Bl. 547, at 553 *et seq.*

⁵⁰ 2 Dy. 113a.

of *assumpsit* was true of the other. Thus, it must have seemed a natural step when the view of the Common Pleas judges in *Pecke v. Redman* was adopted in a situation involving a monetary indebtedness. In *Joslin v. Chelton*⁵¹ the action was based on a promise allegedly made by the defendant to pay 400 marks in equal portions annually for seven years. The consideration was that the plaintiff's son had married the defendant's daughter. Verdict was given for the plaintiff, but the defendant moved in arrest of judgment that one of the seven years had not yet elapsed. The judgment was arrested for this reason.⁵²

The gist of the view of the majority of Common Pleas judges in *Peck v. Redman* and possibly also of the court in *Joslin v. Chelton* was that granting damages for future breaches of continuing contracts was not legitimate and that future damage could not be accurately estimated and measured before it had occurred. It is against the background provided by these cases that the decision in *Milles v. Milles*⁵³ must be read. The action was based on a promise, given in consideration of marriage, to pay twenty pounds, the first ten pounds at Michaelmas 1631, and the second ten pounds at Michaelmas 1632. The action was brought for the non-payment of the first ten pounds and the jury found for the plaintiff 'to his damages twenty pounds, and costs two pounds thirteen shillings and fourpence'.⁵⁴ In arrest of judgment the familiar objection was raised that the rule applicable to Debt actions applied to *assumpsit* as well: nothing could be claimed until the last instalment had fallen due. This was rejected by the court and the distinction drawn between the enforcement of a debt (which is entire) and an action based on the breach of a promise or covenant. The chief importance of the case in our present context lies in the second objection:

Secondly, here are damages given for the last day, which is not yet come.⁵⁵
This was also rejected by the court:

. . . the damages of twenty pounds shall be intended given for the first ten pounds, and that he should have so much damages for non-payment thereof only, without any respect to the ten pounds which is not yet due.⁵⁶

Lord Loughborough was later to criticise this decision:

There is so little reason in this that there is some difficulty to follow it . . .⁵⁷
It seems, however, that there was no less reason in the second holding in *Milles v. Milles* than there ever is in the use of tenuous logic for the purpose of reaching a just and sensible result. The second holding in *Milles v. Milles* was an attempt to meet the kind of objection found

⁵¹ (1558) Moo. (K.B.) 13, pl. 51.

⁵² It is interesting to note that *Joslin v. Chelton* is headed in Moore's reports 'Contract entire'. Before that term acquired its present meaning as a principle of construction, it was apparently meant to designate the rule that nothing can be recovered until the last instalment has fallen due.

⁵³ (1632) Cro. Car. 241, pl. 1.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Rudder v. Price* (1791) 1 H. Bl. 547, 554.

in the early cases on entire contracts, in particular in *Pecke v. Redman* (that damages cannot be awarded for instalments not yet due), by combining two undoubted principles: (1) that non-payment of the first instalment was an actionable breach of contract, and (2) that the jury had an unfettered discretion to determine the *quantum* of damages. The dispute about these instalment problems was happily made redundant when, in *Cooke v. Whorwood*,⁵⁸ the supposed principle that one contract can only give rise to one cause of action was abandoned. It was laid down by that case that each instalment could be recovered separately and successively, as the defendant's default occurred.⁵⁹ This was so sensible that it was eventually adopted for all forms of *assumpsit* actions.⁶⁰ But in actions of debt the archaic view that contracts of debt are entire, even where they are expressed as instalment transactions, remained in full force until fairly recent times.⁶¹

In our present context the important point about the early treatment of instalment contracts is that all parties to the dispute seem to have recognized that the relief granted in *assumpsit*, whether the action was for breach of a promise to pay money or for breach of some other promise, was an award of damages by the jury with few, if any, fetters being imposed on their discretion. It is arguable that the damages formula displayed its substantive significance in yet another area of the law. Where the money claim was based on a provision in the nature of a contractual penalty, the courts in at least one case allowed recovery, but not of the sum stated in the penalty clause; they based their judgments on the actual prejudice sustained by the plaintiff. In *Preston v. Tooley*⁶² the plaintiff had delivered an important document to the defendant to enable the latter to inspect it. The defendant undertook to return the document after six days and further promised

that if he did not redeliver it within the said time, that he would pay him when required £1000.⁶³

The defendant failed to return the document in time and the plaintiff sued for the contractual penalty. The plaintiff's declaration stated that the plaintiff

required the said Preston to pay the said £1000 according to his promise; he had not paid, and refused to pay, to his damages of £1000.⁶⁴

If the action had been thought of as an action for the specific enforcement of the penalty clause, recovery of the £1000 would surely

⁵⁸ (1671) 2 Wms. Saund. 337, pl. 56.

⁵⁹ "... the action might be brought for such sum of money only as was due at the time of bringing the action, and the plaintiff should recover damages accordingly; and when another sum of the money awarded shall become due, the plaintiff may commence a new action for that also, and so *toties quoties*."—2 Wms. Saund. 337.

⁶⁰ Cf. *Gray v. Pinder* (1801) 2 Bos. & Pul. 427.

⁶¹ Cf. *Rudder v. Price* (1791) 1 H. Bl. 547.

⁶² (1587) Cro. Eliz. 74, pl. 35.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

have been a matter of course. However, the plaintiff's demand not only had the appearance of an action for damages, it was also treated as such:

. . . a writ of enquiry of damages was awarded; upon which it was found, that by the non-performance of the promise, the plaintiff sustained damages £200 and for costs of suit, 53s. 4d. which were accordingly adjudged to him; and £17 6s. and 8d. more for costs.⁶⁵

Preston v. Tooley may well be an indication that, in the early days of *assumpsit*, the damages formula presented the Common Law courts with an easy means of granting relief against contractual penalties, restricted admittedly to cases where the penalty provision was contained in a simple contract rather than in a bond.

The cases considered so far were all decided during or before the seventeenth century. By the time Lord Mansfield had become Chief Justice of the King's Bench, the practice of debt enforcement in *assumpsit* had become settled. *Indebitatus assumpsit*, the standard remedy for the enforcement of contractual debts, had become quite distinct from special *assumpsit*, the standard remedy for breach of contract. Convenient labels ('common' or '*indebitatus* counts') had been put upon those transactions of daily occurrence which usually, upon performance by the plaintiff, result in a debt due to him. It was this label (*e.g.* 'goods bargained and sold', 'money lent', 'work and labour done') which was the live core of every *indebitatus assumpsit* action. The balance of the declaration, *i.e.* the statement of the subsequent promise, the breach of this promise and the damage ensuing from the breach, was drafted in accordance with a standard form which never varied and contained nothing which could ever become an issue of fact; to all appearances it had become a matter of form only.⁶⁶ The scope of recovery had also changed very drastically. Originally the practice of the courts had been to award very substantial damages for non-payment of debts. In Lord Mansfield's time such damages were awarded only in exceptional circumstances.⁶⁷ This made the 'damages award' in *indebitatus assumpsit* almost invariably co-extensive with specific recovery *eo nomine*. It is not surprising that the judges now came to think of the 'damages' formula in *Slade's Case* as a mere pleading fiction.

In Lord Mansfield's day the rule existed that damage in tort actions was to be assessed only up to the date of the commencement of the action. In *Robinson v. Bland*⁶⁸ this rule had been applied by associates to an action for money lent with interest from the date of default, with the result that no interest had been included which had accrued under the loan contract during the course of the trial. Lord Mansfield explained, speaking for the whole court, that he had long been waiting for a chance to pronounce this practice erroneous.

⁶⁵ *Ibid.*

⁶⁶ *Cf. Chitty on Pleading*, vol. 2, 37 *et seq.*

⁶⁷ *Eddowes v. Hopkins* (1780) 1 Doug. K.B. 376.

⁶⁸ (1760) 2 Burr. 1077.

Interest, so he thought, should be computed to the time of verdict or even to the moment at which the plaintiff had his earliest opportunity of signing judgment.⁶⁹ This ruling Lord Mansfield supported with, *inter alia*, the following observation:

Nothing can be more agreeable to justice, than that the interest should be carried down quite to the actual payment of the money. But as that cannot be, it should be carried on as far as to the time when the demand is completely liquidated.

Although this be nominally an action for damages, and damages be nominally recovered in it; yet it is really and effectually brought for a specific performance of the contract. For where the money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract to pay the money at the given time; and to pay interest for it from the given day, in case of failure of payment at that day. So that the action is, in effect, brought to obtain a specific performance of this contract. For pecuniary damages upon a contract for payment of money, are, from the nature of the thing, a specific performance; and the relief is defective, so far as all the money is not paid.⁷⁰

Perhaps it is not proper to quarrel with this lucid *dictum* so long after the event. Yet, it could be argued that the practical conclusion drawn from it was a *non sequitur*. It is true that pecuniary damages upon a contract for payment of money are, from the nature of things, a specific performance, but the law is nevertheless quite free to treat such specific performance as if it were a damages award. If such were the law, then the fact that the award is not a genuine damages award from some analytical, natural, or philosophical point of view would be nothing to the point. The difference between specific enforcement of debts and damages awards for non-payment may be fictitious, but if the fiction is, for one reason or another, part of the law, then an attempt to remove the fiction is an attempt to change the law; and if the attempt is made by reasoning from the nature of things, *i.e.* by employing analytical reasoning, then it is an attempt to change the law under the guise or pretext of explaining it. *Robinson v. Bland* itself illustrates this contention to perfection since it did result in a change of previous practice. The true question confronting Lord Mansfield was whether the damages label in *indebitatus assumpsit* actions was a mere pleading fiction or a fiction of the substantive law.

As this article has attempted to show, the early cases were not entirely silent on this question. Some decades after *Robinson v. Bland* Lord Loughborough had occasion to examine the significance of these cases. In *Rudder v. Price*⁷¹ the plaintiff sued in Debt on a promissory note payable by instalments. The action was brought before all the instalments were due and the question was whether the old principle on entirety of contracts of debt still prevented the plaintiff from recovering anything in such circumstances. Lord Loughborough, despite himself, followed the orthodox rule:

⁶⁹ *Ibid.*, 1085 *et seq.*

⁷⁰ *Ibid.*

⁷¹ (1791) 1 H. Bl. 547.

I cannot indeed devise a substantial reason why a promise to pay money not performed, does not become a debt, and why it should not be recoverable, eo nomine, as a debt. But the authorities are too strong to be resisted. . . . The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and being so considered, no action of debt can be maintained upon it till all the days of payment be past.⁷²

In our present context the important feature of Lord Loughborough's judgment is that he also dealt, *obiter* as we would now call it, with the evolution of the corresponding principles in *indebitatus assumpsit*. He reviewed the old cases on instalment contracts, rightly emphasizing the importance of the damages formula. But instead of concluding that the damages formula was of substantive significance, he proceeded as follows:

In the older cases it is admitted that an action of debt could not be brought for the payment of money due by instalments till all the days were past. . . . The inconvenience of this rule puts the judges upon a method of getting rid of the supposed difficulty, by having recourse to the action of assumpsit, which, where the assumpsit proceeds in demand of money, is in truth and substance, and so taken to be in some of the cases, a more special action of debt; for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered damages: it is the specific debt, and the jury give the specific thing demanded.⁷³

The view of *indebitatus assumpsit* which Lord Mansfield and Lord Loughborough had expounded in the eighteenth century was echoed by leading commentators in the nineteenth:

The distinction between the actions of assumpsit and debt so far as the *indebitatus* counts are concerned . . . was previously to the 15 & 16 Vic. c. 76, one of form only.⁷⁴

Indebitatus assumpsit actions were pleaded as if their sole object had been the recovery of damages.⁷⁵ While this practice reflected correctly the substantive law of the seventeenth century, in the early nineteenth century the action was taken to be a form of specific relief, a change which shows that forms of pleading are often dubious guides to the substantive law.⁷⁶ Sir William Holdsworth once pointed out that pleading fictions have often produced substantive law.⁷⁷ This may be true, but there must be at least as many cases where substantively significant elements degenerated into mere pleading fictions. Lord Mansfield's analytical view and Lord Loughborough's realistic assessment of the judicial process (which surely even the most extreme modern 'realist' must find it difficult to rival) are a strong indication that the damages formula in *indebitatus assumpsit* suffered exactly

⁷² *Ibid.*, at 555.

⁷³ *Ibid.*, at 554.

⁷⁴ *Selwyn's Law of Nisi Prius* (13th ed., 1869) vol. 1, 82.

⁷⁵ *Cf. Chitty on Pleading*, vol. 1, 123; *supra*, n. 9.

⁷⁶ The wording of the old writs could be similarly misleading: see Plucknett, *Concise History of the Common Law* (4th ed., 1948) 344.

⁷⁷ 'Unjustifiable Enrichment' (1939) 55 *Law Quarterly Review* 37, at 47.

this fate, and that, by the end of the eighteenth century, *indebitatus assumpsit* had become a remedy for specific relief.⁷⁸

It must be conceded that the foregoing conclusion has never been placed beyond doubt by a truly authoritative decision. Indeed, Chitty seems to have held the view that the damages formula in *indebitatus assumpsit* retained some substantive significance throughout:

This action [of debt] is so called because it is in legal consideration for the recovery of a debt *eo nomine* and *in numero*; and though damages are in general awarded for the detention of the debt, yet in most instances they are merely nominal, and are not, as in *assumpsit* and covenant, the principal object of the suit; and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to.⁷⁹

The note of caution at the end of this statement is not elaborated; nevertheless, it seems to throw some doubt on the progressive views of Lord Mansfield and Lord Loughborough.

Such doubt can only affect the modern law if it is first demonstrated that *indebitatus assumpsit* is in fact the predecessor of our modern contractual money claim. However, the contention that the modern money claim derives from *indebitatus assumpsit*⁸⁰ does not seem to correspond with the historical facts. The action of Debt on simple contract is occasionally described as a medieval predecessor of *assumpsit*.⁸¹ This obscures the fact that Debt on simple contract was revitalized in the nineteenth century. After *Slade's Case* had ruled that *assumpsit* could be employed by creditors for debt enforcement as an alternative to Debt,⁸² this latter action became obsolete. But, even though out of use, it was not forgotten. Lord Holt's attempts to stem the growing tide of *assumpsit* actions are a well-known part of the history of the law of contract.⁸³ There were other, persistent voices stressing the superiority of Debt over *indebitatus assumpsit*. The 'natural and genuine action of debt' was compared with the 'much inferior and ignobler' action of *assumpsit*.⁸⁴ Debt, although obsolete as a remedy for the enforcement of simple contracts, remained alive in other areas, such as the enforcement of money claims based on

⁷⁸ Judicial comment on this subject is somewhat scarce. Apart from *Robinson v. Bland and Rudder v. Price*, this writer has only encountered one more case: *Astley v. Weldon* (1801) 2 Bos. & Pul. 346, the leading early authority on the distinction between contractual penalties and liquidated damages. In this case, Chambre J. commented:

'Though this in point of form is an action for damages, . . . the jury ought to have been directed to find damages to the amount of the whole sum so agreed for; and the effect of the case must have been the same as if the plaintiff had declared in debt for a penal sum'.—*Ibid.*, at 353 *et seq.*

⁷⁹ *Chitty on Pleading*, vol 1, 123.

⁸⁰ This proposition has found occasional endorsement in high quarters. Cf. *Sinclair v. Brougham* [1914] A.C. 398, 452, *per* Lord Sumner; see also *supra*, n. 22.

⁸¹ Cf. Cheshire and Fifoot, *The Law of Contract* (6th ed., 1964), 3 *et seq.*, 8.

⁸² Cf. Simpson, 'The place of *Slade's Case* in the history of contract' (1958) 74 *Law Quarterly Review* 381, 392.

⁸³ Holdsworth, *H.E.L.*, vol. 8, 88 *et seq.*

⁸⁴ *Edgcomb v. Dee* (1670) Vaughan 89, 101.

specialties or leases.⁸⁵ In the eighteenth century it showed itself capable of expansion in the newly developing law relating to the enforcement of foreign judgments.⁸⁶ Even in simple contract, it was kept alive at least in theory, by the ruling that

wherever *indebitatus assumpsit* can be maintained, debt will lie.^{87 88}

Thus the expansion of *indebitatus assumpsit* in the seventeenth and eighteenth centuries was accompanied by a notional expansion of Debt on simple contract.

Towards the end of the eighteenth century, lawyers came to believe that wager of law was no longer available so that Debt on simple contract might again be employed. In *Barry v. Robinson*⁸⁹ Serjeant Marshall argued

. . . the wager of law has long since fallen into disuse; and if a man were now to tender his wager of law, the Court would refuse to allow it, and would put him to plead to the action.⁹⁰

Some years later, Chitty recommended the use of Debt in place of *assumpsit*:

Formerly, when the trial by wager of law was in practice, the action of *assumpsit* was preferable to that of debt on simple contract. Although this mode of defence and trial is still in general in force when the debt is due on a simple verbal contract . . . yet it is now so much disused and discountenanced, that debt has of late become very frequent, and is preferable in some respects to the action of *assumpsit*, the judgment therein being final in the first instance, and not interlocutory as in *assumpsit*.⁹¹

Surely lawyers who thought of themselves as 'modern' in the early days of the nineteenth century must have felt sympathy for these suggestions. But English law did not possess the principle of *desuetudo* which would have allowed the judges to regard obsolete institutions as no longer in force.⁹² Accordingly, the judges in *Barry v. Robinson* showed little sympathy for Serjeant Marshall's liberal views.⁹³ Blackstone's terse statement that wager of law was out of use but not out of force⁹⁴ summed up the law more correctly. This was borne out in 1824. In *King v. Williams*⁹⁵ the plaintiff pleaded a money count in Debt. He found the court as willing as ever to allow the defendant to plead '*nil debet per legem*', i.e. to wage his law. When the defendant prepared to come to court with eleven compurgators the plaintiff

⁸⁵ Cf. *Chitty on Pleading* (5th ed., 1831) vol. 1, 123 *et seq.*

⁸⁶ Cf. *Walker v. Witter* (1778) 1 Dougl. 1.

⁸⁷ *Ibid.*, at 6, per Ashurst J.; Buller J. enunciated the same principle.

⁸⁸ The corollary of this proposition was the following ruling in *Hard's Case*: *Indebitatus assumpsit* will lie in no case but where debt lies (1696) 1 Salkeld 23, pl. 3.

This proposition is sometimes doubted, but with some minor qualifications, treated in the course of this article, it was true—cf. annotation to *Hard's Case*, *loc. cit.*

⁸⁹ (1805) 1 Bos. & P.N.R. 293.

⁹⁰ *Ibid.*, at 297.

⁹¹ *Chitty on Pleading*, vol. 1, 129.

⁹² Cf. Allen, *Law in the Making* (7th ed., 1964) 478-482.

⁹³ (1805) 1 Bos. P.N.R. 293, at 297.

⁹⁴ *Blackstone's Commentaries*, bk 3, 348.

⁹⁵ (1824) 2 B & C. 538.

wisely decided to abandon the action. Like wager of battle,⁹⁶ wager of law was still a permissible form of trial. *King v. Williams* is scanty evidence for the truth of Chitty's claim, published in 1831, that 'debt has of late become very frequent',⁹⁷ but in 1833 wager of law was abolished by statute⁹⁸ and henceforth Debt and *indebitatus assumpsit* were alternative remedies not only in theory but also in practice. The *indebitatus* counts were pleaded in Debt as often as they were in *assumpsit*; the choice between the two depended entirely on procedural considerations. Debt produced a final judgment more promptly,⁹⁹ but, if the plaintiff wanted to join his *indebitatus* count with other *assumpsit* claims, he had to choose *indebitatus assumpsit*, since Debt and *assumpsit* could not be joined.¹ The choice between Debt and *assumpsit* extended to quasi-contractual claims,² a fact conveniently ignored by those who argue that modern claims of this kind stem from the action of *indebitatus assumpsit*.³ Pleading an *indebitatus* count in Debt was no more onerous than pleading it in *assumpsit*. Under the old learning, the mere removal of wager of law would scarcely have revived Debt, since the summary form of declaration appropriate to *indebitatus* counts was not sufficient in Debt, which traditionally required that the transaction underlying the debt be pleaded specially.⁴ But these difficulties had been removed by the *Uniformity of Process Act* of 1832⁵ which had introduced a new standard form of writ for all the personal forms of action. Despite this fact, the various forms were still clearly distinguishable from each other, since the plaintiff was required to insert the name of the form of action he had chosen in the writ. This latter requirement was removed by sec. 3 of the *Common Law Procedure Act* of 1852.⁶ An *indebitatus* count brought after this date⁷ contained no indication whether the plaintiff was proceeding in Debt or *assumpsit*. But the *Common Law Procedure Act* had only brought alterations to rules of pleading; it was hardly open to the interpretation that the forms of action had been abolished. Bullen and Leake summed up the effect of the *Common Law Procedure Act* as follows:

The effect of the recent alterations has not been to destroy the system or to change its essential principles. The object proposed by the learned commissioners and effected by the late statutes and rules has been only to prefer

⁹⁶ Cf. *Ashford v. Thornton* (1818) 1 B. & Ald. 405.

⁹⁷ *Chitty on Pleading*, vol. 1, 129.

⁹⁸ *Civil Procedure Act*, 1833 (3 & 4 Wm. IV, c. 42).

⁹⁹ *Chitty on Pleading*, vol. 1, 129.

¹ *Ibid.*

² Cf. *Edwards v. Bates* (1844) 7 Man. & G. 590.

³ Holdsworth, 'Unjustifiable Enrichment' (1939) 55 *Law Quarterly Review* 37; Landon in (1937) 53 *Law Quarterly Review* 302 ff.; Radcliffe in (1938) 54 *Law Quarterly Review* 24.

⁴ Cf. Fifoot, *op. cit.*, at 368.

⁵ 2 Wm. IV, c. 39; see also Maitland, *The Forms of Action at Common Law* (1948) 8.

⁶ (1852) 15 & 16 Vic., c. 76.

⁷ For examples, see Bullen and Leake on Pleading (3rd ed., 1868), at 35 *et seq.*, and *Common Law Procedure Act*, Schedule B.

substance to form, and to prevent unnecessary technicality from working injustice.⁸

As Maitland put it:

the several personal forms were still considered as distinct.⁹

If the forms were still alive, the question could be asked whether the new type of *indebitatus* action authorized by the *Common Law Procedure Act* was an action in the nature of Debt or in the nature of *assumpsit*. The hallmark of *indebitatus assumpsit* had been the inclusion in the plaintiff's declaration of a promise, alleged to have been made by the defendant after the debt had been incurred, to pay the debt. This promise was a mere pleading fiction and did not require proof at the trial. Sec. 49 of the *Common Law Procedure Act*¹⁰ ordained that the statement of such promises was in future to be omitted from plaintiff's declarations. The deletion of these promises made *indebitatus* actions seem indistinguishable from those Debt actions based on simple contract which had been in use again since the abolition of wager of law in 1833. Even more remindful of Debt was the prescription in Schedule B of the *Common Law Procedure Act* that 'never indebted' was to be the defendant's plea appropriate to *indebitatus* actions.¹¹ It is hardly surprising that learned commentators drew the conclusion that these enactments had rendered *indebitatus assumpsit* obsolete and had reinstated Debt in its rightful place. Selwyn stated:

. . . all actions on the *indebitatus* counts are now both in form and in substance actions of debt.¹²

Bullen and Leake's verdict, though couched in more cautious language, was virtually to the same effect:

There is therefore but one form of *indebitatus* count, which comprises all the advantages of both the forms under the old procedure, and the action of *indebitatus assumpsit* is virtually become obsolete.¹³

If it is true that the main ruling in *Slade's Case*¹⁴ was that *assumpsit* could be employed as an alternative to Debt,¹⁵ then it is also true that the *Common Law Procedure Act* amounted virtually to statutory reversal of that ruling and that it closed the book on the episode of debt enforcement which had been known under the complex description '*indebitatus assumpsit*'. The damages formula of debt enforcement adopted in *Slade's Case* is immaterial to the post-*Common Law Procedure Act* situation, since the remedy available in Debt never was in the nature of a damages award. A plaintiff who pleaded an *indebitatus* count in Debt demanded that the defendant

⁸ Bullen and Leake, *op. cit.*, X.

⁹ Maitland, *op. cit.*, at 8.

¹⁰ 15 & 16 Vic., c. 76.

¹¹ *Ibid.*

¹² Selwyn's *Law of Nisi Prius* (13th ed., 1869), vol. 1, 82.

¹³ Bullen and Leake, *op. cit.*, 36.

¹⁴ 4 Co. Rep. 92a.

¹⁵ Simpson, *op. cit.*, at 392.

render to the said A.B. the sum of £— of lawful money of Great Britain, which he owes to and unjustly detains from him.¹⁶

The plaintiff was, in the words of Chitty, asking for payment of the debt '*eo nomine* and *in numero*'¹⁷ which might be freely translated into a very emphatic 'as such'. Since the plaintiff was demanding the very performance which the defendant contracted to render, it would be appropriate to refer to the corresponding relief¹⁸ granted by the court as 'specific performance' or 'specific enforcement'. Blackstone characterized the action of debt as a remedy designed

to compel the performance of the contract and recover the specific sum due.¹⁹

That the remedy in Debt constituted a type of specific performance was true throughout the history of the forms of action. Characterizing the relief granted in the medieval version of Debt, Pollock and Maitland have pointed out that its function was 'what modern lawyers would regard as the enforcement of a contract'.²⁰

After the *Common Law Procedure Act* of 1852²¹ there was no room left for the argument that the enforcement of a contractual debt in an *indebitatus* count was anything but specific relief. But the *indebitatus* counts covered a field which was slightly wider than the technical notion of Debt. Under the old rule that debts were entire, last affirmed in *Rudder v. Price*,²² an action of debt was not available for the recovery of instalments. Yet the *indebitatus* counts had been made available for this purpose in *assumpsit*.²³ An *indebitatus* count for the recovery of instalments, even after the *Common Law Procedure Act*, was not a claim in the nature of a Debt action. Did this mean that the relief afforded the plaintiff was technically to be regarded as a recovery of damages? It can hardly be doubted that Lord Mansfield and Lord Loughborough would have answered this question in the negative. Nevertheless, it will be appreciated that the arguments in this article, derived from the resurrection of the action of Debt on simple contract in the nineteenth century, are not applicable to claims for instalments. In such cases, there would—certainly until the *Judicature Act* of 1873—have been much to support the view that the damages formula in *assumpsit* was of substantive significance. The problem was not to present itself during the lifetime of the Common

¹⁶ Chitty on Pleading, vol. 2, at 384.

¹⁷ Chitty on Pleading, vol. 1, at 123.

¹⁸ 'The judgment in the plaintiff's favour, which at common law is final, in all cases is, that the plaintiff recover his debt, and, in general, nominal damages for the detention thereof . . .'—Chitty on Pleading, vol. 1, at 130.

¹⁹ Blackstone's Commentaries, bk. 3, 154.

²⁰ Op. cit., vol. 2, 211.

²¹ 15 & 16 Vic., c. 76.

²² (1791) 1 H.Bl. 547.

²³ Cf. supra, nn. 34-60.

Counts, but it did arise after the Common Counts had been superseded by their more modern counterpart, the rules concerning summary endorsement of writs of summons.²⁴

In *Workman, Clark & Co., Limited v. Lloyd Brazileño*²⁵ the plaintiffs, shipbuilders, sued for the first progress payment under a ship construction contract. The Master allowed the plaintiffs to sign judgment under Order XIV, r. 1 of the *Rules of the Supreme Court*, 1883. The summary form of procedure provided by Order XIV, rule 1 was only available in actions which were specially endorsable under Order III, rule 6.²⁶ Walton J. affirmed the Master's order and the defendants appealed. Before the Court of Appeal, they argued that the action did not fall under Order III, rule 6, since it was not in the nature of a debt in the strict technical sense, but rather in the nature of an unliquidated claim for the payment of damages. As we have seen, the rigid rule on entirety of contracts of debt had been evaded in *indebitatus assumpsit* largely by the use of the premise that the recovery in *assumpsit* was in the nature of damages. Harking back to these origins of *indebitatus assumpsit*, Montague Lush, K.C., and Bremner, for the defendants, argued:

. . . even assuming that the vendor would have an option in such a case to bring an action in respect of non-payment of the one instalment, without treating it as a repudiation of the contract by the defendant²⁷ and on the footing that the contract was kept alive, it is submitted that technically that would not be an action for a debt or liquidated demand, but for damages for breach of contract, and that the damages would not necessarily be measured by the amount of the instalment. . . . The damages for breach of a contract to make an advance are clearly, according to the authorities, not the amount of the promised advance.²⁸

That the obligation to pay an instalment was not technically a debt, as the defendants contended, was undeniable. But the defendants' true difficulty was that Order III, rule 6 was not confined to debts. The summary form of pleading provided by the rule, which had undoubtedly been inspired by the Common Counts,²⁹ had been extended to all liquidated demands in money arising upon a contract,

²⁴ The Schedule attached to the *Judicature Act* of 1873 provided in sec. 7 for the special endorsement of writs of summons (which was in essence a simplified form of declaration) 'in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money . . . arising upon a contract, express or implied . . .'

²⁵ [1908] 1 K.B. 968.

²⁶ Order III, rule 6 was essentially a re-enactment of sec. 7 of the Schedule mentioned above—*supra*, n. 24: see *Wilson's Judicature Acts, Rules and Forms* (4th ed., 1883) 178.

²⁷ The defendants' principle argument was that the defendants' failure to pay the first instalment amounted to a wrongful repudiation of the contract and that the plaintiff was suing for the recovery of unliquidated damages for such breach—*cf. ibid.*, at 971.

²⁸ *Ibid.*, at 971 *et seq.*

²⁹ *Cf. Stoljar, The Law of Quasi-Contract* (1964) 166, particularly n. 28.

express or implied. Could the plaintiffs' action in *Workman, Clark & Co., Limited v. Lloyd Brazilleno* not without difficulty be described as such? The defendants argued that

the object of those words was apparently merely to extend the operation of the rule to cases of sums due under covenants or where the action was by an indorsee of a negotiable instrument . . . and such like cases.³⁰

This restrictive treatment of Order III, r. 6 derived some support from the then current edition of the *Annual Practice*, which had annotated the rule by saying that the words 'debt or liquidated demand'

seem properly applicable to a definite sum of money which would formerly have been recoverable in the old common law action of debt in its most technical form.³¹

The reactions of the learned judges of the Court of Appeal to these submissions provide an interesting illustration of the truism that, whatever strict theory may hold, the abolition of the forms of action by the *Judicature Act* of 1873³² affected the substance of the law in many ways. Even though the history of the problem contained much to support the proposition that the plaintiffs' claim was technically for damages, the judges confessed that they were unable even to understand the argument:

It has been argued that technically the claim arising upon default in payment of such an instalment is a claim for damages, and not for a liquidated sum. I confess that I cannot follow this argument.³³

Lord Justice Kennedy's judgment represents perhaps most clearly the typical approach of post *Judicature Act* judges to problems heavily beset and encumbered by overtechnical historical distinctions:

. . . the question is whether the claim is for a 'liquidated demand in money' within the meaning of Order III, r. 6; and, there being, so far as I can see, now that we have no longer to deal with the ancient forms of pleading or to apply reasoning that depended on those forms, nothing which compels us to take the contrary view, the conclusion at which upon the whole I arrive is that this claim is for a liquidated demand in money within the meaning of the rule.³⁴

Farwell L.J., in similar vein, commented:

I do not feel myself sufficiently familiar with the old doctrines of common law pleading to appreciate fully the difficulty which, it is suggested, would have arisen as regards an action of debt in such a case, but I can see no reason for excluding from the operation of Order III, r. 6, any action falling under any of the eight common *indebitatus* counts, which is brought on an executed consideration for a fixed sum agreed to be paid for such execution. Such a case is within the words of the rule, and I object to obscuring the plain meaning of the words by recourse to the rules of special pleading in the time of Lord Loughborough.³⁵

³⁰ [1908] 1 K.B. 968, 971.

³¹ Quoted by Kennedy L.J., *ibid.*, at 981.

³² The operative part of the legislation which did eliminate the forms of action, appears to be sec. 1 of the Schedule which provided that all actions or suits which had previously been commenced by writ, bill or information, by cause *in rem* or *in personam*, or by citation in various named Courts, were henceforth to be instituted by a proceeding to be called an action.

³³ [1908] 1 K.B. 968, 978.

³⁴ *Ibid.*, at 980 *et seq.*

³⁵ *Ibid.*, at 978.

Lord Alverston C.J., emphasizing the business and common-sense point of view, arrived at the same conclusion.³⁶

It might be suggested that Order III, r. 6 of the *Rules of the Supreme Court*, 1883 was merely procedural in its significance and had no bearing on the substantive characterization of contractual money claims in English law. Indeed, there is no dearth of judicial *dicta* and academic writings (quite apart from the common failure of the textbook literature in the law of contract to recognize the contractual money claim as a remedy *sui generis*) which seem to imply that contractual money claims are even now enforced through a notional damages medium.³⁷ The learned judges of the Court of Appeal do not seem to have considered the phrase 'debt or liquidated demand' confined to a narrow procedural context, since they regarded s. 49 of the *Sale of Goods Act* 1893,³⁸ a provision with undoubted substantive connotations, as providing a useful parallel to the question they had to consider. The admittedly generous interpretation of the judgment of the Court of Appeal in *Workman, Clark & Co., Limited v. Lloyd Brazilleno* advocated in this article is that contractual money claims are to be regarded as actions for specific relief rather than for unliquidated damages, regardless of whether the claim in question has its ancestry both in Debt on simple contract and in *indebitatus assumpsit* or in *assumpsit* only. If this is what the case stands for, then a whole host of money claims which prior to the Judicature Act of 1873 were enforceable in special *assumpsit* only (where technically the only remedy was damages) would now be enforceable specifically. An example is an action for money due and payable under a contract before the counterperformance falls due. The plaintiff in *Wilks v. Smith*³⁹ sued for interest on the purchase price of a piece of land, such interest having fallen due under the contract prior to the time stipulated for the transfer of the land. The defendant demurred and argued that the plaintiff should have averred either performance on his part, or at least readiness and willingness to perform. The Court of Exchequer found for the plaintiff. Since the defendant had to make

³⁶ Cf. *ibid.*, at 975.

³⁷ It is open to parties to agree that, for a consideration supplied by one of them, the other will make payments to a third person for the use and benefit of that third person and not for the use and benefit of the contracting party who provides the consideration . . . it cannot, I think be doubted that the common law would regard such an agreement as valid and as enforceable (in the sense of giving a cause of action for damages for its breach to the other party to the contract) . . .—*Re Schebsman* [1944] Ch. 83, 101 *et seq.*, per du Parc L.J. For similar *dicta*, see *Egel v. Drogemuller* [1936] S.A.S.R. 407; *Lloyd's v. Harper* (1880) 16 Ch.D. 290.

' . . . We recognise no difference in principle between suing on a sale for a failure to pay the price of goods, and suing on a building contract for failure to build'.—Simpson, *op. cit.*, at 394.

³⁸ This section stipulates the circumstances in which the seller 'may maintain an action for the price of the goods'.

³⁹ (1842) 10 M. & W. 355.

his payment in advance of performance by the plaintiff, the consideration for the promise to pay the interest was the undertaking to convey the land, not the actual conveyance of it.⁴⁰ Even though the plaintiff recovered the interest, he did so in special *assumpsit*, not in *indebitatus assumpsit*. The latter form of action would indeed not have been available, since it required a consideration executed by the plaintiff,⁴¹ a requirement directly traceable to the old rule in Debt on simple contract that only a material benefit, and not a mere promise, was a sufficient *quid pro quo*.⁴² Other claims which were excluded from *indebitatus assumpsit* (for historical reasons with little or no functional justification) were actions on promissory notes,⁴³ cheques,⁴⁴ bills of exchange,⁴⁵ actions on various policies of insurance,⁴⁶ actions on charter parties (for non-payment of freight and demurrage),⁴⁷ actions on wagers,⁴⁸ actions on awards,⁴⁹ actions to pay money in consideration of the plaintiff's forbearance,⁵⁰ actions to pay money on promises made in consideration of marriage,⁵¹ and actions on promises to provide an indemnity.⁵² Whatever the position might have been prior to the *Judicature Act*, nowadays all such actions must be regarded as directed at specific relief. Any other view would lead to the perpetuation of the distinction between debts in the technical sense and money claims only enforceable in *assumpsit* (money claims arising from 'collateral' promises, as the old Common Law phrase goes). The abolition of the forms of action by the *Judicature Act* of 1873 was intended to resolve the difficulties which arose from artificial distinctions on which nothing turned but the choice between one form of action or another. The continuation of these distinctions in limited contexts, such as the limitation of actions, is rightly regarded by the courts as extremely undesirable.⁵³

The original version of Order III, rule 6 of the English *Rules of the Supreme Court* still has its counterparts in some of the Australian jurisdictions.⁵⁴ It has, however, been revoked in England,⁵⁵ and the

⁴⁰ Cf. the judgment of Parke B., *ibid.*, at 360.

⁴¹ Cf. Bullen and Leake, *op. cit.*, 36.

⁴² Cf. Fifoot, *op. cit.*, 225 *et seq.*

⁴³ *Chitty on Pleading*, vol. 2, 115-141.

⁴⁴ *Ibid.*, at 143 *et seq.*

⁴⁵ *Ibid.*, at 144-178.

⁴⁶ *Ibid.*, at 178-216.

⁴⁷ *Ibid.*, at 221 *et seq.*, 226.

⁴⁸ *Ibid.*, at 226c-235.

⁴⁹ *Ibid.*, at 241-243a.

⁵⁰ *Ibid.*, at 251-253b.

⁵¹ *Ibid.*, at 254-255.

⁵² *Ibid.*, at 316-321.

⁵³ Cf. *Letang v. Cooper* [1964] 3 W.L.R. 573.

⁵⁴ Cf. *Rules of Court*, 1952 (High Court of Australia) O. 13, r. 1; *Rules of the Supreme Court of 1900* (Qld.) O. VI, r. 7; *Rules of the Supreme Court* (S.A.) O. III, r. 3; *Rules of the Supreme Court of the Australian Capital Territory*, O. 4, r. 5.

⁵⁵ *Rules of the Supreme Court* (Revision) 1962—see *The Annual Practice*, 1963, vol. 1, 29.

kind of special endorsement which it provided for has been extended so as to allow claims of all kinds to be endorsed on the writ.⁵⁶ Similar amendments have been passed in a number of Australian jurisdictions.⁵⁷ These changes may well have the undesirable side-effect of obliterating further the substantive distinction between specific relief (available for money claims) and damages (available generally for breach of contract). Fortunately, the 'debt or liquidated demand' clause has been retained in another, somewhat less important, procedural context both in England⁵⁸ and in those Australian jurisdictions which have broadened their rules concerning special endorsement.⁵⁹ Even if this clause were to disappear entirely from the rules of court, the findings of this article would still stand. The distinction between liquidated demands and unliquidated damages was neither created by the original version of Order III, rule 6 of the English *Rules of the Supreme Court*, 1883 nor was its significance predominantly procedural. It merely reflected the distinction between specific relief and damages, an important feature of the substantive Common Law to which current expositions of the law of contract might well pay greater attention.

⁵⁶ Cf. *The Annual Practice*, 1965, vol. 1, 54 *et seq.*; *Bullen and Leake's Precedents of Pleading* (11th ed., 1959) 4.

⁵⁷ Cf. *Rules of the Supreme Court* 1965 (Tas.) O. 3, r. 7; *Rules of the Supreme Court*, 1909 (W.A.) O. III; *Rules of the Supreme Court of the State of Victoria*, O. III, r. 4 (as amended by order of the Supreme Court Judges dated 16th February, 1960). The position in New South Wales differs substantially, since the Common Counts are still in use there—Cf. *Common Law Procedure Act*, 1899, Third Schedule, Nos. 1-3.

⁵⁸ O. 6, r. 2 of the English *Rules of the Supreme Court* reads in part:

(1) Before a writ is issued it must be indorsed—

(a)—

(b) where the claim made by the plaintiff is for a debt or liquidated demand only, with a statement of the amount claimed in respect of the debt or demand and for costs and also with a statement that further proceedings will be stayed if, within the time limited for appearing, the defendant . . . pays the amount so claimed to the plaintiff, his solicitor or agent . . .

⁵⁹ Cf. *Rules of the Supreme Court* 1965 (Tas.), O. 3, r. 8; *Rules of the Supreme Court*, 1909 (W.A.) O. III, r. 7; *Rules of the Supreme Court of the State of Victoria*, O. III, r. 5.