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### Cover Page Footnote

Professor of Law, University of Michigan. The author gratefully acknowledges the very extensive help of Alex Fisher of the Michigan Bar and John V. Donnelly, L'65, Mark E. Schluskel, L'65, Richard F. Vitkus, L'65, and Alice A. Winters, L'66, of the University of Michigan Law School.

# A RADICAL RESTATEMENT OF THE LAW OF SELLER'S DAMAGES: NEW YORK RESULTS COMPARED

ROBERT J. HARRIS\*

## I. INTRODUCTION

**T**HIS is the fourth in a series of articles concerned with the measurement of expectation damages<sup>1</sup> in contract cases where plaintiff is a "seller."<sup>2</sup> In the first article,<sup>3</sup> my notions of how damages should be measured were set forth. This article restates those views and considers the results of relevant New York decisions.<sup>4</sup> Other articles compare my notions with the case law of California<sup>5</sup> and Michigan<sup>6</sup> and the provisions of the Uniform Sales Act and the Uniform Commercial Code.<sup>7</sup>

Rules of law treating the measure of expectation damages must answer four questions: (1) what is to be valued; (2) what technique of valuation should be used; (3) which party has the burden of going forward to prove the value; (4) how should the value, once ascertained, be taken into account.

Conventional judge-made law and statutory law on expectation damage measurements consist of three discrete bodies of authority: (1) state-

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1. Expectation damages are damages whose prime function is to make plaintiff as well off as if the contract had been fully performed.

2. "Seller" is used here to include anyone whose performance is more than or different from payment of money. It includes sellers of realty, services and personalty, as well as bailors and lessors. For the rationale of the definition, see notes 26-31 *infra* and accompanying text.

3. Harris, *A General Theory for Measuring Seller's Damages for Total Breach of Contract*, 60 Mich. L. Rev. 577 (1962) [hereinafter cited as *General Theory*].

4. Some changes have been made in the theory presented in the first article, chiefly regarding burden of proof and the lost volume problem. The present article, unlike the first one, is not confined to total breach cases. Terminology has changed slightly from article to article in an effort to gain clarity. Although effort was expended to examine every New York case involving the measurement of seller's damages, stylistic reasons have necessitated abridgment of the citation of those authorities which agree with my views.

5. Graham & Harris, *A Radical Restatement of the Law of Seller's Damages: California Results Compared*, 18 Stan. L. Rev. — (1965).

6. Harris, *A Radical Restatement of the Law of Seller's Damages: Michigan Results Compared*, 61 Mich. L. Rev. 849 (1963) [hereinafter cited as *Seller's Damages (Michigan)*].

7. Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 Stan. L. Rev. — (1965).

ments of abstract guiding policies; (2) what can be called "parochial damage formulae"; and (3) scattered rulings on the burden of proof. The statements of abstract guiding policies, recognized in New York as elsewhere, can be summarized thus: (1) unless one of the following five policies would be thwarted, plaintiff should recover a sum which, when added to the benefits he already received under the contract, will give him an economic status<sup>8</sup> identical to the one he would have enjoyed if the contract had been performed precisely as agreed;<sup>9</sup> (2) there is no recovery for items of loss unforeseeable to defendant at the time of contracting;<sup>10</sup> (3) there is no recovery for those consequences of breach which plaintiff could have avoided by reasonable self-protective care,<sup>11</sup>

8. The general rule denies recovery for mental anguish. 1 Clark, *New York Law of Damages* § 153 (1925) [hereinafter cited as Clark]; 5 Corbin, *Contracts* § 1076 (1951) [hereinafter cited as Corbin]; Restatement, *Contracts* § 341 (1932) [hereinafter cited as Restatement]; Annot., 88 A.L.R.2d 1367 (1963). New York recognizes some rare exceptions. See, e.g., *Boyce v. Greeley Square Hotel Co.*, 228 N.Y. 106, 126 N.E. 647 (1920) (female guest suffered physically and mentally from innkeeper's verbal abuse); *Finley v. Atlantic Transp. Co.*, 220 N.Y. 249, 115 N.E. 715 (1917) (body wrongfully buried at sea instead of carried ashore). Breach of promise to marry was another exception, *Wolters v. Schultz*, 1 Misc. 196, 21 N.Y. Supp. 768 (N.Y. City Ct. 1892), until the action was abolished by statute, N.Y. Civ. Rights Law § 90.

9. E.g., *St. George Contracting Co. v. City of New York*, 205 N.Y. 121, 98 N.E. 387 (1912), reversing 143 App. Div. 544, 128 N.Y. Supp. 393 (2d Dep't 1911); *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 4 N.E. 264 (1886); *Danolds v. State*, 89 N.Y. 36 (1882); *Bagley v. Smith*, 10 N.Y. 489 (1853); *Industrial Eng'r Co. v. Republic Storage Co.*, 220 App. Div. 178, 220 N.Y. Supp. 623 (1st Dep't 1927); *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N.Y. Supp. 845 (3d Dep't 1910), aff'd, 203 N.Y. 533, 96 N.E. 1122 (1911); 1 Clark § 154. See also *General Theory* 577 n.3.

10. This requirement is variously expressed as involving foreseeability, tacit assent to liability by defendant, that the item of loss be the natural and probable consequence of breach, that it arise directly from the breach. See, e.g., *Long Island Contracting & Supply Co. v. City of New York*, 204 N.Y. 73, 97 N.E. 483 (1912); *United States Trust Co. v. O'Brien*, 143 N.Y. 284, 38 N.E. 266 (1894); *Devlin v. Mayor of the City of New York*, 63 N.Y. 8 (1875); *Ashburner v. Balchen*, 7 N.Y. 262 (1852); *A. Lenobel, Inc. v. Senif*, 252 App. Div. 533, 300 N.Y. Supp. 226 (2d Dep't 1937), modified mem. on other grounds, 253 App. Div. 813, 1 N.Y.S.2d 1022 (2d Dep't 1938). See generally 1 Clark § 160; 5 Corbin § 1007; McCormick, *Damages* §§ 137-41 (1935) [hereinafter cited as McCormick]; Restatement § 330.

11. This is known as the "duty to mitigate damages" or the "doctrine of avoidable consequences" and is recognized in New York. See, e.g., *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605, motion to amend remittitur granted, 253 N.Y. 533, 171 N.E. 770 (1930); *Fulton v. Canno*, 222 N.Y. 189, 118 N.E. 633 (1918); *Beattie v. New York & L.I. Constr. Co.*, 196 N.Y. 346, 89 N.E. 831 (1909), modifying 127 App. Div. 923, 111 N.Y. Supp. 1109 (2d Dep't 1908); *Milage v. Woodward*, 186 N.Y. 252, 78 N.E. 873 (1906); *McCready v. Lindenborn*, 172 N.Y. 400, 65 N.E. 208 (1902); *Ashburner v. Balchen*, 7 N.Y. 262 (1852). But see *White & Carter, Ltd. v. McGregor*, [1962] 2 Weekly L.R. 17 (H.L.); Goodhart, *Measure of Damages When a Contract is Repudiated*, 78 L.Q. Rev. 263 (1962). See generally 1 Clark § 106; 5 Corbin § 1039; McCormick §§ 33-42; Restatement § 336; Annot., 81 A.L.R. 282 (1932).

(4) all of plaintiff's gains causally related to the breach must be taken into account in measuring damages,<sup>12</sup> whether or not plaintiff was obligated by the mitigation notion to incur the risks that were involved in achieving the particular gain;<sup>13</sup> (5) all items not proved with sufficient certainty are to be ignored in damage measurement;<sup>14</sup> (6) all of plaintiff's expenditures in reasonable efforts to avoid the consequences of breach can be recovered,<sup>15</sup> whether or not the effort ultimately proves successful.<sup>16</sup>

A typical "parochial damage formula" appears in the Uniform Sales Act:

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.<sup>17</sup>

Another typical one, used where plaintiff is a building contractor and defendant-owner committed a total breach, appears in *Restatement of*

12. See, e.g., *Fulton v. Canno*, supra note 11; *Beattie v. New York & L.I. Constr. Co.*, supra note 11; *McCready v. Lindenborn*, supra note 11; *Sawyer v. Dean*, 114 N.Y. 469, 21 N.E. 1012 (1889); *Canda v. Wick*, 100 N.Y. 127, 2 N.E. 381 (1885). See also 1 Clark § 120; 5 Corbin § 1041; McCormick § 160.

13. There is no New York case on point. Apparently the only authority in the United States for this proposition is *Griffin v. Oklahoma Natural Gas Corp.*, 132 Kan. 843, 297 Pac. 662 (1931). The commentators cited in note 8 supra are in accord. 1 Clark § 120; 5 Corbin § 1041; Restatement § 336, comment a. See also *Cockburn v. Trusts & Guar. Co.*, [1917] Can. Sup. Ct. 264, 269-70, [1917] 37 D.L.R. 701, 704 (1917), affirming [1917] Ont. L.R. 396, [1917] 33 D.L.R. 159 (App. Div. Sup. Ct. 1917); *British Westinghouse Elec. & Mfg. Co. v. Underground Elec. Ry.*, [1912] A.C. 673, 687-92 (dictum).

14. See pp. 35-36 infra. See also 1 Clark § 154; 5 Corbin § 1020; McCormick §§ 25-32; Restatement § 331(1); Note, 64 Harv. L. Rev. 317 (1950); Annot., 78 A.L.R. 853 (1932).

15. See, e.g., *Sawyer v. Dean*, 114 N.Y. 469, 21 N.E. 1012 (1889); *Lewis v. Graider*, 51 N.Y. 231 (1872); *A. Lenobel, Inc. v. Senif*, 252 App. Div. 533, 360 N.Y. Supp. 226 (2d Dep't 1937), modified mem. on other grounds, 253 App. Div. 813, 1 N.Y.S.2d 1022 (2d Dep't 1938); *Hayes v. Durham*, 194 App. Div. 848, 185 N.Y. Supp. 691 (3d Dep't 1921); *Keenan & Son, Inc. v. Johns-Manville Co.*, 184 App. Div. 98, 171 N.Y. Supp. 582 (1st Dep't 1918); 1 Clark § 114; 5 Corbin § 1044; McCormick § 42; Restatement § 336(2); Annot., 84 A.L.R. 171 (1933).

16. There is no New York authority precisely on point. See *Development Co. of America v. King*, 170 Fed. 923 (2d Cir. 1909); *Baker v. Mode Millinery Co.*, 193 Ill. App. 507 (1915); *Rench v. Hayes Equip. Mfg. Co.*, 134 Kan. 865, 8 P.2d 346 (1932); 1 Clark § 114; 5 Corbin § 1044; Restatement § 336(2).

17. Uniform Sales Act § 64(3). For the New York provision, see N.Y. Pers. Prop. Law § 145(3) (repealed by N.Y. U.C.C. § 10-102). This material is now covered by N.Y. U.C.C. § 2-708.

*Contracts*: "[T]he 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 . . . ."<sup>18</sup>

Yet another, this quoted from *Corbin on Contracts*, governs cases in which plaintiff is an employee wrongfully discharged by defendant-employer before plaintiff 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."<sup>19</sup>

Each parochial damage formula is specifically tailored for a single kind of breach (such as nonperformance, rather than tardy or defective performance), for a single kind of contract (such as sale of goods, rather than bailment or sale of realty or sale of services), and for acts by a certain party (such as plaintiff-seller, rather than plaintiff-buyer). In theory, at least, there are as many of these parochial rules as there are fact situations to be litigated.

The last of the three conventional bodies of doctrine concerns burden of proof. The case law on this topic usually is too fragmentary to provide anything deserving the name "rules." Typically, it consists of (1) scattered holdings devoid of generalization<sup>20</sup> and (2) oscillating judicial endorsements of two overly broad and inconsistent positions. One of these

18. Restatement § 346(2)(a). This formula is used in New York. See, e.g., *McMaster v. State*, 108 N.Y. 542, 15 N.E. 417 (1888); *Devlin v. Mayor of the City of New York*, 63 N.Y. 8 (1875); *Story v. New York & H.R.R.*, 6 N.Y. 85 (1851); *Wetter v. Kleinert*, 139 App. Div. 220, 123 N.Y. Supp. 755 (2d Dep't 1910); *Carlin v. City of New York*, 132 App. Div. 90, 116 N.Y. Supp. 346 (2d Dep't 1909); 1 Clark §§ 322, 325.

19. 5 *Corbin* § 1095, at 516. E.g., *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605, motion to amend remittitur granted, 253 N.Y. 533, 171 N.E. 770 (1930); *Everson v. Powers*, 89 N.Y. 527 (1882); *Howard v. Daly*, 61 N.Y. 362 (1875); *Griffin v. Brooklyn Ball Club*, 68 App. Div. 566, 73 N.Y. Supp. 864 (4th Dep't 1902), aff'd, 174 N.Y. 535, 66 N.E. 1109 (1903); *Baker Transfer Co. v. Merchants' Refrigerating & Ice Mfg. Co.*, 12 App. Div. 260, 42 N.Y. Supp. 76 (1st Dep't 1896); 1 Clark §§ 305, 307.

20. See, e.g., *Wilkinson v. Davies*, 146 N.Y. 25, 40 N.E. 501 (1895); *McMaster v. State*, 108 N.Y. 542, 15 N.E. 417 (1888); *Fletcher v. Jacob Dold Packing Co.*, 41 App. Div. 30, 58 N.Y. Supp. 612 (4th Dep't 1899), aff'd, 169 N.Y. 571, 61 N.E. 1129 (1901); *Henderson Importing Co. v. Breidbart*, 182 N.Y. Supp. 169 (App. T. 1920); *Worcester Bleach & Dye Works Co. v. Dlugasch*, 181 N.Y. Supp. 44 (App. T. 1920); *Annotts.*, 17 A.L.R.2d 968 (1951); 134 A.L.R. 242 (1941). The problem is barely mentioned in the Restatement, probably because it was not considered to be substantive. But see Restatement § 333(d), stating that defendant has the burden of proving that the plaintiff made a losing contract in reliance damage cases.

shibboleths is to the effect that plaintiff has the burden of proving his damages<sup>21</sup>—suggesting that plaintiff *always* has the burden of proving all aspects of damage measurement, including the value of what he saved or should have saved because of the breach. The other purported command provides that defendant, being the party at fault, has the burden of proving mitigation—what plaintiff saved or should have saved thanks to breach.<sup>22</sup> Probably in all states, despite the presence of one or both of these supposed rules in the judicial literature, there are some situations in which defendant consistently has the burden of proving what plaintiff saved or should have saved,<sup>23</sup> and there are other situations in which this burden is routinely placed upon plaintiff.<sup>24</sup>

Conventional doctrine does not address itself directly to the choice among valuation techniques, although the various parochial damage formulae give some clues. Underlying this series of articles is an assumption that the doctrine makes more sense when restated in valuation terms. These articles involve an effort to restate in such terms one sector of expectation damage law—the part that governs cases in which plaintiff is a “seller.”<sup>25</sup>

21. E.g., *United States Trust Co. v. O'Brien*, 143 N.Y. 284, 38 N.E. 266 (1894); *Nichols v. Scranton Steel Co.*, 137 N.Y. 471, 33 N.E. 561 (1893); *Baird v. Mayor of the City of New York*, 83 N.Y. 254 (1880); *Hewlett v. Caplin*, 275 App. Div. 797, 88 N.Y.S.2d 428 (1st Dep't 1949), aff'd, 301 N.Y. 591, 93 N.E.2d 492 (1950); *Watts v. Phillips-Jones Corp.*, 211 App. Div. 523, 207 N.Y. Supp. 493 (2d Dep't 1925), aff'd, 242 N.Y. 557, 152 N.E. 425 (1926); *Babbitt v. Wides Motor Sales Corp.*, 17 Misc. 2d 889, 192 N.Y.S.2d 21 (App. T. 1959). Cf. Restatement § 333(d).

22. See, e.g., *Costigan v. Mohawk & H.R.R.*, 2 Denio 609, 616 (N.Y. Sup. Ct. 1846). See also Restatement § 331, comment c: “Doubts are generally resolved against the party committing the breach of contract.”

23. See cases where plaintiff, a full-time employee, is wrongfully discharged before the end of his term contract. E.g., *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605, motion to amend remittitur granted, 253 N.Y. 533, 171 N.E. 770 (1930); *Milage v. Woodward*, 186 N.Y. 252, 78 N.E. 873 (1906); *Bobrick v. Mackenzie*, 192 App. Div. 594, 183 N.Y. Supp. 208 (1st Dep't 1920). See also 1 Clark § 309; Annot., 41 A.L.R.2d 955 (1955); 134 A.L.R. 242 (1941).

24. See cases where plaintiff is a seller of staple goods. E.g., *Derami, Inc. v. John B. Cabot, Inc.*, 273 App. Div. 717, 79 N.Y.S.2d 664 (1st Dep't 1948); *Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302, 84 N.Y. Supp. 385 (1st Dep't 1903); *Case v. Simonds*, 7 N.Y. Supp. 253 (App. Div. 5th Dep't 1889); *Henderson Importing Co. v. Breidbart*, 182 N.Y. Supp. 169 (App. T. 1920). See also 2 Clark § 794; Annot., 130 A.L.R. 1336 (1941).

25. By and large, the question of the date on which value should be measured will not be treated. For discussion of this vexing question, see 1 Clark §§ 253, 266; 5 Corbin § 1005; McCormick § 48; Restatement § 338; Beale, *Damages Upon Repudiation of a Contract*, 17 Yale L.J. 443 (1908); Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 Yale L.J. 199, 275-76 (1963); Editorial, 66 Cent. L.J. 365, 383 (1908); Note, 37 Minn. L. Rev. 215 (1953); Comment, 17 Yale L.J. 611 (1908); Annot., 34 A.L.R. 114 (1925).

*A. A Single General Rule*

A single general rule can answer two of the four basic questions in all expectation damage cases.<sup>26</sup> The rule is: Plaintiff should recover (minuend minus subtrahend) plus incidental damages.<sup>27</sup> The "minuend" is always the value to plaintiff<sup>28</sup> of the difference between what defendant promised to do and what he in fact actually did in the way of performance. The "subtrahend" is always the value to plaintiff of being relieved by defendant's breach from all or part<sup>29</sup> of plaintiff's scheduled performance.<sup>30</sup> "Incidental damages" are always the value to plaintiff of the

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26. The rule is thought to be useful whether plaintiff is the "seller" or not; whether the subject matter of the contract is realty, personalty, services, or some combination; whether the transfer of property is permanent (sale or exchange), or temporary (bailment or lease); whether the promises were aleatory or not; whether the breach was "total" or "partial"; whether the defendant's default was non-performance, defective performance, or tardy performance; whether the breach was anticipatory or not; whether the contract was unilateral, bilateral, or a non-bargain agreement supported by some substitute for consideration.

27. "Minuend minus subtrahend" appears in parentheses to show that it is the arithmetic, not algebraic, sum of the parenthetical matter and incidental damages which is recovered. If the minuend is \$50, the subtrahend \$75 and the incidental damages \$5, plaintiff recovers \$5, not zero. His \$5 recovery is really a reliance damage recovery; a zero recovery would be called for if the goal were to give plaintiff the equivalent of full performance on both sides—the expectation remedy. This assumes that plaintiff's reliance damage remedy can exceed what he could recover on an expectation damage theory. The New York law is in accord. See *Borough Dev. Co. v. Harmon*, 154 App. Div. 689, 139 N.Y. Supp. 362 (2d Dep't 1913), *aff'd*, 214 N.Y. 691, 108 N.E. 1089 (1915).

There is scattered authority in other states for the proposition that reliance damages must be reduced by the sum that plaintiff saved by not performing the balance of the contract. See *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182, 189-91 (2d Cir. 1949); Restatement § 333(a); Annot., 17 A.L.R.2d 1300 (1951). If "saved" means "expenses not incurred" as well as "resale losses not sustained," in these other states the plaintiff can never recover, as reliance damages, more than he could have recovered as expectation damages. Thus, in such states plaintiff should recover the algebraic sum of the parenthetical matter and his incidental damages.

28. Value to the promisee, not to the plaintiff, is relevant in cases where plaintiff is an assignee. See, e.g., *Lieberman v. Templar Motor Co.*, 236 N.Y. 139, 140 N.E. 222 (1923); *St. George Contracting Co. v. City of New York*, 205 N.Y. 121, 98 N.E. 387 (1912), reversing 143 App. Div. 554, 128 N.Y. Supp. 393 (2d Dep't 1911); *Nichols v. Scranton Steel Co.*, 137 N.Y. 471, 33 N.E. 561 (1893); *Sawyer v. Dean*, 114 N.Y. 469, 21 N.E. 1012 (1889); *Devlin v. Mayor of the City of New York*, 63 N.Y. 8 (1875); 1 Clark § 10.

29. In a "total breach" case, plaintiff is relieved of all his remaining scheduled or promised performance. Of course, if plaintiff has fully performed, he is relieved of nothing. Where the breach relieves plaintiff only of part of his remaining scheduled or promised performance, courts often speak of the breach as partial or of the contract as divisible.

30. No adjustment is needed, of course, if plaintiff fully performed his side of the contract before defendant's breach; or if the contract did not contemplate any return performance by plaintiff and was enforceable because of some substitute for present



expenses and/or losses he reasonably incurred after notice of breach in his attempts to mitigate damages.<sup>31</sup>

This single general rule answers the questions of what is to be valued and how the value, once computed, shall be taken into account. Its universality, of course, is possible only because it ignores questions of valuation technique and burden of proof. The answers it gives to the two other questions are identical to those of the parochial formulae. If the parochial formulae are stripped of their references to valuation technique, they all turn out to be elliptical statements of this single general rule.

### B. *Consistency With Conventional Parochial Rules*

Parochial measurement formulae are almost always expressed elliptically. For example, the Uniform Sales Act rule, quoted earlier,<sup>32</sup> says the measure of damages in a certain situation is the difference between the contract price and the market or current price. It does not state expressly that it really means "the unpaid balance of the contract price," and not "the contract price."<sup>33</sup> The omission has no significance in a case where none of the price has been paid at the time of breach, but the omission becomes important if defendant-buyer has prepaid all or part of the price. However, in cases where the latter problem is presented, courts universally include in the formula an adjustment to reflect that part of the price that was paid.<sup>34</sup> The parochial formulae typically omit reference to

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consideration, such as formalism, past consideration, or action in reliance; or if the contract contemplated an aleatory return performance by plaintiff, and the aleatory condition qualifying plaintiff's duty to perform was neither met nor excused. But, if a return performance by plaintiff was contemplated, and it was neither rendered nor excused for non-fulfillment of an aleatory condition, in measuring expectation damages, account must be taken of plaintiff's saved performance. If plaintiff is the promisee in a "unilateral contract"—one in which plaintiff does not promise to perform—but he has not fully performed at the time of defendant's breach, plaintiff's saved performance should be taken into account in measuring expectation damages. This is true because, although plaintiff's remaining performance was never promised, he could not fulfill his expectations of receiving defendant's performance without rendering all of his own.

31. The term is conventionally used in this sense, but not defined in this manner. E.g., N.Y. U.C.C. § 2-710: "Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach."

32. *Supra* note 17 and accompanying text.

33. The Uniform Commercial Code is more precise: "the difference between the market price . . . and the unpaid contract price together with any incidental damages . . ." N.Y. U.C.C. § 2-708(1).

34. E.g., *Everson v. Powers*, 89 N.Y. 527 (1882); *Lewis v. Greider*, 51 N.Y. 231 (1872); *Dillon v. Anderson*, 43 N.Y. 231 (1870); *Baer v. Durham Duplex Razor Co.*, 228 App. Div.

items which, although deserving attention when they arise, occur only infrequently. Thus, the builder's formula, quoted earlier,<sup>35</sup> makes no reference to the value of materials which the builder has bought to perform the contract and which are still on hand when the breach stops further performance. However, when such items are present in a builder case, they are taken into account, his recovery being reduced by the net resale value of such materials.<sup>36</sup> Other examples of similar ellipses were presented in an earlier article<sup>37</sup> of this series.

The single general rule is identical with *all* parochial measurement formulae which are concerned with expectation damages. There are some parochial formulae, however, which are concerned with measuring plaintiff's recovery under some other remedy, and these rules, of course, cannot be stated in terms of minuend, subtrahend, and incidental damages.<sup>38</sup> Loose judicial language, referring to all remedies which result in a judgment for a sum of money as "damages," sometimes blurs the distinctions among these various contract remedies: the price, expectation damages, reliance damages, money restitution, foreclosure and sale with deficiency judgment, statutory remedies, seller's specific performance remedy, and the peculiar measure used for vendor's "good faith" failure to produce marketable title. The single general rule is only the equivalent of those parochial rules which aim at giving expectation damages.

The single general rule leaves unanswered questions of valuation and burden of proof. These matters require additional rules which are numerous, albeit not as numerous as the parochial damage formulae that they are designed to replace. For convenience, attention in these articles is limited to the valuation and proof burden problems of only two of the three terms—the subtrahend and the incidental damages. In cases where plaintiff is a "seller"—one whose performance is not merely payment of

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350, 239 N.Y. Supp. 473 (1st Dep't), aff'd, 254 N.Y. 570, 173 N.E. 870 (1930). See also 1 Clark § 5.

35. *Supra* note 18 and accompanying text.

36. See, e.g., *Long Island Contracting & Supply Co. v. City of New York*, 204 N.Y. 73, 97 N.E. 483 (1912); *McMaster v. State*, 108 N.Y. 542, 15 N.E. 417 (1888); *Danolds v. State*, 89 N.Y. 36 (1882); *Dillon v. Anderson*, 43 N.Y. 231 (1870); *Beckwith v. City of New York*, 121 App. Div. 462, 106 N.Y. Supp. 175 (2d Dep't 1907); 1 Clark § 325.

37. *Seller's Damages (Michigan)* 855-58.

38. For example, in New York and many other states, plaintiff cannot recover expectation damages where defendant, a vendor of land, is guilty of a "good faith" breach of his promise to deliver marketable title to the land. E.g., *Northridge v. Moore*, 118 N.Y. 419, 23 N.E. 570 (1890); *Cockroft v. New York & H.R.R.*, 69 N.Y. 201 (1877); *Margraf v. Muir*, 57 N.Y. 155 (1874); *Conger v. Weaver*, 20 N.Y. 140 (1859). See 1 Clark § 203 n.6; 5 Corbin §§ 1097-98; *McCormick* § 178; *Annots.*, 68 A.L.R. 137 (1930); 48 A.L.R. 12 (1927). Instead, if plaintiff seeks damages, he gets a smaller recovery. Parochial formulae governing this situation are not equivalent to the single general rule.

a sum of money—the minuend presents no hard valuation problems and the two terms discussed in these articles provide all the controversy.<sup>39</sup> Hence, while the titles of the articles refer to “seller’s damages,” they might more accurately speak of “subtrahend valuation” as the scope limit.

I have excluded from consideration cases in which the valuation problem could be regarded as either a matter of subtrahend or minuend valuation. For example, where plaintiff is a manufacturer who contracted to buy raw materials from defendant, defendant’s failure to deliver may cause plaintiff to close down his plant for a week. The minuend—the value to plaintiff of the difference between what defendant promised to do (deliver the raw materials) and what he did (nothing) may be valued not by replacement cost, but by reference to plaintiff’s larger transaction (manufacturing) which floundered temporarily because of the breach. Of course, the minuend will not be valued by reference to the larger transaction unless the requirements of mitigation, foreseeability, and certainty are met. Where valuation is by reference to the halted manufacturing process, it is customary to speak of plaintiff recovering his lost profits—the gross receipts he otherwise would have garnered, reduced by what he saved by virtue of not operating his factory that week. It is possible to view these lost profits as the value of the minuend.

But, in computing these lost profits, it was necessary to take into account the raw materials that plaintiff would have consumed if he had operated the factory that week. The saved cost of acquisition of these materials is an item that goes to reduce plaintiff’s recovery. Because this item already has been taken into account in valuing the minuend, it should not be further regarded in the subtrahend. Put another way, where the minuend is valued by reference to plaintiff’s lost profits on some larger transaction and, in computing those profits, account was taken of the saved cost of acquiring the performance that defendant promised but failed to deliver, plaintiff recovers minuend plus incidental damages. Viewed thus (which is how I have viewed it), what plaintiff saved when breach released him from his duty to pay defendant is a matter of minuend, not subtrahend, valuation and lies outside these articles.<sup>40</sup>

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39. Where plaintiff is a “buyer”—one who is to receive a performance which is not merely a payment of a sum of money—the minuend provides the valuation problems. Because the minuend, but not the subtrahend, can reach values vastly greater than the contract price—as in *Hadley v. Baxendale*, L.R. 9 Ex. 341 (1854)—doctrines such as foreseeability and certainty are invoked in a fashion rarely encountered in cases involving subtrahend valuation.

40. I have held to this analysis even where the performance that plaintiff saved was not merely the payment of a sum of money, but something harder to value. For example,

### C. Policies Governing Burden of Proof

Unable to find policies concerning allocation of the burden of proof expressed in the general case law of the country, and unable to extrapolate such policies from the six abstract rules presented earlier, I have made up my own notions of proof burden policy. One reason for the series of articles is to discover the extent to which case law results correlate with the results that my notions would dictate. Since my defense of the policies appears elsewhere in depth,<sup>41</sup> I shall merely restate my conclusions with some explanatory remarks: (1) where allocation of the burden is tantamount to resolving the issue against whichever party is laden with the burden (because it is impossible to locate admissible evidence in sufficient quantity to establish the facts even if the court lowers the standard of "certainty" below conventional levels), three policies should be taken into account, in this order of importance: (a) that party should have the burden who will suffer the less severe consequence when he fails to sustain it; (b) where the issue is susceptible to a yes-or-no answer,<sup>42</sup> it is best to place the burden on the party asserting the less likely state of affairs; (c) it should be allocated to encourage loss-splitting and to foster loss distribution; (2) where allocation of the burden is not tantamount to resolving the issue, the burden should coincide with superior access to the evidence needed to sustain it; (3) where it is not clear how often the burden will be insupportable in a particular class of cases, considerations of access to the evidence should be subordinated to the other considerations to the extent that broad pre-trial discovery rules tend to equalize access to evidence.

Some of these notions require amplification. As regards the existence or value of items whose value is *added* to the subtrahend, the consequences are more severe if plaintiff, rather than defendant, has the burden of proof. For if plaintiff fails to prove the value of any such item, he must be deprived of *all* expectation damages. It is necessary to visit him with such a Draconian penalty in order to get him to establish items which, once established, reduce his recovery. On the other hand, if defendant has the burden of proving such items, it suffices to value at zero those items which defendant fails to establish, leaving the other expectation damage measurement issues unaffected. This policy leads to giving defendant the

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in some cases plaintiff is defendant's partner, and defendant's breach of the partnership agreement entitles plaintiff to his share of lost partnership profits—which cannot be computed without valuing the services that plaintiff would have contributed in the future. E.g., *Bagley v. Smith*, 10 N.Y. 489 (1853).

41. *Seller's Damages* (Michigan) 860-70.

42. Such as the question: Could plaintiff have handled another similar contract simultaneously? Questions of dollar value are not susceptible to a yes-or-no answer.

burden of proving the existence and value of all items which go to *enhance* the subtrahend.

If plaintiff has an alternative way to vindicate his expectation interest (such as a suit for specific performance), and defendant has the burden of proof on some item that augments the subtrahend in expectation damage suits, plaintiff's power to elect the damage remedy may be abused in cases where the value of the item is unprovable. Plaintiff may elect his damage remedy in the hope of being overcompensated when defendant fails to carry the burden. This argues for giving plaintiff the burden as to such items if he has an alternative expectation-vindicating remedy.

As to items which, when established, *reduce* the subtrahend, defendant must be visited with a fairly severe penalty to force him to prove facts that augment plaintiff's recovery. This can be done only by valuing the entire subtrahend at zero if defendant fails to prove any one such item. If plaintiff has the burden to prove the value of such an item, it suffices to value it at zero if the burden is not carried. This policy supports giving plaintiff the burden of proving the existence and value of items which go to reduce the subtrahend, irrespective of whether plaintiff has a remedy alternative to expectation damages.

The interplay of all these policies leads me to support a scheme which gives plaintiff the burden of proving almost all issues. On issues as to which it is usually impossible for plaintiff to muster enough precise proof to carry the burden, the courts should relax the standard of "certainty" if plaintiff has no alternative remedy to vindicate his expectation interest. Otherwise, plaintiff will be undercompensated more often than policy justifies.

My search of the New York plaintiff-seller contract cases revealed only one opinion discussing proof burden policy.<sup>43</sup> In this 1846 supreme court case, plaintiff had been wrongfully discharged from his post as a railroad superintendent and remained idle for the remaining ten months of his year's contract. The referee, presuming that a reasonable man would have found new employment within three months of discharge, allowed no recovery for the last seven months of the contract period. Plaintiff argued that there should be no presumption that he could have found comparable re-employment by reasonable effort and that defendant should have the burden unassisted by such a presumption. The basic arguments of plaintiff were: (1) it is more probable that comparable employment was un-

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43. *Costigan v. Mohawk & H.R.R.*, 2 Denio 609 (N.Y. Sup. Ct. 1846). A municipal court case implied that proof burden should correlate with ease of access to the evidence and probability. *J. K. Rishel Furniture Co. v. Stuyvesant Co.*, 123 Misc. 203, 204 N.Y. Supp. 659 (Munic. Ct. N.Y. 1924).

available than available; (2) the burden of proving a fact rests with him who asserts it and who would avail himself of it; (3) idleness is a vice, and a dereliction of duty is never presumed; (4) every presumption should be made against a wrongdoer; (5) it would be easier for defendant to show that comparable jobs were available to plaintiff than for plaintiff to show the contrary since availability could be established by evidence of a single employer offer, whereas non-availability would not be established by evidence that plaintiff had made many applications which failed.<sup>44</sup>

The court sided with the plaintiff, giving these reasons:

But first of all the defence set up should be proved by the one who sets it up. He seeks to be benefitted by a particular matter . . . alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions, between him and the person wronged, should be made in favor of the latter.<sup>45</sup>

The notion that he who pleads should prove begs the question, for then the critical issue is: Who has the burden of *pleading* that plaintiff could have mitigated his damages?<sup>46</sup> The idea of "proving a negative" is weak, too. In a crude sense the issue is susceptible to a yes-or-no answer: Was there any demand at all for plaintiff's talent? But the issue is more plausibly stated as a question of *quantity*: How much would a reasonable man with plaintiff's skills have earned when breach cast him forth on the labor market for ten months? Perhaps the court was adopting plaintiff's argument concerning relative ease of proof, but that argument is flawed. It is as easy for plaintiff to prove he received no offer as for defendant to prove he received one—at least, if we ignore differences in the credibility of plaintiff's witness (probably himself) and defendant's witness (probably a third person who made the job offer). If we turn from evidence of job offers to evidence of rejected applications, it admittedly is easier for plaintiff, than for defendant, to establish how many such applications existed. The court's point seems to be, however, that *no* number of rejected applications proves with mathematical certainty that one more application would have been futile. The point is blunt because plaintiff need not reach that level of certainty to show he did all that was reasonable to find re-employment.

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44. *Costigan v. Mohawk & H.R.R.*, supra note 43, at 611.

45. *Id.* at 616.

46. It is not true that the burden of pleading mitigation always coincides with the burden of proving it. See *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 354-60, 169 N.E. 605, 608-10, (Cardozo, C.J., concurring), motion to amend remittitur granted, 253 N.Y. 533, 171 N.E. 770 (1930).

The notion that defendant, being the wrongdoer, should have the burden of proof on all damage issues assumes a strong punitive strand in contract law. To implement the notion consistently, defendant would have the burden on all damage issues in all kinds of contract cases, and not just in cases where plaintiff is an employee. The case law reluctance to cast the damage measurement burden generally on defendant, or to allow recovery for mental anguish, or to test foreseeability at breach (rather than contracting)—all these damage measurement doctrines suggest that punishment and deterrence play a very minor role in contract damage measurement policy. Fulfillment of the individual plaintiff's expectations—more or less—has priority over the goal of securing all future promisees from the risk of breach. Even in tort law, where deterrence is a more prominent policy, the compensation goal has sufficient priority over the deterrence policy that plaintiff normally has the burden of proving the size of his damages.

By and large, the certainty rule has been applied leniently in New York, easing the chore of carrying the burden of proof. Much-litigated problems concerning proper evidence to establish the resale value of saved property and the cost value of saved services are discussed subsequently.<sup>47</sup>

Where breach occurs before the end of the contract period and counsel disagree about the *volume* of sales that plaintiff would have made during the rest of the contract period, certainty problems beset valuation of both minuend and subtrahend, although only the certainty problems of subtrahend valuation concern us here. Typical cases concern requirements contracts, commission sellers, and profit-sharing arrangements such as business partnerships, theatrical ventures, and book publishing arrangements. If there is no past performance on which the guess about future volume can be based, the New York courts uniformly refuse recovery for the future.<sup>48</sup> However, when there is some history of past sales volume, these courts usually are quick to relax the certainty requirement.<sup>49</sup>

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47. See pp. 51-52 & 66-68 *infra*.

48. E.g., *Bernstein v. Meech*, 130 N.Y. 354, 29 N.E. 255 (1891) (theatrical venture); *Hewlett v. Caplin*, 275 App. Div. 797, 88 N.Y.S.2d 428 (1st Dep't 1949) (*per curiam*), *aff'd*, 301 N.Y. 591, 93 N.E.2d 492 (1950) (publisher to receive 10% royalty of book not yet written); *Streat v. Wolf*, 135 App. Div. 81, 119 N.Y. Supp. 779 (1st Dep't 1909) (new partnership); *K & R Film Co. v. Brady*, 104 Misc. 667, 172 N.Y. Supp. 268 (App. T. 1918) (parties to share receipts from film never shown in New York but which had run in twelve other cities).

49. E.g., *Bagley v. Smith*, 10 N.Y. 489 (1853) (pen manufacturing partnership sales); *Slater v. Kane*, 275 App. Div. 648, 92 N.Y.S.2d 640 (1st Dep't 1949) (commission sales); *Hiltop Sand Corp. v. Simpson*, 225 App. Div. 467, 233 N.Y. Supp. 343 (2d Dep't 1929) (requirements contract); *Brady v. Erlanger*, 188 App. Div. 728, 177 N.Y. Supp. 301 (1st Dep't 1919), *aff'd mem.*, 231 N.Y. 563, 132 N.E. 889 (1921) (vaudeville show); *Nash v.*

The two recurring slogans in these cases reveal Scylla (the plaintiff-victim receives only nominal damages, to the delight of the breaching party) and Charybdis (plaintiff is overcompensated when the trier of fact accepts his outlandishly high estimate of damages). The court cannot use conjecture or guesswork when actual proof is available to the plaintiff to establish his loss,<sup>50</sup> but, "when damage for a wrongful act is proved, the fact that it is difficult to prove the exact amount of damages will not release the wrongdoer from responsibility . . ."<sup>51</sup> Where the quantity of damage sustained is obscure, but it is clear that plaintiff sustained some harm, New York appellate courts are happy to approve somewhat arbitrary recoveries which, although substantial, err towards under-compensation rather than the converse.<sup>52</sup>

#### D. Policies Governing Valuation

Judges rarely articulate the policies that govern their choices of valuation technique, but these policies can be extrapolated from the six abstract guiding principles listed earlier. It follows from the compensation policy (of putting the plaintiff in the economic position that *he* would have reached through full performance) that the value sought is always value *to the plaintiff*, and never value to the defendant.

This broad principle must be immediately qualified by the implications of the mitigation notion. The plaintiff must make a reasonable effort to protect himself from the consequences once he learns of the breach; he will not be permitted to recover losses caused by his own careless, wasteful behavior.

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Thousand Island Steamboat Co., 123 App. Div. 148, 108 N.Y. Supp. 336 (4th Dep't 1908) (sales of concessionaire on summer excursion boat). But cf. *Walter Janvier, Inc. v. Baker*, 229 App. Div. 679, 243 N.Y. Supp. 173 (1st Dep't 1930), aff'd mem. after retrial, 235 App. Div. 671, 255 N.Y. Supp. 906 (1st Dep't), aff'd mem., 259 N.Y. 604, 182 N.E. 200 (1932), where a salesman selling defendant's product was denied recovery for lost profits because of failure to show the stability of the volume of sales of his other products.

50. *Roussos v. Christoff*, 224 App. Div. 276, 277, 230 N.Y. Supp. 185, 186 (4th Dep't 1928) (per curiam); *Joy Vending Co. v. S. & A. Luncheonette & Restaurant, Inc.*, 15 Misc. 2d 565, 567, 180 N.Y.S.2d 194, 196 (Munic. Ct. N.Y. 1958).

51. *Ibid.* See also *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 209, 4 N.E. 264, 266 (1886).

52. In *McMaster v. State*, 108 N.Y. 542, 15 N.E. 417 (1888), the New York Court of Appeals approved the action of the Board of Claims in cutting \$30,000 off the estimated lost profit of a stone supplier, which amount included (a) contingencies and accidents that might have occurred during the remaining five years of the contract, and (b) the value to plaintiff of breach-released overhead assets. See *Mortimer v. Bristol*, 190 App. Div. 452, 180 N.Y. Supp. 55 (1st Dep't 1920); *Fletcher v. Jacob Dold Packing Co.*, 41 App. Div. 30, 58 N.Y. Supp. 612 (4th Dep't 1899), aff'd mem., 169 N.Y. 571, 61 N.E. 1129 (1901); *Crittenden v. Johnston*, 7 App. Div. 258, 40 N.Y. Supp. 87 (1st Dep't 1896).



However, if plaintiff's post-breach behavior results in gain to him that he would not have enjoyed but for the breach, the gain will be taken into account. This is true even though the gain was achieved by plaintiff taking risks above and beyond those required to meet the mitigation policy's standard of self-protection.

These three policies, when combined, give the rule that the value of the subtrahend will always be the higher of (1) value computed in accordance with the plaintiff's actual post-breach conduct, or (2) value computed by reference to what a reasonable man would have done after breach.

For example, if the plaintiff is a full-time employee of defendant and the breach releases time that plaintiff would have devoted to defendant's work, mitigation notions dictate that the value of the saved time is no less than the price it would have brought if plaintiff had made reasonable efforts to find re-employment in the same general line of work in the same general locale.<sup>53</sup> However, if after breach, plaintiff actually finds re-employment in some other line of work which is more remunerative, his receipts from that work fix the value of his saved time.<sup>54</sup>

#### E. *Abandonment and Completion Approaches*

The breach by the defendant can occur at various times in the life of the contract. If breach precedes completion of plaintiff's performance, the question arises: Should the plaintiff complete performance in order to resell the balance of his performance in finished form elsewhere? The clearest example is a manufacturer of goods who learned of buyer's repudiation before the goods were completed. If the proper response under mitigation notions is for the plaintiff to abandon efforts to complete and resell the rest of his performance, what he saves by virtue of breach (the subtrahend in the single general rule) consists of the components that would have gone into the balance of his performance. As a result, in valuing the subtrahend, the court must total the value to plaintiff of the raw materials, the partly finished goods and the finished goods on hand, as well as the saved costs of completing performance. In addition, the court must add in the value of any multi-contract ("overhead") assets which the plaintiff was able to divert to other uses thanks to the breach.

53. See, e.g., *Pindar v. Jenkins*, 128 App. Div. 711, 113 N.Y. Supp. 588 (3d Dep't 1908), rev'd mem. on other grounds, 199 N.Y. 588, 93 N.E. 1129 (1910); *Bigelow v. American Forcite Powder Mfg. Co.*, 39 Hun 599 (N.Y. App. Div. 1st Dep't 1886); *Casper v. Naef*, 80 Misc. 492, 141 N.Y. Supp. 568 (App. T. 1913); *Ashkanazy v. Sachs*, 110 N.Y. Supp. 929 (App. T. 1908); *Costigan v. Mohawk & H.R.R.*, 2 Denio 609 (N.Y. Sup. Ct. 1846); 1 Clark: § 308; Annots., 72 A.L.R. 1049 (1931); 28 A.L.R. 736 (1924).

54. 1 Clark §§ 120, 307; see note 13 supra.

This approach, based upon the cessation of further performance, I call "components valuation."

The approach to be used where the correct course was for the manufacturer to complete performance and resell the goods in finished form requires valuation of the finished goods, not the components that would have gone into finishing them. I have called this valuation approach "entity valuation." These two approaches are well established in New York law, although not, of course, by these names.

If plaintiff's performance had yet to be completed at the time of defendant's breach and if the parties disagree at trial as to whether components or entity valuation is proper, this question becomes the court's first order of business in fixing subtrahend value.

The issue can arise four ways: (1) after breach, plaintiff completed all aspects of his promised performance except delivery to defendant and, at trial, plaintiff wants entity valuation; (2) plaintiff abandoned efforts to finish performance after breach and, at trial, he wants components valuation; (3) after breach, plaintiff completed all aspects of his promised performance except delivery to defendant but, at trial, plaintiff wants components valuation; (4) plaintiff abandoned efforts to finish performance after breach but, at trial, he wants entity valuation.

In the first two situations, where the plaintiff's choice of valuation technique at trial corresponds to his post-breach course of action, the court should side with the plaintiff unless (a) plaintiff should have known at the time that he made his choice to complete or abandon performance that his choice would enhance damages, *and* (b) the opposite choice would not have entailed undue risk or self-sacrifice. In the last two situations, the court should side with the defendant. In all four instances, the plaintiff should have the burden of proving his post-breach conduct and the defendant should have the burden of showing that the conduct was not in accordance with the mitigation notion.

In three New York cases presenting the first situation (plaintiff completed performance and wanted entity valuation), the result clearly was as is suggested here.<sup>55</sup> The fourth case presenting this situation<sup>56</sup> requires extended discussion. Plaintiff, a jobber in steel beams, had a contract with a German manufacturer for the purchase of 500 tons of beams made to specifications to be furnished by defendant. Delivery was to be made in New York. Plaintiff thereupon contracted with defendant,

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55. *Ware Bros. v. Cortland Cart & Carriage Co.*, 192 N.Y. 439, 85 N.E. 666 (1908); *rev'd* after retrial, 148 App. Div. 546, 133 N.Y. Supp. 60 (3d Dep't 1911), *rev'd*, 210 N.Y. 122, 103 N.E. 890 (1913); *Hayes v. Durham*, 194 App. Div. 848, 185 N.Y. Supp. 691 (3d Dep't 1921); *Funt v. Schiffman*, 115 Misc. 155, 187 N.Y. Supp. 666 (App. T. 1921).

56. *Isaacs v. Terry & Tench Co.*, 125 App. Div. 532, 109 N.Y. Supp. 792 (1st Dep't 1908).

who accepted 200 tons of the goods but repudiated before furnishing specifications for the remaining 300 tons. Plaintiff did not cancel his contract with the German supplier, but found another American purchaser who sent in different specifications. This second purchaser accepted delivery at Antwerp.

The first time that the case reached the appellate division,<sup>57</sup> plaintiff was contending for an entity approach. He wanted the subtrahend valued at the resale receipts from the second purchaser<sup>58</sup> (apparently adjusted to reflect saved freight and import duties). However, the appellate division held that the subtrahend should be valued by a components approach because the beams "contracted for were to be used in a particular building and were to be made according to specifications, which were never furnished, and it is apparent that the plaintiff could not have had them manufactured without the same."<sup>59</sup>

Apparently, the court thought that the product sold to the resale purchaser differed too much in size and shape from the product that would have been delivered to the defendant. Whatever merit such an argument might otherwise have had, it seems groundless in view of the fact that plaintiff and his supplier regarded the 300 tons that the resale buyer took as the same 300 tons originally due to defendant. The court apparently had some inkling of the weakness of its position, for it indicated later in the opinion that any profit that plaintiff made on the resale should be taken into account in reduction of his recovery.<sup>60</sup> There is inconsistency here. If the resale is to be taken into account at all, this should be done by valuing the subtrahend by the resale value of the entity. It makes no sense to simultaneously assume that (1) plaintiff stopped work on notice of breach (the assumption underlying a components approach), and that (2) plaintiff completed work and resold after breach (the assumption underlying the court's adjustment to reflect profit made on resale).

The next time that the case reached the appellate division,<sup>61</sup> both parties were committed to the use of a components approach and the only difference between them concerned the components to be taken into

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57. *Ibid.* There were three trials and five appellate decisions. *Isaacs v. Terry & Tench Co.*, retrial ordered, 103 N.Y. Supp. 103 (App. T. 1907), judgment of retrial aff'd, 56 Misc. 586, 107 N.Y. Supp. 136 (App. T. 1907), rev'd and remanded, 125 App. Div. 532, 109 N.Y. Supp. 792 (1st Dep't 1908), judgment of second retrial aff'd, 113 N.Y. Supp. 731 (App. T. 1908), remittitur ordered, 132 App. Div. 657, 117 N.Y. Supp. 369 (1st Dep't 1909).

58. Plaintiff sought to fix the resale value of the entity by an actual resale conducted in a reasonable fashion.

59. 125 App. Div. at 534, 109 N.Y. Supp. at 793-94.

60. *Id.* at 535, 109 N.Y. Supp. at 794.

61. *Isaacs v. Terry & Tench Co.*, 132 App. Div. 657, 117 N.Y. Supp. 369 (1st Dep't 1909).

account.<sup>62</sup> In ordering remittitur, the appellate division adhered to its original (erroneous) formula, but made no adjustment for resale profit because the (admittedly incomplete) record failed to show the amount of such profit. Thus, the final result was the equivalent of components valuation of the subtrahend despite the fact that plaintiff had completed work after notice of the breach. At least if plaintiff had been arguing for entity valuation, I would have used that valuation approach, since it corresponds with the actual post-breach course of performance, and defendant offered nothing to show that the post-breach course which plaintiff took (continuing to perform his contract with his supplier) was commercially unreasonable.

In eleven of the twelve cases where the New York courts encountered or discussed the second situation (plaintiff stopped work on notice of breach and sought components valuation at trial), New York results squared with mine.<sup>63</sup>

The single case that the courts assumed presented the third situation (plaintiff completes performance but seeks components valuation) was handled compatibly with the notions in this article.<sup>64</sup> But I am more dubious than the court which handled the case that it presented an instance where plaintiff completed performance after breach. Plaintiff was the blender of "Belle of Bourbon whiskey" and defendant contracted to buy at least 6,000 cases during the contract period. He ordered out

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62. On the second retrial, the charge conformed to the prior appellate division opinion, but the verdict was in an amount greater than the trial judge's formula would justify. The appellate term thought that the verdict was correct and that the charge was wrong and affirmed a judgment on the verdict. I assume that, on appeal, plaintiff tried to justify his \$1200 judgment (based on an erroneous application of components valuation), rather than renewing his argument for a \$900 recovery under an entity approach. Thus, counsel were not at issue concerning components versus entity valuation when the case reached the appellate division the second time.

63. *Todd v. Gamble*, 148 N.Y. 382, 42 N.E. 982 (1896); *Baxter v. Lustberg*, 205 App. Div. 673, 200 N.Y. Supp. 125 (1st Dep't 1923); *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N.Y. Supp. 845 (3d Dep't 1910), *aff'd mem.*, 203 N.Y. 533, 96 N.E. 1122 (1911); *Kenny v. Knickerbocker Bread & Yeast Co.*, 136 App. Div. 568, 121 N.Y. Supp. 59 (1st Dep't 1910); *Snell v. Remington Paper Co.*, 102 App. Div. 138, 92 N.Y. Supp. 343 (4th Dep't 1905), *aff'd mem. after retrial*, 131 App. Div. 922, 115 N.Y. Supp. 1145 (4th Dep't 1909), *aff'd mem.*, 198 N.Y. 636, 92 N.E. 1103 (1910); *Stumpf v. Merz*, 50 Misc. 543, 99 N.Y. Supp. 337 (App. T. 1906); *Sonneborn v. Steinan*, 85 N.Y. Supp. 334 (App. T. 1903); *Graves v. Hunt*, 8 N.Y. St. Rptr. 308 (App. Div. 5th Dep't 1887); *Thomas v. Cauldwell*, 26 N.Y. Supp. 785 (Super. Ct. 1893); *J. K. Rishel Furniture Co. v. Stuyvesant Co.*, 123 Misc. 208, 204 N.Y. Supp. 659 (Munic. Ct. N.Y. 1924); *Goepel v. Kurtz Action Co.*, 179 App. Div. 687, 690, 167 N.Y. Supp. 317, 319 (1917) (*dictum*). But see *Varley v. Belford*, 156 N.Y. Supp. 597 (App. T. 1916).

64. *Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302, 84 N.Y. Supp. 385 (1st Dep't 1903).

only 3,500. The appellate division assumed plaintiff completed fabrication of the product after defendant's breach, because plaintiff alleged tender of the goods and the court could not see how they could have been tendered unless manufactured after breach.<sup>65</sup> However, if plaintiff was manufacturing large batches of a fungible commodity for delivery to others as well as defendant, and he kept a supply on hand to fill orders, he may well have curtailed production of 1,500 cases because of breach and still accomplished tender by offering any 1,500 cases that were in inventory on the date of tender.

The case presents a common problem of the plaintiff who deals in fungibles. Often it is hard for anyone to prove whether, after breach, plaintiff "completed" fabrication (*i.e.*, produced as many units as if there were no breach) or "abandoned" fabrication (*i.e.*, reduced what otherwise would have been his volume produced).<sup>66</sup>

In another New York case presenting the same problem, a cigarette manufacturer recovered the difference between the contract price and the cost of producing the cigarettes that defendant refused to accept—an appropriate measure if components valuation was accepted.<sup>67</sup> The court did not state whether plaintiff, upon learning of breach, did or should have curtailed production to this extent. I think the result in the second case is preferable on this rationale: Where neither party seeks to show whether the plaintiff, a manufacturer of fungibles, "completed" or "abandoned" production of these goods, the court should presume that he abandoned production; if, in fact, plaintiff completed and resold, it is likely that resale of the completed goods impaired his total volume of sales. Since the abandonment formula and the formula for completion with adjustment for lost volume give very similar results,<sup>68</sup> less distortion

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65. *Id.* at 305; 84 N.Y. Supp. at 387.

66. A similar problem arises if plaintiff is a publisher who agreed to run defendant's full-page ad at no particular location in the magazine. If, after breach, plaintiff does not run the ad, has he abandoned production of that page, or has he resold the page to another advertiser? He was regarded as having abandoned the page in *Stumpf v. Merz*, 50 Misc. 543, 99 N.Y. Supp. 337 (App. T. 1906); *Mendell v. Willyoung*, 42 Misc. 210, 85 N.Y. Supp. 647 (App. T. 1903); *J. K. Rishel Furniture Co. v. Stuyvesant Co.*, 123 Misc. 208, 204 N.Y. Supp. 659 (Munic. Ct. N.Y. 1924). In all three cases, the courts should have presumed that there was a proper resale of the entity. See text accompanying notes 67 & 68 *infra*. Then the burden of proving the value of the saved entity would fall on defendant. See text accompanying notes 123-45 *infra*. And the court would reach its (correct) result by a better rationale.

67. *Kelso v. Marshall*, 24 App. Div. 128, 48 N.Y. Supp. 728 (1st Dep't 1897). See also *J. B. Preston Co. v. Funkhouser*, 235 App. Div. 200, 256 N.Y. Supp. 681 (1st Dep't 1932), modified on other grounds, 261 N.Y. 140, 184 N.E. 737, *aff'd*, 290 U.S. 163 (1933) (involving a seller of slate granules which it had quarried).

68. For a discussion of where these formulae differ, see *Harris, A Radical Restatement*

will result from this presumption than the converse one. In other words, it is most likely that plaintiff-blender *either* reduced bourbon production by 1,500 cases because of breach *or* resold the rejected 1,500 cases to a customer who otherwise would have bought another 1,500 cases.

The sole case in which plaintiff sought entity valuation, although he did not complete performance, was handled correctly.<sup>69</sup>

While an occasional New York case will articulate the notions in this article,<sup>70</sup> for the most part, New York judges eschew rationalizations. Either they rest content on citation of authority<sup>71</sup> or rely on a wholly fallacious New York "rule" to the effect that components-valued recovery is appropriate where there is no market for the goods in question.<sup>72</sup> The supposed rule makes no sense because it is almost completely unrelated<sup>73</sup> to the two critical inquiries: (1) did plaintiff abandon or complete fabrication upon notice of breach? and (2) would a reasonable man have abandoned or completed fabrication then?<sup>74</sup>

The rule's diversion of attention from these two questions results in occasional opinions which fail to make clear whether plaintiff abandoned

of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared, 18 Stan. L. Rev. — (1965).

69. *Durkee v. Mott*, 8 Barb. 423 (N.Y. Sup. Ct. 1850).

70. E.g., *Goepel v. Kurtz Action Co.*, 179 App. Div. 687, 690, 167 N.Y. Supp. 317, 319 (1st Dep't 1917) (semble); *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N.Y. Supp. 845 (3d Dep't 1910), aff'd mem., 203 N.Y. 533, 96 N.E. 1122 (1911). See *Funt v. Schiffman*, 115 Misc. 155, 187 N.Y. Supp. 666 (App. T. 1921), where these notions were pursued in the teeth of (senseless) Sales Act language apparently pointing the other way.

71. E.g., *Baxter v. Lustberg*, 205 App. Div. 673, 200 N.Y. Supp. 125 (1st Dep't 1923); *J. K. Rishel Furniture Co. v. Stuyvesant Co.*, 123 Misc. 208, 204 N.Y. Supp. 659 (Munic. Ct. N.Y. 1924).

72. E.g., *Todd v. Gamble*, 148 N.Y. 382, 42 N.E. 982 (1896). Cf. *Lieberman v. Templar Motor Co.*, 236 N.Y. 139, 140 N.E. 222 (1923) (semble); *Snell v. Remington Paper Co.*, 102 App. Div. 138, 92 N.Y. Supp. 343 (4th Dep't 1905), aff'd mem. after retrial, 131 App. Div. 922, 115 N.Y. Supp. 1145 (4th Dep't 1909), aff'd mem., 198 N.Y. 636, 92 N.E. 1103 (1910); *Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302, 84 N.Y. Supp. 385 (1st Dep't 1903); *Thomas v. Cauldwell*, 26 N.Y. Supp. 785 (Super. Ct. 1893). Even where there is quite clearly some demand for the product, the court still finds "no market." E.g., *Snell v. Remington Paper Co.*, supra; *Belle of Bourbon Co. v. Leffler*, supra.

73. The "rule" makes sense to the extent that it prevents a plaintiff from forcing entity valuation on an unwilling defendant in a case where plaintiff made an unreasonable decision to complete and resell despite breach.

74. One case has another fallacious rationale for permitting a building contractor to stop work and use components valuation. Since plaintiff's services were delegable and he could, therefore, handle several such contracts simultaneously, he need not mitigate by resale of the entity. *Graves v. Hunt*, 8 N.Y. St. Rep. 308 (App. Div. 5th Dep't 1887). His "expansibility" has a bearing on whether or not entity resale would impair total volume, but it does not bear on whether he did resell, or should have resold, to another the product he otherwise would have delivered to defendant.

or continued work after breach.<sup>75</sup> It would also seem to account for one case where a court reached an erroneous result.<sup>76</sup> In this appellate term case, goods yet to be acquired were valued at resale value, apparently on the assumption that *all* goods normally are valued at resale value without regard to whether or not they were complete and on hand at the time of breach.

## II. COMPONENTS VALUATION

Whenever the subtrahend is being valued on the assumption that plaintiff should have abandoned efforts to complete his performance, the tribunal must fix the value of every component that would have gone into the performance if it had not been abandoned.

Usually, there will be many different components to be valued, but, on occasion, there may be only one or two. For example, if plaintiff is a jobber who does business by soliciting buyer orders and then arranging with suppliers to fill them, a buyer repudiation that occurs before plaintiff made arrangements to fill buyer's order may not enable plaintiff to save any components except the yet-to-be-ordered goods (and such percentage of plaintiff's overhead assets as might have been released by breach for other profitable use). If the overhead component is ignored as trifling, the sole component may be the goods that plaintiff would have ordered from his supplier.

From the nationwide case law, I have tried to extrapolate rules governing the way courts go about valuing different kinds of components. The simplest way to state my rules is to identify five mutually exclusive categories of components, noting the appropriate valuation and burden of proof rules for each.

The first category, "multi-contract assets,"<sup>77</sup> includes all components which would have been consumed only partially in the abandoned performance. For example, included in this category would be the value of a plaintiff-manufacturer's factory and permanent labor force, to the extent that breach released these assets for profitable re-employment.<sup>78</sup>

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75. E.g., *Nason Mfg. Co. v. Stephens*, 127 N.Y. 602, 28 N.E. 411 (1891); *J. B. Preston Co. v. Funkhouser*, 235 App. Div. 200, 256 N.Y. Supp. 681 (1st Dep't 1932), modified on other grounds, 261 N.Y. 140, 184 N.E. 737, aff'd, 290 U.S. 163 (1933); *New York Overseas Co. v. China, Japan & South America Trading Co.*, 206 App. Div. 242, 200 N.Y. Supp. 449 (1st Dep't 1923); *Pierson & Co. v. Nederlandsch-Indische*, 203 App. Div. 365, 196 N.Y. Supp. 587 (1st Dep't 1922).

76. *Varley v. Belford*, 156 N.Y. Supp. 597 (App. T. 1916), discussed in Harris, *A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 Stan. L. Rev. — (1965).

77. This category was called "saved overhead" in earlier articles.

78. It is not essential that plaintiff use an asset simultaneously on both defendant's contract and another contract to put the asset into this category. If the asset would retain

No distinction should be drawn between "on hand" and "yet to be acquired" multi-contract assets.

The distinguishing mark of all components in this category is the fact that, theoretically, precise valuation of them is almost always impossible in the rough-and-tumble of litigation. For this reason, courts normally adopt one of two alternative courses. Sometimes they give plaintiff the burden of proving the value of such items, but ease the burden by accepting highly imprecise evidence as sufficient to avoid nonsuit. On other occasions, they ignore such components completely, which is the practical equivalent of a finding that abandonment did not result in saving any valuable components of this sort.

Either of these courses is preferable to insisting that plaintiff offer precise proof of the resale value of his saved multi-contract assets, for this would almost always result in limiting him to nominal damages, as he inevitably fails to accomplish this impossible task. For reasons elaborated in an earlier article,<sup>79</sup> I think that the best judicial course is to give plaintiff the burden of proving the value of saved multi-contract assets, but to permit him to carry the burden by evidence which, albeit not too precise, errs in defendant's favor.

An early New York decision<sup>80</sup> recognized the need to take this category of component into account, but met the need in a fashion more arbitrary than I would suggest. The lower court had reduced by a flat 30,000 dollars a government contractor's recovery of 105,200 dollars for lost construction profits.<sup>81</sup> The reduction, admittedly arbitrary in amount, was to allow for saved multi-contract assets and for accidents that might have occurred to reduce profits in the remaining five years of the contract's life. The court was concerned with both the saved expense of capital, machinery and implements yet to be acquired, and the gains that were or should have been made when breach released the supervisory force and the machinery on hand for other employment.<sup>82</sup> The case conflicts with my notions only insofar as it values these items by arbitrary fiat, rather than crude cost accounting.

While none of the cases is articulate about the concept being employed, that early case seemed to be using my notion of "multi-contract asset." The critical fact was the asset's use on other contracts as well as defend-

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some economic value for plaintiff at the end of plaintiff's scheduled performance for defendant, the asset is an overhead item, and that portion of its value which is allotted to the balance of plaintiff's contract is in the category of "saved overhead."

79. See *Seller's Damages* (Michigan) 860-65, 882-83.

80. *McMaster v. State*, 108 N.Y. 542, 15 N.E. 417 (1888).

81. *Id.* at 556; 15 N.E. at 423.

82. *Id.* at 556-57; 15 N.E. at 423.



ant's, and *not* the fact that plaintiff would have acquired it even if he had not contracted with defendant. Some of the other cases seem to be using the similar, but distinct, concept of "fixed costs": costs plaintiff would have incurred whether or not he contracted with defendant.<sup>83</sup> I have no quarrel with valuing saved multi-contract assets by the portion of plaintiff's total fixed costs properly allocated to the unfinished portion of his contract with defendant, but it should be recognized that this figure is not the ultimate fact sought, but a crude approximation which errs in defendant's favor. In the two instances where New York courts accepted such figures as adequate to avoid nonsuit,<sup>84</sup> it is likely that they viewed the figures as ultimate facts.

Because they tend to think in terms of fixed costs, not multi-contract assets, the New York courts draw no distinction between my first and second category of components. Cases will announce that plaintiff must prove the saved costs of completing the contract, meaning both saved multi-contract assets and saved (single contract) costs yet to be incurred.<sup>85</sup> In many commission salesman cases, there is no inquiry as to whether plaintiff was selling only defendant's products or whether he sold others' products simultaneously;<sup>86</sup> the distinction is unimportant to the New

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83. E.g., *Baird v. Mayor of the City of New York*, 83 N.Y. 254 (1880); *Devlin v. Mayor of the City of New York*, 63 N.Y. 8 (1875); *Walter Janvier, Inc. v. Baker*, 229 App. Div. 679, 243 N.Y. Supp. 173 (1st Dep't 1930), *aff'd mem. after retrial*, 235 App. Div. 671, 255 N.Y. Supp. 906 (1st Dep't), *aff'd mem.*, 259 N.Y. 604, 132 N.E. 200 (1932); *Snell v. Remington Paper Co.*, 102 App. Div. 138, 92 N.Y. Supp. 343 (4th Dep't 1905), *aff'd mem.*, after retrial, 131 App. Div. 922, 115 N.Y. Supp. 1145 (4th Dep't 1909), *aff'd mem.*, 193 N.Y. 636, 92 N.E. 1103 (1910). Cf. *Bishop v. Autographic Register Co.*, 19 App. Div. 268, 46 N.Y. Supp. 97, *aff'd mem.*, 165 N.Y. 662, 59 N.E. 1119 (1897). However, account was taken of the diversion of on hand multi-contract assets in *Dunn v. Allen*, 55 App. Div. 637, 67 N.Y. Supp. 218 (4th Dep't 1900); *Baker Transfer Co. v. Merchants' Refrigerating & Ice Mfg. Co.*, 12 App. Div. 260, 42 N.Y. Supp. 76 (1st Dep't 1896). The courts seem unaware of the difference between the two concepts.

84. *Walter Janvier, Inc. v. Baker*, *supra* note 83; *Snell v. Remington Paper Co.*, *supra* note 83.

85. E.g., *Baird v. Mayor of the City of New York*, 83 N.Y. 254, 259 (1880); *Devlin v. Mayor of the City of New York*, 63 N.Y. 8, 24-25 (1875); *Wasserman v. Broadalbin Knitting Co.*, 270 App. Div. 20, 24, 58 N.Y.S.2d 597, 600 (3d Dep't 1945), *aff'd mem.*, 296 N.Y. 815, 72 N.E.2d 11 (1947); *Thomas v. Cauldwell*, 26 N.Y. Supp. 785, 788 (Super. Ct. 1893). In the great mass of cases where the court simply says that plaintiff should recover the contract price less "the cost of performance" or "the cost of manufacture," etc., it seems likely that the court is lumping together items in my first and second categories for common treatment. But it is possible that the court is thinking only of the second category and plans to ignore saved multi-contract assets.

86. E.g., *Slater v. Kane*, 275 App. Div. 648, 92 N.Y.S.2d 640 (1st Dep't 1949); *Prescott v. Buffalo Fire Appliance Corp.*, 237 App. Div. 198, 260 N.Y. Supp. 840 (2d Dep't 1932),

York courts because the saved selling expenses will be handled the same way whether (in my analysis) they would be classed as multi-contract or not.

Perhaps the most striking thing about this part of the New York case law is the apparently random way that New York courts ignore this category of component in some cases. In a substantial number of cases, it is clear that multi-contract assets would have been employed in plaintiff's performance, and equally clear that the court is making no reduction in recovery to reflect these assets.<sup>87</sup> Perhaps counsel for defendant has made a conscious decision, not reflected in the reported opinion, to ignore this item as *de minimis*. Perhaps trial judges discourage defendants from raising the issue where the sum involved is small.<sup>88</sup> Perhaps court and counsel often assume nothing should be deducted on this score unless breach enabled plaintiff to save some fixed costs—the fallacy noted earlier. It would take a closer examination of more trial records than I have scanned to resolve these questions.

Turning away now from multi-contract assets, there remain to be categorized all the various components that would have been *totally* consumed during the abandoned performance. These other assets must be divided into "on hand" and "yet to be acquired" items. Items are "yet to be acquired"—our second category—if plaintiff, at time of notice of breach, neither had them on hand nor had obligated himself irretrievably to acquire them. For example, if repudiation reached a plaintiff-manufacturer-seller before he acquired or contracted to acquire raw materials to be used in filling defendant's order, these raw materials would be categorized as "yet to be acquired." All "yet to be acquired" assets should be valued at their cost of acquisition.<sup>89</sup>

The way the authors reason, from the policies that they feel should

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aff'd mem., 262 N.Y. 475, 188 N.E. 27 (1933); *Napier v. Spielmann*, 127 App. Div. 711, 111 N.Y. Supp. 1009 (1st Dep't 1908).

87. E.g., *Weisberg v. Art Work Shop*, 226 App. Div. 532, 235 N.Y. Supp. 8 (1st Dep't), aff'd mem., 252 N.Y. 572, 170 N.E. 147 (1929); *Grant v. Abrash*, 191 App. Div. 398, 181 N.Y. Supp. 461 (1st Dep't 1920); *Isaacs v. Terry & Tench Co.*, 132 App. Div. 657, 117 N.Y. Supp. 369 (1st Dep't 1909), reversing 113 N.Y. Supp. 731 (App. T. 1908); *Carlisle v. Barnes*, 102 App. Div. 573, 92 N.Y. Supp. 917 (1st Dep't 1905). See also *McMaster v. State*, 108 N.Y. 542, 15 N.E. 417 (1888). Examination of the record of one case reveals that counsel and court discussed the fact that an overhead item had been included in plaintiff's computation of the cost of performance, but the colloquy passed to other topics and there was never another mention of how "overhead" should be handled. Record, p. 142, *Thieler v. Trinity Advertising Corp.*, 241 App. Div. 34, 270 N.Y. Supp. 717 (1st Dep't), aff'd mem., 265 N.Y. 668, 193 N.E. 437 (1934).

88. Cf. *Wilkinson v. Davies*, 146 N.Y. 25, 40 N.E. 501 (1895) (refusing to reverse for failure to prove trifling savings of multi-contract assets.)

89. General Theory 592; *Seller's Damages* (Michigan) 883-84.

govern allocation of the burden—set out earlier—to the conclusion that the plaintiff should have the burden of proving the existence and cost of yet-to-be-acquired assets, appears in earlier articles.<sup>90</sup>

The New York cases concerning expectation damages<sup>91</sup> consistently value saved expenses at cost<sup>92</sup> and saved on hand items at resale value.<sup>93</sup> Occasionally, this treatment is obscured by the way that the court describes what it is doing. For example, it may allow plaintiff his lost profit (which is really contract price less total costs), plus the extent to which on hand, unconsumed raw materials had a lower resale value at breach than their cost of acquisition (which is really cost of acquisition minus resale value).<sup>94</sup> Or it may allow recovery of lost profits plus costs incurred, to the extent that they are wasted.<sup>95</sup> One case has an excellent dis-

90. General Theory 588-92; Seller's Damages (Michigan) 884-85.

91. Some cases, perhaps without full consciousness of the fact, are concerned with reliance or restitutionary formulae. E.g., *France & Canada S.S. Corp. v. Berwind-White Coal Mining Co.*, 229 N.Y. 89, 127 N.E. 893 (1920); *Roberts v. Wells & Co.*, 4 App. Div. 395, 38 N.Y. Supp. 845 (3d Dep't 1896). Cf. *Carlin v. City of New York*, 132 App. Div. 60, 116 N.Y. Supp. 346 (2d Dep't 1909); *Wieser v. Times Realty & Constr. Co.*, 110 N.Y. Supp. 963 (App. T. 1908), vacated on other grounds, 131 N.Y. Supp. 337 (N.Y. City Ct. 1910); *Mcylcrt v. Gas Consumers' Benefit Co.*, 14 N.Y. Supp. 148 (Cir. Ct. 1890).

92. E.g., *Lieberman v. Templar Motor Co.*, 236 N.Y. 139, 140 N.E. 222 (1923); *Long Island Contracting & Supply Co. v. City of New York*, 204 N.Y. 73, 97 N.E. 483 (1912); *Patterson v. Meyerhofer*, 204 N.Y. 96, 97 N.E. 472 (1912); *McMaster v. State*, 103 N.Y. 542, 15 N.E. 417 (1888); *Wasserman v. Broadalbin Knitting Co.*, 270 App. Div. 20, 53 N.Y.S. 2d 597 (3d Dep't 1945), aff'd mem., 296 N.Y. 815, 72 N.E.2d 11 (1947).

93. E.g., *Lieberman v. Templar Motor Co.*, supra note 92; *Dillon v. Anderson*, 43 N.Y. 231 (1870); *Baxter v. Lustberg*, 205 App. Div. 673, 200 N.Y. Supp. 125 (1st Dep't 1923); *Hausman v. Buchman*, 189 App. Div. 597, 179 N.Y. Supp. 26 (1st Dep't 1919); *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N.Y. Supp. 845 (3d Dep't 1910), aff'd mem., 203 N.Y. 533, 96 N.E. 1122 (1911). In one case, raw materials on hand were valued at cost instead of resale value—a departure from my notions—but it appears that plaintiff would have resold the goods in the same market in which he had acquired them, and that, for most of the long period of time during which partial breaches were occurring, prices in that market had not fluctuated since the goods were acquired. Thus, there was an error in choice of valuation technique, but it is not clear if it led to an erroneous result. *Lehmaier v. Standard Specialty & Tube Co.*, 123 App. Div. 431, 108 N.Y. Supp. 402 (1st Dep't 1908). See pp. 52-55 *infra* & cases cited note 121 *infra*.

94. Cf. *Dillon v. Anderson*, supra note 93; *Baxter v. Lustberg*, supra note 93; *Hausman v. Buchman*, supra note 93; *Meyer Bros. Drug Co. v. McKinney*, supra note 93; *Goldstein v. Godfrey Co.*, 61 Misc. 64, 113 N.Y. Supp. 123 (App. T. 1903) (*per curiam*). This is the same as giving contract price. In other words, costs yet to be incurred are being valued at cost, and on hand materials at resale.

95. *Lieberman v. Templar Motor Co.*, 236 N.Y. 139, 149, 140 N.E. 222, 225 (1923); *Brook Iron Works, Inc. v. Cohen*, 138 Misc. 416, 425, 246 N.Y. Supp. 329, 340 (Munic. Ct. N.Y. 1930), rev'd *per curiam*, 235 App. Div. 123, 256 N.Y. Supp. 411 (2d Dep't 1931). This means lost profit plus costs incurred reduced by the resale value of that which plaintiff ob-

cussion of this distinction between on hand items and yet-to-be-incurred expenses;<sup>96</sup> one case evidences a terrible misconception of what is going on;<sup>97</sup> the bulk of cases take the right course without discussion.

New York has not had much difficulty in categorizing items as "on hand" or "yet to be acquired." In several cases where breach occurred after plaintiff had contracted with a supplier for the item but before the supplier had shipped the item, plaintiff broke his contract with his supplier in order to mitigate damages.<sup>98</sup> The New York courts quite properly<sup>99</sup> permit plaintiff to value the item in question at cost<sup>100</sup> and to recover as incidental damages any damages paid to the supplier for breach of the supply contract.<sup>101</sup> Similarly, the court quite properly handled a case in which plaintiff had goods under contract, but not yet in his possession, at the time of breach. At that moment, the resale value of the goods vastly exceeded both the price that defendant was to pay to plaintiff and the price that plaintiff was to pay to his supplier. Plaintiff, shortly thereafter, entered into a joint venture whereby he assigned two-thirds of the goods to his fellow venturer in return for financing, the two venturers planning to ship the goods to Europe for resale at an even higher price. The appellate division held that the goods should be valued at their resale market value at the date of breach.<sup>102</sup> Since plaintiff could have performed with his supplier after defendant's breach without any risk to himself, and since his post-breach decision to speculate on a further rise in the value of the goods can hardly be viewed as an effort to mitigate damages, the proper valuation technique was resale value at the time of breach—and not the cost to plaintiff of

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tained by incurring these costs. Once again, it is the algebraic equivalent of the views in this article.

96. *Farrish Co. v. Harris Co.*, 122 Misc. 611, 204 N.Y. Supp. 638 (N.Y. City Ct. 1924).

97. *Snell v. Remington Paper Co.*, 102 App. Div. 138, 142-45, 92 N.Y. Supp. 343, 345-48 (4th Dep't 1905), *aff'd mem. after retrial*, 131 App. Div. 922, 115 N.Y. Supp. 1145 (4th Dep't 1909), *aff'd mem.*, 198 N.Y. 636, 92 N.E. 1103 (1910) (echoing the confusion discussed at note 72 *supra*).

98. E.g., *Hausman v. Buchman*, 189 App. Div. 597, 179 N.Y. Supp. 26 (1st Dep't 1919); *Goepel v. Kurtz Action Co.*, 179 App. Div. 687, 167 N.Y. Supp. 317 (1st Dep't 1917); *Masterton v. Mayor of the City of Brooklyn*, 7 Hill 61 (N.Y. Sup. Ct. 1845).

99. See *Seller's Damages (Michigan)* 873.

100. See cases cited note 98 *supra*. While New York courts have had no difficulty seeing that the unacquired items should be valued at cost, they have had rough going in deciding how to prove cost value in this context. *Doelger v. Battery Park Nat'l Bank*, 201 App. Div. 515, 194 N.Y. Supp. 582 (1st Dep't 1922) (*semble*); see pp. 66-68 *infra*.

101. *Masterton v. Mayor of the City of Brooklyn*, 7 Hill 61, 71 (N.Y. Sup. Ct. 1845).

102. *Sheldon v. Argos Mercantile Corp.*, 194 App. Div. 472, 478-81, 185 N.Y. Supp. 513, 517-20 (1st Dep't 1920), *aff'd*, 233 N.Y. 585, 135 N.E. 928 (1922).

acquiring the goods from his supplier or the return to plaintiff from his joint venture (which turned out badly).<sup>103</sup>

Components which are neither "multi-contract" nor "yet to be acquired" must be further subdivided into three groups. Non-delegable personal services<sup>104</sup> must be singled out because they are the only class of components as to which defendant should have the burden of proving saved value. The author's rationale appears elsewhere;<sup>105</sup> it may suffice for now to mention (1) the probability (at least where the employee is the head of a household) that the employee will use reasonable efforts to find re-employment when wrongfully discharged; (2) the great difficulty faced by whoever has the burden in cases where plaintiff did not in fact resell all his breach-released time;<sup>106</sup> (3) the likelihood that the employer is in the better position to distribute any loss sustained; (4) the employee's lack of any expectation-vindicating remedy alternative to damages; and (5) the relative hardship, on the one hand, of overcompensating plaintiff slightly and, on the other hand, of depriving plaintiff of all recovery whatsoever in cases where the burden can be carried as regards most, but not all, of the time period from breach to the end of the contract term.<sup>107</sup> In cases involving sellers of personal services who work for a great many employers at once (such as many lawyers), it is often impossible to identify the precise blocks of time freed by breach for resale to other employers; this means that the party with the burden of proof is doomed to fail to carry it, and allocation of the burden is tantamount of choosing between a defendant's verdict and valuing the subtrahend at zero.<sup>108</sup>

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103. I would value the goods at plaintiff's return from the venture if (a) he could not have entered the venture but for defendant's breach, and (b) the return was greater than the good's resale value at the time of breach, and (c) plaintiff contributed nothing to the venture but these goods.

104. General Theory 605-06; Seller's Damages (Michigan) 888-90.

105. *Id.* at 860-64, 882-86, 889-90.

106. The unsold time cannot be valued by hypothetical resale value because of the live possibility that there may be absolutely no demand for it, except at sacrifice prices, during a substantial part of the remaining contract term. Nor can it be valued, as wheat or coal are, by reference to what other buyers recently paid or bid for identical items at a commodity exchange. About the only persuasive evidence is what other buyers bid for this time when plaintiff solicited their bids after defendant's breach. If plaintiff failed to solicit such bids when he learned of the breach, or if he failed to locate a buyer sufficiently interested to bid, it may be impossible for either party to prove the subtrahend's value.

107. This problem only becomes acute if the contract cannot be regarded as "divisible" by months or weeks or days or hours.

108. See *Carlisle v. Barnes*, 102 App. Div. 573, 580-81, 92 N.Y. Supp. 917, 922-23 (1st Dep't 1905), appeal dismissed, 183 N.Y. 567 (1906) (awarding such a plaintiff-attorney the price, undiminished by the value of his saved time); cf. *Weisberg v. Art Work Shop*, 226

The New York appellate courts reach results that are consistently correct, suggesting at least an intuitive appreciation of the line between non-delegable services and other categories of components. Defendant has the burden of proving the saved value of non-delegable services,<sup>109</sup> whereas plaintiff has the burden of proving the value of other classes of components.<sup>110</sup> Trial judges have had considerable difficulty learning that the distinction lies between non-delegable services and all other categories of saved components; in ten cases, they have been reversed for allowing a seller of delegable services to recover the price undiminished by the value of saved costs.<sup>111</sup> Apparently, many trial judges were trying to apply an erroneous parochial rule which would give to all sellers of services, *prima facie*, the unpaid balance of the price, ignoring the fact that this would give the defendants in such cases the burden on *all* categories of saved components.<sup>112</sup>

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App. Div. 532, 235 N.Y. Supp. 8 (1st Dep't), *aff'd mem.*, 252 N.Y. 572, 170 N.E. 147 (1929) (engineers).

109. *Engel v. Mutual Garment Co.*, 166 N.Y. Supp. 981 (App. T. 1917); see *Casper v. Naef*, 80 Misc. 492, 141 N.Y. Supp. 568 (App. T. 1913); pp. 52-55 & cases cited note 128 *infra*; cf. *Brockhurst v. Ryan*, 2 Misc. 2d 747, 146 N.Y.S.2d 386 (Sup. Ct. 1955).

110. Costs yet to be incurred: *Danolds v. State*, 89 N.Y. 36 (1882); *Walter Janvier, Inc. v. Baker*, 229 App. Div. 679, 243 N.Y. Supp. 173 (1st Dep't 1930), *aff'd mem. after retrial*, 235 App. Div. 671, 255 N.Y. Supp. 906 (1st Dep't), *aff'd mem.*, 259 N.Y. 604, 182 N.E. 200 (1932); *Hausman v. Buchman*, 189 App. Div. 597, 179 N.Y. Supp. 26 (1st Dep't 1919). Leasehold on hand: *Dickerson v. Menschel*, 188 App. Div. 547, 177 N.Y. Supp. 376 (1st Dep't 1919); *Goepel v. Kurtz Action Co.*, 179 App. Div. 687, 167 N.Y. Supp. 317 (1st Dep't 1917). Personalty on hand: *Beckwith v. City of New York*, 121 App. Div. 462, 106 N.Y. Supp. 175 (2d Dep't 1907), *aff'd mem.*, 210 N.Y. 530 (1913); *Miller v. Hahn*, 23 App. Div. 48, 48 N.Y. Supp. 346 (2d Dep't 1897). See cases cited notes 111 & 129 & pp. 52-55 *infra*.

111. *Grant v. Abrash*, 191 App. Div. 398, 181 N.Y. Supp. 461 (1st Dep't 1920); *Bishop v. Autographic Register Co.*, 19 App. Div. 268, 46 N.Y. Supp. 97 (1st Dep't 1897), *aff'd mem.*, 165 N.Y. 662, 59 N.E. 1119 (1901); *Baker Transfer Co. v. Merchants' Refrigerating & Ice Mfg. Co.*, 12 App. Div. 260, 42 N.Y. Supp. 76 (1st Dep't 1896); *Manhattan Carting Co. v. Keen's English Chop House, Inc.*, 180 N.Y. Supp. 409 (App. T. 1920); *Engel v. Mutual Garment Co.*, 166 N.Y. Supp. 981 (App. T. 1917); *Casper v. Naef*, 80 Misc. 492, 141 N.Y. Supp. 568 (App. T. 1913); *Goldstein v. Godfrey Co.*, 61 Misc. 64, 113 N.Y. Supp. 123 (App. T. 1908) (*per curiam*); *Kennelly v. Walker*, 107 N.Y. Supp. 95 (App. T. 1907); *Rosenbloom v. Maas*, 97 N.Y. Supp. 210 (App. T. 1905); *Finck v. Menke*, 31 Misc. 748, 64 N.Y. Supp. 38 (App. T. 1900) *rev'd per curiam*, 33 Misc. 769, 67 N.Y. Supp. 954 (App. T. 1901); cf. *Graves v. Hunt*, 8 N.Y. St. Rptr. 308 (App. Div. 5th Dep't 1887); *Durkee v. Mott*, 8 Barb. 423 (N.Y. Sup. Ct. 1850), which reflect similar confusion.

112. See *J. K. Rishel Furniture Co. v. Stuyvesant Co.*, 123 Misc. 208, 204 N.Y. Supp. 659 (Munic. Ct. N.Y. 1924), where one trial judge makes it apparent that he thought the distinction was between a contract "for personal services" and one "for goods bargained and sold." In *Sackman v. Stephenson*, 11 N.Y.S.2d 69 (Sup. Ct. 1939), the trial court erroneously gave to a correspondence school the price undiminished by the value of saved services and materials; no appeal was taken. Cf. *Haughey v. Belmont Quadrangle Drilling*

The remaining components consist of various kinds of property, all of which were on hand at the time of breach and all of which would be fully consumed<sup>113</sup> by plaintiff's full performance of this contract. These components need to be divided into two categories only when one question arises: May the plaintiff prove the value of the property by expert evidence of what a willing buyer would pay a willing seller? Such evidence should be permitted if (a) the property is so unique that it is not feasible to value it by reference to what has been offered or paid recently for virtually identical property; and (b) the property is of a sort for which there is almost always some demand, albeit units often sell slowly unless reduced to sacrifice prices; and (c) the property will not perish in a fairly short time. The first condition, of course, establishes the necessity for departing from the more conventional proofs of resale value. The second eliminates instances where the property is not just slow-moving, but utterly without demand. The last condition can be illustrated by a hypothetical situation in which a bailee repudiates his contract two months before the end of the term, thereby enabling the bailor to try to re-let the unique chattel for this two month period. Assume further that the bailor did not, in fact, succeed in finding a new bailee during that two month period and that it was unlikely that a new bailee for such a chattel at conventional rates could be found within a month. In these circumstances, it would be unfair to plaintiff to value his savings at what a hypothetical willing bailee would pay a hypothetical willing bailor for two months' use of this chattel.<sup>114</sup> Elsewhere, I have called the category where hypothetical resale valuation is proper "realty on hand," and the residual category "personalty on hand."<sup>115</sup> The New York results are consistent with these ideas. I have found no case patently applying hypothetical resale value to personalty on hand, and

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Corp., 284 N.Y. 136, 29 N.E.2d 649 (1940), motion to amend remittitur granted, 286 N.Y. 584, 35 N.E.2d 931 (1941), where the court of appeals allocated the burden correctly, but saw the distinction as being between employment contracts and sale of goods contracts.

113. That is to say, it would no longer be plaintiff's. He would transfer it or consume it physically in the course of performing.

114. The same thing is true if realty, not personalty, is involved. But it rarely arises in this context because the lessor usually can sue for the price, a superior remedy to expectation damages from his point of view, since it does not require him to mitigate by re-letting. *Becar v. Flues*, 64 N.Y. 518 (1876); *Sancourt Realty Corp. v. Dowling*, 220 App. Div. 660, 222 N.Y. Supp. 288 (1st Dep't 1927); *Railway Advertising Co. v. Standard Rock Candy Co.*, 83 App. Div. 191, 83 N.Y. Supp. 338 (2d Dep't 1903), *aff'd mem.*, 178 N.Y. 570, 70 N.E. 1108 (1904) (same rule where plaintiff leases advertising space in railroad cars); cf. *Manhattan Realty Appraisers v. Marchbank*, 87 Misc. 336, 339, 149 N.Y. Supp. 834, 836 (App. T. 1914) (dictum). But a lessor of rooms must re-let. *Wilson v. Martin*, 1 Denio 602 (N.Y. Sup. Ct. 1845).

115. *Seller's Damages* (Michigan) 874, 885-88.

one of the two cases involving realty on hand appears to approve hypothetical valuation.<sup>116</sup>

While the resale value of on hand personalty cannot be established by expert testimony about the conduct of a hypothetical willing buyer, it can be shown by evidence of the actual receipts of a post-breach resale, if the resale was timed and conducted to fetch the highest price feasible<sup>117</sup> and any relevant statutory requirements<sup>118</sup> were met. And, in the absence of such a resale, plaintiff can still prove resale value, but the reported cases do not make clear the kinds of evidence used in the successful<sup>119</sup> and unsuccessful cases.<sup>120</sup>

### III. ENTITY VALUATION

This approach is appropriate wherever plaintiff reasonably resold or should have resold to another buyer substantially the same finished product<sup>121</sup> which, but for breach, he would have delivered to defendant. As a practical matter, this embraces four kinds of cases: (1) plaintiff's sole unrendered performance at the time of breach was

116. *Dickerson v. Menschel*, 188 App. Div. 547, 556, 177 N.Y. Supp. 376, 381 (1st Dep't 1919). The case involved a twenty-one year lease. I have found no case dealing with the problem of valuing short-term leases or perishable goods that are not in immediate demand. See cases cited note 127 & pp. 52-55 *infra*.

117. *Baxter v. Lustberg*, 205 App. Div. 673, 200 N.Y. Supp. 125 (1st Dep't 1923); *Hausman v. Buchman*, 189 App. Div. 597, 179 N.Y. Supp. 26 (1st Dep't 1919); see *Fox v. Woods*, 96 N.Y. Supp. 117 (App. T. 1905) (actual receipts used to fix resale value of realty); cases cited notes 130 & 131 & pp. 52-55 *infra*; cf. *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N.Y. Supp. 845 (3d Dep't 1910), *aff'd mem.*, 203 N.Y. 533, 96 N.E. 1122 (1911), where the court does not mention whether plaintiff proved the reasonableness of his resale.

118. See N.Y. Pers. Prop. Law § 141 (repealed by N.Y. U.C.C. § 10-102). This material is now covered in N.Y. U.C.C. § 2-706.

119. *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N.Y. Supp. 845 (3d Dep't 1910), *aff'd mem.*, 203 N.Y. 533, 96 N.E. 1122 (1911); *Masterton v. Mayor of the City of Brooklyn*, 7 Hill 61 (N.Y. Sup. Ct. 1845); *Thomas v. Cauldwell*, 26 N.Y. Supp. 785 (Super. Ct. 1893) (scrap value).

120. *Beckwith v. City of New York*, 121 App. Div. 462, 106 N.Y. Supp. 175 (2d Dep't 1907), *aff'd mem.*, 210 N.Y. 530 (1913), where plaintiff failed to establish that on-hand plumbing parts had only scrap value but persuaded the court that their resale value was less than their cost of acquisition; they were valued, therefore, at cost to him.

121. Sometimes the entity resold varies slightly from the entity that defendant would have received. E.g., *Ware Bros. v. Cortland Cart & Carriage Co.*, 192 N.Y. 439, 85 N.E. 666 (1908), *rev'd after retrial*, 148 App. Div. 546, 133 N.Y. Supp. 60 (3d Dep't 1911), *rev'd*, 210 N.Y. 122, 103 N.E. 890 (1913) (advertising space with ad touting the wares of the party renting the space); *Ashburner v. Balchen*, 7 N.Y. 262 (1852) (cargo space aboard plaintiff's vessel); *Mann v. National Linseed Oil Co.*, 87 Hun 558, 34 N.Y. Supp. 481 (5th Dep't 1895) (linseed oil for resale purchaser); *Isbrandtsen Co. v. Lyncroft Grain Corp.*, 8 Misc. 2d 521, 166 N.Y.S.2d 721 (N.Y. City Ct. 1957) (cargo space aboard plaintiff's vessel).



delivery of his own non-delegable services;<sup>122</sup> (2) plaintiff's sole un-rendered performance at the time of breach was delivery of property, and the undelivered property was on hand in completed form when breach occurred;<sup>123</sup> (3) the contract called for delivery of property, and although some or all of the property was neither delivered nor on hand in finished form at the time of breach, plaintiff reasonably did take or should have taken post-breach steps to resell the property in finished form to another buyer;<sup>124</sup> and (4) the contract called for delivery of delegable services, and although some or all such services were undelivered at breach, plaintiff did take or should have taken post-breach steps to resell such services to another buyer.<sup>125</sup>

122. E.g., *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605, motion to amend remittitur granted, 253 N.Y. 533, 171 N.E. 770 (1930); *Fuchs v. Koerner*, 107 N.Y. 529, 14 N.E. 445 (1887); *Everson v. Powers*, 89 N.Y. 527 (1882); *Howard v. Daly*, 61 N.Y. 362 (1875); *Weisberg v. Art Work Shop*, 226 App. Div. 532, 235 N.Y. Supp. 8 (1st Dep't), aff'd mem., 252 N.Y. 572, 170 N.E. 147 (1929). In most of these cases, I suspect that some share of plaintiff's multi-contract assets were saved, too, but this phenomenon was ignored uniformly in the opinions.

123. Goods: e.g., *Ruttonjee v. Frame*, 237 N.Y. 115, 142 N.E. 437 (1923) (per curiam); *Fulton v. Canno*, 222 N.Y. 189, 118 N.E. 633 (1918); *Moore v. Potter*, 155 N.Y. 481, 50 N.E. 271 (1898); *Riendeau v. Bullock*, 147 N.Y. 269, 41 N.E. 561 (1895). Realty: e.g., *Levy v. 315 W. 79th St. Corp.*, 222 App. Div. 9, 225 N.Y. Supp. 218 (1st Dep't 1927); *Ackley v. Parsons*, 190 App. Div. 762, 181 N.Y. Supp. 116 (3d Dep't 1920); *Hayden v. Pinchot*, 172 App. Div. 102, 158 N.Y. Supp. 215 (1st Dep't 1916); *Kuntz v. Schnugg*, 99 App. Div. 191, 90 N.Y. Supp. 933 (1st Dep't 1904). Going business: e.g., *Roussos v. Christoff*, 224 App. Div. 276, 230 N.Y. Supp. 185 (4th Dep't 1928) (per curiam); *Kingston Braid Mills, Inc. v. Aboff*, 179 N.Y. Supp. 127 (App. T. 1919); *Perlman v. Levy*, 109 N.Y. Supp. 785 (App. T. 1908); *Sutcliffe v. Potts*, 88 N.Y.S.2d 55 (Sup. Ct. 1949), aff'd per curiam, 277 App. Div. 751, 97 N.Y.S.2d 200 (1st Dep't 1950). Other: e.g., *Van Brocklen v. Smeallie*, 140 N.Y. 70, 35 N.E. 415 (1893) (one-third of partnership); *Baer v. Durham Duplex Razor Co.*, 228 App. Div. 350, 239 N.Y. Supp. 473 (1st Dep't), aff'd mem., 254 N.Y. 570, 173 N.E. 871 (1930) (patent); *Wyllys Co. v. Nixon*, 165 App. Div. 373, 150 N.Y. Supp. 944 (1st Dep't 1914), rev'd sub nom. *Phelps-Stokes Estates Inc. v. Nixon*, 222 N.Y. 93, 118 N.E. 241 (1917) (stock); *Pardee v. Douglas*, 122 App. Div. 395, 106 N.Y. Supp. 775 (2d Dep't 1907) (stock); *Wilson v. Martin*, 1 Denio 602 (N.Y. Sup. Ct. 1845) (room in rooming house).

124. E.g., *Ware Bros. v. Cortland Cart & Carriage Co.*, 192 N.Y. 439, 85 N.E. 666 (1908), rev'd after retrial, 148 App. Div. 546, 133 N.Y. Supp. 60 (3d Dep't 1911), rev'd 210 N.Y. 122, 103 N.E. 890 (1913); *Hayes v. Durham*, 194 App. Div. 848, 185 N.Y. Supp. 691 (3d Dep't 1921); *Belle of Bourbon Co. v. Lefler*, 87 App. Div. 302, 84 N.Y. Supp. 385 (1st Dep't 1903); *Fletcher v. Jacob Dold Packing Co.*, 41 App. Div. 30, 58 N.Y. Supp. 612 (4th Dep't 1899), aff'd mem., 169 N.Y. 571, 61 N.E. 1135 (1901); *Funt v. Schiffman*, 115 Misc. 155, 187 N.Y. Supp. 666 (App. T. 1921).

125. E.g., *Ware Bros. v. Cortland Cart & Carriage Co.*, supra note 124, where plaintiff published a monthly journal and was to run defendant's ad in it on a designated page, plaintiff should have resold the space; *Ashburner v. Balchen*, 7 N.Y. 262 (1852), where plaintiff resold the cargo space on the vessel that defendant was to fill; *Isbrandtsen Co. v. Lyncroft Grain Corp.*, 8 Misc. 2d 521, 166 N.Y.S.2d 721 (N.Y. City Ct. 1957) (same); *Heclescher v. McCrea*, 24 Wend. 303 (N.Y. Sup. Ct. 1840), where plaintiff should have resold such cargo space; *Shannon v. Comstock*, 21 Wend. 457 (N.Y. Sup. Ct. 1839) (same).

In the first two kinds of cases, there was but a single component to be used in performing the balance of the contract. One could view these cases as involving component valuation, rather than entity valuation, and the result would be the same. In the last two kinds of cases, there is real significance to the use of entity, instead of components, valuation. The four classes of cases share this common trait: The court should value plaintiff's saved performance *in its finished form*.

Appropriate proof burden and valuation rules parallel those discussed earlier: (1) the saved entity should be valued at resale, not at cost;<sup>126</sup> (2) only if the saved entity consists solely or almost entirely of "on hand realty" should the court accept evidence of what a hypothetical willing buyer would pay for it;<sup>127</sup> (3) if the saved entity con-

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I am puzzled why publishers who sell space on a designated page must resell the entity (e.g., *Ware Bros. v. Cortland Cart & Carriage Co.*, supra note 124), whereas those selling ads without a fixed location need not (e.g., *Stumpf v. Merz*, 50 Misc. 543, 99 N.Y. Supp. 337 (App. T. 1906); *Mendell v. Willyoung*, 42 Misc. 210, 85 N.Y. Supp. 647 (App. T. 1903); *J. K. Rishel Furniture Co. v. Stuyvesant Co.*, 123 Misc. 208, 204 N.Y. Supp. 659 (Munic. Ct. N.Y. 1924)). I am puzzled, too, why the maritime carrier must resell the entity (e.g., *Ashburner*, *Heckscher*, *Shannon*, and *Isbrandtsen* cases, supra), but the rafter of logs and the deliveryman ashore need not (e.g., *Baker Transfer Co. v. Merchants' Refrigerating & Ice Mfg. Co.*, 12 App. Div. 260, 42 N.Y. Supp. 76 (1st Dep't 1896); *Durkee v. Mott*, 8 Barb. 423 (N.Y. Sup. Ct. 1850)). Indeed, despite the great number of New York cases involving builders and manufacturers, I find no other case in which the seller of delegable services is required to mitigate by resale of the entity. See, e.g., *Graves v. Hunt*, 8 N.Y. St. Rptr. 308 (App. Div. 5th Dep't 1887) (builder need not resell the entity). Perhaps the courts have trouble visualizing the entity in cases which do not involve designated space on a particular page or vessel. Perhaps the courts are grappling in the dark with the lost volume problem. See pp. 59-69 *infra*. Undoubtedly, they are reluctant to make plaintiff stay in business and risk his capital in situations where he is considering abandoning the enterprise. Conceding all this, it is hard to see why the seller of "room and board" need not resell the entity. E.g., *Lydecker v. Valentine*, 71 Hun 194, 24 N.Y. Supp. 567 (2d Dep't 1893); *Wetmore v. Jaffray*, 9 Hun 140 (2d Dep't 1876), *aff'd*, 73 N.Y. 218 (1878); *Wilkinson v. Davies*, 146 N.Y. 25, 40 N.E. 501 (1895) (dictum). And why the person selling only rooms, and not board, apparently must resell the entity. E.g., *Wilson v. Martin*, 1 Denio 602 (N.Y. Sup. Ct. 1845). But perhaps mitigation does not require one to enter into a relationship as intimate as that with a roomer-boarder. The feeling remains that mitigation notions and the use of entity valuation are underdeveloped in this class of cases where plaintiff sells fairly fungible units of delegable services.

126. E.g., *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605, motion to amend remittitur granted, 253 N.Y. 533, 171 N.E. 770 (1930); *Ruttonjee v. Frame*, 237 N.Y. 115, 142 N.E. 437 (1923) (per curiam); *Fulton v. Canno*, 222 N.Y. 189, 118 N.E. 633 (1918); *Milage v. Woodward*, 186 N.Y. 252, 78 N.E. 873 (1906); *Moore v. Potter*, 155 N.Y. 481, 50 N.E. 271 (1898).

127. Although it is not perfectly clear how the entity should have been valued, hypothetical resale value apparently was approved in the following cases where the entity was land or a going business: e.g., *Roussos v. Christoff*, 224 App. Div. 276, 230 N.Y. Supp. 185 (4th Dep't 1928) (per curiam); *Levy v. 315 W. 79th St. Corp.*, 222 App. Div. 9, 225 N.Y. Supp. 218 (1st Dep't 1927); *Hayden v. Pinchot*, 172 App. Div. 102, 158 N.Y. Supp. 215 (1st

sists solely or almost entirely of non-delegable services, defendant should have the burden of proving its value;<sup>128</sup> (4) otherwise, plaintiff should have the burden.<sup>129</sup> Where resale value is sought, the receipts of an actual resale establish resale value<sup>130</sup> if plaintiff proves the fairness of the resale<sup>131</sup> and plaintiff did not elect some inconsistent remedy earlier.<sup>132</sup>

Dep't 1916); *Kuntz v. Schnugg*, 99 App. Div. 191, 90 N.Y. Supp. 933 (1st Dep't 1904). I found no effort to use hypothetical resale value in a case involving some other kind of entity.

128. E.g., *Milage v. Woodward*, 186 N.Y. 252, 78 N.E. 873 (1906); *Fuchs v. Koerner*, 107 N.Y. 529, 14 N.E. 445 (1887) (semble); *Everson v. Powers*, 89 N.Y. 527 (1882) (semble); *Howard v. Daly*, 61 N.Y. 362 (1875); *Weisberg v. Art Work Shop*, 226 App. Div. 532, 533, 235 N.Y. Supp. 8, 10 (1st Dep't), aff'd mem., 252 N.Y. 572, 170 N.E. 147 (1929) (semble). In only one case was there a close question as to whether the non-delegable services constituted a large enough part of the entity to give defendant the burden of proving the entity's value. *Milage v. Woodward*, supra, where defendant was given the burden of proving the resale value of the entity—carrier services aboard plaintiff's canal boat.

129. Goods: e.g., *Gahen v. Platt*, 69 N.Y. 348 (1877); *Derami, Inc. v. John B. Cabot, Inc.*, 273 App. Div. 717, 79 N.Y.S.2d 664 (1st Dep't 1948); *Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302, 84 N.Y. Supp. 385 (1st Dep't 1903); *National Cash Register Co. v. Schmidt*, 48 App. Div. 472, 62 N.Y. Supp. 952 (2d Dep't 1900); *Babbitt v. Wides Motor Sales Corp.*, 17 Misc. 2d 889, 192 N.Y.S.2d 21 (App. T. 1959) (per curiam); see *Watts v. Phillips-Jones Corp.*, 211 App. Div. 523, 207 N.Y. Supp. 493 (1925), aff'd mem., 242 N.Y. 557, 152 N.E. 425 (1926); *Case v. Simonds*, 7 N.Y. Supp. 253 (App. Div. 5th Dep't 1889); *Farrish Co. v. Harris Co.*, 122 Misc. 611, 204 N.Y. Supp. 638 (N.Y. City Ct. 1924). Realty: e.g., *Kingston Braid Mills, Inc. v. Aboff*, 179 N.Y. Supp. 127 (App. T. 1919); *Perlman v. Levy*, 109 N.Y. Supp. 785 (App. T. 1908); *Wilson v. Holden*, 16 Abb. Pr. 133 (N.Y. App. T. 1863); see *Levy v. 315 W. 79th St. Corp.*, 222 App. Div. 9, 225 N.Y. Supp. 218 (1st Dep't 1927); *Keitel v. Zimmermann*, 19 Misc. 581, 43 N.Y. Supp. 676 (Sup. Ct. 1897); *Guli v. West*, 65 Hun 1, 19 N.Y. Supp. 757 (1st Dep't 1892). Going business: e.g., *Rousses v. Christoff*, 224 App. Div. 276, 230 N.Y. Supp. 185 (4th Dep't 1928) (per curiam). Stock: see *Pardee v. Douglas*, 122 App. Div. 395, 106 N.Y. Supp. 775 (2d Dep't 1907); *Wyllys Co. v. Nixon*, 165 App. Div. 373, 150 N.Y. Supp. 944 (1st Dep't 1914), rev'd on other grounds sub nom. *Phelps-Stokes Estates, Inc. v. Nixon*, 222 N.Y. 93, 118 N.E. 241 (1917). But see *Ware Bros. v. Cortland Cart & Carriage Co.*, 192 N.Y. 439, 85 N.E. 666 (1903), rev'd after retrial, 148 App. Div. 546, 133 N.Y. Supp. 60 (3d Dep't 1911), rev'd, 210 N.Y. 122, 103 N.E. 890 (1913).

130. *Smith v. Pettee*, 70 N.Y. 13 (1877); *Lewis v. Greider*, 51 N.Y. 231 (1872); *Dustan v. McAndrew*, 44 N.Y. 72 (1870); *Pollen v. Le Roy*, 30 N.Y. 549 (1863); *Hyman v. Hullman*, 205 App. Div. 119, 199 N.Y. Supp. 366 (1st Dep't 1923); *Hubbard v. Rockaway Lunch Co.*, 131 Misc. 53, 225 N.Y. Supp. 638 (Sup. Ct. 1927); *Kingston Braid Mills, Inc. v. Aboff*, 179 N.Y. Supp. 127, 129 (App. T. 1919) (dictum).

131. Plaintiff failed to establish this in the following cases: *Derami, Inc. v. John B. Cabot, Inc.*, 273 App. Div. 717, 79 N.Y.S.2d 664 (1st Dep't 1948); *Guli v. West*, 65 Hun 1, 19 N.Y. Supp. 757 (1st Dep't 1892); *Case v. Simonds*, 7 N.Y. Supp. 253 (App. Div. 5th Dep't 1889); *Worcester Bleach & Dye Works Co. v. Dlugasch*, 181 N.Y. Supp. 44 (App. T. 1920); *Perlman v. Levy*, 109 N.Y. Supp. 785 (App. T. 1908); *Wilson v. Holden*, 16 Abb. Pr. 133 (N.Y. App. T. 1st Dep't 1863); *Keitel v. Zimmermann*, 19 Misc. 581, 43 N.Y. Supp. 676 (Sup. Ct. 1897); *Farrish Co. v. Harris Co.*, 122 Misc. 611, 204 N.Y. Supp. 638 (N.Y. City Ct. 1924); *Chozo Yano v. Ledman*, 183 N.Y. Supp. 764 (N.Y. City Ct. 1921), rev'd on other grounds, 192 N.Y. Supp. 647 (App. T. 1922).

132. *Gray v. Central R.R.*, 82 Hun 523, 31 N.Y. Supp. 704 (1st Dep't 1894), aff'd, 157 N.Y. 483, 52 N.E. 555 (1899).

In a case which reaches a result inconsistent with these notions, plaintiff, a publisher of a monthly trade journal, had agreed to set up defendant's ad and to run it for twelve issues in a designated place opposite the back cover.<sup>133</sup> The repudiation occurred after plaintiff had set up the ad but before it had appeared. At least on retrial (and perhaps at the first trial, too), it was shown that plaintiff found it cheaper to run defendant's ad after the repudiation than to take it out, and plaintiff in fact ran the ad for twelve months after repudiation, during which time his advertising salesmen were told to try to resell this particular space to another advertiser. It was not shown whether plaintiff ever received any offer from any advertiser seeking to buy this space.

At the first trial, plaintiff sought to recover the price on the theory that he had fully performed. The trial judge dismissed the complaint, but the court of appeals reversed and ordered a new trial.<sup>134</sup> In the court's view, plaintiff could not sue for the price since mitigation prevented him from completing performance after notice of repudiation. His remedy was damages, and the subtrahend should be valued as in cases involving "the ordinary employment of servants for specified terms . . .":<sup>135</sup> (1) it should not be valued at cost; and (2) defendant should have the burden of proving its value.<sup>136</sup> While aware of these two respects in which employment cases differed from cases involving anticipatory repudiation of a contract to buy goods to be manufactured, the court seemed unaware of a third distinction—the employment cases involve entity valuation whereas the manufacturing cases involve components valuation. However, in rejecting defendant's efforts to analogize the case to those involving manufacture, the court was rejecting, perhaps unwittingly, a components approach to subtrahend valuation.<sup>137</sup>

In my judgment, the court's inadvertent selection of entity valuation was correct. Plaintiff, after notice of breach, had not abandoned efforts to complete and resell the entity—the space on the page facing the back cover.<sup>138</sup> Abandonment of the effort would have entailed abandon-

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133. *Ware Bros. v. Cortland Cart & Carriage Co.*, 192 N.Y. 439, 85 N.E. 666 (1908), rev'd after retrial, 148 App. Div. 546, 133 N.Y. Supp. 60 (3d Dep't 1911), rev'd, 210 N.Y. 122, 103 N.E. 890 (1913).

134. *Ware Bros. v. Cortland Cart & Carriage Co.*, 192 N.Y. 439, 85 N.E. 666 (1908).

135. *Id.* at 442, 85 N.E. at 666.

136. *Id.* at 443, 85 N.E. at 666.

137. The appellate court opinions after the case was retried clearly assumed that entity valuation was proper and addressed only the question: Who has the burden of proving the entity's value? *Ware Bros. v. Cortland Cart & Carriage Co.*, 148 App. Div. 546, 133 N.Y. Supp. 60 (3d Dep't 1911), rev'd, 210 N.Y. 122, 103 N.E. 890 (1913).

138. Of course, the entity resold would differ in one respect from the entity that defendant contracted for—the printed matter appearing in the space would be altered to tout the resale purchaser's wares, not defendant's.

ment of publication of the magazine itself.<sup>139</sup> Plaintiff's decision to continue publishing despite the loss of one advertiser was commercially sound,<sup>140</sup> even though he never succeeded in reselling this space during the term of the contract.

On retrial, plaintiff recovered damages measured by the price, defendant having failed to offer evidence of the resale value of the saved space. The court of appeals approved this result,<sup>141</sup> and reversed the appellate division, which had thought that the burden of proof should rest on plaintiff.<sup>142</sup> Thus, the earlier court of appeals held that defendant had the burden of proving the resale value of the entity in this case. The closest the court came to a rationale was the analogy it thought it saw between this case and one involving "the ordinary employment of servants for specified terms . . . ."<sup>143</sup>

Four of the reasons why defendant should have the burden of proving the value of saved non-delegable services are present in this case: (1) the probability that plaintiff will, after breach, make reasonable efforts to resell the entity, so that any failure to resell reflects lack of demand rather than lack of selling effort; (2) the plaintiff's lack of any alternative expectation-vindicating remedy, such as specific performance, or the price; (3) the relative hardship, on the one hand, of overcompensating plaintiff slightly and, on the other hand, of depriving him of all recovery whatsoever in cases where the burden can be carried as regards most, but not all, of the time period from breach to the end of the contract period; and (4) the live possibility that there may be absolutely no demand for the entity during a substantial part of its remaining life history—thus precluding its valuation by hypothetical resale value. However, the fifth reason why defendant should have the burden in employee cases—the probability that the plaintiff is a worse risk distributor than the defendant—is not applicable.<sup>144</sup> I have taken the

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139. Since plaintiff was to produce this page as well as print certain matter on it, abandonment would involve more than publishing the journal with this page left blank.

140. His decision to run the ad, rather than leave the space blank, would seem sound, too, since it was expensive to alter the page once it was set up.

141. *Ware Bros. v. Cortland Cart & Carriage Co.*, 210 N.Y. 122, 103 N.E. 550 (1913).

142. *Ware Bros. v. Cortland Cart & Carriage Co.*, 148 App. Div. 546, 133 N.Y. Supp. 60 (3d Dep't 1911).

143. 192 N.Y. at 442, 85 N.E. at 666. The court thought that it saw a factual similarity between this case, where plaintiff's abandonment would have saved only trivial amounts of ink and paper and a substantial amount of "services," and cases where abandonment would save only plaintiff's non-delegable services. Apart from the fact that it was comparing an entity with several components, the court seems misaligned in confusing non-delegable services with the various multi-contract assets involved here—all subsumed under the term "services." In contrast, one case clearly perceived the difference that the court of appeals overlooked. *Simon v. Levinson*, 126 N.Y. Supp. 659 (App. T. 1911).

144. See p. 49 *supra*.

position previously that plaintiff should have the burden of proof unless the entity consists of non-delegable services<sup>145</sup>—*i.e.*, unless all five reasons for putting the burden on defendant coincide. Now, having encountered this case, I suspect I should have qualified my statement more. Perhaps it should read: “unless the entity consists of non-delegable services or the policy reasons for giving defendant the burden are substantially as strong as in situations where non-delegable services are involved.”

#### IV. MINOR VALUATION ADJUSTMENTS AND INCIDENTAL DAMAGES

We are not concerned here with the proper time or place of resale valuation, but will pause to note the way that the entity's gross resale value must be adjusted to give accurate damage measurement. Understanding this is the key to understanding the lost volume phenomenon, to be discussed shortly.

The adjustments to resale valuation can be illustrated with a case in which plaintiff agreed to sell defendant a machine for 2,000 dollars delivered to defendant's place of business. Breach occurred when the goods were on hand and ready for delivery but before plaintiff incurred the 25 dollars that he would have spent to deliver them to defendant. Plaintiff, after the breach, contracted to sell X this machine for 1,950 dollars delivered at X's place of business. It cost plaintiff 35 dollars to deliver the goods to X's place of business. It is clear that damages are not measured accurately if the minuend is set at 2,000 dollars and the subtrahend at 1,950 dollars and plaintiff recovers 50 dollars. He should get 10 dollars more.

This can be accomplished by either of two ways. First, the court could make the subtrahend 1,975 dollars (not 1,950 dollars) and could put a 35 dollar item in “incidental damages.”<sup>146</sup> Or the court could put nothing in “incidental damages” and treat the subtrahend as 1,940 dollars—the gross resale value of 1,950 dollars adjusted downward by 10

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145. Seller's Damages (Michigan) 903.

146. Sawyer v. Dean, 114 N.Y. 469, 21 N.E. 1012 (1889); Pollen v. Le Roy, 30 N.Y. 549 (1863); Mann v. National Linseed Oil Co., 87 Hun 558, 34 N.Y. Supp. 481 (5th Dep't 1895); House v. Babcock, 17 N.Y. Supp. 640 (App. Div. 4th Dep't 1892); Isbrandtsen Co. v. Lyncroft Grain Corp., 8 Misc. 2d 521, 166 N.Y.S.2d 721 (N.Y. City Ct. 1957). Of course, expenses reasonably incurred in mitigating can be recovered even though they are not added expenses of reselling. Cogswell v. Boehm, 5 N.Y. Supp. 67 (Sup. Ct. 1889), where plaintiff-vendor had arranged with his mortgagees to discharge his mortgages at the closing with defendant-vendee, upon vendee's breach, plaintiff borrowed money to discharge these mortgages; he recovered the expenses of the loan as incidental damages; Fox v. Woods, 96 N.Y. Supp. 117 (App. T. 1905), where plaintiff-tenant contracted to sell her leasehold to defendant, on the latter's breach, plaintiff made rental payments until she arranged resale of the leasehold; she recovered the rental payments as incidental damages. The items in the last two cases could, alternatively, be treated as part of the subtrahend—the value to plaintiff of the difference between what defendant promised and what he performed.

dollars to reflect the increase in delivery costs.<sup>147</sup> Both ways of accomplishing this result are possible in cases where plaintiff *actually has incurred* the 35 dollar item before trial.<sup>148</sup> However it is accomplished, plaintiff, rather than defendant, should have the burden<sup>149</sup> of proving that the recovery should be augmented by 10 dollars more than would have been allowed if both sets of delivery costs had been ignored.<sup>150</sup> While nine New York cases are in accord with these notions,<sup>151</sup> two cases refused to allow incidentals' recovery.<sup>152</sup>

#### V. LOST VOLUME

Often after breach, plaintiff resells in completed form to a new buyer the performance once destined for defendant. Sometimes, plaintiff thereby deprives himself of something of value—sale to the new buyer of another similar performance. If there had been no breach and, consequently, no resale, plaintiff would have sold two similar performances—one to defendant and one to the new buyer. The breach and resale have reduced plaintiff's total volume of sales by the quantity that was resold to the new buyer.<sup>153</sup>

147. *Almy v. Simonson*, 52 Hun 535, 5 N.Y. Supp. 696 (1st Dep't 1889); *Dunn v. Allen*, 55 App. Div. 637, 67 N.Y. Supp. 218 (4th Dep't 1900) (dictum).

148. Where plaintiff has not resold before trial, but must incur the extra expense to resell, the extra expense should be taken into account, but this can only be done as an adjustment to the subtrahend. See *Seller's Damages* (Michigan) §92. New York law seems to be in accord. *Dunn v. Allen*, supra note 147 (dictum).

149. *Worcester Bleach & Dye Works Co. v. Dlugasch*, 181 N.Y. Supp. 44 (App. T. 1920), in which incidental expenses incurred were disallowed for want of evidence that they were "reasonable"—i.e., justified as an effort to mitigate.

150. If resale is less costly than performance with defendant would have been, the subtrahend should be enhanced to that extent. *Dunn v. Allen*, 55 App. Div. 637, 67 N.Y. Supp. 218 (4th Dep't 1900) (dictum).

151. Cases cited notes 146 & 147 supra.

152. I criticize *Hayden v. Pinchot*, 172 App. Div. 102, 105-06, 158 N.Y. Supp. 215, 218 (1st Dep't 1916), which disallowed plaintiff-vendor's recovery of the broker's commission paid for the resale and taxes paid between breach and resale; and *Perlman v. Levy*, 109 N.Y. Supp. 785 (App. T. 1908), which rejected proof of plaintiff's net receipts from the public auction at which he resold the going business that defendant had refused to accept; the court wanted proof of the gross receipts. Perhaps the results would have been different if plaintiff showed, in *Hayden*, whether or not breach enabled him to save a broker's commission on the original sale, and whether, in *Perlman*, the expenses of the auction were reasonable. I also criticize *Hayes v. Durham*, 194 App. Div. 848, 851, 185 N.Y. Supp. 691, 693 (3d Dep't 1921), where plaintiff's recovery was reduced by \$75 to reflect the amount he spent preparing goods for a resale buyer, although breach enabled him to save precisely the same sum which he would have spent preparing the goods for defendant; since these items cancel out, there should have been no adjustment to reflect this \$75 item. See *Seller's Damages* (Michigan) §90-93.

153. See 1 *Bonbright*, *Valuation of Property* 304 (1937); 5 *Corbin* § 1160, at 539; *McCormick* § 41; *Beale*, *Damages Upon Repudiation of a Contract*, 17 *Yale L.J.* 443, 455

Where, prior to the trial, there has been a resale of the performance with attendant lost volume, the value of the lost volume can be taken into account in either of two ways: (1) by adjusting the value of the subtrahend to reflect it, or (2) by treating the lost volume as an item of incidental damages. Where there has been no such resale before trial, but damages are being computed as if plaintiff had made such a resale, the value of the lost volume should be taken into account as an adjustment of the subtrahend. The subtrahend (actual resale value of the entity) should be reduced by the value to plaintiff of the lost volume. As will be shown shortly, its value is the profit that he would have made on such an additional sale.

To take a simplified example, if plaintiff is a car retailer who sells all his cars of a certain model at 3,000 dollars, and defendant-customer refuses to honor his promise to accept one, and resale would be attended by lost volume, the minuend is the unpaid balance of the price—3,000 dollars. The subtrahend is the resale value of the performance (3,000 dollars), reduced by the profit that plaintiff would have made on the lost sale—hypothetically, 500 dollars. Deducting the adjusted subtrahend, 2,500 dollars, from the minuend, 3,000 dollars, plaintiff should recover 500 dollars plus any incidental expenses. In this particular instance, his recovery is identical with the profit he would have enjoyed on the contract with defendant if there had been no breach, but this is not always the case.<sup>154</sup>

To carry his burden of proving that resale<sup>155</sup> impaired total volume, plaintiff must establish: (1) even if there had been no breach, he would have solicited this particular resale buyer<sup>156</sup> to buy from him; (2) this buyer would have bought; and (3) plaintiff had the ability to perform both the plaintiff-defendant contract and the plaintiff-resale-buyer con-

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(1908); *Waters*, *The Concept of Market in the Sale of Goods*, 36 *Can. B. Rev.* 360 (1958); *Comment*, 34 *Can. B. Rev.* 969 (1956); *Note*, 22 *Cornell L.Q.* 581 (1937); *Comment*, 65 *Yale L.J.* 992, 993 (1956); *Annots.*, 24 *A.L.R.2d* 1008 (1952); 120 *A.L.R.* 1192 (1939); 44 *A.L.R.* 349 (1926).

154. Recovery would be different from the amount of profit lost if (1) part of the price had been prepaid, or (2) there were incidental damages in addition to the lost volume, or (3) resale cost a unit of volume but did not occur at the same price as the contract price.

155. "Resale" is used hereafter to include both a factual resale and the putative resale used as a reference point when the entity's resale value fixes the subtrahend, although in fact plaintiff failed to resell.

156. If plaintiff in fact resold before trial a specified entity scheduled for defendant, this resale purchaser can be identified at the trial. Otherwise, he is a putative person, used as a reference point in valuation. In the latter event, his "behavior" if he had not "bought" the "resold" entity can be known only through inferences drawn from the original contract with defendant and the general nature of plaintiff's business. In the former event, evidence about his particular plans and wants should be admitted.



tract.<sup>157</sup> If plaintiff is not in the business of selling this kind of performance, the court should presume that he would not have solicited this particular resale buyer in the absence of defendant's breach. Even if plaintiff is in this line of business, there should be no presumption that he would have solicited this particular buyer unless plaintiff's business is of a sort characterized by continuous high levels of spending on merchandising and the buyer was in the market which plaintiff ordinarily canvassed.

New York's battles over recognition of the lost volume phenomenon have been waged in cases involving sellers of automobiles.<sup>158</sup> The first case took account of the phenomenon.<sup>159</sup> Counterclaimant was a nationwide distributor of Reo automobiles, who had contracted with the manufacturer to take the entire factory output of these cars. The counterclaim was brought against a retailer who had agreed to buy 420 cars but had never ordered them out. The jury was instructed that the counterclaimant should recover his lost profits, *i.e.*, the contract price less "the cost to the defendant of furnishing the cars in question."<sup>160</sup> A judgment entered upon the jury verdict was affirmed by the court of appeals.<sup>161</sup> The supreme court decision had noted (1) that counterclaimant did extensive advertising; (2) that counterclaimant had no "available market" for resale of these 420 cars, since (a) his was the only source of this particular brand of car and (b) his price controlled the consumer price for these cars; (3) that the sale was to be at a fixed price; (4) that there was limited demand for such cars; (5) that the manufacturer could have filled all the counterclaimant's orders even if these cars had been ordered out; and (6) that counterclaimant would not have increased his overhead expenses if he had handled these cars as well as those actually sold.<sup>162</sup>

While the court applied the Uniform Sales Act to the case, it made it clear that the result was not due to peculiar language in the Act; the Act merely codified common law rules in this area.<sup>163</sup>

Although the court obviously was struggling to identify the precise

157. In a prior article, I listed a fourth condition, but it appears to have so little practical significance that I have abandoned it. See *Seller's Damages (Michigan)* 903, 910.

158. Perhaps some cases awarding "lost profits" on a components valuation rationale have in their background some inkling that, if components valuation is wrong and the subtrahend should be valued as an entity, a lost volume adjustment should be made. See notes 124 & 125 *supra* and accompanying text.

159. *Poppenberg v. R. M. Owen & Co.*, 84 Misc. 126, 141-46, 146 N.Y. Supp. 478, 487-90 (Sup. Ct. 1914).

160. *Id.* at 141, 146 N.Y. Supp. at 487.

161. *Poppenberg v. R. M. Owen & Co.*, 221 N.Y. 569, 116 N.E. 1070 (1917) (memorandum decision).

162. 84 Misc. at 141-45, 146 N.Y. Supp. at 487-89.

163. *Id.* at 143, 146 N.Y. Supp. at 488.

reason why the cars should be valued at cost rather than resale value, it seems fairly clear that it was reaching for the lost volume notions just mentioned. That the counterclaimant probably would have sold another 420 cars to whoever took the 420 that this retailer rejected is fairly clear from the distribution system described; apparently, counterclaimant sold only to its franchised retail dealers. It is equally clear that whichever retailers absorbed these 420 cars would, but for breach, have taken 420 other cars. This appears from the mention of limited demand and advertising and fixed pricing. Clear, too, is counterclaimant's ability to perform this contract and another identical to it, if there were sufficient demand. The manufacturer could supply all orders placed and the counterclaimant could handle an additional 420 cars without increasing his overhead expense.

It is not possible to explain the result on the theory (apparently not urged in the case) that the cars should be valued at cost because they were not "on hand" at the time of breach. At the time of breach—when the retailer should have ordered the cars, but failed to do so—counterclaimant was committed to the manufacturer to take the latter's entire output. It was not shown that counterclaimant could feasibly breach his obligation to the manufacturer and, given the close relationship between them, it should not be presumed. Nor was it shown that the manufacturer reduced his output by 420 cars in order to take account of the retailer's defection.

In 1923, a divided bench at appellate term headed in the opposite direction.<sup>164</sup> Plaintiff was a car retailer. Defendant-consumer rejected a Studebaker when it was tendered to him, and plaintiff had no other orders for this particular model that had been ordered for defendant. The appellate term reversed the judgment below and held that plaintiff should recover only the difference between the contract price and the market price. The earlier case was "distinguished" on the ground that absence of a market price was proved there. Perhaps the later case can be read narrowly as a decision turning on plaintiff's failure to prove the fulfillment of the three conditions necessary to resale impairing total volume;<sup>165</sup> but, in 1937, another case made it clear that the lost volume adjustment itself was being rejected.<sup>166</sup>

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164. *Lowas Garage Co. v. Scheer*, 199 N.Y. Supp. 748 (App. T. 1923).

165. In *Genovese v. A. Lenobel, Inc.*, 148 Misc. 548, 265 N.Y. Supp. 338 (Munic. Ct. N.Y. 1933), rev'd per curiam on other grounds, 154 Misc. 91, 275 N.Y. Supp. 521 (App. T. 1934), a retailer tried unsuccessfully to recover lost profits when a buyer repudiated his contract to buy a Chrysler. The court refused to allow more than contract/market differential because "there was an available market for Chrysler automobiles . . . the Chrysler 72 was a stock model and . . . no particular car was appropriated on this contract." *Id.* at 550, 265 N.Y. Supp. at 340.

166. *A. Lenobel, Inc. v. Senif*, 252 App. Div. 533, 300 N.Y. Supp. 226 (2d Dep't 1937), modified mem. on other grounds, 253 App. Div. 813, 1 N.Y.S.2d 1022 (2d Dep't 1938).

In this case, plaintiff again was a car retailer. The car that defendant rejected was resold for the same price that defendant had agreed to pay. The appellate division held that no damages had been sustained, rejecting plaintiff's argument that he should recover the profit lost on one sale. Plaintiff, seeking to break out of the Uniform Sales Act's general rule which would value the subtrahend by resale, argued that under the terms of his franchise (a) he could sell only in a limited area; (b) his selling price was fixed by the manufacturer; and (c) his overhead must be met out of gross profit from his total volume of sales.<sup>167</sup>

The court based its opinion on several grounds: (1) that it was not foreseeable to defendant at the time of contracting that breach would cause loss of a unit of volume; (2) that the rule urged would embrace a great many cases, leading to a mass exodus from the general rule of the Sales Act; (3) that plaintiff was no worse off, in terms of total volume, than if defendant had assigned the contract to a buyer who otherwise would have bought another car from plaintiff; (4) that plaintiff's rule would lead to a laborious inquiry into the value of the overhead lost, an inquiry which the buyer is hardly in a position to argue at trial; (5) that, at the contract formation stage, plaintiff could have protected himself more by (a) exacting a larger downpayment to be forfeited on breach; (b) arranging for title to pass before delivery; or (c) informing defendant of the special circumstances present that lead to lost profits upon defendant's breach.<sup>168</sup>

The last-mentioned remark suggests that a different result might have been reached if plaintiff had given defendant adequate notice at the time of contracting. Another hint that the case was not barring lost volume adjustment in all cases came in the court's closing lines:

These views leave untouched the opportunity to a vendor to proffer proof that he was put to a special or added expense on a particular resale which would possibly constitute a "special circumstance" that would be a further element of damage, but this item would not be evidenced by mere proof of the amount of gross profits on the original sale, or mere proof of general elements of overhead.<sup>169</sup>

The court's best point seems to be the practical one that adjustment to reflect lost volume complicates the proof at trial. However, in cases where more is at stake than the 226.50 dollars before that court, it seems fair to let the plaintiff try to show the extent of his loss. Discovery devices are available here, as in other cases, to enable the defendant to defend his interests. The other points, except the reference to foresee-

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167. *Id.* at 535, 300 N.Y. Supp. at 229.

168. *Id.* at 536, 300 N.Y. Supp. at 230.

169. *Id.* at 537, 300 N.Y. Supp. at 231.

ability, would seem to be true, but irrelevant. For example, the fact that defendant could impair plaintiff's total volume lawfully by assigning the contract seems a poor reason to permit defendant to impair that volume unlawfully by breach.

Assuming that a car buyer lacks adequate notice that his breach will impair the seller's total volume of sales—a point over which quibbling is possible—it seems unwise to require precise foreseeability of that consequence. The foreseeability, or contemplation, requirement makes sense in cases where the issue is whether the minuend shall be valued at replacement cost ("market") or by reference to the plaintiff-buyer's lost profits on some larger transaction which aborted when defendant failed to perform. In this context, the foreseeability and certainty tests provide controls over potentially astronomical liability. In the present context, there is no peril of astronomical liability and a much relaxed foreseeability test should be used. Under a relaxed test, knowledge that plaintiff was a retailer in cars would be sufficient for a reasonable man to build the pile of inferences leading to the conclusion that breach would cause lost profit, and this should satisfy the foreseeability test.

By 1959, if one appellate term case can serve as a basis of generalization,<sup>170</sup> New York judges treated it as hornbook law that a car dealer could not recover his lost profit when a customer rejected the car which he had ordered. The early case which was affirmed by the court of appeals,<sup>171</sup> involving the distributor of Reos, was not so much distinguished as it was rejected in the light of subsequent lower court cases going against it.

In view of the dearth of New York cases taking the lost volume phenomenon into account, discussion of how lost volume should be valued can be summary. The sole relevant case<sup>172</sup> apparently valued the lost volume by deducting from the contract price of the 420 cars unsold the variable costs that the seller would have incurred if he had sold them. No adjustment was made to reflect saved overhead costs or re-employed overhead assets because the court found that the seller's overhead would not have been increased if he had handled 420 more cars. This treatment accords with the notions that I have expressed elsewhere.<sup>173</sup>

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170. *Babbitt v. Wides Motor Sales Corp.*, 17 Misc. 2d 889, 192 N.Y.S.2d 21 (App. T. 1959) (per curiam).

171. *Poppenberg v. R. M. Owen & Co.*, 84 Misc. 126, 146 N.Y. Supp. 478 (Sup. Ct.), aff'd mem., 165 App. Div. 946, 150 N.Y. Supp. 1107 (4th Dep't 1914), aff'd mem., 221 N.Y. 569, 116 N.E. 1070 (1917).

172. *Ibid.*

173. *General Theory* 601.

## VI. CONFUSION OF LOST VOLUME ADJUSTMENT AND COMPONENTS APPROACH

Counsel and the court often refer to the components approach by describing it as a formula which permits plaintiff-seller to recover his "lost profits." This is dangerous terminology. In some situations, however, "components" valuation of the subtrahend gives plaintiff his "mark-up profit," and this fact apparently gave rise to the terminology. If breach occurs before plaintiff has received any payment from defendant, and before plaintiff has delivered any performance to defendant, and before plaintiff has "on hand" any non-overhead components of performance, all the components saved are valued at cost. Indeed, the subtrahend is identical to a list of the total costs of contract performance, and the minuend is identical to the contract price. The recovery is contract price less total costs, plus incidental damages, if any. It is only natural to regard such a formula as giving plaintiff his "lost profit"—the difference between the contract price and what it would have cost him to perform that contract with defendant.<sup>174</sup>

When breach occurs after plaintiff has accomplished part of his performance, if he still has no components on hand and has received nothing from defendant, it is possible to view the formula as one involving recovery of two items: "lost profit" plus "costs incurred."<sup>175</sup> Even if plaintiff has both delivered some performance and received some payment, the "lost profit" formulation can be retained by viewing the recovery as consisting now of three items: ("lost profit" plus "costs incurred") minus such part of the price as has been paid.<sup>176</sup> And even if plaintiff has delivered some performance, received some of defendant's performance, and has some finished goods on hand but undelivered, the

174. E.g., *Henderson Tire & Rubber Co. v. P. K. Wilson & Son*, 235 N.Y. 489, 139 N.E. 583 (1923); *Wasserman v. Broadalbin Knitting Co.*, 270 App. Div. 20, 58 N.Y.S.2d 597 (3d Dep't 1945), aff'd mem., 296 N.Y. 815, 72 N.E.2d 11 (1947); *J. B. Preston Co. v. Funkhouser*, 235 App. Div. 200, 256 N.Y. Supp. 681 (1st Dep't 1932), modified on other grounds, 261 N.Y. 140, 184 N.E. 737, aff'd, 290 U.S. 163 (1933); *Hiltop Sand Corp. v. Simpson*, 225 App. Div. 467, 233 N.Y. Supp. 348 (2d Dep't 1929); *Industrial Eng'r Co. v. Republic Storage Co.*, 220 App. Div. 178, 220 N.Y. Supp. 623 (1st Dep't 1927).

175. See, e.g., *Lieberman v. Templar Motor Co.*, 236 N.Y. 139, 140 N.E. 222 (1923); *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N.Y. Supp. 845 (3d Dep't 1910), aff'd mem., 203 N.Y. 533, 96 N.E. 1122 (1911); *Carlin v. City of New York*, 132 App. Div. 90, 116 N.Y. Supp. 346 (2d Dep't 1909); *Shapiro v. Mollat*, 168 N.Y. Supp. 723 (App. T. 1918); *Wieser v. Times Realty & Constr. Co.*, 110 N.Y. Supp. 963 (App. T. 1908), vacated on other grounds, 131 N.Y. Supp. 337 (N.Y. City Ct. 1910).

176. *William Wharton, Jr. & Co. v. Winch*, 140 N.Y. 287, 35 N.E. 589 (1893); *Thieler v. Trinity Advertising Corp.*, 241 App. Div. 34, 270 N.Y. Supp. 717 (1st Dep't), aff'd mem., 265 N.Y. 668, 193 N.E. 437 (1934); *Dryfoos v. Uhl*, 69 App. Div. 118, 74 N.Y. Supp. 532 (1st Dep't 1902); *Goldstein v. Godfrey Co.*, 61 Misc. 64, 113 N.Y. Supp. 123 (App. T. 1908) (per curiam); *Brockhurst v. Ryan*, 2 Misc. 2d 747, 146 N.Y.S.2d 386 (Sup. Ct. 1955).

flavor can be retained by seeing in the formula four elements: ("lost profit" plus "costs incurred") minus ("such part of the price as has been paid" plus "the market [actual resale] value of the finished goods on hand").<sup>177</sup>

But this effort to retain the "lost profit" notion at all intellectual costs involves unnecessary steps in computation,<sup>178</sup> and obscures the justification for this measure of damages.<sup>179</sup> Moreover, it invites the judge to treat the "lost profit" involved in such suits as they treat "lost profits" in other types of cases—requiring that the "lost profits" be proved with certainty and be foreseeable to defendant at the time of contract as potential items of loss in the event of his breach.<sup>180</sup> The fact that the "lost profit" involved in this components-valued plaintiff-seller suit is markedly different from the "lost profits" involved in those other suits is thereby obscured.<sup>181</sup>

New York case law bears the scars of this confusion of components-valued plaintiff-seller cases and cases where a plaintiff-buyer seeks to value the minuend by reference to the lost profits on a larger transaction that aborted when defendant-seller breached. In *Masterton v. Mayor of the City of Brooklyn*,<sup>182</sup> decided in 1845, a building contractor was permitted to use components valuation of the subtrahend. One component to be valued consisted of the marble that he would have acquired and used in the remaining three-and-one-half years of work that would have gone into the construction job. At the time of breach, plaintiff had a subcontract with an English quarry which was to furnish the stone. When defendant breached the principal contract, plaintiff breached his supply contract with the quarry. The trial court valued the yet-to-be-acquired stone at the price that the plaintiff would have paid to the quarry under the terms of this supply contract.<sup>183</sup>

The supreme court reversed on very narrow grounds: While the yet-to-

177. Cf. *Dillon v. Anderson*, 43 N.Y. 231 (1870); *Lehmaier v. Standard Specialty & Tube Co.*, 123 App. Div. 431, 108 N.Y. Supp. 402 (1st Dep't 1908); *Beckwith v. City of New York*, 121 App. Div. 462, 106 N.Y. Supp. 175 (2d Dep't 1907).

178. The use of a lost profits formula often leads to the wasted motion of proof of total costs and proof of costs incurred, rather than direct proof of costs yet to be incurred. However, plaintiff often wants proof of costs incurred in the record in case his expectation-damage remedy fails and he must fall back to another remedy based on these costs.

179. See pp. 41-43 *supra*.

180. See p. 64 *supra*.

181. In the components-valued plaintiff-seller suit, there is nothing that properly can be called "lost profits." What plaintiff saved thanks to breach is being valued component by component on the assumption that he stopped work or should have stopped work towards completion when he learned of defendant's breach.

182. 7 Hill 61 (N.Y. Sup. Ct. 1845).

183. *Id.* at 66.

be-acquired marble should be valued by reference to its cost, that cost should be fixed by reference to the market and not by reference to the particular subcontract that plaintiff had made before breach.<sup>184</sup> Four reasons lay behind the reversal: (1) perhaps the supply contract was at a price higher than the price that a reasonable man would have paid for the stone; (2) since defendant would not enjoy any gains that plaintiff might make on his supply contracts (in the event stone prices in the spot market should rise after this long-term supply contract was made), defendant should not be saddled with "losses" on such contracts; (3) it was not established with certainty that plaintiff had to breach the supply contract, nor was there certain proof of the amount of damages plaintiff would have to pay his supplier; and (4) the damages to be paid the supplier are too "remote"—apparently in the sense of being unforeseeable to the defendant at contracting time.<sup>185</sup>

The possibility that the subcontract was made unwisely seems sufficiently slim that a court should presume it was wisely made unless defendant introduced evidence to the contrary; plaintiff's self-interest is fair assurance that in his pre-breach business activities he will try to acquire supplies at the lowest price available.

The second reason really is a pair of reasons: (a) the cost in the spot acquisition market at the time of breach might be lower than the price term of plaintiff's long-term supply contract entered into at an earlier date; and (b) since defendant would not be allowed to use a long-term supply contract's price term where it was more than the spot market at the time of breach, plaintiff should not be permitted to do this when the spot market is the higher. But, since it is value *to the plaintiff* which is being sought, the court should fix cost value in a market and at a time that is relevant to one in plaintiff's position, at least if plaintiff is acting reasonably and not enhancing damages by wasteful conduct. There was nothing unreasonable about plaintiff's decision to enter into a long-term supply contract and, to one with such a contract, the movements of the spot market are irrelevant. The simple answer to the "both ways test" is that defendant, too, should be permitted to offer evidence of such a subcontract where its price term is different from the spot market price.

The court's remarks about certainty and foreseeability are sound in principle, with a single important qualification. The certainty and foreseeability tests should not be manipulated into major obstacles in this context, although it is perfectly permissible to so handle them in cases where plaintiff-buyer is seeking to value the minuend by reference to

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184. *Id.* at 72.

185. *Id.* at 72-73.

profits that he lost when breach caused some larger transaction to abort. In the latter situation, but not in our case, there is a real peril that plaintiff will recover damages much larger than anything defendant contemplated or should have contemplated at the time of contracting. While a concurring opinion in *Masterton* seemed to perceive the difference between "lost profits" in that plaintiff-buyer context and "lost profits" in this plaintiff-seller context,<sup>186</sup> the majority opinion gave no notice to this difference, and the subsequent chain of cases carrying the *Masterton* rule to modern times discusses the foreseeability and certainty requirements that block the use of subcontract evidence with no visible recognition that those doctrines serve little function in this context.<sup>187</sup>

The absurdity of excluding evidence of subcontract terms to help establish plaintiff's saved costs is underlined by the courts' willingness to accept other kinds of evidence which is hardly more probative.<sup>188</sup> Perhaps one can discern in at least one of the cases a disenchantment with the exclusionary rule and a willingness to turn sharp corners to evade it.<sup>189</sup>

Talking in terms of "lost profits" can lead to another brand of confusion. New York courts sometimes overlook the fact that a "lost profit" formula may be appropriate for either of two reasons in the plaintiff-seller cases: because the subtrahend should be valued component by component; or because the subtrahend, once valued as an entity, should be reduced to reflect the lost profit on the sale that otherwise would have been made to the resale purchaser. In one car dealer case, the court

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186. *Id.* at 74-75 (concurring opinion).

187. *Devlin v. Mayor of the City of New York*, 63 N.Y. 8 (1875); *Story v. New York & H.R.R.*, 6 N.Y. 85 (1851); *Louvin Realty Corp. v. City of New York*, 242 App. Div. 181, 272 N.Y. Supp. 752 (1st Dep't 1934); *Goepel v. Kurtz Action Co.*, 179 App. Div. 687, 167 N.Y. Supp. 317 (1st Dep't 1917); *Wetter v. Kleinert*, 139 App. Div. 220, 123 N.Y. Supp. 755 (2d Dep't 1910). The distinction was recognized in *Long Island Contracting & Supply Co. v. City of New York*, 204 N.Y. 73, 97 N.E. 483 (1912), but its legal consequences were inverted. The court of appeals permitted valuation of the minuend by reference to the price at which plaintiff could have resold the goods that defendant failed to deliver, and announced that this was permissible because it involved direct, not collateral, profits. Some of the court's confusion probably flowed from the fact that plaintiff in that case was simultaneously a seller of services and a buyer of goods.

188. In *Isaacs v. Terry & Tench Co.*, 132 App. Div. 657, 117 N.Y. Supp. 369 (1st Dep't 1909), the price actually paid to the supplier, after breach, fixed the goods' value although there was apparently no showing that the supply contract was reasonable. Plaintiff's own testimony about costs of completion has been allowed. *Wasserman v. Broadalbin Knitting Co.*, 270 App. Div. 20, 58 N.Y.S.2d 597 (3d Dep't 1945), *aff'd mem.*, 296 N.Y. 815, 72 N.E.2d 11 (1947); *Deery v. Williams*, 27 App. Div. 131, 50 N.Y. Supp. 138 (1st Dep't 1898); *Engel v. Mutual Garment Co.*, 166 N.Y. Supp. 981 (App. T. 1917).

189. *Goepel v. Kurtz Action Co.*, 179 App. Div. 687, 167 N.Y. Supp. 317 (1st Dep't 1917), where plaintiff-jobber was allowed to use evidence of his supplier's manufacturing costs to establish the reasonable costs of manufacture from which reasonable cost to plaintiff could be inferred.



rejected a lost profit formula on the theory that New York does not take lost volume adjustments into account, and then apparently overlooked the possibility that such a formula might be appropriate on the other rationale—the subtrahend should be components valued.<sup>100</sup> In many cases where the struggle between components and entity valuation has been resolved in favor of the latter, there was no visible inquiry into the next logical question: Did resale of the entity impair total volume?<sup>101</sup>

## VII. CONCLUSION

From examination of over 200 New York plaintiff-seller expectation damage cases, some conclusions emerge clearly. The vast bulk of issues are resolved in every instance as suggested in this article. Only the discrepant rulings need to be mentioned in this summary. In two<sup>102</sup> of the nineteen cases in which counsel contested the issue of components versus entity valuation, the courts resolved the issue differently from what I would have done. In five more cases<sup>103</sup> that are apparently resolved correctly, insufficient facts appear in the opinions to make me certain that the case was characterized properly, although the right result was attached to the category selected. Perhaps, in some of these cases, erroneous results obtained.

My distinction between multi-contract assets and other assets is unknown in New York. Multi-contract assets yet to be acquired at the time of breach either may be handled like other costs yet to be incurred or they may (in effect) be valued at zero—which works to plaintiff's advantage. Multi-contract assets on hand at the time of breach may be valued as I have suggested, or they, too, may be valued at zero. There seems to be no rationality in the courts' choice between these two treatments. One hoary case made an arbitrary reduction in plaintiff's recovery in order to reflect saved multi-contract assets, but this technique has not been repeated.<sup>104</sup>

Another arbitrary area concerns cases in which plaintiff is a seller of fairly fungible delegable services. If plaintiff is a maritime carrier, the

190. *Genovese v. A. Lenobel, Inc.*, 148 Misc. 548, 265 N.Y. Supp. 338 (Munic. Ct. N.Y. 1933), rev'd per curiam on other grounds, 154 Misc. 91, 275 N.Y. Supp. 521 (App. T. 1934).

191. See *Belle of Bourbon Co. v. Leffler*, 87 App. Div. 302, 84 N.Y. Supp. 385 (1st Dep't 1903); cases cited note 123 supra. In none of these cases is there any clear discussion of the possibility that resale cost volume. For such a discussion see *A. Lenobel, Inc. v. Senif*, 252 App. Div. 533, 300 N.Y. Supp. 226 (2d Dep't 1937), modified mem. on other grounds, 253 App. Div. 813, 1 N.Y.S.2d 1022 (2d Dep't 1938).

192. *Isaacs v. Terry & Tench Co.*, 125 App. Div. 532, 109 N.Y. Supp. 792 (1st Dep't 1908), discussed at notes 55-62 supra and accompanying text; *Varley v. Belford*, 156 N.Y. Supp. 597 (App. T. 1916), supra note 76.

193. Cases cited notes 64 & 75 supra.

194. See text accompanying notes 77-88 supra.

proprietor of an establishment furnishing room and board, or a publisher selling advertising space which has a fixed location in the publication, mitigation notions require him to try to resell the space originally slated for defendant. All other sellers of fungible delegable services apparently are free to ignore the possibility of reselling what defendant failed to take.<sup>195</sup> I would let all these sellers of fungible services enjoy the benefit of the same set of presumptions, as they endeavor to show either (1) that it was reasonable to avoid resale after breach, and/or (2) resale would have impaired total volume sold.

New York's recent lower court cases have rejected the idea of reflecting the impact of resale on the total volume of sales, although a groping older case pioneered in this area.<sup>196</sup> These cases reflect the usual widespread confusion of the two rationales for giving a plaintiff-seller "lost profits"—lost volume and components valuation. And they reflect the usual confusion of the plaintiff-seller's and the plaintiff-buyer's "lost profits." This takes the form, among others, of a refusal to permit plaintiffs-sellers to establish the saved cost of yet-to-be-acquired components by evidence of subcontracts, existing at the time of breach, with suppliers who were to furnish such components to plaintiff. I have not encountered this particular taboo in any other jurisdiction studied.<sup>197</sup>

Perhaps in the realm of trivia are two aberrational New York cases refusing recovery of incidental damages<sup>198</sup> and the trial judge who forgot that defendant's total breach, while it excuses plaintiff from further performance, does not excuse him from taking into account what he saved when relieved of the duty to complete performance.<sup>199</sup>

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195. See note 125 *supra*.

196. *Poppenberg v. R. M. Owen & Co.*, 84 Misc. 126, 146 N.Y. Supp. 478 (Sup. Ct.), *aff'd mem.*, 165 App. Div. 946, 150 N.Y. Supp. 1107 (4th Dep't 1914), *aff'd mem.*, 221 N.Y. 569, 116 N.E. 1070 (1917); see text accompanying notes 158-70 *supra*.

197. See text accompanying notes 174-91 *supra*.

198. The two aberrational cases appear in note 152 *supra*, and the eight conventional cases are collected in notes 146 & 147 *supra*.

199. *Sackman v. Stephenson*, 11 N.Y.S.2d 69 (Sup. Ct. 1939) (correspondence school recovers undiminished price despite not sending out all the lessons). Perhaps the result was correct on the rationale elaborated at the end of note 66 *supra*.