THE CONCEPT OF MARKET IN THE SALE OF GOODS

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I. *General Rule of Damages*

It is an old and cardinal rule in the law of contract that he who breaks his contract must put the innocent party into the position in which he would have been had the contract been performed. In 1911 in the House of Lords[1] Lord Atkinson quoted the Irish authority of *Irvine* v. *Midland Railway Co.*[2] as support for this rule, and noted that the *Irvine* case had been approved by Palles C.B. in *Hamilton* v. *Magill.*[3] In the next year Lord Haldane stated the rule in classic terms which ever since have been quoted.[4]

Such an approach, of course, raises the two equally classic questions. For what kind of damage is the innocent party to be able to claim compensation? Secondly, and when the first question is answered, how is the actual monetary value of those items, for which the contract breaker is responsible, to be assessed? The leading authority in England upon the first question is the case of *Hadley* v. *Baxendale*[5] when the Court of Exchequer came to

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[1] *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307. See also *Robinson* v. *Harman* (1848), 1 Exch. 850, at p. 855, and Hart, Damages in Contract at Common Law (1931), 47 L.Q. Rev. 90, at p. 107 (note 91).

[2] (1880), 6 L.R. Ir. 63.

[3] (1883), 12 L.R. Ir. 202.

[4] *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673.

[5] (1854), 9 Exch. 341. On the point of damages, Roman Law is at the foundation of both the civil and common law. D. 46.8. (*Ratam rem habere*) contains the basis of the rule, which later found its way into *Hadley* v. *Baxendale.* The Roman attitude was simply expressed by Ulpian — in *id quod interest agitur* (19.1.1.pr.), and the adoption of current price as the extent of damages appears from a text of Pomponius (19.1.3.3., 19.1.3.4.). See also 19.1.11.9. — *quanti interest.* These principles were enlarged by Pothier (Obligations, numeros 159 and 160), and Pothier's work, together with the similar law of Scotland, was familiar to the English courts before 1854. Pothier was also the source of articles 1149-1155 of the Code Napoleon, and the Louisiana Civil Code of 1870 has almost identical features. The Louisiana courts now adopt the level of the market price on the day, and at the place delivery is due. See further Went, Mea-

the conclusion that the consequences of the defendant's breach must be limited to those consequences only which the parties could have foreseen at the time of the making of the contract. This was to be the extent of the defendant's liability. Unlike the position in tort, contractual parties enter voluntarily into cross-obligations, and a division of risks is no doubt best achieved by the principle of reasonableness and foresight. The decision sensibly reduced the extent of liability to a question of fact in the instant case, and there the matter has remained to this day. Between the World Wars controversies arose as to whether remoteness of damage was similar in contract and tort, but these were largely academic upheavals, despite the contention which followed in the wake of *Re Polemis and Furness Withy & Co.*[6]

The second question concerns the measure of damages, and here the age-long principle has been that the innocent party is entitled to a *restitutio in integrum* on those items of damages which have been found to be the contract breaker's responsibility. This approach makes clearer Maugham L.J.'s objection in *The Arpad*[7] when he said that the innocent party was not entitled to damages on the footing of a *restitutio in integrum* as far as money would put him in that position. The case concerned a defendant's liability for losses sustained by the plaintiff under previously concluded sub-contracts. The learned Lord Justice was merely finding that the proximate damage on a reasonable finding of fact did not include the value of "accidental" sub-contracts concluded some time before the breach of the main contract. The Latin maxim is somewhat misleading, however, because it suggests that the innocent party is entitled to a restoration of his position as it was at the time of contracting. Of course, this is not so. As Lord Atkinson said, the innocent party is entitled to performance or to damages which provide him with the value of performance.

II. *The Market Test: Its Object and Statutory Adoption*

How then does one measure value? In the case of the sale of goods the disappointed seller or buyer is each able to go into the market place and there dispose of or acquire. The measure of loss to the plaintiff then becomes the difference between the contract price and the price obtaining in the market at the time of the failure to

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sure of damages when a vendor breaches the contract of sale by failure to deliver (1956-57), 31 Tulane L.R. 537.

[6] [1921] 3 K.B. 560.

[7] [1934] P. 189, at p. 228.

deliver or accept.[8] From the beginning of the nineteenth century the market valuation was a practice of the common law. In *Borries* v. *Hutchinson*[9] Erle C.J. spoke of this measure of loss as a "general rule", and in 1874 in *Elbinger Action-Gesellchaft* v. *Armstrong* Blackburn J. considered the measure of damages rule, that is, the difference between the contract and the market prices, to be "quite settled".[10] The object of the market valuation appears clearly from the words of Lord Atkinson in *Wertheim* v. *Chicoutimi*,[11]

> The market value is taken because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is presumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in the market at that price.

For the reason that this particular measure was already part of the common law it was included by Sir M. D. Chalmers in his draft of the codifying Sale of Goods Bill in 1888 and became statutory in 1893 when the Sale of Goods Act was passed. It appears in two sections of that Act, namely, section 50(3), which is concerned with the damages resulting from the buyer's non-acceptance, and section 51(3), which duplicates the language of section 50(3) in dealing with a seller's non-delivery. The language of the Act runs as follows:—

> S. 50(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
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> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
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> (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by 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.

Such was the skill of Chalmers that subsequently the wording of this Act was adopted throughout the majority of the provinces of Canada and South Africa, the states of Australia, and in New Zealand. Variations of wording do occur, and in the case of sections reproducing the substance of sections 50(3) and 51(3) of the

[8] In most cases this will be the time of breach. For the purposes of this article coincidence will be presumed.
[9] 18 C.B. (N.S.) 445, at p. 460.
[10] (1874), L.R. 9 Q.B. 473, at p. 476.
[11] *Supra*, footnote 1, at p. 307.

English and Scottish Act the change or addition of language is typified by the wording of the U.S. Uniform Sales Act.[12] The first two sub-sections of section 64 of the latter Act exactly reproduce the language of the English and Scottish Act, but sub-section three is slightly different in wording.

> S. 64(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.[13]

From this it appears that the English and Scottish Act makes no explicit allowance for "special circumstances" creating greater "proximate damage". Since the adoption of the market value is taken as an accurate assessment of the plaintiff's loss, the query must arise as to when English and Scottish courts are prepared to find that the circumstances of a case require the application of the broader sub-section two. The answer is that, despite the absence of the additional American words, these courts consider sections 50(3) and 51(3) to be merely *prima facie* in the sense that the sub-sections will not be allowed to work injustice. In fact, therefore, the difference of statutory wording has not produced any immediate difference of sub-sectional scope.

The significance of the market test is immense. Maugham L.J. pointed out with some force in *The Arpad* that the innocent party is only entitled to the value of the goods at the place to which they are consigned. "And it is a rule closely analogous", he went on, ". . . that actual loss of profits and damages payable to sub-purchasers or other sub-contractors are not ordinary consequences of delay or failure to deliver . . . . It is manifest, then, that, if there is a market, the plaintiff will not be awarded damages on the footing of the actual loss *to him* occasioned by the defendant's default, and the Court disregards the sub-contract, which

[12] See de Zulueta, The Roman Law of Sale (1945), p. 195, for the states, which have adopted the Act, and subsequent modifications of the Act.

[13] Section 67 of the Uniform Sales Act reproduces the substance of section 51 of the English and Scottish Act. The sole difference is that sub-section one of the U.S. Act requires the property in the goods not to have passed to the buyer. See also the Uniform Commercial Code, sections 2-713, 2-715. Section 2-713, "Buyer's Damages for Non-Delivery": "(1) The measure of damages for non-delivery is the difference between the price current at the time the buyer learned of the breach and the contract price together with the incidental and consequential damages as provided in this Article [2-715], but less any expense saved in consequence of the seller's breach."

may have been a sale at a price substantially higher or lower than the market price at the date when the goods should have been delivered."[14] Clearly in all jurisdictions the courts have been variously hostile towards the plea that they should find sub-contracts as part of the loss "directly and naturally resulting" but such sub-contracts may be put in evidence, in the absence of a market price, in order to show the real value of the goods.[15]

The significance of the market is enhanced by the additional fact that, though the distinction may be theoretically clear, it is often difficult in practice to distinguish between remoteness of damage and measure of damages. The distinction has not been assisted by the use of such vague phrases as "natural" and "proximate", and the confusion of "remote damage" with "damages". Throughout the common-law world it is possible to find situations where the plaintiff's task in establishing greater loss has been made more difficult by the otherwise clear existence of a market for the goods.

III. "*Market*": *Its Meaning*

In the light of its importance, therefore, it is somewhat surprising to find that there is very little authority on the meaning of "market". This may be because most common-law jurisdictions would regard the question as one of fact, and, indeed, in New Zealand Callan J. deliberately avoided a definition, when faced with the disagreement of their Lordships in *Marshall & Co.* v. *Nicholl & Son*,[16] on the grounds that in any case this was such a question.[17] It may also be because the courts have tended to regard the meaning of market as one dependent upon the circumstances of the case. A contract of sale with a door-to-door salesman raises the issue of the price of similar goods in the open market in the near-

[14] *Supra*, footnote 7, at p. 222. Choice of market is also vital to the plaintiff. *E.g.*, the second-hand market value of an article is £750. If A contracts to purchase an article from B at the Government controlled price for new such articles of £500, upon B's failure to deliver A's computable loss may well be nominal. If B neither knew nor ought to have known of the intended resale, and there are alternative vendors, the court is only entitled to consider the market value of a new article, not the market value of the article as it would have once in A's hands. Yet does this result yield to A "the value of performance"?

[15] See Brett M.R. in *Grebert-Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85, at p. 89. A recent example of this rule occurred when goods supplied to Hongkong purchasers, themselves bound by a contract of resale, arrived late, and at a time when the market had disappeared due to a Chinese Communist embargo: *Kwei Tek Chao* v. *British Traders*, [1954] 2 Q.B. 459. See also *Wold* v. *Disler*, [1918] C.P.D. 305 for a South African view.

[16] [1919] S.C. 244 (Ct. of Sess.). Affirmed [1919] S.C. 129 (H.L.).

[17] *Dominion Motors, Ltd.* v. *Grieves* [1936] N.Z.L.R. 766; "available market".

est town. On the other hand goods sold for export, and finding their way into the chain of world-wide middlemen sellers, raise a quite different issue. "A market for this purpose means more than a particular place. It means also a particular level of trade", as Devlin J. put it in just such a case in England.[18]

It is these two facts, which have made doubly difficult the uniform interpretation of the words "available market", as they appear in the English and Scottish Sale of Goods Act, 1893, together with the counterpart Acts throughout the Dominions, and the U.S. Uniform Sales Act. The phrase is not defined in any of the Acts, and the courts in all jurisdictions appear to be torn between the desire to define a statutory term, and yet at the same time to leave the matter as open, and, therefore, as flexible as possible. "We assume that the words 'available market' in section 53(3) (Uniform Sales Act, c. 106) mean an existing market that is available to the plaintiff."[19] A fairly typical reaction. Those definitions or descriptions, which have gone further, have referred variously to a number of different aspects of market. Difficulty has been experienced over the number of potential buyers or sellers that are needed to constitute a market, and similar difficulty has arisen over the extent to which those buyers and sellers must have a connecting link, whether solely through a common market place or through a national or even international trade. Further, linked with market is the notion of "market price", and again market price or value has been described as a question of fact.[20] The Acts all speak of "the market or current price", and none of the Acts define this term, though there appears to have been no contention in the courts against at least regarding the words "market or current" as identical in meaning. Some courts appear to have accepted a current price without evidence of existing market conditions, and undoubtedly the notion of international market has been encouraged in its development by the discovery of current international prices. This development followed in turn the recognition of national levels of trade.

Until recently in England, however, no court in any jurisdiction has gone so far as to suggest that within the meaning of the Acts the existence, and, therefore, the definition of an "available

[18] *Heskell* v. *Continental Express & Another*, [1950] 1 All E.R. 1033, at p. 1050.

[19] *Charles Street Garage Co.* v. *Kaplan*, 45 N.E. 2d 928, at p. 929 per Cox J. (Mass.) Also adopted by Sturtevant J. in the earlier case, *Breding* v. *Champlain Marine & Realty Co.*, 172 A. 625, at p. 627 (Vt.).

[20] *Sterling-Midland Coal Co.* v. *Great Lakes Coal & Coke Co.* (1932), 266 Ill. App. 46.

market" must depend upon the character of an existing current price. The two terms have always been kept distinct, and it is the object of this article to argue that the recent English approach is unnecessary within the Acts, confusing to the meaning of the term "available market", and productive of restriction in the application of market valuation within the respective sub-sections three.

IV. "*Available Market*": *The Traditional Approach*

The recent novel interpretation in England arose from the now familiar trade feature of fixed wholesale and/or retail prices. In *Thompson* v. *Robinson*[21] Upjohn J. was faced with these facts. A car dealer in Yorkshire, acting as area agent for Standard Vanguard cars, secured his cars from the main distributors at a fixed wholesale price. He then sold them to the public at higher retail prices fixed by the manufacturers, and his own margin of profit was the difference on each car sale. The defendant agreed to purchase a new Standard Vanguard, the dealer agreeing to accept the purchaser's own car in part exchange. After the contract was drawn up, the purchaser was offered better terms elsewhere on the value of his own car, and forthwith refused to accept the dealer's car. The main distributors agreed to the rescission of their contract with the dealer concerning the car in question, no damages being sought, but the dealer now brought an action against the defaulting purchaser for the loss of profit on the sale.

His Lordship was pressed by counsel for the defendant, first, to take a wider view of the physical bounds of "available market" than James L.J. had taken in *Dunkirk Colliery Co.* v. *Lever*,[22] and, secondly, in the light of the fact that the distributors had since resold the car, to find that there was an "available market" whose price was the same as the contract price. Upjohn J. found that he was bound by the market place conception of "available market", as defined by James L.J., and that, therefore, no market existed in this case. Further, even had he been free to accept the wider view of market, on the facts of the case he considered that a precisely similar result would have been reached. Presumably because over that entire area of Yorkshire the supply of Standard Vanguard cars exceeded the demand. Finally, he also noted that, even once again had he been able to accept that wider meaning, sub-section three of section 50 was not to be allowed to work injustice. For

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[21] [1955] 1 Ch. 177.

[22] (1878), 9 Ch. D. 20, at p. 24.

these reasons he applied sub-section two and awarded the marginal profit as damages.

There was nothing in Upjohn J.'s judgment to suggest that the existence of fixed prices affected the meaning of "available market". Indeed he defined the term[23] purely in the language of supply and demand and would have adopted this definition had he not been bound by James L.J.'s words. This attitude towards the meaning of the term was now familiar after the previous American authority on the same lines.[24]

V. *The New Approach: An Evaluation*

Recently, however, in the Court of Appeal Jenkins L.J. advanced the argument that "available market" and "market or current price" were inter-related, and that a fixed market price destroyed the notion of an "available market" which term suggested a freely fluctuating price. The facts of the case, *Charter* v. *Sullivan*,[25] were identical with those of *Thompson* v. *Robinson*, except that the plaintiff dealer in the present case had himself resold the car, a Hillman Minx, within ten days to another customer, and the Court of Appeal found as a fact that the dealer could sell all the Hillman Minx cars he could obtain from the distributors. All three members of the court[26] were of the opinion that, since demand exceeded supply, resale of the car had sufficiently recouped the plaintiff's losses. But the court was divided in its interpretation of "available market". Hodson L.J. was silent upon the point, Sellers L.J.[27] was of the opinion that, "since its trading has to serve as a factor in measuring the damages, it must at least be a market in which the seller could, if he wished, sell the goods left on his hands", while Jenkins L.J.[28] doubted whether there could be such a market unless the market or current price was fixed by reference to supply and demand. Sellers L.J. held that there was no "available market" on the facts, and therefore applied sub-section two of section 50, but added that, even had there been a market, the

[23] [1955] 1 Ch. at p. 177, and p. 187. "Had the matter been *res integra* I think that I should have found that an 'available market' means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it so that if a purchaser defaulted, the goods in question could readily be disposed of." Sellers J. considered this definition "very acceptable" in *A.B.D. (Metals & Waste) Ltd.* v. *Anglo-Chemical & Ore Co. Ltd.* (1955), 2 Lloyd's Reports 456, at p. 466.

[24] To be discussed later.

[25] [1957] 2 Q.B. 117

[26] Jenkins, Hodson, Sellers, LL.J.

[27] *Ibid.*, at p. 133.

[28] *Ibid.*, at p. 128.

question would remain as to whether the resale mitigated the plaintiff's loss. Jenkins L.J. also found that, whatever his findings on sub-section three, the *prima facie* rule gave way to the application of sub-section two. On this basis the respondent dealer lost the appeal.

Jenkins L.J.'s argument appears clearly from two passages:[29]

> If the state of the trade were such that the plaintiff could sell at the fixed price all the cars he could get, so that the defendant's default did not result in the plaintiff effecting one sale less than he would otherwise have effected, it may well be that the plaintiff could not make out his claim to anything more than nominal damages. I am, however, inclined to think that this would not be on account of the necessary equality of the contract price and the fixed retail price at which alone the car could be sold, taken for the present purpose as the market or current price within the meaning of section 50(3), but because on an application of the general principle laid down by section 50(2) the plaintiff would be found to have suffered no damage.
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> The language of section 50(3) seems to me to postulate that in the cases to which it applies there will, or may, be a difference between the contract price and the market or current price, which cannot be so where the goods can only be sold at a fixed retail price.

Though little objection could be taken to the result reached in this case, if Jenkins L.J.'s view is to be adopted, it is difficult to see what commensurate gain there is for the introduction of market pricing into the definition of market.[30] Section 50(3) and section 51(3) are in any event only rules of convenience, designed to assist the court in the otherwise difficult monetary assessment of circumstances flowing "directly and naturally" from the breach, and the plaintiff is always free to show that he suffered loss over and above that reflected in a market level compensation. To deprive the judge of this assistance when the market price is fixed appears to imply that with a freely fluctuating price loss of profit may be recovered in the price current at the time of the breach, that price itself reflecting the quantum of demand in the market. Such recovery, however, does not take place. Only in the event that the market price is below the first contract price will the injured party secure substantial damages, but he may still have lost

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[29] *Ibid.*, at pp. 125 and 128 respectively. *Obiter dicta* on the argument of the inter-relation of "available market" and "market or current price" since at p. 125 Jenkins L.J. had already found that, even should there be such a market and a fixed retail price constitute a "market or current price", loss of profit was a case for section 50(2).

[30] After *Thompson* v. *Robinson* and *Charter* v. *Sullivan* it is clear that English authority is not following those American cases which argue that all loss of profit is recouped by the fact of resale at the same price.

profit on this sale.[31] The added fact of resale makes the sole difference that, if the resale price is above the market price, substantial damages will be proportionately reduced. Should the supply exceed the demand, the vendor will find himself to have lost one sale with the profit (or part of it) which he would have made. Resale in fact will only recoup the vendor for loss of his first customer when the resale price makes a similar profit plus the profit lost on the first sale, but this is achieved by the vendor's own initiative and not section 50(3).[32] Loss of profit then must be pleaded under section 50(2), even with a freely fluctuating price.

If, however, the injured party fails to recover for the loss of a customer under sub-section two, he must rest content with the market level compensation of sub-section three, involving substantial or mere nominal damages. When the market price is fixed by the trade, the only difference from the situation above is that market level compensation must automatically result in nominal damages. Loss of a customer is a question for sub-section two, and, if the vendor fails to show that supply exceeded demand, he, too, must rest content with his nominal damages under sub-section three.[33]

VI. *Price Fixing: Its Effects upon the Objects of the Sale of Goods Act, 1893*

Difficulty appears to have arisen in *Charter* v. *Sullivan* over what market level compensation is designed to provide. As one author has said in relation to the law of damages, "the endeavour of the law is to compensate the injured party, as far as it is politic, for the losses caused, and the benefits prevented by the breach".[34] In 1893 Chalmers adopted the market level compensation for both injured vendor and purchaser. The sections, 50(3) and 51(3), are similarly worded, and do not allow—even in a free market—for the fact that an innocent purchaser is fully compensated by the alternative goods, once procured, while an innocent vendor of standard articles will always, despite resale, have lost one sale and

[31] *E.g.*, A buys 100 items at 20/- each. He contracts to sell one item to B at 27/6. The market price is 22/6. On B's breach A recovers 5/- damages. Loss of profit on this sale is 2/6. Should the market price be at a level with or above the contract price, damages will be nominal.

[32] Even then it is possible for the injured vendor to reflect that he would have made the second lucrative sale in any case.

[33] Whatever the state of the market at the time of the failure to accept, loss of a customer will shorten the vendor's waiting list, and thereby lessen the sale asset of his goodwill. This must be a matter for section 50(2).

[34] Hart, *op. cit.*, *supra*, footnote 1, at p. 108.

consequent profit. However, it was surely "politic" in 1893 to strike a balance in the case of the injured vendor. To provide in the *prima facie* rule for the situation where, though purchasers could be obtained, supply exceeded demand, and loss of a customer constituted a material loss, would have argued in favour of an evaluation giving entire loss of profit, regardless of market level.[35] From this point of view the other aspect is ignored. The vendor would now both have his cake and eat it.

Breach by the purchaser would often be in the vendor's interest. In order to avoid this embarrassment the draftsman adopted market level compensation, which looks to the sale of the item in dispute to the exclusion of the loss of a customer, and the latter loss becomes a matter for section 50(2). In this way section 50(3) was never designed to deal with loss arising from one breached sale and one successful sale of the same item. Both 50(3) and 51(3) have the same purpose; 50(3) to ensure that the disappointed vendor shall yet have for his item a price at least equivalent to that of the breached sale, and 51(3) that the disappointed purchaser shall have an equivalent item at a price not higher than that of the breached sale.

In the case of trade protection fixing of the retail price, the market is in effect rigged. Manufacturers ensure that their commodities shall be available to the consumer at one price only. The reason for section 50(3) being excluded from operation in these cases is not because there is not an "available market" or "a market or current price". It is excluded because the work of the subsection is performed before the case comes into court, that is, there being procurable alternative buyers, a resale or possible resale of the item can only be at an idemnifying price. This means that, if demand exceeds supply, the sub-section need merely recognise breach by giving nominal damages, and, if supply exceeds demand so that a customer is lost, the court may award substantial damages under sub-section two.

Fixing of the trade retail price immediately renders irrelevant the issues of "available market" and "market or current price". In the light of his description of "market",[36] this in fact appears to have been the line of reasoning which Sellers L.J. adopted in *Charter* v. *Sullivan*. The approach argued above also allows the scope of the term, "available market", or even "market" itself, to retain the traditional implication (sometimes definition) of the

[35] See *supra*, footnote 31. On this example, 7/6.
[36] *Supra*, footnote 25, at pp. 117, 133, 134.

procurability of alternative buyers or sellers. It seems with respect that the argument of Jenkins L.J., making the insufficiency of sub-section three a question of law as opposed to a question of evidence, introduces a complexity of definition merely for those cases where wholesale and retail prices are fixed.[37]

Jenkins L.J., having described Upjohn J.'s definition[38] in *Thompson* v. *Robinson* as not "entirely satisfactory", contented himself with the "negative proposition"[39] that he doubted whether there could be an available market "in any sense relevant to section 50(3) of the Sale of Goods Act, 1893" unless there was a market or current price fixed by reference to supply and demand as the price at which a purchaser could be found, "be it greater or less than or equal to the contract price". If the foregoing argument is valid, it seems with respect that at most Jenkins L.J. could have said that, though there be an "available market", that is, readily obtainable buyers or sellers, yet the fixed market price will render the sub-section inoperative except to award nominal damages.

Nevertheless, when concerned with the definition of "market" and "available market", it must be noted that judges elsewhere have spoken in terms of the necessity of price fluctuation. In an Australian case where there was in fact a free market, *Eclipse Motors Pty. Ltd.* v. *Nixon*,[40] Mann C.J. said, "The rule as prescribed by the Goods Act contemplates a continuous market for the commodity, but always subject to fluctuation according to rise and fall of the market resulting from the demand of buyers and sellers." On the other hand in a much earlier case in South Africa, *Dennill* v. *Atkins & Co.*,[41] Innes C.J. was more guarded. He merely inferred that market price as a measure presupposes a free market for the goods at the time and place of delivery.

In the light of the qualification and hesitation, and particularly of Jenkins L.J.'s recent remarks, it might be useful to have some analysis of the scope and meaning of the terms "market" and "available market" as interpreted in several jurisdictions, namely, Canada, Australia, New Zealand, South Africa, and the United States.

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[37] A question of evidence as to whether the two constituent elements of sub-section three are present, *i.e.*, buyers or sellers, and current price.

[38] *Supra*, footnote 21, at p. 187.

[39] *Supra*, footnote 25, at pp. 117, 128.

[40] [1940] V.L.R. 49, at p. 54. Also [1939] A.L.R. 468. It is to be observed that Mann C.J. spoke of "the rule", and not of "available market".

[41] [1905] T.S. 282.

VII. "*Available Market*": *History of the Term*

The history of the term is a long one. The dictionary definition[42] gives meanings from "meeting . . . for the purchase and sale of provisions . . . at a fixed time and place" to "marketing or selling" and "sale as controlled by supply and demand". In connection with the first meaning the historic trade fairs of mediaeval Europe come to mind. It would be beyond the scope of an article to trace the change of the meaning from those times, but it can be noted that this notion of a physical location remained unchallenged until the late nineteenth century when modern methods of communication and transportation widened every economic horizon. It was in this period also that statutory adoption of the term was being made, and different phraseology, coinciding with changing patterns of trade, has resulted in later hesitation over a uniform meaning.

The first extended definition of "market" in English law was given by James L.J. in *Dunkirk Colliery Co.* v. *Lever*,[43] a case decided fifteen years before the Sale of Goods Act, 1893.

> What I understand by a market in such a case as this is that, when the defendant refused to take the 300 tons the first week or the first month, the plaintiffs might have sent it in wagons somewhere else, where they could sell it, just as they sell corn on the Exchange, or cotton at Liverpool: that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances.

Chalmers adopted the phrase "available market" in 1893, and in 1955 Upjohn J. found that he was bound by the *Dunkirk* definition in the interpretation of the subsequent statutory term. On the other hand the Ontario Act[44] uses the term "open market", and in *Mason & Risch, Ltd.* v. *Christner*[45] at first instance Middleton J. defined this term broadly as a market "ready to absorb all that can be fed to it". On appeal Maclaren J.A. both cited James L.J. with approval, and agreed with Middleton J. that there was no "open market" for player pianos "in the sense that the term is used in the cases". "They are not sold like grain or cattle or stock upon the open market or exchange".[46] Clearly, therefore, Upjohn

[42] Oxford English Dictionary.

[43] *Supra*, footnote 22, at p. 24. An *obiter dictum* since on the facts James L. J. found that there was no market for the coal at the time of the breach; at p. 23.

[44] R.S.O., 1950, c. 345.

[45] (1919), 47 O.L.R. 52, at p. 54. On appeal to the Ontario Supreme Court, (1920), 48 O.L.R. 8, 54 D.L.R. 653.

[46] 54 D.L.R. 653, at p. 655.

J. by necessity in interpreting section 50(3) of the English and Scottish Act, and the Ontario Supreme Court by choice in interpreting the Ontario Act, were prepared to regard the respective phrases, "available market" and "open market", as both implying a capacity to absorb (and supply?) the particular goods and a specifiable physical location. Yet in *Brown* v. *Buck*, heard in 1934 in the Manitoba Court of Appeal,[47] in a case concerning a buyer's refusal to accept, Prendergast C. J. M., though following Middleton J. in the earlier Ontario case, remarked obiter, "It may be, however, that the words 'open market' in the Ontario Act . . . are not as wide as 'available market' in our own. (Sale of Goods Act, R.S.M., 1913, c. 174)." This was a case concerning loss of profits despite a resale, and, as the Court of Appeal equally found that the Manitoba sub-section three did not adequately deal with a loss of profits situation, Prendergast C. J. M. did not expand his views on "available market". In the United States at a yet later date the term "available market" was being defined in the broadest possible manner.[48] In 1953 the Connecticut Supreme Court was still utilising language employed in 1934 and 1942. "The words 'available market' mean an existing market open to the plaintiff." [49]

VIII. *Nearest Market*

It is apparent from this hesitation and employment of the word "market" in the very definition of the term, that the first problem has been for the legal definition to keep abreast of the economic conception. In this connection came the question of what values to adopt when there was no specifiable market place at the place of delivery or acceptance. Early American authority took the confident line that this would merely necessitate the disappointed buyer or seller travelling to the nearest trading centre of the goods concerned and there making good his loss.[50] In 1877 in *Cahen* v. *Platt* Earl J. had this to say:[51] ". . . it may not always be practicable to show the price at the precise place of delivery. There may have been no sales of the commodity there, and hence evidence of the price at places not distant, or in other controlling markets may be

[47] [1934] 4 D.L.R. 446, at p. 449.

[48] "an existing market that is available to the plaintiff"; *Charles Street Garage Co.* v. *Kaplan, supra*, footnote 19, at p. 929.

[49] *Continental Copper & Steel Industries, Inc.* v. *Bloom* (1953), 96 A 2d 760 per Baldwin J. for the court.

[50] *Grand Tower Co.* v. *Phillips* (1874), 90 U.S. 471; *Cahen* v. *Platt*, (1877), 69 N.Y. 348 *Wemple* v. *Stewart*, 22 Barbour 154.

[51] *Ibid.*, at p. 352.

given, not for the purpose of establishing a market price at any other place, but for the purpose of showing the market price at the place of delivery." This line of reasoning was followed in *Wertheim* v. *Chicoutimi Pulp Co.*,[52] when the Judicial Committee of the Privy Council specifically followed the American authority and permitted evidence of the Manchester market to be introduced, there being no market at Chicoutimi, Canada. However, it is equally clear that the plaintiff cannot be expected to travel the globe looking for an alternative buyer or seller, even if the market at which he eventually arrives is the nearest. For this reason, in conformity with the principle that the plaintiff must only do what is reasonable in order to mitigate the damage resulting from the breach, the courts of all jurisdictions have merely required the nearest market to be reasonably available to the plaintiff on the facts. As in any event South Africa in 1922 had not the centres of England and America, the Supreme Court of Transvaal thought it reasonable to ascertain the values at Johannesburg in lieu of a market at Potgietersrust.[53] In 1926 a court of the same jurisdiction thought it reasonable to be guided by world prices, in this case the price in England.[54]

It is not only that the plaintiff cannot reasonably be expected to "hunt the globe" for a market, but that delivery from the unreasonably far or inaccessible market might result in the buyer obtaining alternative goods long after the contractual date. A seller might equally be unreasonably situated in the disposal of goods. But so much is all this a matter of fact on the individual circumstances that Goddard L.C.J. in *Lester Leathers* v. *Home & Overseas Brokers, Ltd.*[55] refused to be drawn by counsel's query whether, failing an "available market" in London, a market in Bordeaux would have been an alternative. There was no available

[52] *Supra*, footnote 1. See also the earlier case in England: *Bolag* v. *Hutchison*, [1905] A.C. 515, where Manchester, Liverpool, and London markets were adopted failing a market at the place of delivery, Cardiff.

[53] *Slotar & Sons* v. *De Jongh*, [1922] T.P.D. 330, de Waal J., at p. 335, "There was no obligation on the plaintiffs to hire a fleet of wagons, and to employ agents to scour the district in an endeavour to collect the stipulated quantity within the limited time." Failing a nearest convenient market, the market price within a few days of the date of the breach may be adopted; *Leviseur* v. *Highveld Supply Stores*, [1922] O.P.D. 206; *Natal Milling Co.* v. *Strachan*, [1936] N.P.D. 327.

[54] *Hersman* v. *Shapiro*, [1926] T.P.D. 378. There is in fact little difference between English and Dutch law on damages, though Dutch law is vague; *id quod interest*. Dutch law also requires the buyer to mitigate the loss by purchasing in the market. See Morice, English and Roman Dutch Law (1903), p. 139. For Canadian authority taking a similar line on nearest market, see *Schrader Mitchell & Weir* v. *Robson Leather Co.* (1912), 3 O.W.N. 962, 3 D.L.R. 838.

[55] [1948] W.N. 437, 64 T.L.R. 569.

market for snake skins in London, the nearest was proved to be India, and the buyer could not be expected to wait eight to nine months for a delivery from an alternative source in that market.[56]

IX. *Extent of the Market Area*

The extent of the market area, as a problem, was also raised by economic developments. It came under review much earlier in the United States than in England, and English law, notably in the interpretation of section 50(3) of the Sale of Goods Act, 1893, is still restricted by nineteenth century geographically limited concepts of market.[57] The Restatement runs as follows:[58]

> Market places are of many kinds and may be few or many in number. They may be run by an organization having a regular membership, as in the case of stock exchanges and boards of trade; they may be merely places where buyers and sellers are accustomed to gather for trade, as in the case of street markets for farm produce; they may be innumerable shops and stores, as in the case of stores for the sale of groceries and dry goods.

It is in the notion of a trade organisation as setting a market level that English law has been tardy. Naturally what may be adopted as the market may be limited by the facts of the case,[59] but *Associated Press* v. *Emmett*,[60] though primarily concerned with much wider issues, established that there need not be an organised exchange or regular market for determining the market price. In that case Justice Yankwich leaned heavily on a case decided the previous year in a Californian court, where the Supreme Court of California was content that goods "were actually sold and offered for sale at quoted prices each day." There was no exchange, and there were no published quotations.[61]

Pressed with similar arguments in the *Thompson* case Upjohn J. refused to pass any comment on whether there could be such an

[56] See also *Kwei Tek Chao* v. *British Traders*, *supra*, footnote 15, at p. 499, per Devlin J.

[57] In *Thompson* v. *Robinson*, *supra*, footnote 21, Upjohn J. found himself bound by James L.J.'s definition and, unless Sellers L.J's words of description of "available market" can be taken to widen James L.J.'s view, *Charter* v. *Sullivan* has not changed the position. Jenkins L.J., at p. 128 doubted "if James L.J.'s observations . . . should be literally applied as an exhaustive definition of 'available market' in all cases".

[58] Restatement of the Law of Contracts, section 329, comment (d)

[59] *E.g.* defendant distributor's right to sell within a restricted area limited market to that area: *Breding* v. *Champlain*, *supra*, footnote 19. See Marshall (1956), 34 Can. Bar Rev. 969 for a criticism of recognition by the courts of traders' self-imposed limited market areas.

[60] (1942), 45 F. Supp. 907 (D.C. Cal.).

[61] *Rice* v. *Schmid* (1941), 115 P2d 498, 138 A.L.R. 589, at p. 592 (Cal.) Under Civil Code Cal., s. 1784 (3).

extended meaning within section 50(3), though outside this subsection the English courts have recently taken a wider view. No doubt largely assisted by Lord Dunedin's earlier opinion that "market" had "no fixed legal significance",[62] Devlin J. took this wider view in *Heskell* v. *Continental Express & Another* in 1950,[63] while Sellers J. in 1955 was prepared to say that "no fixed place or building" was required,[64] as long as sufficient traders were in touch with one another. English law is therefore faced with the extraordinary result that "available market" within section 50(3) has the character of an ascertainable physical location, while within section 51(3), with which Sellers J. was concerned, the same term has the character of a level of trade.[65]

In South Africa development towards this aspect of "market" was also in advance of English and Scottish authority. In 1917 the Supreme Court of Transvaal was saying "that general selling price is determined not only by the price at the public market, but also by the general prices throughout the district among people, who deal in that particular commodity."[66] In 1918 the Supreme Court of Cape Province practically spoke the words of Goddard L.C.J. thirty years later.[67] "Market", said the court, "means a general current of sale of goods available for the purposes in a trade." Of course, it must always be kept in mind that the difference of terminology has produced difference of interpretation. What may appear as a more restricted Australian reaction to "market" results from an attempt to define "available market" within the Acts rather than the "market" of Roman-Dutch law. However, the matter is not left as uncertain as the Canadian courts have so far left it.[68] In interpreting section 49(3) of the South Australia Sale of Goods Act, 1895, Murray C.J. said, "But, in a country like this, there is probably only one agent for the sale of a particular make of motor-cars, and it is notorious that purchasers are not readily to be found. I do not say that there is not a market in a broad sense, but there is not, in my opinion, an 'available market' in the sense of a market, where purchasers of Brockway motor

[62] *Charrington & Co.* v. *Wooder*, [1914] A.C. 71, at p. 82.
[63] [1950] 1 All E.R. 1033, at p. 1050.
[64] *A.B.D. (Metals & Waste) Ltd.* v. *Anglo-Chemical & Ore Co. Ltd.*, *supra*, footnote 23.
[65] See E. R. Hardy-Ivamy, The Solicitor, 23: 63.
[66] *S. A. Railways* v. *Theron*, [1917] T.P.D. 67, at p. 71 per Mason J.
[67] *Wold* v. *Disler*, *supra*, footnote 15, at p. 309, per Gardiner J.: "... I do not think that a buyer is bound to go into all the highways and byways and to seek out where these articles can be obtained, buying a few here and a few there." Goddard L.C.J.; see *supra*, footnote 55.
[68] *Supra.*

chassis may be found from day to day, or within a reasonable time, or at a then current or fair price."[69]

The difficulty is that "market" has often been defined with an eye to adopting as a consequence a particular level of trade prices, already established in evidence. The breadth of interpretational vision, to which this has given rise, has not been reproduced in the case of "available market" where the accent in definition has been upon the reasonable possibility of the disappointed plaintiff disposing of his goods or acquiring further goods. This has highlighted physical location.

This brings one to the essential of what the courts mean by the word "market". Jenkins L. J., in his "negative proposition" concerning "available market", did suggest that the term must involve a notion of freely fluctuating price. As was noted, that idea has not been expressed elsewhere in the common-law world. "Market" has always been considered to be the relationship of supply and demand in the sense that buyers or sellers are procurable.

X. "*Available Market*": *Its Meaning*

1. *Available buyers or sellers*

In England this factor has received as much stress as in the Dominions and the United States. In the middle of the nineteenth century an English court was speaking of "market" as "constant demand and supply",[70] and in 1934 the High Court heard this said, "I think market means buyers and sellers, and where it is possible for a person to go into that market and buy what he wants or sell what he wants."[71] However, the mere alternative buyer or seller has never been adequate to create a market. In a case not concerned with the Sale of Goods Act, 1893, Sankey J. did not think that sale in open market meant the price a single purchaser would offer,[72] and Sellers J., in a case concerned with section 51(3) of that Act, felt that to "evidence a market" "there must be sufficient traders, who are in touch with each other".[73] Clearly no court has

[69] *Cameron* v. *Campbell & Worthington, Ltd.*, [1930] S.A.S.R. 402, at p. 405.

[70] *Borries* v. *Hutchinson, supra*, footnote 9, at p. 460 per Earl C.J.

[71] *The Arpad, supra*, footnote 7, at p. 191 per *Bateson J.* See also *Heskell* v. *Continental Express & Another, supra*, footnote 18, at p. 1050 per Devlin J.; South Africa: *Wold* v. *Disler, supra*, footnote 15.

[72] *Ellesmere (Earl)* v. *I.R.C.* [1918] 2 K.B. 735, at p. 739.

[73] See *Supra*, footnote 23. But see Callan J., *Dominion Motors Ltd.* v. *Grieves, supra*, footnote 17, at p. 771: a single vendor able to supply quickly may be sufficient to constitute an "available market" for the disappointed *purchaser*, but the existence of other persons willing to buy

been able to pinpoint sufficiency; again it is a matter of reasonable fact. In looking at it this way the New Zealand Court said,[74] "So far from there being an 'available market' to which it (the plaintiff) could resort, there was merely a limited, uncertain and varying number of purchasers for whose custom there would be competition."

A further feature, which runs through the cases, is that the market must be defined in the light of the character of the plaintiff. If he is a buyer, there must be sellers; if he is a seller, there must be buyers. An English judge has spoken to the effect that "the buying and the selling price do not ordinarily differ greatly, but one has nothing to do with the other", an American court, on breach by a vendor, has referred to a place "in which the purchaser can supply himself", and the Supreme Court of Victoria, concerned with a disappointed purchaser, has gone on to say that the market value of a commodity is the price at which somebody is willing to buy, and not the price at which there are sellers but no buyers.[75]

All this makes the Scottish case of *Marshall & Co.* v. *Nicholl & Son*[76] harder to understand, and undoubtedly its legacy has only been of confusion. In that case the Court of Session found that the vendor had failed to deliver goods, which were completed for the contract to a special specification, were not held in stock, and were merely obtainable in small quantities at occasional intervals at "ransom" prices in open purchase. Did this constitute an "available market" within section 51(3) of the English and Scottish Act, 1893? By a majority their Lordships found that it did, but their reasoning differs so much on what constitutes a market that the case has merely proved a stumbling block to lower courts. The Lord Justice-Clerk was simply of the opinion that on the evidence there was such a market, and, if there were insufficient evidence he came to the same result on sub-section two, the general principle. Lord Dundas knew of no other definition of market than that of James L.J. in the *Dunkirk Colliery* case,[77] and that he doubted both as to its intended and actual universality. There was, he thought, an "available market" here, though it be a"special and

does not establish that the disappointed *vendor* will quickly and readily sells good left on his hands.

[74] *Ibid.*, at p. 774. See also for South Africa, *Wold* v. *Disler*, *supra*, footnote 15, at p. 309, "Here bags were not generally available for purchase, there were small dealers, each of whom bought a few at a time".

[75] *Kwei Tek Chao* v. *British Traders*, *supra*, footnote 15, at p. 497, per Devlin J. *Wilmoth* v. *Hamilton*, 127 Fed. 48, at p. 53; *Vicary* v. *Foley* (1891), 17 V.L.R. 407, 13 A.L.T. 68.

[76] *Supra*, footnote 16.

[77] *Supra*, footnote 22, at pp. 24, 25.

limited one—not like the open market for coal, or corn, or cotton seed". If anything, one would have thought that the case decides that an "available market" is created by the procurability of alternative buyers or sellers; a view wider than that of James L.J., and already accepted elsewhere in the common-law world. Lord Dundas speaks of "a fair market where they (the purchasers and plaintiffs) could have found a seller", and adds "because there may not be, for a certain class of goods, a regular fixed current market such as exists for the staple commodities of commerce, it does not, in my judgment, necessarily follow that there is no 'available market' for such goods".[78] The Lord Justice-Clerk had merely said that there was such a market, Lord Salvesen gave a dissenting judgment, and Lord Guthrie simply agreed with the majority. Only by looking at the dissenting judge's view of "available market", that is, requiring the goods to be in stock and of a general class not made to specification, does the case offer no agreed definition of the term.

In the House of Lords, however, any confusion became worse confounded. Viscount Finlay definitely found there was "no market in which goods of the description could be obtained".[79] For his part, with whom Lord Dunedin concurred, Viscount Cave agreed with the Lord Ordinary at first instance that a market price did exist on the facts, and inferred that equally on the facts he accepted the existence of an "available market". Lord Shaw merely occupied himself with a criticism of Lord Salvesen's argument in the court below on the broad procedural and substantive relationship of sub-sections two and three, and agreed simply with the decision below.[80]

Since whether or not there are sufficient buyers or sellers to constitute a market is a question of fact, and what is reasonable, one might have thought in the light of this disagreement that Upjohn J. in *Thompson* v. *Robinson* would have felt himself free to accept the majority definition in the Court of Session. However, since Lord Salveson in that court did offer a distinct concept of "available market", the case has left English law in its present state of flux, which has not been aided by *Charter* v. *Sullivan*. In defence of Upjohn J.'s hesitation it can at least be said that American decisions, adopted and followed in the English case of *In re Vic Mill*,

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[78] *Ibid.*, at p. 25. [79] *Ibid.*, at p. 130.

[80] Is there a consequent note of humour in the penultimate sentence of the House of Lords' report? "Viscount Finlay intimated that Lord Wrenbury also concurred in the judgment."

Ltd.,[81] have consistently required that the goods should not be of such a speciality that they brought about a situation "where there was no real market", and, since *In re Vic Mill* was neither discussed nor referred to in *Marshall's* case, the Lords' decision becomes more confusing.

2. *Effect of one alternative offer or actual resale*

The dissension in *Marshall's* case directly raises the next question. Though it is now generally held that only a volume of buyers and/or sellers constitutes "market", can one alternative offer or actual resale afford evidence of "market or current value"? And, if this is possible, does that offer or sale nevertheless thereby constitute the "market"?

As far as it has been possible to establish, the two terms, as was noted earlier, have always been kept distinct. Though resale at the time of failure to accept or deliver has been generally adopted as "market value" for the purpose of calculating damages, no court appears to have discussed the implication, which this adoption raises, that a "market", that is, a volume of buyers or sellers, actually exists. It may well be that this has followed from the tendency, particularly in some American jurisdictions, for evidence of trade prices to be adduced from journals containing market quotations and news of a general nature relating to the trade in question without at the same time showing a current volume of buyers and sellers in the trade. Of course, as was argued earlier,[82] a freely fluctuating price level will automatically reflect the volume of demand upon the market, and, though the nature of this reflection does not necessarily in all cases imply the existence or otherwise of alternative buyers or sellers, the "available market", it is surely with this reflection in mind that the jurisdictions in question have not required specific evidence of buyers and sellers. However, this argument could not hold in the presence of a fixed price level. The refusal of many American courts to allow such a fixing to affect the existing distinction between "market" and "market value", and also the description of "market" as a volume of buyers and sellers, suggests that this is a deliberate choice.

(*a*) *United States*

American authority is divided upon the question whether resale sufficiently compensates the injured party for loss of profits,

[81] [1913] 1 Ch. 465. [82] *Supra.*

but it is generally held that resale does constitute the market price. It is merely that in cases concerned with the Uniform Sales Act, or its equivalent, some courts have held loss of profits[83] to be "special circumstances" taking the matter out of sub-section three, while others have felt that the resale price as the market price adequately compensated the injured party.[84] The reason for this general use of resale as market price appears most clearly from the judgment of a New York court. In *Farrish Co.* v. *Harris Co.*[85] the court observed that the term "market value" is somewhat elastic, and has been differently defined. The judgment went on:—

> It is evident that, where there is a definite price established by public sale in the ordinary course of business, or where the price of property has been established by being the subject of purchase and sale to so great an extent and in so many instances as to be fixed, there is no necessity for resale to establish the damage. But where the property has a limited use, and is not subject to frequent purchase and sale, and there is no current market price, the seller can only estimate or ascertain his damage by seeking out a purchaser, either by public or private sale. In such a case it is clear that very often a sale cannot be made immediately; that the price realized may be dependent upon the procuring of a purchaser willing to buy, and not an intrinsic value or general demand. Nevertheless, such sale, if fairly conducted and within a reasonable time,—both of which elements are questions of fact for jury determination,—is evidence of the price at which the goods can be replaced for money in the market, and forms a basis for estimating the damage sustained by the breach, or, as often termed, the 'market value'.

"Market value" is therefore being used as a term in those cases which under the Uniform Sales Act would come under sections 64(3) or 67(2). It is being used, strictly incorrectly, as a term of art when assessment is being made of loss flowing "directly and naturally" from the breach, and when there may in fact be no ready buyers or sellers, that is, an "available market".[86]

[83] *I.e.* the difference between the wholesale and retail prices in cases involving breach of sales between dealers in manufactured articles and the public.

[84] The two lines of authority are discussed in an excellent note in 24 A.L.R. 2d 1101. See particularly for a case where resale was taken to be adequate compensation, *Charles Street Garage Co.* v. *Kaplan, supra,* footnote 19. Here there was found to be an "available market" under section 53(3), Uniform Sales Act, c. 106, therefore a "market or current price", and that that price was the list retail price. Nominal damages were awarded.

[85] (1924), 122 Misc. 611, 204 N.Y. Supp. 638, at p. 641.

[86] See further 44 A.L.R. 308 *et seq.*, and 24 A.L.R.2d 1016. The ease with which the fact of resale can blur the meaning of "market" can also be seen from these words: " . . . the price of a given article in a given market is most satisfactorily determined by what a buyer not compelled to

It follows, therefore, that as one offer or actual resale does not strictly constitute the market value, but only the price, which other purchasers might also give, if (of which there may be no evidence) they existed, so a single offer or resale does not constitute "market".

(b) Dominions and Great Britain

Outside the United States the phrase "market value" has seldom been associated with this confusion. This may be for two reasons. First, the courts throughout the Dominions and Great Britain have assiduously determined the prior existence of alternative buyers or sellers, and, secondly, have considered such resale cases to create problems for the general principle: what is the loss flowing "directly and naturally" from the breach? Under the head of the general principle, therefore, have come all the loss of profits situations. The leading case in England upon this point is *In re Vic Mill, Ltd.*,[87] and the Court of Appeal there adopted *Masterton* v. *Mayor of Brooklyn* and *Todd* v. *Gamble*[88] as authority for this view. In *Todd* v. *Gamble* Gray J.[89] said in so many words that the mere fact of other sales by the respondent did not constitute a market value unless "the vendor could have placed the commodity upon the market, and by thus disposing of it, have relieved himself from the consequence of the defendant's default". Following *Masterton's* case Gray J. therefore held that the contract price and the actual loss to the injured party must be considered and the difference be awarded as damages. The English court in its turn went further to say that there might or might not be an "available market" in the sense of alternative buyers or sellers, but the matter was irrelevant. It might perhaps be argued that the logic of this view, namely, the inapplicability of the term "market value" to those cases coming within the general principle, is more obvious when the goods in question are made to order. This occurred in *In re Vic Mill* and *Todd* v. *Gamble*. It is not so clear when the goods are of a "standard make or pattern",[90] for

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buy would be willing to give, and a seller not compelled to sell would be willing to take for a given article at a given time, . . . and the best test of a market value is the price realised from such a sale." *Sterling-Midland Coal Co.* v. *Great Lakes Coal & Coke Co.*, *supra*, footnote 20. See further 108 A.L.R. 1500.

[87] *Supra*, footnote 81.

[88] Respectively (1845), 42 Am. Dec. 38, 7 Hill 61, and (1896), 148 N.Y. 382.

[89] *Ibid.*, at p. 385, (N.Y.).

[90] See *Frederick* v. *Willougby* (1909), 136 Mo. App. 244, 116 S.W. 1109, (sale of a refrigerator by a dealer). "Since the evidence discloses be-

in these cases the goods are designed to meet the requirements of a similarly situated volume of the public. The distinction between "market" in that broad sense, and a market at hand, or "available market", is sufficiently small to induce the occasional view that standard goods in any event have a market. Hence talk of market value.

Even in cases of standard goods, however, English and Dominion courts have consistently treated loss of profits as a matter for the general principle, the availability of alternative buyers or sellers continuing to be an irrelevant issue. In Canada in *Mason & Risch, Ltd.* v. *Christner*[91] the Supreme Court of Ontario awarded loss of profits, though first observing that there was no "open market" on the facts, while in *Brown* v. *Buck*[92] the Manitoba Court of Appeals followed the Ontario court, and also found "available market" to be irrelevant. New Zealand and Australian courts have followed this reasoning.[93] In his judgment in *Thompson* v. *Robinson* Upjohn J. was therefore in good company when he quoted the Dominion authority, together with the decision of the Supreme Court of Utah in *Stewart* v. *Hansen*.[94] Equally the Court of Appeal had no reservation in saying that, with the facts justifying it, loss of profits could have been awarded in *Charter* v. *Sullivan*.[95]

XI. "*Market or Current Value*": *Its Assessment*

A discussion of the significance of loss of profits to the definition

yond question that the refrigerator was not to be specially made for the defendant but was of a standard make or pattern, and therefore, was an article of merchandise on the market, the practical rule applicable to the measurement of the plaintiff's damages . . . would be the difference between the market value and the contract price of the refrigerator."

[91] *Supra*, footnote 45.

[92] *Supra*, footnote 47.

[93] *Dominion Motors Ltd.* v. *Grieves, supra*, footnote 17; *Cameron* v. *Campbell & Worthington, Ltd., supra*, footnote 69; *Eclipse Motors Pty., Ltd.*, v. *Nixon, supra*, footnote 40; *White Trucks Pty., Ltd.* v. *Riley* (1949), 66 W.N. 101 (N.S.W.). Roman-Dutch law, though less precise in its use of "market value", has approached the matter in the same way. See *Kritzinger* v. *Marchand & Co.*, [1926] C.P.D. 397. Also (1957), 74 S.A.L.J. 61.

[94] (1923), 218 P. 959. Gideon J. dissented merely because he felt that evidence should have been adduced to show that the car in question was purchased so that the dealer could comply with his contract, and also because there was nothing in his opinion to show that the dealer had lost a sale to any other purchaser as a result of the original breach.

[95] *Supra*, footnote 25. The justification was that the seller could sell all the cars he could get. He had not, therefore, lost a sale. This conclusive Dominion attitude, in addition to English authority (see *supra*, footnote 30) is worthy of note in the light of American judicial opinion.
Charter v. *Sullivan* was approved in *Interoffice Telephones, Ltd.* v. *Robert Freeman Co. Ltd.*, [1958] 1 Q.B. 190 (C.A.): extension of *In re Vic Mill, Ltd.* to a case of hiring.

of "market" and "available market", with its inevitable close reference to "market value", calls for further treatment of the last of those terms. How is "market value" assessed? Something has already been said of this, but, omitting now the preceding question of the existence of buyers or sellers, what evidence have the courts accepted as proof of "market value"? "Market value" is a question of fact; so much seems clear.[96] But it is not so clear what sources of evidence may be turned to for this purpose. "The market price of an article at a particular place simply means the price, which a person who wants the article at that place has to pay for it."[97] However, once the concept of market widens, sources of evidence must be more extensive in scope. In the United States this development has gone further than in any other part of the common-law world. As early as *Harrison* v. *Glover*[98] a New York court was saying, "A price list, stating the price at which a manufacturer will sell, or statements of dealers in answers to enquiries are competent evidence of the market price of a marketable commodity, and is a common way of ascertaining or establishing a market price." In later cases as already noted, trade or financial journals containing market quotations and general news of the trade in question have been held admissible to show market value, though here the courts have differed. Some have required convincing evidence of values to the particular plaintiff in the form of amounts realised on actual sales.[99]

In the United States, also, list retail prices have been accepted as "market price", though the controversy over awarding loss of profits on resale has naturally extended to this field. In *Willhelm*

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[96] *Sterling-Midland Coal Co.* v. *Great Lakes Coal & Coke Co., supra,* footnote 20.

[97] *Durr* v. *Buxton White Lime Co.*, [1909] T.S. 876, at p. 883 per Bristowe J. On this basis the price of an option to purchase by a lessee was adopted as the market value: *Jardine* v. *Van Niekerk* [1918] E.D.L. 246. Can there be two distinct market values of the same item? *E.g.* the market value of shares, and the market value of a controlling interest. X & Co. is making a considerable trading loss every year. A owns a controlling interest of 100 shares which are selling for 10/- each. B offers to buy the 100 shares at £1 each and subsequently breaches his contract. As a result of the breach the shares fall to 5/- each. Can A claim from B 15/- on each share, or can B require mitigation by resale to Z & Co., which company would willingly pay £1 per share in order to offset X & Co.'s losses against its (Z & Co.'s) own tax position?

[98] (1878), 72 N.Y. 453, at p. 454.

[99] 108 A.L.R. 1500. Where offers have been accepted in lieu of actual sales, the courts have not required proof of a legally binding offer, but one "binding in honour in case of an immediate acceptance": *Harrison* v. *Glover*. See further Restatement of the Law of Contracts, section 329, comment (d).

Lubrication Co. v. *Brattrud*[100] it was thought that any attempt to establish a so-called "market value" of the goods was irrelevant, since in the case of manufactured articles that value would normally be no different from the "retail price" fixed by the manufacturer. In *Charles Street Garage Co.* v. *Kaplan*[101] on the other hand, and in *A. Lenobel, Inc.* v. *Senif*[102] both courts found that there was an "available market", and that the plaintiff dealer could only sell at the regular retail price. Nevertheless, this was held to be the "market price".

Conclusion

In *Charrington & Co., Ltd.*, v. *Wooder*,[103] Lord Dunedin having described the term "market" as being of "no fixed legal significance",[104] Lord Kinnear in agreement said, "it is a common word of the most general import".[105] It is probably because it is so much a matter of common sense, and a question of fact in the circumstances of each individual case that on the whole the courts have shrunk from circumscription of the term. If the cases suggest any highest common multiple of single meaning, it is that by "market" is intended a volume of buyers and/or sellers. The addition of the word "available" in the Sale of Goods Act and its statutory offspring would therefore require that alternative buyers or sellers, as the case may be, should be procurable at once, and be within reasonable distance of the injured party. To gear "market price" to the simple meaning of "market" or "available market" seems, with respect, but to confuse terms which hitherto have possessed

[100] (1936), 197 Minn. 626, 268 N.W. 634, 106 A.L.R. 1279.

[101] *Supra*, footnote 19.

[102] (1937), 252 App. Div. 533, 300 N.Y.S. 226. Among those cases, which have awarded loss of profits, no case has come to the writer's attention where the court overlooked the existence of alternative buyers or sellers, and found that there was no "available market" because of the existence of a fixed retail price.

[103] *Supra*, footnote 62. In *Thompson* v. *Robinson* this was the only case counsel for the defendant could discover which suggested that, though the price was fixed, this did not prevent it from being the market price. However, the case did not concern the sale of goods within the 1893 Act, and was concerned with the phrase "market". Publicans leased a public house on condition that the tenant dealt exclusively with them, and agreed that the tenant should receive beers at a fair market price. Was a fair market price the discount bargained for by free house tenants, or the standard fixed discount paid to tied house tenants? The Lords held the latter to be applicable to the respondent, and that this was the market price. As Upjohn J. considered himself bound to find that there was no "available market" on the facts of *Thompson's* case, and Jenkins L.J.'s words on the matter in *Charter* v. *Sullivan* were *obiter dicta*, the question remains open in the handling of the English and Scottish Sale of Goods Act.

[104] *Ibid.*, at p. 82.

[105] *Ibid.*, at p. 80.

common meanings both inside the statutes and in the myriad other fields where the terms are employed. Particularly is this approach regrettable today when, with the widening of the economic horizon and trade levels, evidence of "market prices" is increasingly drawn from more remote sources, for example, foreign exchanges and a variety of publications. Sometimes prices will be quoted when in fact buyers or sellers are nowhere to be found, and sometimes prices will be fixed to the available volume of buyers and/or sellers. In this latter event those that would buy and sell must trade at the prevailing fixed prices. When subsequent non-delivery or non-acceptance occurs, sections 51(3) and 50(3) of the Sale of Goods Act and similar overseas statutory provisions are automatically satisfied. If there are alternative and procurable buyers or sellers, the innocent party can call for nominal damages only. Further loss, *e.g.*, a purchaser's breach when supply exceeds demand, is a matter for sections 50(2) and 51(2). If there are no such buyers or sellers, there is no available market, and the general principle of the latter sub-sections comes into immediate operation. An alternative offer or actual resale, like an alternative purchase, does not affect this analysis; with or without a market, compensation for further loss must be sought in the general principle.