DECREEING SPECIFIC PERFORMANCE: 
A (ROMAN-)DUTCH LEGACY

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1 Introduction

The remedy for specific performance is generally seen as a famous example of the divergence between the civil law and common law. Whereas the claim is readily available in continental European jurisdictions and viewed as a primary remedy of a contracting party, it is traditionally seen as a secondary action in English law: as an equitable remedy it is available only if damages do not provide adequate relief.1

The origin of the divide between the continental and the English approach seems to lie in the reception on the continent of the learned law, the Roman-law based ius commune. Consequently, specific performance in South African law is described as a concept of a mixed legal system. On the one hand, its Roman-Dutch origin is reflected in the creditor’s right to claim specific performance, irrespective of the obligation’s source. On the other hand, this right to specific performance is not absolute, because judges enjoy a judicial discretion to decide in particular cases to refuse an order of specific performance. Here, an English common-law influence is discernable.2

That the creditor is entitled to claim specific performance under South African law was already decided in 1882. In Cohen v. Shires McHattie and King3 Sir John Gilbert Kotzé CJ (1849-1940) stated that “by the well-established practice of South Africa, agreeing with the Roman-Dutch law, suits for specific performance are matters of daily occurrence”. At the same time, common-law rules “crept in insidiously and as it were almost by accident, so much so that the grounds for refusing specific performance listed


3 (1882) 1 SAR 41.

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by some academic writers in the early part of the twentieth century were virtually the same as those applied by English Courts. In 1904 Innes CJ formulated the legal position as follows: “Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the court either to grant such an order or not.” Thus judgements expressly referred to English authorities in support of the view that specific performance should not be ordered to enforce contracts of employment, nor in cases where damages would be an adequate remedy, or where specific performance would be unjust.

2 Judicial discretion: An English legacy?

A similar development is discernable in Scots law. This system displays its civilian roots in the remedy of specific implement being more prevalent: a creditor is entitled to choose specific performance, should he so wish. In the course of the nineteenth century Scots courts introduced discretion as part of their inherent jurisdiction. The first clear case arose in 1877. In McArthur v. Lawson Lord Inglis said it would be inequitable or contrary to public policy to compel someone to marry or to enter into a partnership. Four years later, in a case where the defendant was sued for the construction of a road through the property of a third party willing to sell only at an exorbitant price, Lord Inglis and Lord Shand remarked in an obiter dictum that the court had a discretion to say which of the remedies (specific implement or damages) would be appropriate in the circumstances, and would have held for the latter remedy. Shortly thereafter, in 1883 a discretion was actually exercised, where a landlord was sued for the removal of cottars living under a customary Highland tenure.

Scots case law reveals that judicial discretion is exercised not only in contractual obligations, but also in cases on broadly similar facts where the owner of a property seeks the removal of an encroachment. As Lord Gifford said in 1875 in Begg v. Jack, “there is an equitable power vested in the Court in virtue of which, when the exact

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5 Shakinovsky v. Lawson and Smulowitz 1904 TS 326; see also Kotzé CJ in Manasewitz v. Oosthuizen 1914 CDP 328 at 331 (case of a contract of sale).
8 (1877) 4 R 1134, 1136.
9 Moore v. Patterson (1881) 9 R 348, 351.
10 Winans v. McKenzie (1883) 10 R 941.
11 (1875) 3 R 35, 43. See also Macnair v. Cathart (1802) 12 M, 832; Sanderson v. Geddes (1874) 1 R 1198 and Grahame v. Magistrates of Kirkcaldy (1882) 9 R (HL) 91.
restoration of things to their former condition is either impossible or would be attended with unreasonable loss and expense ... the court can award an equivalent”.

The judicial discretion of South African courts has been characterised as a legacy of English law. However, several scholars in civil-law countries have ascribed a discretionary power to the judge. The first was Karl Salomo Zachariae von Lingenthal (1769-1843), who taught at the University of Heidelberg in Baden, where the French Civil Code applied since 1810. The phrasing of article 1144 Cc prompted him to say that the court may reject the request to have the obligation performed at the debtor’s expense. In the third (1827) edition of his companion to the Code Napoléon, he left it to the court’s discretion to award damages instead. The French version of Zachariae’s work, edited by Aubry and Rau, expresses the same view.

About the same time, scholars in both France and the Netherlands acknowledged a judicial discretion in more general terms. The Groningen professor Gerard Diephuis (1817-1892) taught in 1849 that claims for removal (in lieu of art. 1143) could also be rejected. So did the French judge Léon Larombière (1813-1893) in 1857. By then Diephuis, though, had changed his mind and argued that the court must award an injunction whenever a third person can do what the debtor should do, or undo what the debtor had done. It was the creditor’s choice whether or not to claim damages or specific performance. This was also defended by Charles Demolombe (1804-1886), professor at the University of Caen. Demolombe could not convince the editors of the subsequent German editions of Zachariae’s work. Among legal scholars in France, Belgium and

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13 Cc 1144 (transl.): A creditor may also, in case of non-performance, be authorised to have the obligation performed himself, at the debtor’s expense.
14 Cf. Zachariae von Lingenthal, Handbuch des Französischen Civilrechts II (1827), 179: “Eben so kann er, wenn der Schuldner die ihm obliegende Verbindlichkeit nicht erfüllt hat nach befinden (Mit Vorbehalt des richterlichen Ermessens. Sir. XXI.1.429. S. auch Journ. du Palais du Justice XII.1.457) ermächtigt werden die Verbindlichkeit auf Kosten des Schuldners selbst in Vollziehung zu setzen.” In the fourth (1837) and later editions, the note reads: “(Also der Richter kann dieses Suchen auch abschlagen. Sir. XXI.1.432.).”
15 See Aubry & Rau, Cours de droit civil français par C.S. Zachariae, II (1850), § 299.
16 Diephuis, Nederlandsch burgerlijk regt, naar de volgorde van het Burgerlijk Wetboek VI (1849), 38: “Hoe algemeen deze bepaling moge luiden, zoo schijnt toch de regter niet onbepaald verpligt te zijn eene vordering van den schuldeischer tot vernietiging toe te wijzen, maar eenvoudig art. 1275 BW te kunnen toepassen, waar de omstandigheden zulks voor den schuldenaar te hard zouden doen zijn, en de schuldeischer die vernietiging niet volstrekt behoeft.”
17 Cf. Larombière, Théorie et pratique des obligations I (1857), 515: “Or les juges peuvent la rejeter, pour adopter un autre mode d’indemnité qui leur paraît plus juste et plus favorable à l’intérêt des parties (Cass. 20 dec. 1820 Sirey 1821 I.432).”
18 Cf. Diephuis (n. 16), 2 ed. (1858), 31.
19 Cf. Demolombe, Cours de Code Napoléon XXIV Traité des contracts (1868), no. 505; Laurent, Principes de droit civil XVI (1887), no. 199; Baudry-Lacantinerie, Traité théorique et pratique de droit civil des obligations (1900), 422.
20 Cf. Zachariae-Puchelt, Handbuch des Französischen Civilrechts II (1875), 281; Zachariae-Dreyer, Handbuch des Französischen Civilrechts II (1886), 298; Zachariae-Crome, Handbuch des
the Netherlands, however, the view of Demolombe became to prevail. Henceforth it was the general opinion that judges were not to reject claims of a possible performance.\(^{21}\) The occasional refusals by the courts\(^{22}\) met, however, with little opposition. There were exceptions, for instance, the ruling of the district court in The Hague which, while decreeing specific performance, rejected the claim based upon article 1277 BW (viz. allowing execution by substitution in case of non-compliance) “because the defendant, being the State, could be trusted to comply with a court order”.\(^{23}\)

Also in cases where real rights had been encroached upon, Dutch scholars sometimes ascribed a discretionary power to the judge. The 1838 Dutch Civil Code provided several examples of claims to restore the status quo, namely to take down what had been built or to rebuild what had been destroyed in infringement of a real right. The first, the right to removal, was not considered to be subject to judicial discretion. With regard to the right to repair, Paul Scholten (1875-1954) was of another opinion. In 1927 he considered it by no means self-evident that the court should order reconstruction, because of the analogy to a delictual claim\(^{24}\) for damages in kind. Hence, it was left to the discretion of the court to award damages.\(^{25}\)

### 3 Decreeing specific performance: The Roman-Dutch approach

In 1655, Willem de Groot, the younger brother of Hugo Grotius, reported with regard to court orders for specific performance in the province of Holland that “in our country there is a system unknown to other nations by which judgements condemning a person to render account, or to perform an act are executed ... called *gijzeling*”.\(^{26}\) The 1580 Ordinance on the procedure in the lower courts in Holland described this mode of execution as follows:

**Article 31:** The judgment debtor shall be ordered to place himself in *gijzeling* in a certain inn under penalty of ten guilders ... If he places himself in the inn, and having been there

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21 See, e.g., Van Goudoever, *Mr. C. Asser’s Handleiding tot de beoefening van het Nederlandsch burgerlijk recht* III (1913), 178: “De rechter mag ons inziens de gevorderde machti ging niet weigeren, omdat hij bijvoorbeeld vreest, dat de schuldenaar daardoor te zeer in zijne belangen zou worden benadeeld.”

22 For example see Baudry-Lacantinerie (n. 19), 422 note 2; Asser-Van Goudoever (n. 21), 178; Suijling, *Inleiding tot het burgerlijk recht* I (1923), 24; Van Rossem-Cleveringa, *Het Nederlandsch Wetboek van Burgerlijke Rechtsvordering verklaard en door formulieren toegelicht* (1934), 5 note 4.


24 As had been pointed out by Meijers. See his “Zakelijke rechtsvorderingen en vorderingen uit onrechtmatige daad” 43 (1912) *WPNR*, 598-599.


for 14 days is not as prudent to perform the act to the satisfaction of the court, he shall be apprehended and lodged in the goal at a cost of 3 pennies per day. If, after having been lodged in the goal for a month, the judgment debtor still does not satisfy the judgment, the judgment holder shall be entitled to request the court to tax the act and convert it into a money judgment.27

The availability of civil custody28 as mode of execution of court orders for specific performance, by no means implies that the court should always order performance in kind of contractual obligations. A limitation of gijzeling to the enforcement of duties prescribed by law would certainly have been in accordance with the ius commune. It had been the majority view since the times of Bartolus de Saxoferrato (1314-1357) that parties to a contract could in principle discharge their obligation to do something through the payment of damages. In this respect contractual obligations differed from duties prescribed by law or resulting from a last will.29 Hugo Grotius seems to suggest in his Inleidinge, written circa 1620, that this was also the case in Holland. He stated that even though by natural law a person who agreed to do something is bound precise, if it can be done, the civil law allows him to discharge this obligation through a payment of damages.30 There is no reference to a divergent legal practice.31

Simon Groeneweegen (1613-1652), however, said in his annotated edition of Grotius’ Inleidinge, published in 1644, that “nowadays he cannot relieve himself this way, but may be compelled by means of gijzeling to fulfil his promise”.32 To substantiate his view


28 Civil imprisonment would only then follow if a debtor had not placed himself in an inn (as ordered) or if he persisted in his refusal to comply with the court order. Hence, it should be distinguished from imprisonment for debts. Cf. Steyn, Gijzeling. The historical development of the mode of proceeding in gijzeling in the provincial court of Holland from 1531 (1939), 4ff.

29 Bartolus’ distinction between duties prescribed by law or testament, and contractual obligations became the prevailing view in the fifteenth and sixteenth centuries. See Dilcher, “Geldkondemnation und Sachkondemnation in der mittelalterlichen Rechtstheorie” 78 (1961) ZRG Rom. Abt., 29ff.; Repgen, Vertragstreue und Erfüllungszwang in der mittelalterlichen Rechtswissenschaft (1994), 249, 256, 261, 269, 288; Nehlsen-von Stryk, “Grenzen des Rechtswangs: zur Geschichte der Naturalvollstreckung” 193 (1993) Archiv für die civilistische Praxis, 553ff. She refers to the opinion of Baldus and later commentators, that oaths bind precise, but fails to mention that the same was true for duties prescribed by law.


32 Inleidinge tot de Hollandsche rechtsgeleerhteyt ... mitsgaders aanmerkingen door Simon Groenewegen van der Made, III.3.41 note 94 (ed. Delft 1644, 160): “Edog huydensdaegs en mag hy daermede nit volstaen, maer kan tot ’t geene hy toegeseit heeft precis gedwongen worden by giselinge ... .” See also Groeneweegen, De legibus abrogatis ad D. 42.1.13. For a detailed analysis of Groenwegen’s view see Hallebeek & Merkel, “Simon Groenewegen van der Made on the enforcement
Groenewegen referred to provisions on *gijzeling* in several ordinances, to a decision of the provincial court of Brabant reported by Paul van Christynen (1553-1631), and finally added that some jurists, not without reason, declare this to be in accordance with Roman law.

The case law and statutes Groenewegen refers to hardly justify his assertion that all contractual obligations were enforced by means of *gijzeling* in Holland, if the creditor so wished. The statutory provisions on *gijzeling*, like article 31 of the Ordinance discussed above, are silent on the issue of what acts the court should order to be specifically performed. Whether the ruling of the *Raad van Brabant* could be generally applied, may be doubted. The decision concerned a case where, with the parties’ consent, the taxation of the annual fruits of a fief had been commissioned (by the court apparently) to public appraisers who had promised to do so. When they subsequently were unwilling to undertake the taxation and offered to compensate the parties’ losses, namely their extra costs, the court ruled that specific performance could be enforced. It referred to a passage in Dumoulin’s commentary on the *Coutumes de Paris*.

Thus Charles Dumoulin (1500-1566), distinguishing between private persons and public appraisers stated that the latter may be compelled to accept their commission. Compelling public appraisers, to a taxation commissioned by the court would certainly be in accordance with the of obligationes faciendi” in Hallebeek & Dondorp (eds.), *The right to specific performance, the historical development* (2010), 91ff.

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33 *Viz.* Instructiën van den Hoogen Raad van Holland en Zeeland, 31 May 1582, art. 275 (ed. *Groot-Plcaetboek*, II, The Hague 1664, 883); Ampliatie van de Instructie van den Hove van Holland, 21 December 1571, art. 14 (ibidem, 770); Ordonnantie van de Iustitie en den steden en ten platte lande van Holland, 1 April 1580, art. 31-32 (ibidem, 702), and Costumen van Antwerpen, tit. LXVIII, art. 42-43. In Antwerp decrees for specific performance were not coerced by means of civil custody, but by sending *cnupers*, and, if this failed to have effect, by *executie op synen persoon* unless the interest in the performance was paid.

34 “Het welck ook enige regts-geleerden niet sonder reden seggen met de Roomse regten over een te komen” referring to Corasius, *Miscellanea II.3* and Busius, ad D. 42.1.3.1. Later editions add Bronchorst, *Enantiophanon*, cent. 4 assert. 41. See, for instance, ed. Amsterdam 1667, 239. These scholars denied that a debtor could discharge his obligation through a payment of damages. Cf. Jean de Coras (Corasius; 1513-1570), *Miscellanea iuris civilis II.3* (ed. *Opera omnia* Wittenberg 1603, II, 607); Everhard Bronchorst (1554-1627), *Enantiophanon IV.41* (ed. Franeker 1695, 418). They did not discuss compulsory measures. Hence, whether they considered civil custody to be in accordance with Roman law (as Hallebeek & Merkel (n. 32) 91 assume) cannot be ascertained. In his *De legibus abrogatis* ad D. 42.1.13 (ed. Beynart & Hewett 1984, 271) Groenewegen also referred to Fernando Vásquez (1512-1569) and Hendrik van Kinschot (1541-1608).

35 See Christinaeus, *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatorum decisiones* I, 323 no. 8 (ed. Antwerp 1626, 548): “cum dominus feudalis pro releviis feudi aperti eligit fructus anni, quorum aestimatio partium consensu collata est in publicos aestimatores, qui hoc faciendum susceperant. Nam cum illi nollent aestimare, sed partium interest offerretur, censuit eodem praecise cogi posse ad aestimandum, secundum Molinaeum ad Consuetudines Parisienses tit. 1 § 33, gloss. 3 no. 8.”

36 Cf. Dumoulin, *Opera omnia* (ed. Paris 1612, I, 1094): “Quid si aestimatores nominati nolint negotium suscire vel præmoriuntur? ... secus si publici aestimatores essent ad hoc nominati, quia praecise cogi possent a iudice ... “
learned law. Their duty can, however, hardly be seen as a representative example of a contractual obligation, even though they may have accepted their commission.

Nevertheless, Groenewegen’s became the prevailing view. Simon van Leeuwen (1627-1682) affirmed in his *Het Rooms-hollands regt*, published in 1664, that parties capable of performing could not pay damages instead. *Gijzeling* as mode of execution compelled them to perform (as decreed by the court) instead of resorting to a payment of damages. Judgement debtors who stubbornly refused performance, stayed in *gijzeling* for at least six weeks (of which only the first two in an inn) before the court, at the creditor’s request, would tax the performance due, and he would only be released after its payment. The eighteenth-century authors Willem Schorer, Gerlach Scheltinga and Dionysius van der Keessel considered this even to be in concordance with the *ius commune*.41

Only Johannes Voet (1647-1713) is said still to subscribe to the “antiquarian view” of Hugo Grotius. However, even though Voet in his commentary to D. 45.1 (no. 8) adhered to the *nemo precise cogi potest ad factum* principle, he acknowledged *gijzeling* as compulsory measure to enforce contractual obligations to do. While Groenewegen emphasised that in case of non-performance the court would not award damages but only decree specific performance, Voet underlined that eventually, if the *gijzeling* failed to have effect, the performance due would not be enforced. Hence, in his view the principle *nemo precise cogi potest ad factum* still applied. However, the debtor could not escape imprisonment (after two weeks of civil custody in an inn) by offering to pay the creditor’s damages or by ceding his goods.43

37 Bartolus and later commentators maintained that parties to a contract are not capable of creating an obligation to do something that is *precise* enforceable, unless one of the parties promises to do something to which he is already bound by law. See Repgen (n. 29), 315; Dondorp, “Precise cogi. Enforcing obligations in medieval legal scholarship” in Hallebeek & Dondorp (n. 32), 53-55.


40 Cf. e.g., art. 31 of the 1580 Ordinance on the procedure in the lower courts in Holland, discussed above.


42 Zimmermann, “Roman-Dutch jurisprudence and its contribution to European private law” 66 (1992) *Tulane Law Review*, 1700; see also Du Plessis (n. 30), 358: “Die benadering van Voet gee derhalwe erkening daaraan dat spesifieke nakoming wel in uitsonderlike ad faciendum gevalle (daar moet onthou word dat Voet ook die lewing van ‘n saak hieronder klassifiseer) in die Romeins-Hollandse reg beveel kon word, maar hy beskou ‘n skadevergoedingsseis as die primêre remedie.” This is, however, not the issue discussed in Voet ad D. 19.1 no. 14. Voet denied that D. 6.1.68 (enforced delivery) applied.

43 Cf. Voet, *Commentarius ad Pandectas*, ad D. 62.3 no. 5 (ed. Napels 1833, III, 137) : “... cum demum per praestationem eius quod interest a facti obligatione liberatio contingat, interesse autem non
According to Voet the same applied in case of a sale, as is clear from his commentary to D. 19.1 where, according to Zimmermann, he “launched into a rather unpersuasive, and ultimately unsuccessful, attempt to vindicate the Roman rule of *omnis condemnatio pecuniaria*”. The immediate cause was a decision of the High Court (Hoogen Raad) of Holland and Zeeland, first reported in the abridged 1627 edition of a collection of court cases compiled by Cornelis van Nieustadt (1549-1606). In the case, the Court had ordered that a seller, capable of complying with a previous court order, be kept in *gijzeling* until he had delivered. This was also what Groenewegen in his annotated edition of Grotius’ *Inleidinge* said, and also Van Leeuwen in his *Censura forensis*. Was it true that the vendor stayed in prison until delivery had taken place? They would not have had any doubts, Voet said, if in Holland it had been in the court’s power to deprive the owner of his ownership and to transfer it to another, as Van Nieustadt asserts. Voet meant the anonymous editor of the 1627 edition, who had noted that if the seller’s perseverance conquered his disgust of imprisonment, he would be either deprived of the object or be compelled to deliver it, by means of imprisonment after two weeks of civil

praestet qui tantum bonis cedit, consequens est ut etiamnum ad factum obligatus, etiam custodia civili alisque modis adigitur ad implementum eius.”

Zimmermann (n. 42), 1700.

See Fischer, *De geschiedenis van de reëele executie bij koop* (1934), 277.

Neostadius, *Uttriusque Hollandiae Zelandiae Frisiaeque curiae decisiones*, decisio 50 (ed. The Hague 1667, 197): “Venditor fundum emptori tradere condemnatus remque iudicatam facere iussus, eundem alii ex empto traditum affirmabat: quamobrem se oferre quanti interesset rem traditam non esset ... .” The case, as reported by the anonymous editor, involves a seller who has been ordered by the court to convey a tenement. Subsequently the buyer had given notice to convey the property (or appear in *gijzeling* in an inn). Parties thereupon once again sought recourse to the court, the seller alleging that by now he had sold and conveyed the property to another buyer. For this reason, viz. no longer being able to perform, he offered to pay the buyer’s damages (and requested to be released from civil custody).


*Neostadius* (n. 46), 197: “Quod si, taedium carceris pervicacia evincat, et tradare nolit: aut judicis officio, res ei erit auferenda, aut ad rei traditionem compellendus.” It is likely, that a question is meant, because the text continues: “Quod si nolit, tum demum emporti facta praestionem per judicem aestimare licebit, preciumque pignoribus captis, exequi.” Hallebeek & Merkel (n. 32), 93 wrongly assert that the High Court decided that specific enforcement was possible, if the *gijzeling* failed to
custody in an inn. However, as Voet pointed out, the courts in Holland did not dispossess a vendor _manu militari_.

Voet here merely described the executionary law in Holland. He was not trying to save the face of Roman law, as Zimmermann asserts. The Ordinance on the procedure of the lower courts in Holland (arts. 29-30) and the instruction of the provincial court (_Hof van Holland_) authorised dispossession _manu militari_ in cases where real claims had been brought (_sententiën in reële actien_).\(^51\) Absolute rights were enforced in Holland through specific enforcement. As Fischer pointed out in 1934 already, the buyer’s right to delivery was not enforced in this way.\(^52\) Instead, the vendor was compelled through _gijzeling_ to deliver the object himself.\(^53\) Eventually, however, the _gijzeling_ would come to an end. Voet underlined that this was not at the moment of an enforced delivery,\(^54\) but at the moment damages had been paid in full, including the cost of _gijzeling_ which the buyer had to prearrange.

4 **The Roman-Dutch legacy**

Returning to _gijzeling_ as mode of execution was proposed in the Netherlands in 1815, immediately after the Napoleonic occupation.\(^55\) However, the legislator decided to adopt the system of the French _Code civil_ and _Code de procédure civil_, which had had force of law in the Netherlands since 1811. As a consequence, coercive measures to enforce contractual obligations failed almost completely. Only two measures could be found in the 1838 Dutch Code of Civil Procedure: civil imprisonment of a depositee who refused to restore an object deposited out of necessity, and the eviction of a tenant who failed to vacate the premises after expiry of the lease. In all other situations the use of coercive measures would be without any statutory ground.

\(^{51}\) Cf. Ordonnantie op de justitie in de Steden ende platte Lande, 1 April 1580, art. 29-30 (ed. _Groot-Placaetboek_ II, The Hague 1664, 702); Instructie van den Hove van Holland, 21 December 1531, art. 172 (_ibidem_, 742).

\(^{52}\) Fischer (n. 45), 301ff.

\(^{53}\) Wessels (n. 41), 618 is mistaken in deriving from Voet, ad D. 19.1 no. 4, that Voet considered it “inadvisable to give a judge the power of specifically enforcing contracts by gijzeling”.

\(^{54}\) According to Hallebeek & Merkel (n. 32), 93 it was generally acknowledged that specific enforcement (dispossession _manu militari_) followed, if _gijzeling_ failed to have effect. This sequence of measures is denied by Voet; Groenewegen and Van Leeuwen merely repeated what the High Court had decided. For this opinion Van Nieustadt (viz. the anonymous editor of the 1627 edition) is the only writer Voet, Voorda and Kramp referred to.

\(^{55}\) The Ontwerp Kemper of 1816 characterised all obligations other than to give a sum of money as obligations to do. The latter were to be enforced through _gijzeling_. Cf. Ontwerp Kemper 1816, art. 2469 _jo._ Art. 410 Ontwerp op de manier van procederen in civiele zaken 1815.
The plaintiff could choose between a claim for specific performance and (if the defendant was in default) a claim for damages. The courts also decreed specific performance, but as a rule creditors had to be content with damages if the defendant, though capable of performing, refused to comply with the court’s sentence. In the event of non-performance, obligations to do resolved into damages — the obligation of a seller of immovables to cooperate in drawing up a deed of transfer being one of them. The buyer eventually had to content himself with damages if the vendor failed to comply, because the court’s sentence (ordering specific performance) could not be remitted in the registers.

Specific performance of a sale of movables was rarely sought in the nineteenth century. Willem Molengraaff (1858-1931) reported in 1900 that he had found no examples of courts ordering delivery. Here, Dutch case law diverged from the French. In 1838 the Netherlands returned to the modes of transfer of Roman-Dutch law and required a separate conveyance. In France, ownership passed the moment the sale was concluded. As a consequence, in France it was never doubted that the buyer’s right to enjoy possession could be manu militari enforced, even though a statutory basis was missing. In the Netherlands, courts began to authorise enforced delivery of the merchandise only in the early twentieth century. Specific enforcement remained disputed. Even in 1933 the Legislature did not introduce it as coercive measure. According to the Leiden practitioner Willem Hugenholtz (1902-1969), this was regrettable, but not surprising “because one was afraid to pull down the ancient partition between personal and real rights”.

56 Art. 1142 Cc was adopted by the Dutch Legislature (1275 OBW). This provision was understood to apply where the performance due could not be executed by someone else, for arts. 1143-1144 Cc (1276-1277 OBW) ruled that a plaintiff could be authorised to have the performance due executed at the debtor’s expense; hence, in acts that could be performed by someone else, the creditor could choose between claiming specific performance (and execution by substitution) and damages.

57 See HR 23 June 1899 W 7302. The case concerned a sale which was concluded orally. A separate deed of transfer was not needed, if the sale was put in writing. The buyer could remit the deed of sale (koopakte) for registration. See for a detailed discussion Dondorp, “Ergen dan bolsjevisme. Reële executie in de zaak Van der Kraan vs. Van der Spiegel (1896)” in Coppens et al., Fabricia iuris. Opstellen over de werkelijke toepassing van het recht aangeboden aan Sjoerd Faber (2009), 233-251.

58 It was also decided (HR 23 June 1899) that the court could order specific performance notwithstanding the lack of compulsory measures. Until then, legal scholars and the judicature had been divided on this issue. For examples, see Fischer (n. 45), 347 notes 1 and 2.

59 Rb Rotterdam 18 May 1896 W 6862 is the first example of a court authorising the buyer to have its sentence remitted in the registers. This was overturned by the court of appeal (Hof Den Haag 25 October 1897 W 7067) and the Supreme Court (HR 23 June 1899 W 7302). Fischer (n. 45), 347 failed to distinguish between the question whether the court orders specific performance, and the question whether it authorises specific enforcement.

60 Cf. Fischer (n. 45), 347. He reports only two examples.

61 Cf. Moolengraaff, “Hoe moet geregeld worden de tenuitvoerlegging van vonnissen in burgerlijke zaken, inhoudende een veroordeling tot een andere prestatie dan die eener geldsom”: Handelingen der Nederlandse Juristen Vereniging (1900), 1-86.


63 Hugenholtz, Over reële executie (1937), 22: “[I]mmers men was bevreeds den alouden scheidsmuur tussen persoonlijke en zakelijke rechten omver te halen.” (Also published in WPNR 3503-3505.)
As mentioned earlier, after 1806 in the Cape Colony plaintiffs could still bring a claim for specific performance. However, it was common practice in the case of obligations to do, to bring an alternative claim for damages in case the order was not complied with.64

Occasionally a simple claim for specific performance was brought. The earliest case is *Twentyman v. Hewitt*65 in 1833, where the court decreed that an antenuptial contract be drawn up and ordered imprisonment of the husband for disobedience of this order. At the end of the nineteenth century, however, in 1879 in *Norden v. Rennie*,66 Sir Henry De Villiers CJ (1842-1914) said that “the creditor is entitled to have specific performance, but judgement must be in the alternative”. Hence, the defendant had the option of paying damages in lieu of specific performance. “In such cases”, De Villiers CJ said in *Van der Westhuizen v. Velenski* in 1898,67 “the Court has never gone very minutely into the question of damages sustained, but has taken a round sum for the purpose of enforcing its own judgement”. Here, the decree of damages seems to be meant as coercive measure.68

A different line of thought is discernable in the decisions of the Supreme Courts of Natal and the Transvaal. In *Trollip v. Tromp and Van Zweel*69 the Natal Court in 1867 authorised the registrar to pass transfer when Tromp refused to cooperate in the conveyance of a farm after the court had declared that the plaintiff was entitled to transfer. In 1907 in *De Villiers v. Meyer’s Executrix*70 the Transvaal Supreme Court did the same after the seller had been ordered to transfer a tenement. And in 1904 in *Shanovski v. Lawson*,71 Sir James Rose Innes CJ (1855-1942) also acknowledged the right to specific performance, albeit subject to judicial discretion. The Court, however, chose another mode of execution: instead of authorising the registrar to pass transfer if the seller failed to obey, the court would commit the defendant for contempt. This implied civil imprisonment as compulsory measure.

5 Conclusions

Lord De Villiers’ assertion that judgement must be in the alternative, even though merely specific performance is claimed, seems to resemble the predominant view among nineteenth-century French and Dutch legal scholars that obligations to do resolve in damages if the judgement debtor refuses to comply with the court order. In other words, the creditor may claim specific performance, and the court should also decree specific

64 Cf. Gross (n. 4), 372; Lee (n. 41), 448.
65 (1833) 1 Menz 156. But in *Van Staaden v. Kocks* (1838) 4 EDC 24, the Court refused to order specific performance of an obligation to marry.
66 (1879) Buch 155.
67 (1898) 15 SC 237. The latter concerned an agreement to sell land on certain conditions. The agreement was in pencil and provided for “a contract to be properly drawn up, which shall be signed by the parties tomorrow”. The defendant refused to sign the formal contract of sale. An example of specific enforcement of a contract of sale provides *Van der Byl v. Hanbury* (1882) 2 SC 80.
68 This was repudiated in *Woods v. Walters* 1921 AD 303.
69 (1867) 1 NLR 130.
70 1907 TS 519.
71 1904 TS 326.
performance unless the performance is no longer possible, but then the creditor must content himself with damages, if the debtor refuses to comply with the court order. Under Dutch law this was also true in case of a contract of sale, even though the 1838 Civil Code (following the French *Code civil*) characterised the seller’s obligation to transfer possession as an obligation to give (*obligatio dandi*).

As explained, in the Netherlands, this was caused by the absence of (statutory) coercive measures. On the one hand, the compulsory measure used in Holland to enforce obligations, *gijzeling*, had been abolished. On the other hand, like in Holland in the times of the Republic, dispossession with the help of the police was considered to be restricted to real claims.

In South Africa another line of thought became predominant. There was no reason to assert that the creditor must be content with damages in case of non-compliance. Imprisonment was still available as a compulsory measure, because a refusal to comply with a court order (not phrased alternatively) constituted contempt of court at common law. The buyer’s right to specific performance could even be enforced *manu militari*, if a seller capable of conveying failed to comply with the decree of the court. Even though this could be the result of a misinterpretation of the Roman-Dutch scholars, it was in concordance with the *ius commune* according to French and German.