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A GENERAL THEORY FOR MEASURING SELLER'S DAMAGES FOR TOTAL BREACH OF CONTRACT

Robert J. Harris*

THE ordinary remedy for breach of contract is the award of expectation damages,¹ measured so that the award, plus that part of defendant's performance which plaintiff received, will give plaintiff the economic equivalent² of the status he would have enjoyed had he and defendant performed the contract as promised.³ If defendant's breach is serious⁴ and plaintiff's duty to perform was conditioned upon defendant's proper performance,⁵ the breach not only entitles plaintiff to sue for expectation damages, it also gives him the legal power to refuse to render the balance

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¹ This article is concerned with expectation damages—those fashioned to give plaintiff as good a status as he would have enjoyed had the contract been fully performed by all parties. This is the normal measure of damages in almost all situations. McCORMICK, DAMAGES § 137 (1935). Breach of a promise to repay money and, in some states, a good faith failure to keep a promise to deliver good title to land give rise to damages which are less than expectation damages. McCORMICK, DAMAGES § 178 (1935). Where plaintiff cannot prove his expectation damages with certainty, he is usually permitted to recover his expenditures made in reliance on the contract. See discussion in 5 CORBIN, CONTRACTS § 1035 (1951); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936). A total breach which results in unjust enrichment of the breaching party at the expense of the plaintiff normally is the occasion for a restitution suit. 5 CORBIN, CONTRACTS § 1104 (1951), unless the breach has given rise to a debt. *Id.*, § 1110.

Although the courts often tend to blur the distinction between these three, the author regards them as distinct remedies, and the present article is confined to situations where the court is pursuing the expectation damage remedy.

² Generally there is no recovery for harm to psychic interest. See 5 CORBIN, CONTRACTS § 1076 (1951); McCORMICK, DAMAGES § 145 (1935); 1 RESTATEMENT, CONTRACTS § 341 (1932); Annots., 84 A.L.R. 1345 (1933), 23 A.L.R. 372 (1923).

³ The goal of restoring plaintiff to this status is subordinated to several other policies, as indicated on pp. 583-84 *infra*. But if none of these overriding policies is present, plaintiff's expectation interest is vindicated completely. See *Atlas Trading Corp. v. S. H. Grossman, Inc.*, 169 F.2d 240, 246 (3d Cir. 1948); *Silberstein v. Duluth News-Tribune Co.*, 68 Minn. 430, 71 N.W. 622 (1897); *Griffin v. Colver*, 16 N.Y. 489 (1858); *cf. Jones v. Van Patten*, 3 Ind. 107 (1851). See generally 1 BONBRIGHT, VALUATION OF PROPERTY 270 (1937); 5 CORBIN, CONTRACTS § 992 (1951); McCORMICK, DAMAGES § 137 (1935); RESTATEMENT, CONTRACTS § 329, comment *a* (1932); 1 SEDGEWICK, DAMAGES 25 (9th ed. 1912).

⁴ See generally 4 CORBIN, CONTRACTS § 946 (1951); McCORMICK, DAMAGES § 142, at 582 (1935); RESTATEMENT, CONTRACTS § 313 (1) (1932); 3 WILLISTON, CONTRACTS § 1290 (1931).

⁵ *E.g., Roehm v. Horst*, 178 U.S. 1, 17 (1900); *Carlson v. Doran*, 252 Minn. 449, 90 N.W.2d 323 (1958); *Nichols v. Scranton Steel Co.*, 137 N.Y. 471, 33 N.E. 561 (1893). See also 3A CORBIN, CONTRACTS § 637 (1960); 3 WILLISTON, CONTRACTS § 1329 (1931).

of plaintiff's promised performance.⁶ When plaintiff first exercises this power and then sues for expectation damages, the "savings" which the plaintiff enjoyed by exercise of the power must be taken into account in measuring damages.⁷

What plaintiff saved upon breach is only the first of three elements that go into all formulae for measuring ordinary contract damages. These savings must be deducted from the second element, the value to plaintiff of the difference between what defendant promised to do and what defendant in fact did to perform the contract—in other words, the unpaid balance of the price.⁸ The last element in all expectation damage formulae often is called "consequential damages" or "incidental damages."⁹ The object of this element is to compensate plaintiff for his reasonable post-breach expenditure made in an effort to mitigate the consequences of breach. This element arises only if plaintiff actually incurred such expenditure after breach and before trial.

Plaintiff's obligation to mitigate damages,¹⁰ or, as it is sometimes called, the doctrine of avoidable consequences,¹¹ often requires the plaintiff to exercise his power to stop work.¹² Failure to exercise it is visited by oblique sanction:¹³ when the court

⁶ *E.g.*, *Lowe v. Harwood*, 139 Mass. 133 (1885); *Lee v. Briggs*, 99 Mich. 487, 58 N.W. 477 (1894); *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339 (1905).

⁷ *Cf.* *Bullard v. Eames*, 219 Mass. 49, 106 N.E. 584 (1914); *Mays v. Hartman*, 81 Ohio App. 408, 77 N.E.2d 93 (1947). See also 5 CORBIN, CONTRACTS § 1038 (1951); MCCORMICK, DAMAGES § 143 (1935); RESTATEMENT, CONTRACTS § 335 (1932).

⁸ Frequently judges, commentators, and draftsmen of statutes describe this element elliptically, referring to it as "the contract price," rather than "the unpaid balance of the contract price." *E.g.*, the Uniform Sales Act (§ 64) provides that "the measure of damages is . . . the difference between the contract price and the market or current price . . ." The decided cases, however, make it clear that the thought, amplified, is the unpaid balance of the contract price. See, *e.g.*, *Bradford Novelty Co. v. Technomatic, Inc.*, 142 Conn. 166, 112 A.2d 214 (1955); *Sal's Furniture Co. v. Peterson*, 86 R.I. 203, 133 A.2d 770 (1957).

⁹ See *Development Co. of America v. King*, 170 Fed. 923 (2d Cir. 1909); UNIFORM COMMERCIAL CODE § 2-710; 5 CORBIN, CONTRACTS § 1044 (1951); Annot., 84 A.L.R. 171 (1933). *But see* SEDGEWICK, DAMAGES, ch. 3 (1st ed. 1847).

¹⁰ 5 CORBIN, CONTRACTS § 1039 (1951); MCCORMICK, DAMAGES §§ 33-42 (1935); RESTATEMENT, CONTRACTS § 336 (1932); 1 SEDGEWICK, DAMAGES 385 (9th ed. 1912).

¹¹ See 5 CORBIN, CONTRACTS § 1039 (1951); MCCORMICK, DAMAGES § 33 (1935); 1 SEDGEWICK, DAMAGES § 203 (9th ed. 1912).

¹² *E.g.*, *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929); *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263 (1891); *Wigent v. Marrs*, 130 Mich. 609, 90 N.W. 423 (1902); *Clark v. Marsiglia*, 1 Denio 317 (N.Y. 1845).

¹³ This fact is often referred to as a "duty to mitigate." This is a misnomer. See *Rock v. Vandine*, 106 Kan. 588, 189 Pac. 157 (1920); *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930) (Cardozo, Ch.J., concurring); 5 CORBIN, CONTRACTS § 1039, at 205 (1951); MCCORMICK, DAMAGES § 33, at 128 (1935); 1 SEDGEWICK, DAMAGES § 202 (9th ed. 1912); Annot., 81 A.L.R. 282 (1932).

comes to measure plaintiff's damages it will treat him as though he had exercised the power and stopped work immediately upon notice of breach. Thus plaintiff's actual or potential savings¹⁴ upon exercise of this power are an important part of damage measurement both in cases where plaintiff exercised the power and in cases where he should have done so, but failed to do it.

This article is concerned with the legal rules which should govern the process of valuing what plaintiff saved by exercising his power to stop further performance upon notice of defendant's serious breach. Where plaintiff is a "buyer" (whether he buys land, services, personalty, or the temporary use of some kind of property), and he was to pay the price in dollars,¹⁵ few difficulties arise in valuing his saved performance. But if he was a "seller" of any of those commodities, valuation is hard. Thus our inquiry is chiefly concerned with cases in which plaintiff is a "seller," not a "buyer."¹⁶

Valuation—the process of translating something into a quantity of dollars—usually gets little direct discussion in the reported opinions concerned with measurement of contract damages.¹⁷ The rules governing it must be inferred from the results affirmed or reversed and from the cryptic clues afforded by elliptical generalizations. An example of the latter is the Uniform Sales Act's familiar codification of the common-law rule:

"Section 64. Action for damages for non-acceptance of goods.—

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

¹⁴ If he mitigates, his savings are actual; if he should have, they are potential.

¹⁵ The same valuation problems exist if the plaintiff was a buyer who agreed to pay all or part of the price in something other than dollars.

¹⁶ This article is concerned with valuation of what plaintiff saved by virtue of defendant's total breach. It is rare that valuation problems are presented in cases where plaintiff's performance was to be a money payment—that is, in cases where plaintiff is a "buyer." Consequently, the title of the article refers to "seller's damages." But the theoretical considerations apply whether plaintiff was to pay money and defendant do something else ("plaintiff is a buyer"), plaintiff was to do something else and defendant was to pay money ("plaintiff is a seller"), or both parties were to do something other than pay money (contract of exchange).

¹⁷ See I BONBRIGHT, VALUATION OF PROPERTY 277 (1937).

Here the legislature is saying that plaintiff-seller's savings should be valued by reference to the price the rejected goods would fetch at the nearest commodity exchange,¹⁸ or if the goods are not of a sort sold at such an exchange, by reference to the highest price the seller could obtain for them by reasonable efforts at reselling them.¹⁹ This much meaning is locked in the term "market or current price."

The *Restatement of Contracts*, section 346 (2) (a), states the familiar measure of damages where plaintiff is a building contractor and defendant-owner committed a total breach of the contract:

"the entire contract price and compensation for unavoidable special harm that the defendant had reason to foresee when the contract was made, less installments already paid and the cost of completion that the builder can reasonably save by not completing the work. . . ."

Here plaintiff's savings by exercise of his power to stop further performance are to be valued by reference to what it should have cost plaintiff to complete performance.

In *Corbin on Contracts*²⁰ a formula appears for use in cases where plaintiff is an employee who is wrongfully discharged before he substantially completed the service of a particular period for which a definite wage installment was the agreed equivalent. The measure is

"the total amount of the unpaid wages that were promised to him for his service, less the amount that he can earn by making reasonable effort to obtain similar service under another employer."

Here the employee's savings upon exercise of the power are valued by reference to the price his services would have fetched had he used reasonable efforts to resell them:²¹ they are valued by reference to the labor market in which he could resell them.

¹⁸ E.g., *Bogren v. Conn*, 224 Iowa 1031, 278 N.W. 289 (1938); *Garfield & Proctor Coal Co. v. New York, N.H. & H. Ry.*, 248 Mass. 502, 143 N.E. 312 (1924); *Buyer v. Mercury Technical Cloth & Felt Corp.*, 301 N.Y. 74, 92 N.E.2d 896 (1950); *Rees v. R. A. Bowers Co.*, 280 Pa. 474, 124 Atl. 653 (1924).

¹⁹ See *Churchhill Grain and Seed Co. v. Newton*, 88 Conn. 130, 89 Atl. 1121 (1914); *Babbitt v. Wides Motor Sales Corp.*, 17 Misc. 2d 889, 192 N.Y.S.2d 21 (Sup. Ct. 1959); *Growers Exch. v. John A. Eck Co.*, 66 Utah 340, 242 Pac. 391 (1925).

²⁰ 5 CORBIN, CONTRACTS § 1095, at 431 (1951).

²¹ *Ibid.*

In Corbin's discussion of the seller's damages for breach by a buyer of goods the following passage appears:

"If the seller is a manufacturer or producer of the subject of the sale, with capacity to produce enough such articles to supply all probable customers, the buyer's rejection does not make possible a second sale that the seller could not otherwise have made. Every new customer would have been supplied even if the buyer had kept the goods and performed his contract. The same is true if the seller, though not himself a producer of the goods, is an intermediate dealer whose relations with a producer enable him to supply all obtainable customers. In these cases, the buyer's breach does not make possible a new sale in which the profit lost by the buyer's breach would be replaced. Every new sale by the seller would have brought in a new profit. The only 'saving' that the buyer's breach makes possible in these cases is the 'cost' of producing or procuring the subject of the sale; the seller is enabled to make one new sale without incurring the cost of a second article of the kind. In order to put the seller in as good a position as that in which performance would have put him, he must now be awarded the contract price diminished only by his cost of procurement. Normally, this 'cost of procurement' by an intermediate dealer is the 'wholesale price' to dealers, not the market value at retail, the difference being the dealer's profit."²²

The passage reflects the views of several other commentators as well,²³ and its idea has been followed in a substantial group of cases involving "expansible" sellers of goods as plaintiff.²⁴ Indeed, similar notions appear in many cases where the "expansible" seller-plaintiff sells services, not goods.²⁵ In all these cases what plaintiff saved is valued by reference to its cost to plaintiff, rather than the price at which he could resell it.

²² *Id.* § 1100, at 449.

²³ See 1 BONBRIGHT, VALUATION OF PROPERTY 304 (1937); McCORMICK, DAMAGES § 41 (1935); Comment, 65 YALE L.J. 992, 993 (1956); Note, 22 CORNELL L.Q. 581 (1937).

²⁴ *E.g.*, Tedford Auto Co. v. Horn, 113 Ark. 310, 168 S.W. 133 (1914) (by implication); Willhelm Lubrication Co. v. Brattrud, 197 Minn. 626, 268 N.W. 634 (1936); Cameron v. White, 74 Wis. 425, 43 N.W. 155 (1889). See also Mossy Motors v. McRedmond, 12 So. 2d 719 (La. 1943). See pp. 599-604 *infra*. Annot., 24 A.L.R. 2d 1008 (1952).

²⁵ See Van Winkle v. Satterfield, 58 Ark. 617, 25 S.W. 1113 (1894); Nucholls v. College of Physicians & Surgeons, 7 Cal. App. 233, 94 Pac. 81 (1907); Sullivan v. McMillan, 37 Fla. 134, 19 So. 340 (1896); Mount Pleasant Stable Co. v. Steinberg, 238 Mass. 567, 131 N.E. 295 (1921); Annot., 15 A.L.R. 751 (1921).

Thus it would appear that in some situations plaintiff's savings are to be valued by reference to his costs, and in some situations they are to be valued by reference to resale price. Moreover, it appears that even where plaintiff's savings are valued by reference to their resale price there is a split as to who must prove the resale price, some cases holding that defendant has the burden of proving that price,²⁶ while other cases indicate that plaintiff has the burden.²⁷ Thus there are at least three, not two, rules competing in the cases involving valuation of what plaintiff saved by defendant's breach. Despite this diversity of basic approaches there is very little effort made in the reported opinions²⁸ or the commentators' writings²⁹ to explain the type of case in which each valuation approach is appropriate.

This article attempts to state some broad rules which the author thinks *should* govern the process of valuing what plaintiff saved by exercise of his power to avoid further performance.³⁰ The purpose of this article is to demonstrate that there are general principles and considerations which make possible a set of rules for valuing what plaintiff saved regardless of the type of contract involved. The rules stated herein purport to apply whether plaintiff is seller or buyer,³¹ and whatever the type of commodity being

²⁶ *E.g.*, *Ogden v. George F. Alger Co.*, 353 Mich. 402, 91 N.W.2d 288 (1958); *McMullan v. Dickinson*, 60 Minn. 156, 62 N.W. 120 (1895); *Manhattan Overseas Co. v. Camden County Beverage Co.*, 125 N.J.L. 239, 15 A.2d 217 (1940); *Howard v. Daly*, 61 N.Y. 362 (1875). See also Annot., 17 A.L.R.2d 968 (1951).

²⁷ *E.g.*, *Frankel v. Foreman & Clark*, 33 F.2d 83 (2d Cir. 1929); *Obrecht v. Crawford*, 175 Md. 385, 2 A.2d 1 (1938); *McColl v. Wardowski*, 280 Mich. 374, 273 N.W. 736 (1937); *Derami, Inc. v. John B. Cabot, Inc.*, 273 App. Div. 717, 79 N.Y.S.2d 664 (1948). See also Annot., 130 A.L.R. 1336 (1941).

²⁸ See 1 BONBRIGHT, VALUATION OF PROPERTY 276-77 (1937).

²⁹ Among the best of the commentators writing on the variant approaches to valuing what plaintiff saved thanks to defendant's total breach are 1 BONBRIGHT, VALUATION OF PROPERTY (1937); 5 CORBIN, CONTRACTS § 1004 (1951); McCORMICK, DAMAGES §§ 43-49 (1935); Matthews, *The Valuation of Property in the Early Common Law*, 35 HARV. L. REV. 15 (1921).

³⁰ Subsequent articles will examine the case law in selected jurisdictions and under the Uniform Sales Act to determine the extent to which the results of decided cases correlate with the author's ideas of policy.

³¹ The conventional categorization of damage rules distinguishes between seller as a plaintiff and buyer as a plaintiff. See, *e.g.*, UNIFORM COMMERCIAL CODE § 2-708; UNIFORM SALES ACT § 64; or the table of contents of any treatise or digest. This often leads to creation of another category or categories to embrace situations involving breach of a contract of exchange, such as a typical manufacturer-distributor arrangement. See *Nelson Equip. Co. v. Harner*, 191 Ore. 359, 230 P.2d 188 (1951); Annot., 89 A.L.R. 252 (1934). *Cf.* 5 CORBIN, CONTRACTS § 1025 (1951); 1 SEDGWICK, DAMAGES § 193 (a) (9th ed. 1912). Although they rarely recognize the source of their difficulty clearly, courts often have heavy going in cases involving contracts of exchange because they are used to buyer/seller

exchanged^{31a} or the character of plaintiff's enterprise,³² or the precise nature of defendant's serious breach.³³

The author's "should" is derived in part from what he thinks are well-established notions that apply across the board in all cases involving measurement of expectation damages for breach of contract: (1) the goal is expectation-compensation, subject to the other policies listed below; (2) there is no recovery for items of loss unforeseeable to defendant at the time of contracting;³⁴ (3) there is no recovery for those consequences of breach which plaintiff could have avoided by reasonable self-protective care;³⁵ (4) all plaintiff's gains causally related to the breach must be taken into account in measuring damages, whether or not plaintiff was obligated by the mitigation notion to incur the risks that were involved in achieving the particular gain;³⁶ (5) all items of loss not proved with sufficient certainty shall be ignored in damage measurement;³⁷ (6) all plaintiff's expenditures in reasonable ef-

type of categorization of plaintiffs. See *Frederick v. Hillebrand*, 199 Mich. 333, 165 N.W. 810 (1917) (ignoring the problem). Compare *Poppenberg v. R. M. Owen & Co.*, 84 Misc. 126, 146 N.Y.S. 478 (Sup. Ct. 1914) with *A. Lenobel, Inc. v. Senif*, 252 App. Div. 533, 300 N.Y. Supp. 226 (1937). See note 16 *supra*.

^{31a} Conventionally, damage measurement formulae are particularized according to whether they involve goods, land, services, etc.

³² See, e.g., *Renner Co. v. McNeff Bros.*, 102 F.2d 664 (6th Cir. 1939) (business requires advance contracts); *Patty v. Berryman*, 95 Cal. App. 2d 159, 212 P.2d 937 (1949) ("middleman"); *Nelson Equip. Co. v. Harner*, *supra* note 31 ("dealer"); Annot., 24 A.L.R. 2d 1008 (1952); 32 A.L.R. 209 (1924); 41 A.L.R. 1175 (1926).

³³ For use of this sort of distinction, see *Roehm v. Horst*, 178 U.S. 1 (1900); *McGrew v. Ide Estate Inv. Co.*, 106 Kan. 348, 187 Pac. 887 (1920); *Forest Prods. Co. v. Dant & Russell, Inc.*, 117 Ore. 637, 244 Pac. 531 (1926); Annot., 44 A.L.R. 215 (1926).

³⁴ The foreseeability doctrine rarely comes into issue in cases where plaintiff is a seller. The vast bulk of cases in which the doctrine has significance involve efforts to value "item #2": the difference between what defendant promised to do and what he in fact did. And "item #2" only presents difficult valuation choices if defendant's performance is something other than the payment of money—that is, if defendant is a buyer. See generally *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903); *Dally v. Isaacson*, 40 Wash. 2d 574, 245 P.2d 200 (1952); *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854); 5 CORBIN, CONTRACTS § 1007 (1951); MCCORMICK, DAMAGES §§ 137-141 (1935); RESTATEMENT, CONTRACTS § 330 (1932).

³⁵ See materials cited note 10 *supra*.

³⁶ See *Pacific Odorite Corp. v. Gersh*, 94 Cal. App. 2d 174, 210 P.2d 318 (1949); *Griffin v. Oklahoma Natural Gas Corp.*, 132 Kan. 843, 297 Pac. 662 (1931); 5 CORBIN, CONTRACTS § 1041 (1951); MCCORMICK, DAMAGES § 160, at 630 (1935). See also text at p. 605 *infra*.

³⁷ *Stephany v. Hunt Bros.*, 62 Cal. App. 638, 217 Pac. 797 (1923); *Isbell v. Anderson Carriage Co.*, 170 Mich. 304, 136 N.W. 457 (1912); *Schoenberg v. Forrest*, 253 S.W.2d 331 (Tex. Civ. App. 1952); 5 CORBIN, CONTRACTS § 1020 (1951); MCCORMICK, DAMAGES §§ 25-32 (1935); RESTATEMENT, CONTRACTS § 331 (1) (1932); Annot., 78 A.L.R. 858 (1932); Note, 64 HARV. L. REV. 317 (1950).

forts to avoid the consequences of breach can be recovered, whether or not the effort ultimately proves successful.³⁸

By the time all these notions are heeded, the range of choice in the valuation process is much reduced. The question of choice is then resolved by reference to two notions: (1) the value being sought is value *to the plaintiff*,³⁹ and (2) all remaining choices should be resolved in the interests of convenient trial administration. The latter notion requires that some attention be given to matters which are deeply entwined in the choice of valuation approach:⁴⁰ the allocation of the burden of proof, the types of evidence deemed sufficient to carry the burden, and the availability of flexible discovery devices.

RULES FOR MEASUREMENT

In fixing the value of plaintiff's unrendered performance, the initial choice is between valuing the savings as an "entity," or by reference to the individual components which would have gone into completing plaintiff's performance. The "entity" approach, which places emphasis on the possible or actual resale price of the commodity, rests on the assumption that plaintiff should have minimized his damages by completing his performance and reselling it to another buyer. The components approach, which places emphasis on plaintiff's costs, rests on the assumption that the best way for plaintiff to minimize his damages was to stop work upon notice of breach. In the great majority of cases mitigation principles will require that the plaintiff stop work upon notice of breach, so that the typical valuation problem will involve an inquiry into the value of the components of plaintiff's performance which he was not required to render.

³⁸ *Hartford City Paper Co. v. Enterprise Paper Co.*, 86 F. Supp. 549 (E.D. Pa. 1949); *National Commodity Corp. v. American Fruit Growers*, 45 Del. 169, 70 A.2d 28 (1949); *Berquist v. N.J. Olsen Co.*, 165 Minn. 406, 206 N.W. 931 (1925); *Lake County Pine Lumber Co. v. Underwood Lumber Co.*, 140 Ore. 19, 12 P.2d 324 (1932); 5 CORBIN, CONTRACTS § 1044 (1951); MCCORMICK, DAMAGES § 42 (1935); RESTATEMENT, CONTRACTS § 336 (2) (1932).

³⁹ See *Continental Copper & Steel Industries v. Bloom*, 139 Conn. 700, 96 A.2d 758 (1953); *Moline Furniture Works v. Club Holding Co.*, 280 Mich. 587, 274 N.W. 338 (1937). Cf. *Cody v. American Educational Co.*, 131 Ill. App. 240 (1907). See also 1 BONBRIGHT, VALUATION OF PROPERTY 271 (1937); MCCORMICK, DAMAGES § 44, at 168 (1935); 1 SEDGWICK, DAMAGES § 251 (9th ed. 1912); 3 WILLISTON, CONTRACTS § 1343 (1931). Cf. RESTATEMENT, TORTS § 911 (1939).

⁴⁰ See discussion at pages 588-92 *infra*.

I. PLAINTIFF'S SAVINGS VALUED INDIVIDUALLY

A. *Identification of Components*

Identification of the components which were to have gone into plaintiff's performance during the time interval after defendant's total breach necessitates inquiry into plaintiff's state of affairs at the moment of total breach.⁴¹ What he had on hand then and how he planned to assemble component parts of his performance not yet on hand are essential matters for accurate measurement.

Five types of components of his as yet unrendered performance can be distinguished as of that moment in time: (1) overhead; (2) variable costs yet to be incurred; (3) real property on hand; (4) personal property on hand; and (5) plaintiff's non-delegable services yet to be rendered. Distinctions must be drawn among these categories because each should have its own appropriate valuation rules.

"Overhead" in this context embraces all economic items that share two characteristics: (1) had plaintiff not exercised his power to stop work they would have been brought to bear, directly or indirectly, in the task of completing plaintiff's promised performance; (2) the item in question, whether or not plaintiff had it on hand at the moment he learned of breach, would have been used by plaintiff not only in completing his performance of this contract, but also in the performance of others. "Overhead," as used here, includes such items as the plaintiff's insurance protection, his goodwill, the work time of his employees, his productive real property whether owned or leased, his machinery—in short, all assets whose cost of acquisition is regarded as fixed, not variable. It makes no difference whether an overhead item was on hand or yet to be acquired, at the moment of breach notice.

"Variable costs yet to be incurred" differ from "overhead" in two obvious ways: (1) we now concentrate on items not yet on hand nor under contract to plaintiff at the moment of breach notice, whereas the "overhead" category was indifferent to the mo-

⁴¹ The moment of notice of breach—in repudiation cases—or the moment when plaintiff elects to terminate—in other total breach cases—is the critical moment for determining *what* is to be measured. When that question has been resolved, and the court seeks to value property on hand by reference to its resale price, a separate and distinct problem of timing arises: as of what date shall resale value be measured? Resolution of the latter question is beyond the scope of the present article. See, *e.g.*, MCCORMICK, DAMAGES § 48 (1935); Note, 37 MINN. L. REV. 215 (1953).

ment when plaintiff *acquired* the item in question; (2) we now concentrate exclusively on costs which are *variable*, not fixed. Only those items which are to be used only on the balance of the plaintiff-defendant contract come into this category. Obviously, difficulty will be encountered in close cases in tracing the borderline between overhead and variable costs yet to be incurred.⁴² There will, of necessity, be similar difficulty in close cases in distinguishing variable costs yet to be incurred from real or personal property on hand.⁴³

“Real property on hand” includes all interests in real property which meet two tests: (1) had plaintiff completed his performance with defendant he would have transferred this interest in the real property; and (2) at the time of breach notice plaintiff owned this interest in the real property. It makes no difference for present purposes whether the interest in question was a fee or some lesser estate in land or some incorporeal hereditament. The critical things are that plaintiff saved the interest thanks to breach and he had this interest on hand at the time of breach notice.

The line between real property on hand and variable costs yet to be incurred may become gray in some cases.⁴⁴ For example, if plaintiff was to convey land in fee to defendant, and at the time of breach plaintiff owned it subject to a mortgage which was in default, probably plaintiff should be deemed to have the real property on hand. But if his only interest in the land at the moment of breach notice was his right to redeem it from the purchaser who bought it at the foreclosure sale, and plaintiff contracted to deliver the land in fee, plaintiff probably should be regarded as having saved the variable cost yet to be incurred of redeeming the land from the foreclosure sale purchaser.⁴⁵ Perhaps the question should turn on whether it is likely that a reasonable man in plain-

⁴² *E.g.*, *Rantoul Co. v. Claremont Paper Co.*, 196 Fed. 305 (1st Cir. 1912); *Detroit Fireproofing Tile Co. v. Vinton Co.*, 190 Mich. 275, 157 N.W. 8 (1916); *Jessup & Moore Paper Co. v. Bryant Paper Co.*, 297 Pa. 483, 147 Atl. 519 (1929).

⁴³ *E.g.*, *Dolly Parker Motors v. Stinson*, 220 Ark. 28, 245 S.W.2d 820 (1952); *Nestler v. Pure Silk Hosiery Mills*, 242 Ill. App. 151 (1926); *Athol Mfg. Co. v. Briscoe Motor Corp.*, 222 Mich. 95, 192 N.W. 668 (1923); *Hayes v. Durham*, 194 App. Div. 848, 185 N.Y. Supp. 691 (1921).

⁴⁴ *E.g.*, *Roycraft v. Northville-Six Mile Co.*, 358 Mich. 466, 100 N.W.2d 223 (1960); *Roper v. Milbourn*, 98 Neb. 466, 153 N.W. 557 (1915); *McDaniel v. Daves*, 139 Va. 178, 123 S.E. 663 (1924).

⁴⁵ *Cf.* *Shurtleff v. Marcus Land & Inv. Co.*, 59 Cal. App. 520, 211 Pac. 244 (1922).

tiff's shoes, upon notice of defendant's breach, would exercise the right to redeem anyway.

"Personal property on hand" embraces both goods and choses in action. Of course in cases where plaintiff is a bailor, not seller, it is the *use* of the property for the length of time fixed in the contract which is the item to be valued. A distinction is drawn between personal property on hand and real property on hand solely because different rules of valuation govern them. The difference in these valuation rules stems from the fact that in goods cases plaintiff's alternative remedies to the damage remedy are different from those in the realty cases. This will be elaborated subsequently.⁴⁶

"Non-delegable services yet to be rendered" embraces the saved "time" of persons who were to perform all or part of plaintiff's side of the bargain and whose identity is an essential part of plaintiff's promised performance. If plaintiff is an individual, and his services were so "personal" that delegation of them to another without defendant's consent would have justified defendant's refusal to perform further,⁴⁷ plaintiff's services are non-delegable. If plaintiff is a partnership, corporation, unincorporated association or the like, and the contract required all or part of plaintiff's performance being rendered by a specific person or persons,⁴⁸ the services of such persons are "non-delegable" as the term is here used.

These five categories should embrace all items that would have gone into the process of completion of plaintiff's promised performance. In some cases all items saved will fall into a single category;⁴⁹ in other cases items will fall into more than one category.⁵⁰ In any event categorization must precede application of the rules of valuation.

⁴⁶ See text at pp. 595-97 *infra*.

⁴⁷ *New England Cabinet Works v. Morris*, 226 Mass. 246, 115 N.E. 315 (1917); *Corson v. Lewis*, 77 Neb. 446, 109 N.W. 735 (1906); *Folquet v. Woodburn Pub. Schools*, 146 Ore. 339, 29 P.2d 554 (1934); 4 CORBIN, CONTRACTS § 865 (1951).

⁴⁸ See *Wetherell Bros. v. United States Steel Co.*, 200 F.2d 761 (1st Cir. 1952); *Wooster v. Crane & Co.*, 73 N.J. Eq. 22, 66 Atl. 1093 (1907); *Johnson v. Vickers*, 139 Wis. 145, 120 N.W. 837 (1909).

⁴⁹ *E.g.*, *St. John v. Richard*, 272 Mich. 670, 262 N.W. 437 (1935) (real property on hand); *Goldsmith v. Stiglitz*, 228 Mich. 255, 200 N.W. 252 (1924) (personal property on hand); *Gallino v. Boland*, 221 Mich. 502, 191 N.W. 222 (1922) (non-delegable personal services); *Burrel v. New York & Saginaw Solar Salt Co.*, 14 Mich. 34 (1865) (variable costs).

⁵⁰ *Brunswick-Balke-Collender Co. v. Foster Boat Co.*, 141 F.2d 882 (6th Cir. 1944);

B. *Overhead Saved*

1. *Valuation Problems*

Were there neither problems of proof nor of accounting the process of valuing plaintiff's saved overhead might exhibit the following sequence: (1) listing of all non-variable items that would go into completion of plaintiff's performance, directly or indirectly; (2) elimination by the court of those items on the list that contribute only indirectly, since breach does not "release" them for other profitable re-employment by plaintiff; (3) elimination of those items remaining which plaintiff after breach neither re-employed nor was obligated by mitigation to re-employ; (4) determination of the percentage of the remaining items on the list that should be allocated to the performance of the balance of plaintiff's contract with defendant; (5) valuation of each of these remaining items at cost to plaintiff and multiplication of the cost of each by the percentage of it that should be allocated to the balance of this contract; (6) totaling the figures thus determined for each remaining item to get the value to plaintiff of the overhead saved.

2. *Burden of Proof and Presumptions*

Of course the process just described bears little resemblance to reality, where there are problems of proof⁵¹ and of accounting.⁵² Step number three above, which requires a determination of whether the plaintiff either did or should have re-employed the overhead items released by breach, is almost always incapable of proof. Whichever party has the burden of proof usually is doomed to fail to carry it on this issue. ("Burden of proof" is used here in the sense of the burden of going forward.) Accordingly, the court must either assume (a) that *all* released assets were or should have been re-employed by plaintiff or (b) that *no* released assets were or should have been thus re-employed. The latter assumption

McConnell v. Corona City Water Co., 149 Cal. 60, 85 Pac. 929 (1906); Capital Paper Box, Inc. v. Belding Hosiery Mills, Inc., 350 Ill. App. 68, 111 N.E.2d 858 (1953); Callender v. Myers Regulator Co., 250 Mich. 298, 230 N.W. 154 (1930).

⁵¹ See McCORMICK, DAMAGES § 29 (1935); Note, 28 COLUM. L. REV. 76 (1928); Note, 46 HARV. L. REV. 696 (1933); Note, 17 MINN. L. REV. 194 (1932).

⁵² See Comment, 65 YALE L.J. 992 (1956).

means, in effect, that the court never treats plaintiff as having saved any overhead.⁵³

If the court engages in the latter assumption it creates the peril that in some cases—those in which plaintiff does in fact re-employ his overhead items—plaintiff will be overcompensated. The opposite assumption creates a peril that in cases where plaintiff does not and cannot re-employ released overhead items he will be undercompensated. Neither prospect is happy, and the amount at stake can be large if a large part of plaintiff's costs are fixed.

The best course is to create a rebuttable presumption, either that all overhead items have been re-employed, or, on the contrary, that none have been re-employed. The latter presumption would have the virtue of simplifying trial in those cases where no effort at rebuttal is made.

In choosing between the two possible presumptions, the court faces a conflict of policy goals. Anything which tends toward under-compensation has the virtue of helping to split the loss between the parties. If the court assumes there is social utility in splitting the loss⁵⁴—so that each party has less loss to absorb and/or distribute—this argues for presuming that all overhead items have been re-employed.

But if the court assumes there is social utility in deterring future breaches of this sort⁵⁵ and in encouraging reliance upon promises of this sort,⁵⁶ then undercompensation is an evil. The court which embraces these as policy goals of contract law will find its damage law already too undercompensatory, thanks to the "certainty" requirement,⁵⁷ the non-recovery of expenses of litigation,⁵⁸ and the notion that recovery is limited to harm to plaintiff's eco-

⁵³ Compare McCORMICK, DAMAGES § 165, at 644 (1935) with Note, 78 U. PA. L. REV. 563 (1930).

⁵⁴ See SEDGWICK, DAMAGES 38 (1st ed. 1847); *On the Measure of Damages Ex Contractu*, 3 U. PA. L. REV. 513 (1855); Comment, *Loss Splitting in Contract Litigation*, 18 U. CHI. L. REV. 153 (1950).

⁵⁵ See KESSLER & SHARP, CASES ON CONTRACTS 555 (1953); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 61 (1936); Comment, 57 YALE L.J. 1360, 1366 (1948); cf. Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 738 (1931).

⁵⁶ Fuller & Perdue, *supra* note 55, at 72; Llewellyn, *supra* note 55, at 725 n.47.

⁵⁷ See text at note 37 *supra*.

⁵⁸ See 5 CORBIN, CONTRACTS § 1037 (1951); McCORMICK, DAMAGES § 71 (1935); RESTATEMENT, CONTRACTS § 334 (1932); Comment, 49 YALE L.J. 699 (1940); Note, 21 VA. L. REV. 920 (1935).

conomic interests.⁵⁹ Such a court should presume that no overhead items have been re-employed.

To treat loss-splitting between plaintiff and defendant as a social goal of contract law seems dubious inasmuch as the parties usually regard the contract as a device for *shifting* the risk of loss.⁶⁰ In situations in which the parties never contemplated the risk of this kind of loss at the time they contracted, the contract, of course, is not intended by them as a device for shifting the loss. In such cases, non-consensual allocation of the loss is necessary, and the judges are well-advised to split such losses between the parties to minimize the peril that either of them will be destroyed by the entire loss.⁶¹ The doctrine of *Hadley v. Baxendale*⁶² performs this function in contract litigation, much as the doctrine of proximate cause performs it in tort litigation.⁶³ But where the risk of this kind of loss was contemplated at the time of contracting and the economic function of the contract was to shift this risk from plaintiff to defendant, the courts should not foster doctrines which prevent a substantial part of the risk from being thus shifted.

Courts which nevertheless choose to presume that all plaintiff's released overhead items were or should have been re-employed on other contracts must then face the problems involved in measuring saved overhead. In view of the manifold problems of proof and accounting that such cases can present, little in the way of "rules" seems desirable other than a requirement that the court handle each case ad hoc, with due appreciation of (a) the particular kinds of data which are available in each case and (b) the amount of money at stake. Obviously the court should permit some minor inaccuracy in theory if it permits counsel to make use of existing data, rather than requiring theoretical accuracy to the point where the only available evidence is inadmissible. Equally obvious is the idea that more precision should be demanded when larger sums are at stake.

If saved overhead is to be measured, the burden of proving

⁵⁹ See materials cited note 2 *supra*.

⁶⁰ LLEWELLYN, *CASES ON SALES* 1 (1930).

⁶¹ See authorities cited note 55 *supra*.

⁶² 9 Ex. 341, 156 Eng. Rep. 145 (1854).

⁶³ See generally 1 BONBRIGHT, *VALUATION OF PROPERTY* 287 (1937); GREEN, *JUDGE AND JURY*, ch. 2 (1930); GREEN, *RATIONALE OF PROXIMATE CAUSE*, ch. 6 (1927); McCORMICK, *DAMAGES* § 32 (1935); Miller, *Damages, Responsibility, and Loss of Profits*, 17 MARQ. L. REV. 3 (1932).

the items in question and the amount of each item should be placed on defendant, at least if the state has broad discovery procedures which defendant can use to obtain information in plaintiff's control.⁶⁴ It is true that even with the aid of discovery devices defendant will have poorer access to the data than plaintiff, and it is also true that in cases where small sums are involved discovery may not be feasible. But admitting these disadvantages it is still better to saddle defendant with the burden of proof than to place it on plaintiff, since plaintiff has no incentive to prove his items of saved overhead or to prove any item to be large. It is in his interest that there be fewer items of overhead saved and that each item be as small as possible.⁶⁵ If defendant has the burden of proof the court can force defendant to carry the burden by (a) assuming no items of overhead to exist except those proved by defendant; and (b) assuming no item is larger than defendant proves it to be. If plaintiff has the burden the court cannot compel it to be carried by such assumptions when the burden falls; plaintiff would like nothing better than to see the burden fall in that event.

In order to compel plaintiff to carry the burden, it would be necessary to give him this all-or-nothing proposition: if the court concludes that plaintiff failed to prove all items of overhead or that he understated any particular item of overhead he will be deemed to have failed to carry the burden of proof on the whole subject of damages.⁶⁶ His penalty is that he is not permitted to recover more than nominal damages.⁶⁷ The practical difficulties with this arrangement are enormous. For one thing, the court is hardly in a position to know whether plaintiff's evidence of saved overhead is incomplete.⁶⁸ Moreover, plaintiff's failure to prove a

⁶⁴ In a state where very limited discovery is available the author can see little reason for preferring one resolution of the burden of proof over the other. Either way the court allocates the burden there is some peril of unfairness here. Cf. *Bova v. Roanoke Oil Co.*, 180 Va. 332, 23 S.E.2d 347 (1942). But see *Capital Paper Box, Inc. v. Belding Hosiery Mills, Inc.*, 350 Ill. App. 68, 111 N.E.2d 858 (1953).

⁶⁵ Cf. *Demirjian v. Kurtis*, 353 Mich. 619, 91 N.W.2d 841 (1958); *Breding v. Champlain Marine & Realty Co.*, 106 Vt. 288, 172 Atl. 625 (1934); *Quist v. Zerr*, 12 Wash. 2d 21, 120 P.2d 539 (1941).

⁶⁶ E.g., *C. L. Percival Co. v. Sea*, 207 Iowa 245, 222 N.W. 886 (1929); *Callender v. Myers Regulator Co.*, 250 Mich. 298, 230 N.W. 154 (1930).

⁶⁷ See *International Textbook Co. v. Schulte*, 151 Mich. 149, 114 N.W. 1031 (1908); *Crichfield-Loeffler, Inc. v. Taverna*, 4 N.J. Misc. 310, 132 Atl. 494 (Sup. Ct. 1925); *Buyer v. Mercury Technical Cloth & Felt Corp.*, 301 N.Y. 74, 92 N.E.2d 896 (1950).

⁶⁸ E.g., *Nesler v. Pure Silk Hosiery Mills*, 242 Ill. App. 151 (1926); *Nurmi v. Beardsley*, 284 Mich. 165, 278 N.W. 805 (1938); *Nelson Equip. Co. v. Harner*, 191 Ore. 359, 230 P.2d 188 (1951).

single item or part of an item may not be due to such gross delinquency on his part that he should be visited by so severe a penalty. His failure may come from inability to locate evidence of a kind that can satisfy the certainty requirement⁶⁹ or his erroneous theory as to the approach to valuation which would be taken.⁷⁰ A court must indeed be fearful of the risk of possible overcompensation if it prefers to put the burden of proving saved overhead on plaintiff rather than defendant, especially where defendant has discovery devices available to help him carry the burden.

C. *Variable Costs Yet To Be Incurred*

These items should be valued at the sum plaintiff would have paid for them had he incurred these costs. Valuation requires proof of (a) which cost-items would have been purchased; and (b) the actual disbursement which would have been made for each item. Here, as in the previous section involving overhead, allocation of the burden of proof requires choice between the party with superior access to the evidence and the party who has the motive to bring the evidence forward. For all the reasons given in the prior section the burden of proof should be placed on the defendant, at least in a state where defendant has adequate discovery tools at hand.

D. *Real Property on Hand*

1. *Valuation Problems*

The court usually need not choose between valuing the realty by replacement cost or valuing it by resale price: replacement and resale normally would take place in the same market.

If the land was sold by plaintiff after breach and before trial, and if that sale was made under conditions that conform to plaintiff's obligation to mitigate by resale⁷¹ (*i.e.*, it was not a sacrifice

⁶⁹ Cf. *Busam Motor Sales, Inc. v. Ford Motor Co.*, 85 F. Supp. 790, 796 (S.D. Ohio 1949); *O'Hare v. Peacock Dairies, Inc.*, 26 Cal. App. 2d 345, 79 P.2d 433 (1938); *Western Hatcheries v. Byrd*, 218 S.W.2d 342 (Tex. Civ. App. 1949).

⁷⁰ See *Transit Bus Sales v. Kalamazoo Coaches*, 145 F.2d 804 (6th Cir. 1944); *Crawford v. Cicotte*, 186 Mich. 269, 152 N.W. 1065 (1916); *Maxwell v. Schaefer*, 381 Pa. 13, 112 A.2d 69 (1955).

⁷¹ See *McBrayer v. Cohen*, 92 Ky. 479, 18 S.W. 123 (1892); *Griswold v. Sabin*, 51 N.H. 167 (1871); *Kempner v. Heidenheimer*, 65 Tex. 587 (1886).

sale), the price received upon resale should fix the value to plaintiff of the saved realty.⁷²

Absent such an actual proper resale before trial, however, the court must seek to measure the *potential* resale price of the realty saved. Two questions are involved: (1) whether or not any willing buyer could be found for the realty in question; and (2) if the first question is answered affirmatively, the price such a willing buyer would pay. Because land is a slow-moving commodity, with few buyers bidding on any particular tract on any particular day, it is most difficult to prove with certainty that a willing buyer could have been found for a particular tract unless the court presumes that *every* tract of land can be sold, given enough time for the seller to turn up a buyer. This presumption corresponds to reality better than would a contrary presumption, and should be indulged by the courts.

There remains the question of what price a willing buyer would pay for the tract in question when he finally was found. Here the only feasible solution is to permit expert testimony based upon familiarity with the tract in question and the "market." In this context "market" means the mass of actual sales, and of offers made by buyers of other comparable tracts at comparable dates in a comparable geographic area. Of course the extrapolation from these other bids and sales grows more accurate as the other bids and sales grow more similar to the sale as to which the expert is giving his opinion.

2. *Burden of Proof*

The burden of proving the resale value of the realty saved should be placed on plaintiff. In cases where there has been a resale before trial which conforms to mitigation standards plaintiff has the best access to this evidence.⁷³ In cases where the proof must be by expert testimony of potential, not actual, resale value the parties have equal access to the evidence. But the defendant is placed under greater hardship than the plaintiff if he is given the

⁷² *E.g.*, *Bouchard v. Orange*, 177 Cal. App. 2d 521, 2 Cal. Rptr. 388 (1960); *Gardner v. Armstrong*, 31 Mo. 535 (1862); *Stephenson v. Butts*, 187 Pa. Super. 55, 142 A.2d 319 (1958).

⁷³ If plaintiff proves a fair resale he breaks even on the entire transaction. If he suppresses the fact of resale in order to prove a lower potential resale value he runs the risk the court will find a higher potential resale value.

burden of proof: if plaintiff cannot or does not choose to adduce evidence of potential value (and run the risk of a jury finding of high resale value) he can seek his alternative expectation remedies⁷⁴—specific performance,⁷⁵ non-judicial foreclosure of the seller's lien⁷⁶ or a suit for the whole price.⁷⁷ But if defendant is saddled with the burden of proof he has no alternatives.

Where there is an actual proper resale before trial plaintiff should be permitted to recover as incidental damages the extra expenses entailed in the process of resale. Such expenses might include costs of advertising, paying broker's commission, taxes during the interval between the originally scheduled closing and the closing with the repurchaser, maintenance expenses during that interval, insurance during that interval, assessments during that interval, etc. Plaintiff should have the burden of proving both the size and the existence of these items since he has superior access to the evidence and the motive to bring it forth.

Where there has been no actual resale, but the kind of resale required by mitigation would entail similar kinds of expenditure, plaintiff again should have the burden of proof. But as a practical matter plaintiff will rarely be able to prove with certainty the size or existence of these items, since the hypothetical resale in question is the somewhat hazy extrapolation of experts who are basing their opinion on fragmentary market data and some assumptions which are contrary to fact: that there is a willing buyer present on the date as of which the tract is to be valued.⁷⁸

⁷⁴ Plaintiff also has the alternative (non-expectation) remedies of restitution and reliance damages.

⁷⁵ See *Morgan v. Eaton*, 59 Fla. 562, 52 So. 305 (1910); *Staples v. Mullen*, 196 Mass. 132, 81 N.E. 877 (1907); *Abbott v. Moldestad*, 74 Minn. 293, 77 N.W. 227 (1898); 3 AMERICAN LAW OF PROPERTY § 11.68 (Casner ed. 1952); 5 CORBIN, CONTRACTS § 1139 (1951); 3 WILLISTON, CONTRACTS § 1443 (1931).

⁷⁶ See *Carns v. Sexsmith*, 193 Iowa 1080, 188 N.W. 657 (1922); *Barnard v. Huff*, 252 Mich. 258, 233 N.W. 213 (1930); *Vance v. Blakeley*, 62 Ore. 326, 123 Pac. 390 (1912); 3 AMERICAN LAW OF PROPERTY § 11.73 (Casner ed. 1952).

⁷⁷ See *McCurry v. Pitner*, 159 Ga. 807, 126 S.E. 781 (1925); *Prichard v. Mulhall*, 140 Iowa 1, 118 N.W. 43 (1908); *Bohlen v. Black*, 237 Pa. 399, 85 Atl. 470 (1912); 3 AMERICAN LAW OF PROPERTY § 11.77 (Casner ed. 1952); 5 CORBIN, CONTRACTS § 1099 (1951); 3 SEDGEWICK, DAMAGES § 1024 (9th ed. 1912); 3 WILLISTON, CONTRACTS § 1399 (1931).

⁷⁸ Cf. *Thornthwaite v. Thomas*, 71 So. 2d 159 (Fla. 1954); *Linde v. Ellis*, 224 Ky. 649, 6 S.W.2d 1089 (1928); *Hubbard v. Epworth*, 69 Mich. 92, 36 N.W. 801 (1888); *Levy v. 315 W. 79th St. Corp.*, 222 App. Div. 9, 225 N.Y. Supp. 218 (1927).

E. *Personal Property on Hand*⁷⁹

1. *Valuation Problems in General*

For the most part valuation of personal property on hand is conducted in the same fashion as valuation of realty on hand. It is the resale value of the personalty which the court seeks,⁸⁰ and if there was no actual resale before trial which meets mitigation standards, it is the potential resale price of the personalty saved which is the ultimate fact sought. As with realty two questions must be answered: (1) could a willing buyer have been found, and (2) if he could have been found, what would he have been willing to pay?

The presumption—appropriate in realty cases—that a willing buyer always can be found, is not appropriate in personalty cases. In real property cases potential resale value properly is proved by expert testimony as to what a hypothetical willing buyer would pay a hypothetical willing seller, for reasons already indicated. In cases involving goods or choses there is often available to the diligent plaintiff more reliable evidence of potential resale value—reports of prices actually paid or offers actually made by other buyers and sellers of this product. To encourage resort to such better evidence courts should reject efforts by the party with the burden of proof to prove potential resale value of goods and choses by reference to expert guesses as to the behavior of hypothetical willing buyers and sellers. Plaintiff, who will have the burden of proof,⁸¹ if he would prove potential resale value at all, should be required to offer evidence of actual sales or offers of a sort comparable to his potential resale—comparable in subject-matter, date, and locale.⁸²

⁷⁹ The problems of double counting and impairment of total volume by resale of the plaintiff's saved performance are discussed in this section because they most frequently arise in cases where plaintiff is a seller of goods. However, they can arise in connection with other saved commodities, and in that event should be treated in a fashion analogous to that sketched here.

⁸⁰ There is often some confusion about this in the cases. *E.g.*, *H. W. Faulkner & Co. v. Centralia Bottling Works*, 234 Ill. App. 9 (1924); *Hausman v. Buchman*, 189 App. Div. 597, 179 N.Y. Supp. 26 (1919); *Breding v. Champlain Marine & Realty Co.*, 106 Vt. 288, 172 Atl. 625 (1934). But many cases which purport to be valuing the saved goods on hand at replacement cost or cost of acquisition seem to be giving a false rationale for a result which can better be justified on the more complex grounds suggested at pp. 599-604 *infra*.

⁸¹ See discussion at p. 599 *infra*.

⁸² The line between cases where expert testimony as to willing buyers is and is not proper is best drawn at the familiar point where realty is separated from personalty. This is not because all realty is non-fungible and slow-moving and all personalty is the opposite, but because the correlation between these traits and these categories is sufficiently high that it seems better to use well-marked categories than to create new ones.

Since such proof is not always feasible for all kinds of goods and choses, there must be some route open for the plaintiff dealing in a commodity not sold at organized exchanges. Rather than permit such a plaintiff to resort to the loose real property valuation technique,⁸³ the courts should reject his efforts to recover expectation damages, and require that he use some other remedy calculated to vindicate his expectation interest.

The plaintiff's alternatives include (1) a suit at law for the price, with defendant getting title to the undelivered goods or choses which plaintiff holds as bailee;⁸⁴ (2) an informal foreclosure of plaintiff's lien on the undelivered goods or choses by non-judicial resale under specified conditions with deficiency judgment;⁸⁵ (3) a suit for expectation damages, with plaintiff's savings valued by reference to the cost of replacing the goods in question.⁸⁶

All three alternatives have disadvantages which limit their use. The availability of the price remedy hinges on whether the saved personalty is goods or choses, whether or not title has passed, and whether the problem is governed by common law, Uniform Sales Act, or the Uniform Commercial Code. If choses are involved, the price remedy will be uniformly available if title has passed,⁸⁷ but in some states it is not available if title has not passed.⁸⁸ If goods are involved and the Uniform Commercial Code is in effect, the price remedy is rarely available,⁸⁹ even if title has passed.⁹⁰ If

⁸³ The plaintiff should not be permitted to sue for damages in a realty case if an alternative expectation remedy is available to him, such as specific performance, price, or foreclosure. He should not be encouraged to use a damage remedy which entails a speculative type of proof of value. However, a rule forcing plaintiff to shun his legal remedy while there is an available equitable one runs directly contrary to the pro-jury maxims which have guided the accommodation of legal and equitable remedies. So giving jury trial its due, the plaintiff in realty cases cannot be deprived of his damage remedy except where he has a price remedy. In such cases plaintiff normally uses the price remedy.

⁸⁴ See *Home Pattern Co. v. W. W. Mertz Co.*, 86 Conn. 494, 86 Atl. 19 (1913); *Corwin v. Grays Harbor Washingtonian, Inc.*, 151 Wash. 585, 276 Pac. 902 (1929); *Renne v. Volk*, 188 Wis. 508, 205 N.W. 385 (1926).

⁸⁵ See *Howse v. Crumb*, 143 Colo. 90, 352 P.2d 285 (1960); *Urbansky v. Kutinsky*, 86 Conn. 22, 84 Atl. 317 (1912); *Ore-Ida Potato Products, Inc. v. Larsen*, 362 P.2d 384 (Idaho 1961); UNIFORM COMMERCIAL CODE § 2-706; UNIFORM SALES ACT § 60; *Annots.*, 119 A.L.R. 1141 (1939), 44 A.L.R. 296 (1926).

⁸⁶ See *Brunswick-Balke-Collender Co. v. Wisconsin Mat Co.*, 24 F.2d 78 (7th Cir. 1928); *Breding v. Champlain Marine & Realty Co.*, 106 Vt. 288, 172 Atl. 625 (1934); *Popp v. Yuenger*, 229 Wis. 189, 282 N.W. 55 (1938).

⁸⁷ WILLISTON, SALES § 561 (1924).

⁸⁸ See DAWSON & HARVEY, CASES ON CONTRACTS 218 (1959).

⁸⁹ UNIFORM COMMERCIAL CODE § 2-709.

⁹⁰ The Code does not speak of "title," but of the "risk of loss." Even after the "risk

goods are involved and the Uniform Sales Act governs, the price remedy is available if title has passed,⁹¹ and in a limited class of cases where title has not passed.⁹²

The informal foreclosure procedure is available only to the limited extent permitted by statute,⁹³ and presents problems of hindsight policing of the sale which plaintiff made.⁹⁴ Unless the jury can be kept out of this process plaintiff faces substantial risks when he resells and hopes it will later meet official approval.

The resort to a damage remedy with plaintiff's savings valued by his cost of replacing the goods has the disadvantage of measuring value to him by reference to behavior (replacement) which is not plausible for one in his position. It is essentially an arbitrary method of valuation in this context.

It is dubious whether valuing plaintiff's saved goods on hand at replacement cost is any improvement over valuing them by what an expert says a willing buyer would pay. If replacement cost valuation is the only available alternative to expert guessing at resale value, perhaps the trial court should have discretion to permit use of expert testimony of resale value in a goods case. But where a price or informal foreclosure remedy was available to plaintiff and he failed to use it, the court should not accept the real property type of proof.

The handling of incidental damages (where plaintiff actually resold properly before trial) or the extra expenses that would have been incurred in proper mitigation by resale (where plaintiff did not resell properly before trial) should be the same in personalty and realty cases with this exception: in personalty cases it should be possible more often for plaintiff to prove with certainty the extra expenses that would have attended proper resale.

A peril of double counting arises, however, when plaintiff's efforts at mitigation prove successful, and they take the form of

of loss" has passed to the buyer, seller has no price remedy unless the goods were accepted, or they were lost or damaged shortly after the risk passed, or they were identified to the contract and cannot be resold feasibly. UNIFORM COMMERCIAL CODE § 2-709 (1).

⁹¹ UNIFORM SALES ACT § 63 (1).

⁹² UNIFORM SALES ACT § 63 (3).

⁹³ UNIFORM SALES ACT § 60; UNIFORM COMMERCIAL CODE § 2-706.

⁹⁴ Frankel v. Foreman & Clark, 33 F.2d 83 (2d Cir. 1929); Lund v. Lachman, 29 Cal. App. 31, 154 Pac. 295 (1915); Zinsmeister v. Rock Island Canning Co., 145 Ky. 25, 139 S.W. 1068 (1911); Rees v. R. A. Bowers Co., 280 Pa. 474, 124 Atl. 653 (1924).

expenditure to accomplish a resale of the goods.⁹⁵ For example, a plaintiff may be a seller of goods who, upon defendant-buyer's repudiation, incurs advertising expense in a successful effort to locate a new buyer for the goods. The advertising expense is properly included as an item of incidental damage unless it has already been taken into account in measuring accurately plaintiff's savings. This can occur if the value of what plaintiff saved was computed by deducting from the gross resale price of the goods the cost to plaintiff of advertising them.

Another situation presenting the peril is this: in a situation similar to that just described, plaintiff avoids the expense he otherwise would have incurred in shipping the goods from plaintiff's plant in Chicago to defendant's plant in Detroit. But his resale contract obligates him to deliver the goods to the resale purchaser in San Francisco. Plaintiff cannot recover as an item of incidental damage the whole cost of shipping the goods from their location at breach (Chicago) to the place of resale (San Francisco); account must be taken of the shipping costs saved—from Chicago to Detroit. The amount of damages properly allowed is the difference between freight from Chicago to San Francisco and the freight from Chicago to Detroit.⁹⁶

Where plaintiff is obligated to mitigate by resale, but he does not do so before trial, his damages are calculated as if he had. In computing the value to him of what he saved the court should take into account the extra expenses that would have been involved in the process of mitigation. For example, if plaintiff should have mitigated in the example above by reselling in San Francisco and he utterly failed to mitigate, the value to him of what he saved is the price the goods would have brought in San Francisco, reduced by the difference between freight to San Francisco and freight to Detroit.

The extra freight involved in resale in San Francisco should be taken into account now *not* because it is an item of incidental

⁹⁵ See *Willhelm Lubrication v. Bratrud*, 197 Minn. 626, 268 N.W. 634 (1936); *Lake County Pine Lumber Co. v. Underwood Lumber Co.*, 140 Ore. 19, 12 P.2d 324 (1932); *Margaret Mill v. Aycock Hosiery Mills*, 20 Tenn. App. 533, 101 S.W.2d 154 (1936); 5 CORBIN, CONTRACTS § 1036 (1951); MCCORMICK, DAMAGES § 142, at 585 (1935); RESTATEMENT, CONTRACTS § 333, comment *f* (1932).

⁹⁶ Cf. *Miller v. Robertson*, 266 U.S. 243 (1924); *Simons v. Ypsilanti Paper Co.*, 77 Mich. 185, 43 N.W. 864 (1889); *Reading Co. v. Aronsky*, 19 Leh. County L.J. 320 (Pa. Ct. C.P. 1941).

damages; it is not; but because it is relevant if plaintiff's opportunity to achieve a savings is to be measured accurately. Of course, if the item in question is not proved with certainty the court must disregard it,⁹⁷ but it is possible to prove the item although it was not in fact incurred before trial. In other words, where such an extra expense is actually incurred, there are two reasons for taking it into account—because it bears on what plaintiff saved, and because it is an item of incidental damage—and the court must exercise care to avoid double counting. Where such extra expense is not actually incurred, there is only one reason for taking it into account—to measure accurately what the plaintiff should have saved—and the court must exercise care lest it fallaciously ignore the item.⁹⁸

2. *Burden of Proof in General*

There remains the question of which party should have the burden of proving the potential resale value of the goods by reference to actual comparable sales. Since plaintiff has the choice of remedies—price, foreclosure, damages—there is some peril in giving defendant the burden of proving values. Plaintiff, where proof of value is hard to produce, would always elect the damage remedy if defendant had the burden of proof; if defendant failed to carry the burden plaintiff would retain the goods and recover the unpaid balance of the price without deducting anything to reflect the value of the goods retained. It is better to solve the problem by placing the burden of proof on plaintiff.

3. *Problems of Lost Volume*

a. When does resale impair volume? Corbin's discussion of the expansible seller as plaintiff,⁹⁹ which was quoted earlier, identifies a familiar problem in the cases involving saved personality: one of the extra expenses of actual or potential mitigation by resale in some cases is an impairment of plaintiff's total volume of sales. If plaintiff, upon defendant's rejection of the goods, should resell them to the first customer who comes along after the breach, and plaintiff otherwise would have sold other goods to

⁹⁷ *E.g.*, *Demari, Inc. v. John B. Cabot, Inc.*, 273 App. Div. 717, 98 N.Y.S.2d 34 (1948); *Columbia Produce Co. v. Tiskowitz*, 134 Pa. Super. 145, 3 A.2d 990 (1938).

⁹⁸ *Cf.* McCORMICK, *DAMAGES* § 182, at 696 (1935).

⁹⁹ See text at note 23 *supra*.

that customer, the resale has "cost" plaintiff the sale of those other goods. This invisible cost will be present whether the contract with defendant called for the sale of specified personalty or personalty that was only generally described in the contract. And it will be present whether or not plaintiff has special channels open with his supplier.

Three conditions, however, must be met before the phenomenon occurs. First, at the time of the breach, plaintiff must have had the intention of maximizing his sales volume. If he lacked such intent the resale did not cause a reduction of his total volume since he never intended to sell other goods to the customer who, because of defendant's breach and the consequent resale, took the goods defendant rejected. Whether or not plaintiff had such an intent normally can be ascertained by proof of whether plaintiff was a commercial seller of the personalty in question. If he was a commercial seller, and if the sale was in the ordinary course of business, plaintiff probably intended to maximize his volume. Otherwise, it is safe to presume that he did not intend to maximize his volume.

The second condition concerns plaintiff's physical capacity to perform both his original contract with defendant and another, similar contract with the first customer who comes along after defendant's breach. If plaintiff lacked this physical ability (and could not have performed with the other customer but for the breach), his failure to sell *additional* goods to the first customer who came along after breach was not *caused* by the breach and resale.¹⁰⁰ In resolving this question plaintiff's arrangements with his supplier of goods should be scrutinized as should all his commercial arrangements which might bear on this ultimate question.¹⁰¹

The last of the three conditions goes to the question whether plaintiff should have recaptured (or did recapture) any lost volume by some adjustment in his manner of doing business which would have increased the demand for his product. For if plaintiff either did or should have recaptured his lost volume in this

¹⁰⁰ See *Hinckley v. Pittsburg Bessemer Steel Co.*, 121 U.S. 264 (1887); *Petrie v. Lane*, 67 Mich. 454, 35 N.W. 70 (1887); *Locks v. Wade*, 36 N.J. Super. 128, 114 A.2d 875 (1955); RESTATEMENT, CONTRACTS § 336, comment *c* (1932); Annot., 24 A.L.R.2d 1008 (1952).

¹⁰¹ *But see Waters, The Concept of Market in the Sale of Goods*, 36 CAN. B. REV. 360 (1958).

fashion the resale cannot be regarded as having cost plaintiff the value of the lost volume; it should be regarded as having cost plaintiff whatever it would take to adjust his manner of doing business in a way that recaptures the lost volume. These re-adjustments to recapture lost volume might take the form of selling at a lower price, selling on terms more favorable to the buyer, extending credit to poorer risks, or increasing plaintiff's total promotional expenditure.

Where the change in plaintiff's way of doing business would seriously inconvenience him, or might seriously inconvenience him, mitigation does not require the change. Courts do not, and should not, listen to defendant's suggestions as to possible changes plaintiff could have made in his standard business procedures unless the proposed change is simple enough that the court feels some confidence in its ability to judge whether or not it would entail subtle, but real, hardship on plaintiff. Thus it should be the rare case where a court seriously entertains the question of whether plaintiff should have changed his way of doing business in other aspects than lowering his price or increasing his promotional efforts. Even these changes may entail subtle, but real, drawbacks that destroy their feasibility.

Plaintiff should have the burden of proving that he had the intent and the ability to maximize his sales volume. He has both superior access to this information and the motive to adduce it. If he meets the burden of proof on these two conditions, the court should presume the existence of the third condition, leaving it to defendant to prove that in some fashion, plaintiff either did or should have recaptured his lost volume. This burden should be on defendant for two reasons: the difficulty of plaintiff's negating the feasibility of all possible schemes for increasing volume, and the probability that a commercial seller's self-interest more often than not leads him to maximize his volume in all possible ways.

b. Valuing lost volume. If plaintiff succeeds in proving that an invisible cost was the loss of as much volume of business as he resold, there remains the problem of proving the value to plaintiff of the lost volume. The value to him of lost volume is the difference between the receipts that would have been received from such additional sales, and the extra costs that would have been involved had plaintiff made such additional sales. The price at which plaintiff resold, or would have resold, is good evidence of the

receipts he would have received from such additional sales. But there is more difficulty in measuring what it would have cost plaintiff to have made such additional sales.

Calculation of the variable costs that would have gone into such additional sales is not too difficult; it is the overhead costs that give difficulty. If plaintiff could have handled the additional sales without any increase in his overhead costs, no overhead should be taken into account. To the extent overhead would have had to be increased it should be regarded in the calculations.¹⁰²

c. Burden of proving the value of lost volume. Plaintiff should have the burden of proving the value to him of the lost receipts. Defendant should have the burden of proving the saved costs. The rationale for this allocation is identical to the rationale for handling overhead problems, discussed earlier at pages 590-92.

Were these rules accepted by a court, a plaintiff dealer suing a customer who wrongfully refused to accept delivery would be well-advised to prove the following items during his case in chief: (1) the unpaid balance of the price; (2) the price he did get or could have gotten by resale of the rejected goods to another consumer; (3) his intent to maximize his volume; (4) his ability to obtain other goods like the ones defendant rejected for resale to the first customer who came along after the breach; and (5) other ("visible") extra expenses of mitigation by resale.

Defendant would be well-advised to offer proof of (1) the variable costs plaintiff saved on the original deal by virtue of the breach, and (2) the total cost to plaintiff of an additional unit of volume.

d. Lost volume treatment illustrated. Plaintiff is a car dealer who contracted to deliver a new car to defendant buyer at a price of \$3,000, of which \$100 was paid at the time of contracting. When plaintiff tendered delivery of the car defendant wrongfully refused to accept it. Plaintiff thereupon sued for damages after having resold the car to another customer for \$3,000. The basic measurement formula consists of the value to plaintiff of what defendant failed to do less the value to plaintiff of what he saved, plus incidental expenses caused by the breach.

¹⁰² Problems here are parallel to those discussed at pp. 588-92 *supra*.

What defendant failed to do was pay the balance of the price. That sum, \$2,900, is our first term. What plaintiff saved consists of two items at most: goods on hand at breach (the car) and variable costs yet to be incurred. Since breach was not anticipatory no variable costs were saved. The value to plaintiff of the saved car is determined by the car's resale value with adjustments. Whether we use actual or potential gross resale price the resale value is \$3,000 before adjustments.

The first adjustment is subtraction from \$3,000 of all the visible extra expenses involved in reselling the car. "Extra expenses" are those in excess of the expenses plaintiff would have incurred had he completed performance with defendant. Let us assume that the variable cost items involved in the resale are (1) the cost of a credit check on the new buyer—\$50—and (2) the commission of the salesman who closed the deal with him—\$300. Both items are "extra" since they would not have been incurred to sell this car, but for the breach. These two items must be subtracted from \$3,000 to give the value to plaintiff of the car he saved.

Moreover, if it appears plaintiff's resale of this car cost him another car's sale, the \$3,000 figure (value of what plaintiff saved) must be further reduced by the value to plaintiff of this invisible extra expense of resale. This figure consists of the difference between the potential receipts of another unit of volume—\$3,000—and the potential expenses of such an additional sale. If plaintiff's total variable costs involved in another sale (including the cost of acquiring the car from the manufacturer) are \$2,500, and fixed costs are ignored, the value to plaintiff of the lost unit of volume is \$3,000 less \$2,500, or \$500.

Thus, plaintiff's savings from the breach consist of the value of saved goods on hand (\$3,000) reduced by the visible costs of resale, *i.e.*, the cost of a credit check (\$50) and salesman's commission (\$300) and further reduced by the invisible costs of resale, *i.e.*, the difference between the resale price of the car (\$3,000) and the total variable costs of reselling such a car (\$2,500).

In tabular form the formula appears thus:

Unpaid balance of the price			\$2,900
Less savings from breach:			
Saved goods on hand		\$3,000	
Less extra costs of resale:			
Visible:			
Credit check	\$50		
Sales commission	300		
Total visible costs		\$350	
Invisible:			
Receipts from potential sale	\$3,000		
Less costs of resale	2,500		
Total invisible costs		500	
Total extra costs of resale			850
Total savings from breach			<u>\$2,150</u>
Plaintiff's recovery			<u><u>\$750</u></u>

In linear terms this would be:

$$\begin{aligned}
 & \$2,900 - [[\$3,000 - [\$350 + (\$3,000 - \$2,500)]]] \text{ or} \\
 & \$2,900 - [[\$3,000 - [\$350 + \$500]]] \text{ or} \\
 & \$2,900 - \$2,150 = \$750.
 \end{aligned}$$

The figures in double brackets represent the value to plaintiff of what he saved. The figures in single brackets represent the total extra expense of resale. The figures in parentheses represent the invisible extra expense of resale—the value to plaintiff of the loss of one unit of volume.

The resale price of the car figures in the equation twice, once as the value to plaintiff of saved goods on hand before adjustment, and once as the minuend in a subtraction designed to fix the value to plaintiff of the volume impaired by resale. Algebraic cancellation of these two items permits the formula to be condensed thus: unpaid balance of the price plus the visible extra expenses of resale minus the variable costs of selling one more car. This works out as \$2,900 plus \$350 minus \$2,500.

If the breach was anticipatory, the formula becomes more complex. Within the double brackets and outside the single brackets will go a new positive term: variable costs saved. For example, if the breach occurred after the car was on hand but before plaintiff had completed his work of preparing it for customer delivery, variable cost items in the preparation process would be introduced into the formula.

If the breach occurred before plaintiff was obligated to the

manufacturer to accept delivery of the car, "saved goods on hand" do not enter the picture; only saved variable costs need to be taken into account. In this case the formula should read thus: unpaid balance of the price (\$2,900) minus saved variable costs—all variable costs of an average sale (\$2,500) less the two items not saved, the credit check (\$50) and the salesman's commission (\$300). Thus the formula, in dollar terms, is \$2,900—\$2,150, or \$750.

F. *Non-Delegable Services*

1. *Valuation Problems*

The saved "time" of persons who cannot delegate their duty of rendering services cannot be valued at cost of replacement; it must be valued by reference to its actual or potential resale price. It must be valued at the higher of these two figures, actual resale price or the price at which plaintiff could have resold his time by reasonable effort to find the top-paying job which did not entail undue risk or self-sacrificing.

If the potential resale price—what plaintiff could have earned by reselling these non-delegable services elsewhere without undue self-sacrifice—is higher than the actual resale price, mitigation notions require that potential resale price be used. If actual resale price is the higher—because the services were resold in a fashion not required by mitigation notions—the actual resale price must be used to satisfy the doctrinal requirement that breach-caused gains to be taken into account. A similar interplay of the notions of "mitigation" and "breach-caused gain" in a different context was discussed previously.¹⁰³

Three specific issues emerge: (1) what did plaintiff in fact earn by resale of his released time? (2) if plaintiff had used reasonable efforts to find the top-paying job which did not entail too much self-sacrifice or risk on his part, would he have found a job? (3) if the prior answer was affirmative, what would the job have paid?

2. *Burden of Proof*

On the first issue once again a situation emerges where plaintiff has superior access to the evidence, and defendant is the only person motivated to bring the evidence forward. For the reasons

¹⁰³ See discussion at note 36 *supra*. And see discussion at pp. 607-08 *infra*.

given in the discussion of overhead the burden should fall on defendant in such a situation.

On the last two issues the parties are equal in their access to the information and defendant is the only party motivated to bring forward the information. The burden of proving these items should thus fall on him.

II. PLAINTIFF'S SAVINGS VALUED AS AN ENTITY

In rare instances plaintiff's "duty to mitigate" damages requires that, upon notice of defendant's total breach, plaintiff *not* stop work on the contract. Rather, he should complete fabrication and resell the completed entity to some buyer other than defendant. In these instances what plaintiff saved should be valued as an "entity"—at the price the completed performance would bring upon resale. The determination of when the "entity" approach to valuation is appropriate is best considered in the light of specific contexts.

Illustration 1. Plaintiff-manufacturer agreed to fabricate and deliver clocks to defendant-buyer's specifications. Defendant repudiated at a point where plaintiff had no clocks finished, many in process, and much special raw material on hand. Should the court value what plaintiff saved by reference to the price the clocks would bring on the market if plaintiff completed fabrication after notice of breach? Or is the better reference to the sum of the values of the various components of plaintiff's as yet unrendered performance: his as yet unincurred expenses for more raw materials, his ability to divert his overhead facilities to other work, his ability to sell the raw materials as raw materials and to sell the unfinished clocks as scrap?

Illustration 2. Plaintiff publishes a magazine, and agreed to design, set up and run weekly advertisements for defendant for fifty-two weeks. After two weeks defendant repudiated. Should the court value plaintiff's savings by reference to the resale value of the entity—the space in the magazine which the ad would have filled—or by reference to the components of plaintiff's performance as yet unapplied to the contract when plaintiff learned of the repudiation—his variable costs still unincurred on the rest of the contract?

A. *Application of the Entity Approach*

The choice must be made with regard both to the mitigation notion and to the notion that breach-caused gains are to be taken into account whether or not mitigation obligated the plaintiff to take the risks involved in making such gains. Four basic situations can arise: (1) upon notice of breach plaintiff completes the process of fabrication and resells the entity to a new buyer, and at trial he wants his savings measured by reference to the resale value of the entity; (2) upon notice of breach plaintiff does not complete the process of fabrication and at trial he resists defendant's efforts to measure plaintiff's opportunity to save by reference to the probable resale value of the entity; (3) upon notice of breach plaintiff does not complete fabrication and resale of the entity, but at trial he wants to value his savings by reference to the potential resale price of the entity rather than by reference to his saved components of performance; (4) upon notice of breach plaintiff completes fabrication and resells the entity, but at trial he resists defendant's efforts to value the savings by reference to the resale receipts actually gleaned, arguing for valuation by reference to the components as they stood when notice of breach was received.

In the first two situations, if defendant raises no objection to plaintiff's valuation technique the court should raise none. If defendant objects, defendant should have the burden of proving that the notion of mitigation obligated plaintiff to take the opposite course from that which he in fact took. Defendant should be obligated to prove not only that in the light of hindsight the plaintiff's alternative course of action would have resulted in lower damages, but also that plaintiff should have known this at the time he exercised his choice. The burden should be placed on defendant, rather than plaintiff, because it is more likely than not that plaintiff's self-interest will lead him to use reasonable self-protective care upon breach. It is the rare plaintiff who is so sure he will later prevail at trial that he is careless of present loss. By putting the burden of proof on defendant the court increases the likelihood that the result reached in cases where the burden is not carried will correspond to the true state of facts.

Even if defendant carries the burden of proof described above, plaintiff should be permitted to rebut by showing that the course advocated now by defendant, although more economical, would

have been impractical or perilous for plaintiff for valid commercial or personal reasons. Plaintiff should have the burden of showing such reasons since defendant cannot anticipate and negative all possible reasons of this sort.

In the last two situations, where plaintiff wants his savings valued in a fashion different from the course of action which he actually took upon notice of breach, if defendant has no objection, the court should have none. However, if defendant insists upon valuing plaintiff's savings by reference to the course of action actually pursued by plaintiff the court should sustain defendant's objection. The plaintiff's objection to reference to his actual course of action must rest on the fallacious argument that inasmuch as he was not obligated to take the course he took (which turned out to be very effective in mitigating the effects of breach), the court should not "penalize" him by subtracting his actual savings thus achieved at his own risk. The fallacy of plaintiff's position has been noted before: defendant's position does not rest on the mitigation notion, but on a separate principle—that plaintiff's breach-caused gains be taken into account.

B. *Valuation of the Entity*

It is the rare case in which (a) entity valuation of what plaintiff saved will give a different answer from separate valuation of each component *and* (b) entity valuation is appropriate. In those rare instances, however, problems of valuation of the entity should be handled in the same way as similar problems of valuation of goods or choses on hand. The entity thus will be valued by reference to its resale value, adjusted to reflect incidental damages and reduction in plaintiff's total volume.

C. *Timing of the Decision To Use the Entity Approach*

In the bulk of cases, neither counsel raises the possibility of using an entity approach to valuation. In some cases both counsel assume without question that an entity approach will be used. But in the fairly rare case in which counsel disagree as to whether the entity or the components approach is appropriate, it is most desirable to resolve that question before the actual trial begins. If resolution of that question is postponed until after all the evidence is in, each counsel must guess, before and during trial, which approach

the tribunal will take. Counsel therefore faces this unhappy choice: offer proof in the alternative—with the confusion and extra preparation which that involves—or take a guess, with the chance that the case will be lost because he guessed wrong. Moreover, if the issue is not resolved before trial, there is the chance that at least one attorney will overlook the possibility that this issue might arise, and will assume erroneously, but with confidence, that a components approach will be used.

Everything said thus far argues for pretrial resolution of the question. But our procedural habits restrict our ability to resolve such questions before the start of trial. The hallowed way of resolving such questions before trial is by giving one party an option, and deeming him to have exercised it by the way he pleads or fails to plead. Our question, however, should not be left to the option of either party. It should be resolved by agreement of the parties—if they can be brought to agree—or by an order of the tribunal according to the rules suggested in the previous section. The appropriate time for such an agreement or ruling is at a pretrial conference of the trial judge and trial counsel, held sufficiently late in the pretrial history of the case that counsel will know their facts, but sufficiently in advance of trial that counsel may adjust their trial preparations to take the ruling into account.

Judges would be well-advised, wherever possible, to pre-try at least the damage issue of every contract case in which either the court or one counsel evidences a desire to resolve before trial the question of entity or components valuation. Of course, the pretrial conference cannot resolve legal questions which turn on disputed facts if counsel cannot agree sufficiently on the resolution of these disputes. In such cases, resolution of the entity-components question must await the end of the fact-finding process. But even in these instances where pretrial fails to bring about a resolution of this question, it will at least serve to alert counsel to the risks they run on this issue, and, if the pretrial judge is also the trial judge, it will serve to educate him on the issue.

Where this matter cannot be resolved until fact-finding is completed, the fact-finding upon which it depends should be done by the court, not the jury, even in jury cases. The choice between

entity and component valuation should be categorized as a "question of law." To submit it to the jury, with complex instructions as to its resolution and an additional set of alternative instructions as to how the jury should proceed after it resolves this question, is to guarantee confusion.