REMEDIES FOR TOTAL BREACH OF CONTRACT
UNDER THE UNIFORM REVISED SALES ACT

In a mass production economy, the smooth course of business is dependent upon a free flow of large quantities of goods. The assembly line can move at high speed only so long as raw materials and subassemblies appear at one end of the line on a fixed, regular schedule; continued production requires that the finished product be carried away, distributed, marketed, and consumed with equal predictability. To insure smooth operation of their own enterprises, businessmen make contracts to protect the myriad expectancies on which they must rely. Armed with a contract, the businessman feels that he may safely anticipate that goods of a particular type will be delivered at a specified time, and, perhaps most important, that the purchase or sale will be at a previously determined price, regardless of how the market may fluctuate between the time the contract is made and the time it is executed.¹

¹ "Remember that your written contract is your best protection against unexpected and possibly disastrous market fluctuations." TEXTILE DISTRIBUTORS INSTITUTE BULLETIN
In exchange for his sacrifice of possible gain if the market should turn in his favor, each of the parties expects protection against loss in the event that the market turns against him.

The legal remedy of an action for breach of contract is intended to protect the contractual expectancies against the temptations of greater economic advantage which a fluctuating market may offer. Ideally the contract should be performed, and at least to the extent of moral suasion, the law endeavors to insure this result.

But according to the famous view of Justice Holmes, it is in the election of a party either to perform his promise or to answer in damages. Yet even if this dictum be doctrinally sound, it is believed that the businessman regards a contract-breaker as a wrongdoer. The smooth flow of goods is de-
dependent upon contract performance, and business suffers from the inconvenience and disruption of a breach. Even though the victim receive "full" indemnity in damages, he is not so well satisfied as the businessman who receives the goods on the contract date. In any event, the Holmes' view may be defended only if damages are so fully compensatory that the position of the promisee is materially the same regardless of the election of the promisor. And since in most cases the innocent party's loss will approximate the breacher's gain, fully compensatory damages would materially reduce the incentive to answer in damages rather than to perform.

It is widely recognized that judicial remedies for a breach are rarely an exact indemnity for the original performance; study of the cases arising under the Uniform Sales Act indicates that the discrepancy may be much greater than had been supposed. And this discrepancy is of moment because the inadequacy of damages as compensation leads to a similar inadequacy of judicial sanctions as a deterrent to breach of contract.

The normal remedy for breach of contract codified in the Uniform Sales Act is an action for damages in the amount of the difference between the contract price and the market price, usually measured as of the time and place set for delivery. Special damages may be recovered in addition, where they can be proved, but in practice such recovery is extremely unlikely.

The party who takes advantage of a price fluctuation will profit from his nonperformance to the extent of the difference between the contract price and the market price—the maximum amount which can be recovered from him under the normal measure in the absence of special damages. Usually, then, he can lose at most his counsel fees and court costs by breaching his
contract; there is a strong possibility that instead of losing even this amount he may retain all or a part of his gain.

It seems likely that often the injured party will ignore a breach, or if the amount of damage is too great to be disregarded, that he will accept a compromise settlement. Litigation is so difficult and hazardous that the average businessman is loath to go to court except upon the greatest provocation. Even if suit be brought, it is far from certain that the plaintiff will recover full compensation for his loss. He may be unable to satisfy the burden of proof. Some minor defect in his own performance which would, in the ordinary course of business, be ignored, may be held to have been a material breach, barring recovery for the defendant's default. Counsel for the breaching party may be able to find a posteriori legal justification for the nonperformance. The trial court or jury may fail to assess damages ac-

9. Although this seems to be a reasonable conclusion, it is difficult to provide statistical verification. One study which made a finding tending to corroborate the statement in the text is Clark and Corstvet, The Lawyer and the Public, 47 Yale L. J. 1272 (1938). That survey found that businessmen consult an advisor on only 17.7% of the legal matters with which they are concerned. Id. at 1276.

10. The burden of proof is particularly difficult where the plaintiff must prove something as nonobjective as that the goods "cannot readily be resold for a reasonable price," USA § 63(3), or that there is no "available market" for the goods, USA §§ 64(3), 67(3). Cf. Norwood Lumber Corp. v. McKean, 153 F.2d 753 (3rd Cir. 1946); Haughey v. Belmont Quadrangle Drilling Corp., 284 N.Y. 136, 29 N.E.2d 649 (1940); Van Houten v. Campbell, 9 N.J. Misc. 214, 153 A. 391 (Sup. Ct. 1931). And proving a market price on which to base damages is not only often difficult, but in many cases is little more than a guessing game, as in Benj. Harris & Co. v. Western Smelting & Refining Co., 313 Ill. App. 455, 40 N.E.2d 747 (1942), aff'd 381 Ill. 443, 45 N.E.2d 639 (1942), where the commodity involved was not for sale at any price in this country.


12. In the cases following, the nonperformance was not penalized although it seems clearly to have been induced by fluctuating prices: Sistrom v. Anderson, 51 Cal.App.2d 213, 124 P.2d 372 (1942) (plaintiff found to have agreed to rescission); Bennett v. S. Blumenthal & Co., 113 Conn. 223, 155 Atl. 68 (1931) (contract oral, and defendant claims plaintiff knew defendant's agent had authority to make only written contracts); May v. Burns, 227 Iowa 1385, 291 N.W. 473 (1940) (contract invalid for want of mutuality); Gunderson v. Kenyon, 253 App. Div. 306, 2 N.Y.S.2d 1 (1st Dept. 1938) (contract unenforceable under statute of frauds); Orto Seidenberg Inc. v. Tautfest, 155 Ore. 420, 64 P.2d 534 (1937) (plaintiff found to have cancelled contract by statement that goods of required quality were not of required quality). But cf. Hugo V. Lowei Inc. v. Kips Bay Brewing Co., 63 N.Y.S.2d 289 (Sup. Ct. 1946) (complaint that contract was made under duress rejected, where in war emergency defendant could not get goods elsewhere save from seller who compelled a long term contract); Robie v. Wheeler Shipyard Inc., 167 Misc. 279, 3 N.Y.S.2d 813 (Sup. Ct. 1938), aff'd 257 App. Div. 841, 12 N.Y.S.2d 764 (2d Dept. 1939) (contractual requirement that buyer's credit be satisfactory subject to objective determination—seller was not justified in breaching because credit was not satisfactory in his opinion).
And even should the plaintiff recover maximum damages, he is still short of entire satisfaction by the sizable cost of litigation. Rather than being sanctions to deter breach of contract, then, the remedies of the Uniform Sales Act seem to open to the party in whose favor the market has turned an attractive gamble to pocket a neat profit by ignoring his contractual obligations.

Nor is the efficacy of present legal remedies as an inducement to performance demonstrated by the fact that most contracts are performed even in a fluctuating market, since such non-legal considerations as possible loss of goodwill, alienation of sources of supply, and similar inhibitions, give pause to the would-be breacher who may not be worried by the possibility of being required to answer in damages.

An interesting example of an over-ingenious attempt to assess damages, which led to an absurd result, is Gillman v. Broad Brook Co., 137 Misc. 685, 243 N.Y.Supp 312 (Sup. Ct. 1930), aff'd without opinion 232 App. Div. 743, 248 N.Y. Supp. 823 (1st Dept. 1931). The buyer there sued for damages for nondelivery of cloth, alleging that cloth was not obtainable elsewhere and that he thus lost profit he would have made from the manufacture of overcoats out of the cloth. After deciding that the plaintiff should recover for such damage, the court took out its slide rule and calculated that the cloth used in each coat cost $18.50 of a total manufacturing cost of $36, or 51.4% of the entire cost. Since the average net profit on each coat was $11, the court ruled that the plaintiff's proportional damage per garment by reason of the nondelivery of the cloth was 51.4% of $11, or $5.65, and allowed recovery for this amount multiplied by the number of coats which could have been made from the undelivered cloth. Clearly if the nondelivery of the cloth prevented plaintiff from manufacturing overcoats, the court did not consider that plaintiff was entitled to $11 for each coat he could have manufactured.

Another possible barrier to full compensation which could work real hardship in an inflationary period such as the present is the refusal of courts to consider fluctuations in the purchasing power of money which may have occurred between the time of breach and the time of judgment. Developments in the Law, Damages—1935-1947, 61 Harv. L. Rev. 113, 118 (1947). Money damages awarded now, measured as of a breach five years ago—and even more protracted litigation is not unknown to the courts—would be far less than equal to the value of the promised performance. One judge has recently used the decreased purchasing power of the dollar as justification for holding a tort verdict not excessive. Armentrout v. Virginian Ry., 72 F. Supp. 997 (S.D.W.Va. 1947). But any injustice in not considering changes in the value of money might tend to be negated in a deflationary period when the purchasing power of money would rise, and plaintiff would get more than he is entitled to. And the administrative simplicity of not considering the value of money would seem far to outweigh its possible inequities.

See Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704, 736-8 (1931). A student of Llewellyn's recognizes these non-legal sanctions, but assumes that they lose force when the market fluctuates. "The desire to avoid loss or to make greater profits overcomes the possible desire to be a 'squareshooter' and to shoulder his part of that risk of price fluctuation which any present contract for future delivery carries, both for the seller, and for the buyer. In such a situation the buyer will often seize upon any excuse to


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Such societal pressures effectively exercise their force only in highly institutionalized segments of the business world. The large corporation has too great an investment at stake to justify jeopardizing its prestige and reputation for reliability by endeavoring to reap the comparatively small gain of a market turn.\(^\text{16}\) In fields where goodwill is of little economic value, such as where both buyers and sellers are numerous, or where the goods involved are of a unique type, not regularly the subject of transactions by at least one of the parties, non-legal sanctions are inoperative. Thus it is that the reported cases in which price movement seems to have induced breach of contract so often involve atomistic industries, such as lumber and coal;\(^\text{17}\) transactions beyond the scope of commercial morality, such as on the black market;\(^\text{18}\) or sales outside the usual course of the party's business, such as used capital equipment.\(^\text{19}\)

There is, too, a significant number of cases in which it appears that the

\[^\text{16}\text{See note }16\text{ infra.}\]


\[^\text{19}\text{E.g., J. Wallworth's Sons v. Daniel E. Cummings Co., 135 Me. 267, 194 Atl. 890 (1938) (sale of waste machine that seller had been using in his plant); Monaci v. Turner, 37 Cal.App.2d 98, 98 P.2d 755 (1940) (defendant machine shop had never before attempted to make article involved); Gildner Bros. v. Ford Hopkins Co., 235 Iowa 191, 16 N.W.2d 229 (1944) (sale of store front by one store owner to another).}\]
parties had had little or no previous business relations, perhaps implying that reluctance to take advantage of an old customer frequently operates as a real factor in fulfillment of business contracts. 20

Even from the appellate court reports it is possible to discern a great number of cases in which market fluctuation has been the direct cause of breach of contract. 21 Legal sanctions are needed to deter such breaches where societal sanctions are insufficient. And a system of remedies is necessary which will make "full compensation to the injured party" when a breach has occurred, more than a meaningless cliché. It is in the light of these twin needs that the relevant remedy provisions of the proposed Uniform Revised Sales Act 22 must be considered.

20. E.g., Hawkins v. Midland Flour Milling Co., 236 Ky. 803, 34 S.W.2d 439 (1930); Smith v. Johnson, 2 Wash.2d 351, 98 P.2d 312 (1940).

21. In most reported cases, and particularly when the reports are as distant from the facts as the appellate bench, it is impossible to discern the reason for a breach; often such reason as can be discerned is a makeweight advanced by a defendant hoping to justify a breach which was actually induced by the market fluctuation. It is surprising, therefore, to find a multitude of cases in which the reports do indicate that price change was the reason for breach. And there is a great number of cases in which no inferences are necessary, since it is explicit in the report that defendant breached because the market had turned in his direction. The following cases are examples of the latter group: Campfield v. Sauer, 189 Fed. 576 (6th Cir. 1911); Empire Box Co. v. Jefferson Island Salt Mining Co., 3 Terry 432, 36 A.2d 40 (Del. 1944); Benj. Harris & Co. v. Western Smelting & Refining Co., 313 Ill. App. 455, 40 N.E.2d 747 (1942), aff'd 381 Ill. 443, 45 N.E.2d 639 (1942); McNeff v. White Eagle Brewing Co., 294 Ill. App. 37, 13 N.E.2d 493 (1938); Santa Rosa-Vallejo Tanning Co. v. Charles Kronauer & Co., 228 Ill. App. 236, 256 (1923); Louisville Packing Co. v. Crain, 141 Ky. 379, 132 S.W. 575 (1910); Hanson & Parker Ltd. v. Wittenberg, 205 Mass. 319, 91 N.E. 383 (1910); Goldfarb v. Campe Corp., 99 Misc. 475, 164 N.Y. Supp. 583 (City Ct. 1917); Consolidated Trimming Co. v. Angelo, 70 R.I. 455, 40 N.E.2d 478 (1944); Huggett v. Sears, Roebuck & Co., 248 Wis. 281, 21 N.W.2d 640 (1946).

It should be recognized, however, that the effect upon the free flow of goods in the economy of a breach by a consumer of his contract to buy from the corner hardware store is far less than that of breach by a coal mine of its contract to supply a steel mill. On the consumer level it is probable that fewer breaches are for price advantage. Indeed it might be profitable to develop a concept of "excusable breach" to include such cases as that of the $50-a-week laborer who cancels his wife's contract to purchase a $2500 mink. In the terms of the brilliant analysis of contractual interests which has recently been propounded by Fuller and Purdue, supra note 2, and Mason, A Theory of Contract Sanctions, 38 Col. L. Rev. 775 (1938), it might be that, while a seller's reliance interest should be protected, his expectation interest could be denied protection where the consumer had committed an "excusable breach." For the suggestion that clear differentiation should be made between the merchant and consumer, see Isaacs, The Dealer-Purchaser, 1 U. of Cin. L. Rev. 373 (1927).

22. Prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws with Professor Karl N. Llewellyn, of Columbia Law School, as Reporter, the Act will shortly be submitted to the states for adoption as a part of the Commercial Code which is now being drafted. The present survey discusses the Proposed Final Draft submitted to the Commissioners, March, 1948 (cited hereafter as URSA). The draftsmen of the Uniform Revised Sales Act have prepared a detailed set of Comments on each section of the new Act, which is anticipated will be adopted as the authoritative interpretation of the URSA. These Comments present a thorough and convincing analysis
Remedies of the Seller

Resale

The basic remedy of a seller under the URSA is resale of the goods, and recovery at law of the difference between the contract price and the price obtained on resale, in addition to any incidental damage which may have been suffered.\(^2\) The Act permits this resale remedy so long as the resale is made "in good faith and with reasonable care and judgment."\(^2\) In the unlikely event that the seller is able to resell for more than the contract price, he is permitted to keep the additional amount for himself, although the Act is not clear as to whether such additional profit also bars recovery of or reduces the incidental damages resulting from the expense of resale.\(^2\)

The emphasis placed on resale in the new Act is in accord with the normal usage of merchants, and it may, in fact, not be so far removed from the practice actually prevailing under the old Act as the draftsmen of the URSA seem to believe. The average seller will almost always endeavor to sell his wares, whether to the party who originally contracted for them or to a substitute buyer. In most cases such a resale will be consummated soon after breach and will be at the market price then prevailing; the difference between the contract price and the resale price, which the seller may recover under the URSA, will be identical with the difference between the contract price and the market price, the test of damages of the Uniform Sales Act.\(^2\)

of the theories and background of the Act, and are invaluable to understanding of it. But they are still subject to change, and therefore it has not seemed advisable to quote from the Comments; the point of view which they express has been referred to, however, and for purposes of reference when the Comments are released, this discussion cites generally to the sections of the Comments which are relevant.

23. URSA § 107.

24. URSA § 107(1). This concern with good faith and with mercantile practice and judgment is an echo of an earlier proviso of the Act that "every contract within this Act imposes an obligation of good faith in its performance and one between merchants shall also be interpreted in accordance with commercial standards." URSA § 26(2).

25. URSA § 107(6). The problem presented will be rare, since normally buyer will breach only in a falling market, which would prevent seller from reselling above contract price. When it does arise, as in Washington Sand & Gravel Co. v. Brann & Stuart Co., 162 F.2d 826 (3rd Cir. 1947), the sounder solution would seem to be to deduct any additional sum realized by the seller on resale from the incidental damages. In the case cited, plaintiff's records were so poorly kept that he was unable to establish the amount of his incidental damage, and the court rejected his claim for compensation as "speculative."

26. USA § 64(3). The limitation of this remedy to the case where there is an "available market" indicates that the old Act contemplated that the seller would resell the goods. The old Act had a separate section, USA § 60, prescribing "when and how resale may be made," but this was not a separate remedy of the seller—rather it was a means of fixing the amount of damages. 2 Williston, Sales § 581 (2d ed. 1924). The price obtained on resale could explicitly be used to measure damages where the goods were of a perishable nature, where the seller had expressly reserved the right of resale in case the buyer should make default, or where the buyer had been in default in the payment of the price an unreasonable time. USA § 60(1).
But despite this similarity, the emphasis placed on resale as a separate procedural remedy in the new Act leads to a flexibility of the place, time, and price used to measure recovery which should be advantageous to sellers. If the seller is better able to dispose of the goods in some market other than the place of delivery, he may do so without being confined to damages measured by the price at the place of delivery. In any situation, "good faith" on the seller's part will be sufficient answer to the charge that by following some different course—selling in some different market or at another time—he might have reduced the amount of damage. Under the old Act, the seller, whose damages were firmly riveted to the time of delivery, might suffer loss for which recovery was unavailable if the market continued to fall while he searched for a new buyer. Since a falling market presages a lack of demand and consequent difficulty in finding a buyer, the older rule could work real hardship. The new Act avoids this difficulty by making the resale price the determinant, regardless of when the resale is made. And perhaps the most important advantage of the resale provision is the ease with which a seller can prove the amount obtained on a good faith resale, as contrasted with the great difficulty often encountered under the old Act with its requirement of proof of a market price which might be entirely hypothetical.

27. Cf. Obrecht v. Crawford, 175 Md. 385, 2 A.2d 1 (1938). When the buyer, in the United States, breached a contract for the sale of a special type of Argentine flour, the seller resold the flour in London, since there was no market for such flour in America. Defendant urged that the measure of damage should be the difference between the contract price and the market price of a similar type of flour in the United States. But in the absence of evidence of bad faith, the court permitted the seller to recover the difference between the contract price and the price at which he resold in London. Such a decision was a commendable landmark under the old Act; with the new Act it will be a matter of course.

28. Cf. McNeff v. White Eagle Brewing Co., 294 Ill. App. 37, 13 N.E.2d 493 (1938), where the market price was 30c on the date of the breach, but the price was falling so sharply that by the time seller was able to dispose of all the goods, the market price was only 24c. Although the resale prices on parts of the goods ranged from 24c to 30c, the court held that damages must be measured by the market price on the date of the breach, or 30c. Although the resale prices on parts of the goods ranged from 24c to 30c, the court held that damages must be measured by the resale price rather than the higher market price.

A result similar to that which is expected under the URSA was reached in Dolfin v. Bruesselbach, 111 Colo. 525, 143 P.2d 1014 (1943), where the court held that since the seller had used due diligence to minimize damages by resale of the goods, and his good faith was unquestioned, damages might be measured by the resale price rather than the higher market price.

29. Southern Pac. Milling Co. v. Billiwack Stock Farm, 50 Cal.App.2d 79, 122 P.2d 650 (1942), indicates how unrealistic a market price test can become. In that case the only evidence of the market price of rolled barley used by the trial court was a statement by the plaintiff that it could secure unrolled barley for $18 a ton, spend $2 for rolling it, $2 for transportation, add $1 profit, and sell it as rolled barley for $23. The appellate court ordered a retrial on the question of damages. Cf. Benj. Harris & Co. v. Western Smelting & Refining Co., 313 Ill. App. 455, 40 N.E.2d 747 (1942), aff'd 381 Ill. 443, 45 N.E.2d 639 (1942). An understanding of the almost metaphysical difficulties involved in determining market price can be had from an inspection of the conflicting definitions of the term in Amerine v. Darden, 116 S.W.2d 763 (Tex. Civ. App. 1938).
Action for the Price

As an alternative remedy to resale, the URSA allows an "action for the price," by which the buyer is required to take the goods in exchange for the agreed-upon price.\(^{30}\) This action is permitted wherever the seller is "unable after reasonable effort to resell [the goods] at a reasonable price," \(^{31}\) and should be a welcome improvement over the unhappy compromise of the old Act, \(^{32}\) which, after it had been emasculated by strict construction, allowed an action for the price only after a nebulous determination that the buyer had "title" to the goods. \(^{33}\)

Instead of providing the remedy of action for the price after any breach of contract, the draftsmen of the new Act made it complementary to the resale remedy because of a questionable belief that it is usually socially desirable to have goods sold by the seller, who has the facilities, the skill, and the knowledge to market such goods, rather than to force them upon an unwilling purchaser who may have no use or need for such goods, and whose inexpert attempts to resell may often be made only at a heavy loss. \(^{34}\) It seems fair to suppose, however, that the most important situation in which a buyer will have no need or use for the goods is where he has breached in order to purchase them elsewhere at a lower price. Such a wrongdoer is scarcely deserving of protection, and it is believed that the availability of a liberal action for the price, which would force unwanted goods on the buyer, might deter many breaches.

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30. URSA § 110.
31. URSA § 110(1)(b). Action for the price is also permitted where the buyer has already accepted the goods, or where they have been lost or damaged after risk of loss has passed to the buyer.
32. The old Act, USA § 63, compromised between the rule of the English Sales of Goods Act, which permits action for the price only where title to the goods has passed to buyer, and the liberal "New York rule," adopted in most commercially important American jurisdictions, which allowed an action for the price at the option of the seller wherever there was a contract. 2 WILLISTON, SALES §§ 562–6 (2d ed. 1924). A recent example of the application of the "New York rule" in a non-USA state is Smith v. Ratliff, 157 S.W.2d 945 (Tex. Civ. App. 1942). The rule of the old Act is defended in Williston, The Right of a Seller of Goods to Recover the Price, 20 HARV. L. REV. 363 (1907).
33. The old Act had also provided that where the goods could not readily be resold for a reasonable price, action for the price would lie, even though title had not passed. USA § 63(3). But the ambiguities of "readily be resold" and "reasonable price" prevented this section from being of great importance, and the mystic element of "title" usually had to be found in the buyer if an action for the price were to be had. Llewellyn, Through Title to Contract and a Bit Beyond, 15 N.Y.U.L.Q.REV. 159 (1938). See also Comments to URSA § 110. An excellent discussion of the distinction between the remedies of action for the price and damages for nonacceptance under the old Act is contained in Haughey v. Belmont Quadrangle Drilling Corp., 284 N. Y. 136, 29 N.E.2d 649 (1940). An example of the strict application of the title concept under the old Act is J. Wallworth's Sons v. Daniel E. Cummings Co., 135 Me. 267, 194 AtJ. 890 (1937). But cf. Wales Adding Machine Co. v. Huver, 98 N.J.L. 910, 121 Atl. 621 (Ct. of Err. and App. 1923).
A little used sub-section of the old Act permitted an action for the price of the goods "if they cannot readily be resold for a reasonable price."  The draftsmen of the new Act believe that they have devised a test more objective and capable of proof by providing for an action for the price if the seller be "unable after reasonable effort to resell (the goods) at a reasonable price."  Under the URSA the seller will not need to show that the goods could not have been resold, but only that his own efforts to resell were unsuccessful, with the law presuming a good faith attempt to resell on his part.  Such a presumption of good faith seems quite justifiable, for in the case where the seller can in fact resell, he will prefer to use the resale remedy and obtain most of his cash immediately, rather than idly hold the goods and wait for payment upon the fruition of his legal action for the price.

**Damages for Nonacceptance**

With resale and recovery of any loss the usual remedy under the URSA, and an action for the price available where resale cannot be effected, the action for damages for nonacceptance of the goods, the primary remedy of the old Act, assumes minor importance. The draftsmen of the URSA contemplate that this action will be of practical value in only two situations. The first of these, where the seller, expecting the market to rise, prefers to collect damages and hold the goods for later, more profitable sale, is a situation rarely observable in the case law. The other situation contemplated by the draftsmen is typified by the "automobile dealer cases"—cases where the seller's resale must be at a fixed list price identical with the contract price so that by the standard resale or damages remedy no recovery could be had, although absent the breach the seller would have profited from two sales instead of only one.

As a remedy in these cases, Section 109 of the URSA states the old rule that a seller may recover the difference between the unpaid contract price and the market price at the time and place for tender, but provides further that if that measure of damages "is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit the seller would have made from full performance by the buyer."  The latter provision seems more felicitously phrased than was the damage for nonacceptance section of the Uniform Sales Act, which used the contract price less market price test "in the absence of special circumstances, show-

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35. USA § 63(3).
36. Comments to URSA § 110.
37. See note 24 supra.
38. URSA § 109.
39. USA § 64. The old Act's action for damages encompassed, as has been seen, many cases which under the new Act will be cases for the resale remedy.
40. Comments to URSA § 109.
41. URSA § 109.
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ing proximate damage of a greater amount.” 42 The URSA should induce more widespread acceptance of the better interpretation of the old Act which allowed the recovery of lost profit in situations similar to the automobile dealer cases. 43

It seems regrettable, however, that the apparently broad language of Section 109, designed to permit recovery of lost profits by sellers where resale must be at a fixed list price, is at the same time to be limited to this type of situation. 44 In any case in which the demand for a product within the reach of a particular seller is limited, and his supply is, for practical purposes, unlimited, the seller is injured by failure to recover from a breaching buyer the full amount of the seller’s anticipated profit on the transaction. This is true not only where the price remains fixed, as seems to have been supposed by the draftsmen of the URSA, but also where the price has dropped since the time the contract was made, so long as it has not fallen below the point at which the seller could make a profitable sale to another party. 45

If, for example, a manufacturer of chiffon frames contracts to sell at $96 frames which he can manufacture for $76, and if at the time of delivery the manufacturer has located one further customer for frames who is willing to buy at the then prevailing market price of $80, the seller can anticipate a profit of $20 on his contract and $4 on the sale to the second customer, or a total profit from chiffon frames of $24. 46 Yet if the original buyer breaches, and the manufacturer resells to the second buyer the goods made under the breached contract, his market will be exhausted and he will have made a

42. USA § 64(3).
44. Comments to URSA § 109.
45. See note 61 infra. The seller may even be injured though the market price has risen. Ibid., last example.
46. The facts are adapted from those of Bennett v. S. Blumenthal & Co., 113 Conn. 223, 155 Atl. 68 (1931). Although a new trial was ordered on another point, the Connecticut court correctly held that the plaintiff was entitled to $20 damages; it appears, however, that there may not have been an actual market at $80, in which case the $20 damages would be the usual award, based on the difference between contract price and cost of manufacture.
profit of only $20, $4 realized on the sale and damages of $96–$80, or $16. If the breaching party had been the only customer for such frames, and they were not readily resalable, the seller could bring an action for the price and in that way obtain his profit. But where the number of customers, while limited, is greater than one, apparently the damages which the breaching party must bear are mitigated by any profit the seller would make by a sale at current market prices. Such a result is scarcely compatible with the desirable goals of fully compensating an injured party and of providing damages so onerous as to deter breach.

Since recovery of lost profits is an integral part of any adequate system of remedies, and since such profits will not usually be recoverable by either a resale action or, as has been seen, an action for the price, it would seem desirable that Section 109 of the URSA authorize such recovery wherever demand is limited and supply unlimited. But the very narrow scope indicated for lost profit recovery by the authoritative Comments of the draftsmen of the new Act, the difficulties which heretofore have often attended proper assessment of lost profits, and the evidenced reluctance of some

47. Cf. Mossy Motors v. McRedmond, 12 So.2d 719 (La. App. 1943), an automobile dealer case, where it was held that the dealer would have been entitled to recover his lost profit through an action for the price, and that since he resold the car to another party he was acquiescing in the cancellation of the original contract, and was not entitled to damages. Under the URSA the action for the price would not have been possible for the seller, since resale was available. See pp. 1369–70 supra.

48. In J. A. LaPorte Corp. v. Pennsylvania-Dixie Cement Corp., 164 Md. 642, 165 Atl. 195 (1933), the court said that where the manufacture of goods has been completed and a market is available, the seller's recovery is the difference between the contract and market prices, while if the goods are not completed or not saleable, the measure of damage is the contract price less the cost of production, which equals the lost profit. "In each situation the result to [the seller] would be the same in theory, the difference being that upon application of the one measure his total loss would be recovered in part from the market and in part from the buyer, while upon application of the other it would all be recovered from the buyer." Id. at 647, 165 Atl. at 197.

49. See p. 1369 supra. The dubious premise of the Act that action for the price is undesirable where resale can be had not only weakens the Act as a deterrent to breach, by limiting the situations in which goods can be forced on a breaching buyer, but also as a vehicle for the recovery of full compensation, by preventing a court in most instances from giving a seller his lost profit through an action for the price.

50. Comments to URSA § 109.

51. Lost profits are usually measured by the difference between the contract price and the cost to the seller. It has been held that overhead is not to be included in the cost to seller for the computation of damages. Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929), 78 U. of Pa. L. Rev. 563 (1930); Breding v. Champlain Marine & Realty Co., 106 Vt. 288, 172 Atl. 625 (1934). Contra: Wilhelm Lubrication Co. v. Brattrud, 197 Minn. 626, 268 N.W. 634 (1936). Other difficulties arise under an alternative contract, where the buyer has a choice of different-priced goods. James Talcott Inc. v. Marshall Field & Co., 15 N.Y.S.2d 846 (Sup. Ct. 1939), aff'd 258 App. Div. 1045, 17 N.Y.S.2d 1020 (1st Dep't 1940); see Restatement, Contracts § 344 (1932). And in some cases it is impossible to make little more than an informed guess as to the amount of lost profit. Compare Quist v. Zerr, 12 Wash.2d 21, 120 P.2d 539 (1941) with Joest v. John A. Denie's Sons Co., 174 Tenn. 410, 126 S.W.2d 312 (1939).
courts to permit such recovery make it very doubtful whether the lost profits alternative of Section 109 will be any more widely employed than was its counterpart in the Uniform Sales Act.

Once a realistic analysis of the seller's expectancy of profit is attempted, other situations can be discovered in which the rules of the URSA provide an unsatisfactory measure of damages. Suppose that the chiffon frames manufacturer who contracts to sell for $96 and who later finds another customer willing to buy for $80 has in inventory just sufficient frames to fill the first order, manufactured at a cost of $76. Suppose further that the market drop reflects a fall in the price of wood, so that it would cost the seller only $60 if he were to build frames to fill his second order. In this case his expected profit is $20 on each sale, or a total of $40. But here a breach would force him to sell the frames already in inventory to the second customer, at a profit of only $80-$76, or $4, so that the seller emerges from the transaction with $36 less in his pocket than if the contract had been performed. Yet his recovery, under either the resale provisions of Section 107 or the contract price less market price test of Section 109, is $96-$80, or $16, while in the unlikely event that he were awarded "lost profit" under the alternative measure of Section 109, his recovery might be expected to be $96-$76, or $20.

A similarly vexing problem—and one which is not confined to the situation where the demand is limited and the supply unlimited arises when the market price falls below the seller's cost, either because he is bound to a fixed price under a requirements contract with his suppliers, or because his cost of production does not drop along with the market price. In the case of the chiffon frames maker, suppose that his contract price is $96, his inflexible cost, $76, and the new market price, $70. Here the maximum lost profit is $20, but if the normal measure of damages be applied, he will recover $96-$70, or $26, thus being $6 better off than he would have been had the contract been performed. The old Act employed the normal measure of damages "in the absence of special circumstances, showing proximate damage of a greater amount." Some courts followed the Act literally, awarding dam-

52. The automobile dealer cases, note 43 supra, are the most conspicuous situation in which a lost profit is almost universally recognized, but where only a few courts are willing to permit recovery of that profit. The courts have found in other situations that the assessment of lost profits is so difficult, note 51 supra, or so uncertain, note 105 infra, that they have preferred completely to refuse recovery of profits.

53. It is possible that if lost profits were recoverable here at all, they might be recoverable in a larger amount, viz., $96-$60, or $36. There is nothing in the Act, the Comments to the Act, or the case law to indicate that this would be the result. Previous cases involving lost profits have not displayed more than the most superficial analysis of the seller's loss, and it is probably not unfair to suppose that this condition will persist in the absence of express language in the Act. But cf. Margaret Mill v. Aycock Hosiery Mills, 20 Tenn. App. 533, 101 S.W.2d 154 (1936).

54. Nor is it a problem only of the seller. The background, reasoning, and suggested solution of this problem are equally applicable where the buyer is the innocent party.

55. USA §§ 64(3), 67(3).
ages based on the market price even when it was clear that special circumstances made the actual, proximate damage a smaller sum. Such an interpretation was both approved and criticized, and when the proposed Federal Sales Bill was drafted, the authors of that Bill apparently decided against the soundness of such a generous interpretation by providing for the award of contract price less market price only "in the absence of special circumstances showing proximate damages of a different amount." By this rule the hypothetical chiffon frames manufacturer would receive $20 damages, and the buyer, who saved $26 by breaching his contract and purchasing from another seller, would pocket $6, even if he were successfully sued.

A neat dilemma is raised. If damages are measured by the market price test, the seller is put in a better position than if the contract had been performed. If the seller is confined to the smaller amount of damage actually suffered, the buyer is enriched, since maximum damages for which he is liable will be less than his profit from the market fluctuation and his breach. As between an innocent seller and a breaching buyer, there seems little doubt that the seller should receive the benefit of any enrichment, and particularly when a contrary rule, far from being a deterrent, would be a foolproof invitation to breach. The URSA seemingly recognizes this by substituting the loss of profits test for the market price measure of damages only where the latter is inadequate for full compensation of the seller.

Although the rule of Section 109 is satisfactory in the situation just pre-


57. Williston said of the interpretation in the text: "... this conclusion seems nearly if not quite always sound on principle." 2 Williston, Sales § 599i (2d ed. 1924). But discussing the changes which the proposed Federal Sales Bill made in USA § 67, which included changing "greater" to "different," thus avoiding the interpretation considered here, Professor McCurdy, a former collaborator of Williston's, said that they "are probably correct and seem not undesirable." McCurdy, Uniformity and A Proposed Federal Sales Act, 26 Va. L. Rev. 572, 629 (1940). And Williston wrote that he was entirely in accord with McCurdy's conclusions. Williston, A Statement, 26 Va. L. Rev. 637 (1940). The interpretation of the Act which gave a party the difference between the contract price and the market price when proximate damage was seen to be smaller never found favor in some quarters. See McCormick, Damages § 175 (1935); Note, 27 Col. L. Rev. 877 (1927).


60. URSA § 109. The same result would probably be reached where the innocent party is the buyer, although the language of the Act is not so unambiguous. URSA § 114.
sented, it has been seen that there are many situations in which it is unsatisfactory. When “lost profits” are available they are likely not to be fully compensatory, and too often they will probably not be available when they are needed. The following substitute for the section is believed in every situation to yield a more satisfactory and more completely compensatory rule:

“The measure of damages for nonacceptance is the difference between the unpaid contract price and the lesser of: the cost at which the seller can manufacture, purchase, or otherwise obtain the goods contracted for at the time of tender; or the price current at the time and place for tender; together with any incidental damages under section 111 but less any expense saved in consequence of the buyer’s breach.”

Application of the proposed rule is illustrated in the margin.61

61. The following table shows the lost expectancy of a seller and the amount which he might recover under several possible measures of damage in a variety of situations. As in the examples in the text, pp. 1371-4, the seller is represented as having only two possible sales; this is a satisfactory simplification of the demand limited, supply unlimited situation, since if the seller has more than two sales, those between the breached contract and the final sale will cancel out, and the net result will be the same as if he had but two customers. The first two columns show the profit the seller would make on his two sales if his first contract is performed; the third column shows the result of the substituted sale which he must make if the first contract is breached. In the fourth column the damages recoverable by the Market Price Rule (contract price less market price) are presented as MPR, and as LPR is listed the damage which the seller can recover if he is permitted recovery under the Lost Profit Rule of §109 of the URSA, and if that section is construed as anticipated, note 53 supra. AD represents the Actual Damage—the difference between the seller’s expectancy if both contracts had been performed, and the amount which he makes from the substituted sale if the first contract is breached. The amount of damage which the seller would recover under the rule suggested in the text is presented, for want of a better abbreviation, as CAR.

The examples are set up in terms of a retail seller whose wholesale price keeps pace with the retail market price. They can be equally well thought of as representing a producer, whose production cost reflects a change in the market price. And in fact the situation which is described in the table as “multiple inventory” might more accurately be entitled “inflexible production or wholesale cost.” In each example the first figure is the selling price, the second figure the cost, and the difference the profit.

<table>
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<tr>
<th>CONTRACT PERFORMED</th>
<th>CONTRACT BREACHED</th>
<th>DAMAGES</th>
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</thead>
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<td>Additional Sale</td>
<td>Substituted Sale</td>
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<td>300 = 600</td>
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Application of the proposed rule is illustrated in the margin.
### Mkt. Drop $500 Between Contract and Breach

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<th>Profit</th>
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<td>1000</td>
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<td>LPR = 800</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AD = 800</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>One Article in Inventory</td>
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<td>1000</td>
<td>1000</td>
</tr>
<tr>
<td>MPR = 500</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>LPR = 300</td>
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<tr>
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<td>AD = 800</td>
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<tr>
<td>Multiple Inventory</td>
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<td>1200</td>
<td>1000</td>
</tr>
<tr>
<td>MPR = 500</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LPR = 300</td>
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<td></td>
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<tr>
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### Mkt. Drop $200 Between Contract and Breach

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<td></td>
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<tr>
<td>AD = 500</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>One Article in Inventory</td>
<td>1500</td>
<td>1300</td>
<td>1300</td>
</tr>
<tr>
<td>MPR = 200</td>
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<tr>
<td>LPR = 300</td>
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<td></td>
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<tr>
<td>Multiple Inventory</td>
<td>1500</td>
<td>1200</td>
<td>1300</td>
</tr>
<tr>
<td>MPR = 200</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>LPR = 300</td>
<td></td>
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<tr>
<td>AD = 300</td>
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### Mkt. Rise $500 Between Contract and Breach

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<th>Profit</th>
</tr>
</thead>
<tbody>
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<td>2000</td>
<td>2000</td>
</tr>
<tr>
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<tr>
<td>LPR = 0</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>CAR = 0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AD = -200</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>One Article in Inventory</td>
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<td>2000</td>
<td>2000</td>
</tr>
<tr>
<td>MPR = 0</td>
<td></td>
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<tr>
<td>LPR = 300</td>
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<td></td>
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<tr>
<td>AD = -200</td>
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<tr>
<td>Multiple Inventory</td>
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<td>MPR = 0</td>
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<tr>
<td>LPR = 300</td>
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<tr>
<td>AD = 300</td>
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</table>
Incidental Damages

Each of the remedies available to an aggrieved seller includes provision for recovery of any incidental damages which the seller has suffered. These are loosely defined in Section 111 of the URSA, and are intended to include any commercially reasonable charges flowing from the breach. It is expected that they will be limited in the same way as are the similar damages of the buyer discussed below.

Remedies of the Buyer

On the sound premise that the fundamental concern of the buyer in a sales contract is to obtain the goods which he needs, the draftsmen of the URSA have made available to a buyer remedies for a breach which emphasize general replacement of the goods instead of money damages.

Cover

It is in accordance with this policy that the basic remedy made available to the buyer is to "cover," i.e., to make any reasonable purchase of goods in substitution for those due from the defaulting seller. So long as the cover purchase is made in good faith and without unreasonable delay, the buyer may recover as damages the difference between the cover price and the contract price, in addition to any incidental and consequential damages which the buyer may have suffered.

While the concept of "cover" as such may be comparatively new to American law, it is descriptive of the normal mercantile reaction to a breach, and, just as is the case with the seller's remedy of resale, it will usually be difficult to distinguish the result of its application from the result which

63. "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." URSA § 111.
64. Comments to URSA § 111.
66. Comments to URSA § 112.
67. URSA § 113.
68. Ibid. See note 24 supra. Good faith and reasonable mercantile standards of judgment would probably justify such a result as that reached in Empire Box Corp. v. Jefferson Island Salt Mining Co., 3 Terry 432, 36 A.2d 40 (Del., Sup. Ct., 1944). In that case the contract price was $4.60 per thousand for cardboard boxes which were necessary to buyer if he were to continue merchandising his product. When the price rose sharply, the seller first demanded $4.95 and then $5.13 per thousand if he were to perform, and refused to guarantee performance even at the latter price. Buyer was able to get the boxes elsewhere for $5.45, and asked for damages in the amount of $5.45—$4.60, or $8.85, per thousand. Since the supply of cartons on the market was small, the court found that buyer was justified in covering, rather than relying on the chance that seller would actually perform at the lower price.
69. URSA § 113.
would have been obtained under the Uniform Sales Act. But the recognition accorded cover by the URSA will, as with resale, be advantageous to the innocent party: by not penalizing him, if he uses good faith and reasonable commercial judgment, with damages arbitrarily fixed according to the price prevailing at a given place and time; by freeing him from risk of loss should the market continue rising while he seeks an alternative source of supply; and by determining damages by the easy and certain test of the cover price, instead of by difficult proof of the market price.

But the cover remedy is just as inadequate to the buyer in the situation where the supply of a commodity is limited and the demand unlimited as is the resale remedy to the seller in the reverse situation. The importance of this problem was highlighted during the recent war when a dealer could resell at a profit any shipment of scarce goods, such as scrap steel or cigarettes, which he might be able to obtain. Under such circumstances even if the dealer were successful in covering, the net result would be that he would make a profit on the resale of only one shipment of goods, instead of double that amount. The dealer may hope to recover such lost profits as an item

70. Cf. page 1367 supra. As when a Philadelphia brewer decided to handle only the local demand for beer in the chaotic market the day after repeal of prohibition, and thus breached its contract to sell to a buyer in Rhode Island, the court correctly awarded the buyer damages of the difference between the price at which he was able to cover in New York and the contract price, rather than assessing damages according to the market price in Philadelphia. Abrams v. C. Schmidt & Sons, Inc., 143 Pa. Super. 339, 17 A.2d 681 (1941). URSA § 126(2) meets the problems of proof in such a situation.

The flexibility which cover will offer under the new Act was achieved by the Second Circuit in Parrott v. Allison, 145 F.2d 415 (2d Cir. 1944), under the old Act. When the seller in that case breached a contract for the sale of ten tons of powdered timbo root, the buyer found that timbo root could not be purchased in this country. He managed to cover on six tons of his requirements, however, by a bargain with another merchant under which the buyer was allowed to purchase the six tons of root at 32c a pound, but was required in exchange to cancel 40% of a contract under which he held an option to buy another commodity from the other merchant beneath market price. The court included the buyer's loss of potential profit on the other commodity in the cover price on those six tons, and computed that he had covered at 48.6c per pound. As to the other four tons, the court regrettably awarded damages based on a fictitious market price of 35c at which a very small number of token sales had been made.

And note Williston v. Mathews, 55 Minn. 422, 56 N. W. 1112 (1893), where the contract stipulated that if seller breached, buyer might cover in the open market and charge the difference between the cover price and contract price to the seller's account.


of consequential damage, although the draftsmen give a regrettable impression that the buyer who has managed to secure the goods by covering may have no need of compensation for lost profits.\textsuperscript{73}

Although the URSA specifically provides that failure of the buyer to effect cover does not bar him from any other remedy,\textsuperscript{74} the buyer who does not make a reasonable effort to cover will be regarded as having had no need for the goods, and will not only be barred from seeking specific performance, but will be denied any elements of consequential damages which might have been prevented by cover.\textsuperscript{75} Such an assumption is justifiable, although it is true that obtaining goods later by cover is often not as satisfactory as having the goods on the contract date, and a buyer may be damaged by such delay.\textsuperscript{76}

\textit{Specific Performance}

While strongly urging cover as the simplest and most commercially expedient remedy,\textsuperscript{77} the draftsmen recognize that there are circumstances in which the seller cannot be permitted to choose between performance and answering in damages; thus they propose specific performance as a remedy when equivalent goods are not otherwise available to the buyer.\textsuperscript{78} Far more liberal than the Uniform Sales Act, which authorized specific performance only where the goods were "specific or ascertained,"\textsuperscript{79} the URSA limits the equitable decree only by insisting that the buyer must have unsuccessfully attempted to cover, thus integrating specific performance with cover much as action for the price is integrated with resale.\textsuperscript{80}

But the courts have long guarded jealously their power to decree specific performance; the broad language of the new Act will not require them to be any less reluctant.\textsuperscript{81} And more basically, it is difficult to conceive of specific performance as often being an effective remedy.


\textsuperscript{74} URSA § 113(3).

\textsuperscript{75} Comments to URSA § 113; URSA § 116(2).

\textsuperscript{76} Campfield v. Sauer, 189 Fed. 576 (6th Cir. 1911); cf. Tingwall v. Wilson, 50 Idaho 452, 296 Pac. 1017 (1931).

\textsuperscript{77} Comments to URSA § 112.

\textsuperscript{78} URSA § 117.

\textsuperscript{79} USA § 68. In Cohen v. Rosenstock Motors, 188 Misc. 426, 65 N.Y.S.2d 481 (Sup. Ct. 1946), an application for specific performance was denied where the contract was for a "1946 Plymouth sedan. Color: open." According to the court, the subject of the contract was not "specific or ascertained." Accord: Kirsch v. Zubalsky, 139 N.J.Eq. 22, 49 A.2d 773 (Ch. 1946) (court refuses to take judicial notice of any special value attached to a new car making it a unique chattel). Contra: De Moss v. Conart Motor Sales, Inc., 72 N.E.2d 158 (Ohio, Common Pleas, 1947) (court finds plaintiff has no adequate remedy at law in unusual condition of new car market), 33 CORN. L. Q. 432 (1948).

\textsuperscript{80} Comments to URSA §§ 112-3. See pp. 1369-70 \textit{supra}.

\textsuperscript{81} "Specific performance may be decreed where the goods are unique or in other proper circumstances." URSA § 117(1). "Unique" may be a more apt term than "specific or ascer-
Specific performance, coupled with an injunction against sale to any other buyer, may suffice to ensure performance of output and requirements contracts, but it could accomplish little to help the restaurant proprietor who calls a distributor during the war to inquire why a promised case of Scotch has not arrived, and learns that the distributor has sold his entire stock on the black market. Even under normal circumstances, the average businessman is thought to have little interest in bringing an action which, with the delays so common to litigation, may bring him goods months or years after he had originally wanted them, by which time they may no longer be needed, or their cash value may have changed.

**Damages for Nondelivery**

Where the buyer is unable to cover, the only alternative to specific performance is an action for damages for nondelivery. The measure of damages in such an action, which is permitted even when cover is possible, is the difference between the contract price and the market price at the time the buyer learned of the breach, and, usually, at the place of tender. Both the time and place used to measure the damages are chosen to equalize, as nearly as possible, the damages recoverable with those the buyer might have obtained had he covered.

The action for damages for nondelivery does not appear to be a very attractive alternative to specific performance where the buyer is unable to cover. The market price used in the computation of damages must necessarily be used, as used in USA § 68. But a court would not have to violate the literal terms of the Act to confine its specific performance decrees to the "Mona Lisa cases," or even to contracts for all the output of a seller or requirements of a buyer, and deny this relief where the contract is for a chattel such as a new automobile. It seems regrettable that the URSA did not explicitly authorize specific performance for every case in which cover is not possible.

82. Comments to URSA § 117. An injunction against sale to any other buyer—a sort of "negative specific performance"—can usually be obtained more swiftly than a specific performance decree, and will ordinarily accomplish the same purpose, at least in mercantile cases.

83. The facts are similar to those of Murphy v. Lischitz, 183 Misc. 575, 49 N.Y.S.2d 439 (Sup. Ct. 1944), aff'd, 268 App. Div. 1027, 52 N.Y.S.2d 943 (1st Dep't 1945); appeal denied, 294 N.Y. 892, 63 N.E.2d 26 (1945). In that case the court was unable to decree specific performance, since the goods had already been sold, and it said that the loss of the profits which the buyer might have made by selling the liquor across the bar were too speculative to be used to measure damages. It awarded as damages, therefore, the difference between the contract price and the price which the seller was presumed to have gotten on the black market.

84. The action for damages for nondelivery was the basic buyer's remedy under the old Act. Where there was an available market, the measure of damages was the difference between the market price and the contract price at the time and place of delivery. USA § 67. But cf. Perkins v. Minford, 235 N. Y. 301, 139 N.E. 276 (1923) (court finds "special circumstances" and measures recovery as of time buyer learned of breach).

85. URSA § 114. In cases of rejection after arrival or revocation of acceptance, the place of arrival is substituted for the place of tender in measuring damages. URSA § 114(2).

86. Comments to URSA § 114.
sarily be hypothetical, since had a market actually existed the buyer would have been able to cover. The rule of damages in the action for nondelivery admittedly may result in harshness to the buyer, since damages are measured as of the place of tender rather than as of the buyer’s city.\textsuperscript{57}

The rule of damages in the nondelivery action was deliberately made harsh in order to force buyers to cover in the two unimportant situations where they might not cover although able to do so. A buyer might wish to collect damages and delay purchasing in the market, anticipating that the market will drop. Although this is possible, it is rare that a merchant would exchange the much less difficult lawsuit available to him by covering in exchange for the chance of gain to be derived from a fickle market, and one which, at the time of breach, would probably have been rising. The Act makes this sort of speculation more difficult for a buyer, whose damages are measured as of the time he learned of the breach, than for the seller, who collects damages calculated as of the time of tender.\textsuperscript{58} Such a distinction seems without merit but also without practical importance.

The other situation in which the buyer might refrain from covering is where he no longer has need of the goods by the time of the breach. But few merchants of acumen would be likely to bind themselves in a forward commitment for goods that would not be needed at the time of delivery, and even in the non-mercantile situation, the rising market which induced the breach would probably make the goods seem more desirable to the buyer.\textsuperscript{59}

\textit{Anticipatory Breach}

The emphasis which the new Act places on cover, and the rule that damages are to be measured as of the time the buyer learned of the breach, constitute a reversal of what had been thought to be settled doctrine as to the remedy available after an anticipatory breach. The Uniform Sales Act had provided that damages be measured as of the time set for delivery, even when the breach was anticipatory.\textsuperscript{59} But in the business world merchants

\textsuperscript{57} Ibid. The new Act would seem to cause real difficulty in situations where the buyer failed to learn of the breach until the goods had left the place of delivery, such as Hanson & Parker Ltd. v. Wittenberg, 205 Mass. 319, 91 N.E. 383 (1910) and Perkins v. Minford, 235 N. Y. 301, 139 N.E. 276 (1923).

\textsuperscript{58} URSA § 109. The draftsmen consider that measuring the buyer’s damages at the time he learns of the breach is necessary to keep in harmony with the better case law. Comments to URSA § 114. See Llewellyn, \textit{Through Title to Contract and a Bit Beyond}, 15 N.Y.U. L.Q. Rev. 159, 181 (1938). But cf. Segall v. Finlay, 245 N.Y. 61, 156 N.E. 97 (1927).

\textsuperscript{59} There may be situations in which buyer is unable to cover even when cover is available, either because he lacks cash or because he is bound to purchase exclusively from one supplier. E.g., Hole v. Unity Petroleum Corp., 15 Wash.2d 416, 131 P.2d 150 (1942).

\textsuperscript{60} USA §§ 64(3), 67(3); 2 WILLISTON, SALES § 583a (2d ed. 1924).

The rule was not novel to the Uniform Sales Act, but was the established rule for all anticipatory repudiation. Callan v. Andrews, 48 F.2d 118 (2d Cir. 1931); \textit{Restatement, Contracts} § 338 (1932); Beale, \textit{Damages upon Repudiation of a Contract}, 17 YALE L. J. 443 (1908) (but see Professor Corbin’s note pointing out an error in Beale \textit{supra}, 17 YALE L. J.
make new commitments to replace those of a breached contract as soon as they are satisfied that the old contract will not be performed,\textsuperscript{91} and the URSA correctly assumes that damages measured as of the time that the innocent party accepts the breach\textsuperscript{92} approximate more closely the actual loss than do damages measured as of some later date.

The provisions of the new Act dealing with anticipatory breach seem to guard adequately against injustice to either party. Where a party has reasonable grounds for insecurity with respect to the performance of the other, he may demand adequate assurance of due performance, and until he receives such assurance, he may suspend his own performance.\textsuperscript{93} Lack of such assurance after ten days constitutes a repudiation of the contract, and upon repudiation the aggrieved party may suspend his own performance and either await performance or retraction of the repudiation by the breaching party, or resort to any remedy for breach.\textsuperscript{94} At any time thereafter, until the innocent party has materially changed his position or otherwise indicated that he considers the repudiation as final, the breaching party may retract his repudiation by giving adequate assurance of performance.\textsuperscript{95}

If an action based upon anticipatory repudiation comes to trial before the time of performance set by the contract, damages are measured as of the time the injured party learned of the repudiation.\textsuperscript{96} The older view that such damages should be measured as of the time the injured party accepted the repudiation as final and acted accordingly\textsuperscript{97} seems preferable, since there is little justification for penalizing the injured party to the extent of any market change during such time as he may be endeavoring to persuade the breacher to retract his repudiation. If the trial is subsequent to the time set

\textsuperscript{91.} 2 \textsc{Williston, Sales} § 588 (2d ed. 1924).
\textsuperscript{92.} URSA §§ 99, 114, 126.
\textsuperscript{93.} URSA § 98.
\textsuperscript{95.} URSA § 100. Note the effect of market fluctuation upon parties' insistence upon their anticipatory repudiations. Western Grocer Co. \textit{v.} New York Overseas Co., 28 F.2d 518 (N.D.Cal. 1928); Louisville Packing Co. \textit{v.} Crain, 141 Ky. 379, 132 S.W. 575 (1910); Canda \textit{v.} Wick, 100 N.Y. 127, 2 N.E. 381 (1885).
\textsuperscript{96.} URSA § 126(1).
\textsuperscript{97.} Segall \textit{v.} Finlay, 245 N.Y. 61, 156 N.E. 97 (1927).
for performance, breach by the seller entitles the buyer to damages as of the
time the buyer knew the goods would not be delivered,\textsuperscript{98} while breach by
the buyer entitles the seller to damages measured as of the time of tender.\textsuperscript{99}
No compelling reason for such a distinction is readily apparent.

**Incidental and Consequential Damages**

Any remedy which the URSA provides for the buyer includes the award
of incidental damages,\textsuperscript{100} some of which are specified in the Act,\textsuperscript{101} but which
are intended generally to include any commercially reasonable charges and
expenses flowing from the breach.\textsuperscript{102}

Less simple than these incidental damages are the consequential dam-
ages which the Act provides shall be a part of the buyer's recovery.\textsuperscript{103}
American business life is so highly complex and so tightly integrated that the
failure of a buyer to receive goods exactly as he expected may set off a chain
reaction of harmful consequences. The judicial problem is one of finding a
satisfactory compromise between the desire to extend the breaching sell-
er's liability to cover as many as possible of the elements of damage caused
by his action, and the desire to protect the seller, so far as is feasible,
from an assessment of damage out of all proportion to the price of the goods
sold and the profit capable of being made.\textsuperscript{104} The scope of the conflict of
these desires may be limited by the "rule of certainty," which imposes
liability only for elements of loss attributable to the breach which are cap-
able of proof with reasonable certainty,\textsuperscript{105} and by the degree of willfullness

\begin{itemize}
\item \textsuperscript{98} URSA § 114(1). See McCurdy, \textit{Uniformity and a Proposed Federal Sales Act}, 26 VA. L. REV. 572, 630 (1940).
\item \textsuperscript{99} URSA § 109.
\item \textsuperscript{100} URSA §§ 112–114.
\item \textsuperscript{101} URSA § 116(1). "Incidental damages resulting from the seller's breach include
expenses reasonably incurred in inspection, receipt, transportation and care and custody of
goods rightfully rejected, any commercially reasonable charges, expenses or commissions in
connection with effecting cover and any damages from delay or otherwise resulting from the
breach."
\item \textsuperscript{102} Ibid.
\item \textsuperscript{103} URSA § 116(2).
\item \textsuperscript{104} See Squire v. Western Union Tel. Co., 98 Mass. 232, 237 (1867). For varying
treatments of a similar balancing of interests in the field of torts compare \textit{In re Poles and
N.Y. 339, 162 N.E. 99 (1928).
\item \textsuperscript{105} RESTATE\textit{MENT, CONTRACTS} § 331(1) (1932); McCormick, \textit{The Standard of Cer-
tainty in the Measurement of Damages}, 43 YALE L. J. 1109 (1934). This rule does not always
require proof with mathematical exactitude: Comments to URSA § 116; see Melson v.
Woodruff, 23 So.2d 364, 366 (La. App. 1945). The most important application of the rule of
certainty is in the award of lost profits, which will be denied if they are too uncertain or
speculative: Thrift Wholesale, Inc. v. Malkin-Illion Corp., 50 F. Supp. 998 (E.D.Pa. 1943);
the best analysis of the speculative profits cases is Note, 46 HARV. L. REV. 696 (1933). The
author says that all cases involving speculative profits can be divided into three groups:
of the breach, a deliberate breach tending to induce courts to allow harsher damages.\textsuperscript{106}

One well-known compromise for the measurement of consequential damages is the "tacit agreement test," which purports to limit liability to the consequences for which the seller may be assumed to have guaranteed indemnity when he entered into the contract.\textsuperscript{107} But the URSA rejects this standard, and chooses instead the "foreseeability rule" of \textit{Hadley v. Baxendale}.\textsuperscript{108} That rule, undoubtedly the most widely used, holds the seller liable for consequences he was able to foresee, or might reasonably have foreseen, at the time the contract was made.\textsuperscript{109} But subtracted from the array of such

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\item definitely established profit, amount uncertain;
\item opportunity to earn a profit, corresponding risk of loss;
\item opportunity to earn a profit, no loss possible, profit may be zero.
\end{enumerate}

It is clear that no damages can be awarded in cases in group (2). Courts today often deny recovery in cases belonging in (1) because the case looks like a (2) case, e.g., breach of contract delays establishment of a new business, but when goods are finally obtained and business established, it is seen to be clearly profitable. American courts do not allow a recovery in case (3), although there is no compelling reason why profit should not be recoverable.

106. It is commonly said that the motive for a breach of contract is immaterial, Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 547 (1903), and courts rarely will pay explicit heed to the degree of wilfulness of a breach, \textit{Developments in the Law—Damages, 1935-1947}, 61 HARV. L. REV. 113, 118 (1947), but it is possible to give weight to the motive for the breach: by relaxing requirements of certainty of proof, Overstreet v. Merritt, 186 Cal. 494, 200 Pac. 11 (1921); by inferring that elements of consequential damage were within the contemplation of the contract-breaker, Tanner v. Eagle Bag Corp., 145 La. 502, 82 So. 682 (1919), Mihoveich v. Mid-West Mutual Auto Ins. Co., 261 Mich. 495, 246 N.W. 202 (1933) (an ingenious demonstration of judicial rationalization in order to punish a deliberate contract-breaker); by refusing restitution to a deliberate contract-breaker who had partly performed, \textit{Reatement, Contracts} \textsection{} 357(1)(a) (1932); or by applying an entirely different measure of damages, Hanson & Parker Ltd. v. Wittenberg, 205 Mass. 319, 91 N.E. 383 (1910), Foss v. Heineman, 144 Wis. 146, 128 N.W. 881 (1910). A leading authority concludes: "Our rules should sanction, as our actual practice probably does, the award of consequential damages against one who deliberately and wantonly breaks faith, regardless of the foreseeability of the loss when the contract was made." McCormick, \textit{The Contemplation Rule as a Limitation upon Damages for Breach of Contract}, 19 MINN. L. REV. 497, 517-8 (1935); and see Bauer, \textit{The Degree of Moral Fault as Affecting Liability}, 81 U. of PA. L. REV. 586, 592 (1933); LA. REV. CIV. CODE, Art. 1934 (Dart. 1932); Note, 61 HARV. L. REV. 1022, 1026 (1948).


108. 9 Ex. 341 (1854). Comments to URSA \textsection{} 116.

109. \textit{Restatement, Contracts} \textsection{} 330 (1932); URSA \textsection{} 116(2)(a); Krauss v. Greenberg, 137 F.2d 569 (3rd. Cir. 1943), \textit{cert. denied}, 320 U.S. 791 (1943); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903) (milliner who was making trousseau held to have reason to contemplate "deprivation of intellectual enjoyment and . . . mental suffering" which bride would suffer by nondelivery); Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N.Y. 33, 173 N.E. 913 (1930); Marcus & Co. v. K.L.G. Baking Co., 122 N.J.L. 202, 3 A.2d 627 (1939) (seller knew his buyer had a resale contract for goods, but court held he was not
elements of damage are all damages which could reasonably have been prevented by cover or otherwise. In most cases this subtraction will greatly limit consequential damages, since the most common item of such damage is lost profit and other injury resulting from the buyer's inability to perform contracts with his customers. Where cover is readily available the buyer will suffer such loss less often, and in smaller amount.

**Remedies of the URSA Evaluated**

It may now be possible to evaluate how satisfactory the remedies of the Uniform Revised Sales Act will be in providing full compensation for an injured party, and in deterring breach of contract motivated by price fluctuation.

The greatest barrier to an injured party's obtaining full satisfaction—his own reluctance to bring suit—would seem to be reduced by the new Act, at least so far as the remedies which it offers are more certain and less expensive than those hitherto prevailing. But to the extent that the remedies of resale and cover are only codifications of existing practice, they will offer no important new inducement to filing suit.

The obstacle of burden of proof is markedly lessened, at least in proving the amount of damage, by the new Act. And it is less likely that a court or jury will fail to assess damages correctly. On the other hand, the URSA does nothing to diminish the possibility that ingenious counsel for the breaching party will find some technical defect in the transaction or in the innocent party's performance sufficient for the contract-breaker to avoid legal liability completely.

The cover and resale provisions, while they will lighten the task of proving damages, will not usually change the amount of recoverable damages from the unsatisfactory awards permitted by the Uniform Sales Act. And the measure of damages for nonacceptance of the goods has been seen to be unsatisfactory.

The remedies for the buyer, other than cover, seem most inadequate. Where cover is not available, the seller who chooses to dispose of his supply at the high price he is able to command, instead of selling according to con-

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111. See pp. 1368, 1378 supra.
112. Of the cases cited in note 13 supra where the trial court clearly failed to assess damages correctly, the Brunswick-Balke-Collender result will probably be avoided by resale, and the inequity in the Crown Products Co. case averted by cover. But the new Act seems to do little to avoid the possibility of error in assessing lost profits which caused difficulty in Gilman v. Broad Brook Co. and the Holden case.
113. See pp. 1367, 1377–8 supra.
tract, will usually complete the transaction before the buyer has learned of it, thus putting himself beyond the reach of a specific performance decree. And damages for nondelivery have been shown to be of little help in such a situation.\textsuperscript{116}

It is possible that the new Act may tend to encourage adjustment and compromise of claims, and to discourage litigation.\textsuperscript{116} Since it is obvious that an out-of-court settlement would rarely be for the full amount of damage, such a tendency would only increase the likelihood that businessmen, already loath to prosecute an action for breach of contract, would content themselves with less than the value of the promised performance. Certainly it is desirable to discourage litigation, but a sounder method of doing so is to make the penalties for breach of contract so readily obtainable and so onerous as to discourage breach.

Finally, the new Act does nothing to combat the serious problem of the high cost of litigation, an expense which prevents even the plaintiff who has been awarded the fullest damages from being in as good a position as he would have been had the contract been performed. Sharp criticism from many commentators of the strong American tradition against the recovery of attorney's fees and actual costs of litigation\textsuperscript{117} has caused a growing tendency toward permitting the recovery of such expenses in a limited class of cases.\textsuperscript{118} While patently there are strong arguments against recovery of

\begin{itemize}
\item \textsuperscript{115} See \textit{Supra} pp. 1380–1.
\item \textsuperscript{116} The Act certainly eases the way for the compromiser: "Any claim or right of action for a breach which has occurred can be discharged in whole or in part without consideration by a written waiver or renunciation signed by the aggrieved party." URSA § 123. And the desire of the principal draftsman to encourage settlement of grievances is wellknown. See, e.g., his criticism of the old Act: "[I]n a falling market, the type case in which the buyer backs out, the rules of the Act press the seller away from adjustment and into a lawsuit. He is not safe in waiting to negotiate." Llewellyn, \textit{Through Title to Contract and a Bit Beyond}, 15 N. Y. U. L. Q. Rev. 159, 180 (1938) (italics by the original author). For the reasons given in the text, it is difficult to reconcile a desire for compromise with the express statement of the Act that: "The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed." URSA § 102(1).
\item \textsuperscript{117} See First Report of the Judicial Council of Massachusetts, note 14 supra, which urged the adoption of some system of substantial costs as the most effective way of reducing litigation and of doing better justice. McCormick says: "Upon balancing the opposing considerations, it seems probable that the English practice, which allows reimbursement with fair completeness of counsel fees and actual expenses in favor of the successful party, is more just and equitable than the American rule limiting recovery to the inadequate arbitrary statutory scale of costs, and has a greater tendency to lessen the flow of litigation." \textit{McCORMICK, DAMAGES} § 71 (1935). See also Comment, 49 YALE L. J. 699 (1940); Note, 21 VA. L. Rev. 920 (1935).
\item \textsuperscript{118} The most encouraging tendency is that of a Nebraska statute which authorizes the award of reasonable attorney's fees to a successful plaintiff in most contract cases where the suit is for $300 or less. \textit{NEB. REV. STAT.} § 25–1801 (1943). The federal courts may assess counsel fees as part of the taxable costs under extraordinary circumstances, usually involving groundless or vexatious litigation. \textit{Sprague v. Ticonic National Bank}, 307 U.S. 161
such costs, the draftsmen of the new Act might have been well advised to consider seriously the possibility that only by such recovery will plaintiff ever be fully compensated for the damage caused by a breach.

Many of the weaknesses of the remedial provisions of the URSA can be avoided by a contract carefully drafted to guard against them. Usually, however, in the absence of skilled counsel the need for such clauses is recognized only after breach; and moreover the bargaining power necessary to insist on their inclusion is present only in the institutionalized situations where a breach to take advantage of a market change is unlikely.

CONCLUSION

The Uniform Revised Sales Act places much emphasis on harmonizing the law with commercial practice; and in many respects the remedial provisions of the Act will, by their flexibility and their certainty, be a boon to the businessman for whom the Act was written. Yet by its failure to supply sanctions sufficient to ensure performance of contractual obligations regardless of the vicissitudes of a fluctuating market, the URSA has left un-

(1939). E.g., Cleveland v. Second Nat. Bank & Trust Co., 149 F.2d 466 (6th Cir. 1945), cert. denied 326 U.S. 775 (1945); In re Swartz, 130 F.2d 229 (7th Cir. 1942); see Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946). But no attorney’s fees may be granted in a diversity action if the state courts deny such allowance. Danville Building Ass’n v. Gates, 66 F. Supp. 706 (E.D.Ill. 1946).

119. McCormick, Counsel Fees and Other Expenses of Litigation as An Element of Damages, 15 MINN. L. REV. 619 (1931). The arguments on both sides of the controversy are marshalled by the commentators cited at note 117 supra. If, as most students seem to think, allowing the recovery of attorney’s fees would reduce litigation, it is interesting to query whether this would be because potential plaintiffs are encouraged to settle out of court, or because it would act as a punitive sanction deterring breach of contract.


121. A glance at the names of the plaintiffs in the cases collected note 120 supra is an indication that only the contract of adhesion of the party with great bargaining power is likely to contain such clauses. See Isaacs, The Industrial Purchaser and the Sales Act, 34 COL. L. REV. 262 (1934). Note particularly id at 270, describing the price guaranty clause used by many large purchasers which should serve to prevent breach of the type discussed herein, even if their institutional character were not a sufficient deterrent. See also Kessler, Contracts of Adhesion, 43 COL. L. REV. (1943).

122. URSA §§ 21, 22, 26 and passim.
solved an important problem common to many merchants. And by failing to put the innocent party in as good a position as he would have been in had the contract been performed, the Act has left open the discrepancy between the avowed ideal in measurement of damages and the compensation for breach actually available.

It is not possible to suggest a one-sentence rule of damages which would cure these twin defects. It is very probable that to work complete justice a multitude of rules would be needed, to be employed according to the circumstances of the particular case. The inclusion or exclusion of overhead in computing lost profits involves different considerations when the innocent party is a dealer than when he is a manufacturer; the need for recovery of attorney's fees is almost certainly greater for the consumer-purchaser than for the industrial purchaser. It is quite possible that an action at law may never be a completely satisfactory remedy; if that should be the case, it might be desirable for the Act to place official emphasis on arbitration of disputes by a commercial tribunal.123

An adequate system of remedies for breach of a contract of sale must await more complete information about business practices than can be garnered from judicial opinions. A large-scale study of commercial procedures seems indicated to gather authentic information bearing on realistic mercantile problems, and to provide accurate data with which to determine how strong a sanction is needed to ensure performance of performable contracts, to guard against the compromise of claims to the detriment of innocent parties, and to remove the other barriers to full compensation for the value of the promised performance.

The skilled and devoted draftsmen of the Uniform Revised Sales Act, with their wide commercial and legal knowledge, and their sizable funds available for research, had a unique opportunity to make such a study and to incorporate their findings into law. It is to be regretted that they chose instead to produce a vehicle which, while cheaper, speedier, and better streamlined than the 1906 model, is little more likely to meet performance specifications.