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The Sale by Weight, Count, or Measure

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Comments

THE SALE BY WEIGHT, COUNT, OR MEASURE

Articles 2458 and 2459 of the Louisiana Civil Code of 1870 deal with goods, produce, and other objects. The French translation uses the word *marchandises*,[1] a word which more properly expresses the purpose of the redactors to exclude property that is immovable by nature from the operation of these articles. Accordingly, this discussion is limited to a treatment of the sale of movable property by weight, count, or measure.[2]

1. 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana (1942) 1354-1355.

2. For a treatment of the sale of immovable property by measure see Comment (1939) 1 LOUISIANA LAW REVIEW 609.

Generally speaking, Article 2458[3] covers two possible situations:

1. The case where all of a mass of goods is sold at a price to be determined by weighing, counting, or measuring the entire mass.

Example: *A* sells *B* all the wheat in *A*'s granary for a price of $1.00 a bushel. The lack of certainty of the price hinders the perfection of the sale. Nevertheless, some authorities have argued that this situation is in reality a lump sale.[4]

2. The case where a certain number of units are sold from a limited mass of objects. The parties are agreed upon the price and the amount; but a weighing, counting, or measuring is necessary to separate, designate, or individualize the goods sold.

Example: *A* sells *B* ten bushels of the wheat that is in *A*'s granary for ten dollars. The uncertainty of the *object* sold hinders the consummation of the sale. Until the ten bushels have been separated from the mass, the parties do not know which ten bushels have been sold.

On the other hand, if the weighing, counting, or measuring is not necessary in order to determine either the price of the thing sold, then the sale will be ruled by Article 2459. Between the parties the sale will be complete immediately.

Example: *A* sells *B* all the wine in *A*'s wine cellar for $100. The sale is perfect and both the title and the risks then pass to the buyer.

The problems arising from these distinctions have bothered courts and legal scholars since the days of Roman law.

ROMAN LAW

In Roman law the contract of sale—*emptio venditio*—amounted to a promise by one person to transfer a thing in return for the promise of another person to pay a determined price. The buyer became owner of the thing sold only upon the delivery or transfer of possession—known as the traditio.[5] The contract

3. Art. 2458, La. Civil Code of 1870: "When goods, produce, or other objects, are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery of them or damages, if there be any, in case of non-execution of the contract."

4. See discussion, p. 297, infra.

5. Buckland, A Manual of Roman Private Law (1939) 135-137, § 51; Moyle, The Contract of Sale in the Civil Law (1892) 110. In early Roman law, a transfer of *res mancipi*—land, slaves, beasts of burden, and servitudes re-

was consensual, requiring no particular form. Ordinarily risks would be on the owner of the thing sold—*res perit domino*—but where specific goods were sold for a determined price the risks fell on the buyer from the time the obligation was perfected. The perfection of the contract gave a right of damages to the buyer if the seller refused to perform; it transferred the risks to the buyer, but it did not transfer title.[6] For the sale to be perfect (*perfecta*), it was not sufficient that the ordinary elements of an obligation be present. The price must be fixed; the goods must be specifically determined; the contract must not be subject to a suspensive condition or the reservation of a right of test.[7] Accordingly a sale would not be considered perfect so long as a weighing, counting, or measuring was necessary to determine either the price to be paid or the specific thing sold. The obligation would be binding between the parties, but the risks would remain on the seller until the weighing, counting, or measuring had occurred to remedy the defect of uncertainty of the thing sold.[8] If a flock of sheep were sold at a price per head, the sale would not be perfected until the price had been determined by counting the sheep.[9] Likewise, if a hundred measures of wine were sold from a wine cellar, the risk would remain on the seller until the particular one hundred measures were separated from the remainder of the wine; otherwise the sale would be imperfect for lack of certainty of the thing sold.[10] However, if the loss occurred due to the lack of reasonable care by the seller even after the contract had been perfected, the seller would have to bear the loss.[11]

In pre-codal French law, the Roman law provision that title did not pass until delivery retained its efficacy,[12] although this requisite was often circumvented by inserting a clause in the act of sale declaring that the object had been delivered, or appointing the seller agent to hold the goods for the buyer.[13] Without such

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quired a formal ceremony known as *mancipatio*. Jolowicz, Historical Introduction to the Study of Roman Law (1932) 139.

6. I.3.23.3; Buckland, op. cit. supra note 5, at 282, § 109; Moyle, op. cit. supra note 5, at 77. But the parties could validly agree that the risk would remain on the seller until delivery, D.18.1.35.4; D.18.6.1.pr. See Moyle, op. cit. supra note 5, at 90.

7. Buckland, op. cit. supra note 5, at 283, § 109; Moyle, op. cit. supra note 5, at 77-86.

8. Moyle, op. cit. supra note 5, at 83-85.

9. D.18.1.35.6.

10. D.18.1.35.7.

11. Moyle, op. cit. supra note 5, at 90. I.3.23.3; D.18.6.12; D.19.1.36.

12. 1 Pothier, Treatises on Contracts (Cushing transl. 1839) 200-201.

13. Id. at 197-198. See 1 Guillouard, Traités de la Vente & de l'Echange (2 ed. 1890) 90, nº 77; 10 Planiol et Ripert, Traité Pratique de Droit Civil Fran-

fictional delivery the buyer would be limited to a personal action for damages for failure of the seller to deliver the goods.[14] The feigned delivery enabled the purchaser to seize the property from the seller or seizing creditors[15] or even from third parties in good faith. However, this use of feigned delivery served no purpose in the case of a sale by weight, count, or measure. If the sale was not perfected by agreement on the price and the thing, the imperfect contract of sale could not be given effect even by an actual delivery. According to Pothier, when specific goods were sold, the risks were on the purchaser in case the goods were destroyed without fault on the part of the seller from the moment the sale was perfected and even before delivery.[16] A sale by weight, count, or measure was an imperfect sale until the weighing, counting, or measuring both in the case where a certain number of units was to be taken from a designated mass and also where an entire mass was sold at a price per unit,[17] the imperfection of the sale existed, said Pothier, because of the uncertainty of the thing sold on the one hand and because of the uncertainty of the price on the other. The risks remained on the seller and the buyer could not enforce the contract against third parties. Nevertheless certain obligations resulted even from an imperfect contract of sale. The buyer had a right of action against the seller for delivery of the thing, or for damages, and the seller was entitled to the price after offering delivery.[18]

The French Civil Code contains Article 1585, which is identical with Article 2458 of the Louisiana Civil Code. All French commentators agree that this article includes the sale of a certain

çais (1932) 185, nº 175, n. 2. For a discussion of this subject, see Comment (1941) 3 LOUISIANA LAW REVIEW 629, 630.

14. 1 Pothier, op. cit. supra note 12, at 200-202, nºs 319-321.

15. Id. at 202-204, nº 322.

16. Id. at 187-190, nº 308: "It is true that, before the measuring, weighing, or counting, and at the instant of the contract, the engagements which result from it exist. The buyer is then entitled to an action against the seller for the delivery of the thing, and the seller is entitled to an action against the buyer, for a recovery of the price, upon offering to deliver it."

17. 1 Pothier, op. cit. supra note 12, at 191, nº 309: "But though the engagement of the seller subsists from that time (of the agreement), it may be truly said that it is not yet perfect, in this respect, that as yet it is only [a sale] of an object which is indeterminate, and which can be determined only by the measuring, weighing, or counting. For this reason, until the thing is measured, weighed, or counted, it does not become at the risk of the buyer; for the risk cannot fall but upon some determinate thing.

"This rule holds . . . also . . . when the sale is of the entire quantity contained in a magazine or granary, provided it is made at the rate of so much the measure, etc.

"The sale, in this case, is not considered as perfect . . . until it is measured or weighed; for, until that time, *non apparet quantum venierit.*"

18. Id. at 191, nº 309.

number of units to be taken from a designated mass at so much per measure,[19] since the thing sold is not determined until it has been segregated from the mass by means of a weighing, counting, or measuring.

However, the French commentators are almost evenly divided in regard to a sale of an entire mass at a price to be determined by weighing, counting, or measuring. A substantial number of commentators argue that this is a lump sale[20] which is complete before the weighing, counting, or measuring, and that Article 1585 contemplates only the situation where the thing sold is not determined until it is separated from a larger mass. It is the contention of this group that the price can be estimated with relative ease and that hardship to the buyer can be averted by placing upon the seller the burden of establishing the amount of goods sold in cases where the goods are destroyed. This view conforms to the few terse remarks on this subject made by the redactors of the French Civil Code.[21]

A majority of French commentators take the position that it is also a sale by weight, count, or measure when an entire mass is sold at a price per unit, since the price is not known until the weighing, counting, or measuring.[22] This view finds support in

19. Baudry-Lacantinerie, Traité Theorique et Pratique de Droit Civil Des Obligations (3 ed. 1906) 188, nº 147.

20. 5 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1907) 20-21, § 349; 1 Guillouard, op. cit. supra note 13, at 42-44, nº 30; 10 Planiol et Ripert, op. cit. supra note 13, at 330-331, nº 299.

21. 14 Fenet, Recueil Complet des Travaux Préparatoires du Code Civil (1836) 21: (Translation) "M. Treilhard says that the article as it is worded is not perhaps perfectly exact; for, if one sells all that which is found in his warehouse for so much per measure, there remains uncertainty only on the quantity; the thing and the price are determined.

"The Consul Cambacérès thinks that this opinion is susceptible of objections. In a sale of ten hogsheads of wheat, for example, the thing is at the risk of the buyer only after the measuring; this is the case that the article provides and decides.

"M. Treilhard agrees that this opinion is correct but he thinks that it can be reconciled with his own.

"If one buys all of the goods deposited in a warehouse, the sale is perfect as soon as the price is agreed.

"If on the contrary one buys a certain quantity of goods not in lump, but by measure, as in the hypothesis presented by the Consul, the sale is perfected only after the goods have been measured and delivered.

"The Consul Cambacérès shares this opinion; but the important thing, he says, is that the case is not submitted to the disposition of article 2 (1583) which, following the maxim *res perit domino,* puts the thing at the risk of the buyer from the moment that the sale is perfect."

22. 19 Baudry-Lacantinerie et Saignat, Traité Théorique et Pratique de Droit Civil, De la Vente et de l'Échange (3 ed. 1908) 147-148, nº 148; 7 Demante et Colmet de Santerre, Cours Analytique de Code Civil (2 ed. 1887)8-9, *bis* II; 16 Duranton, Cours de Droit Français (3 ed. 1834) 112-117, nº 88; 10 Huc, Commentaire Théorique & Pratique du Code Civil (1897) 31-33, nº 17; 24

the writings of Pothier[23] and also in the Roman law background.[24] The decisions of the Louisiana Supreme Court have consistently adhered to this latter view.[25]

Sale of a Fractional Part

If a fractional part, such as a third or a fourth of the goods located at a particular place, is sold for a lump price, there is no doubt that this would be treated as a lump sale with the buyer becoming an owner in indivision.[26] If the fractional part is sold for a price per unit, the French commentators, although several of them do not discuss the point, would probably be divided along the same lines as in the case where an entire mass is sold at a price to be determined by weighing, counting, or measuring.[27] The same question of uncertainty of the price arises and the solution to the problem will usually depend upon the significance to the particular authority of this degree of uncertainty. Guillouard, however, changes sides on this point and says that the result would be different from that where an entirety is sold at a price per unit. According to Guillouard,[28] the purchaser has consented to become an owner before the partition and it should be presumed that he is willing to undertake the risk of the part purchased. Although this point has not been decided in Louisiana, it seems reasonable to suppose that since the Louisiana decisions are in harmony with the view of the commentators who consider a sale of a totality at a price per unit to be a sale by weight, count, or measure,[29] Louisiana will probably treat such a fractional sale as a sale by weight, count, or measure.

Laurent, Principes de Droit Civil Français (1877) 141-146, nº 139; 6 Marcadé, Explication Théorique et Pratique du Code Civil (7 ed. 1875) 155; 1 Troplong, Droit Civil Expliqué, 1 De la Vente (5 ed. 1856) 89-98, nºs 83-88.

23. See note 18, supra.

24. See note 9, supra.

25. Lambeth v. Wells, 12 Rob. 51 (La. 1845); Larue & Prevost v. Rugely, 10 La. Ann. 242 (1855); Goodwin v. Pritchard, 10 La. Ann. 249 (1855); Rhea v. Otto, 19 La. Ann. 123 (1867); Peterkin v. Martin, 30 La. Ann. 894 (1878); Kohler v. Huth Construction Co., 168 La. 827, 123 So. 588 (1929). See Duncan v. George Arnold Holt & Co., 21 La. Ann. 235 (1869). But see Penick & Ford v. Waguespack & Haydel, 148 La. 39, 86 So. 605 (1920).

26. See for example, 19 Baudry-Lacantinerie, op. cit. supra note 22, at 154-155, nº 153; 7 Demante et Colmet de Santerre, op. cit. supra note 22, at 12, nº 7; 1 Guillouard, op. cit. supra note 20, at 42-44, nº 30; 10 Planiol et Ripert, op. cit. supra note 20, at 331, nº 299.

27. The position of those who would consider such a sale to be made in lump is represented by 10 Planiol et Ripert, op. cit. supra note 20, at 330-331, nº 299. Representative of commentators considering the situation a sale by weight, count, or measure are 16 Duranton, op. cit. supra note 22, at 114, nº 88; 1 Troplong, op. cit. supra note 22, at 99, nº 90.

28. 1 Guillouard, op. cit. supra note 20, at 45-46, nº 32.

29. See supra note 25.

Effects of a Sale by Weight, Count, or Measure

Risks have always passed to the buyer at the time the goods are weighed, counted, or measured.[30] It seems probable, however, that even this rule can be modified by express agreement of the parties.[31] By the adoption of Article 1583 of the French Civil Code, from which Article 2456[32] of the Louisiana Civil Code was derived, title was made to pass, as between the parties by mere agreement on the price and the thing rather than at the time of delivery. This departure from Roman law was designed to cause both title and risks to be transferred at the time when the sale was "perfected" rather than at the time of delivery. Unfortunately the French decisions and French commentators have not been in complete harmony on this point.

In the case where a certain number of units are sold to be taken from a determined mass, an early decision of the Court of Cassation held that since a sale by weight, count, or measure was not perfect *en ce sens*[33] that the goods were at the risk of the seller until the weighing, counting, or measuring, that it was complete in all other respects.[34] Nevertheless the French commentators now agree almost unanimously that title is not transferred until the weighing, counting, or measuring on the ground that the thing sold is not determined until it is separated from the mass by means of a weighing, counting, or measuring.[35] This view was taken by the redactors of the French Civil Code.[36]

30. See supra notes 9, 10, and 18.

31. See supra note 6. See also cases in which custom has controlled in determining the intentions of the parties, such as 10 Planiol et Ripert, op. cit. supra note 20, at 333, nº 300.

32. Art. 2456, La. Civil Code of 1870: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."

33. Where Art. 2458 of the Louisiana Civil Code of 1870 uses the word "inasmuch" the French translation and the same passage of the French Civil Code uses the words *en ce sens*, which might more literally be translated to mean "in this sense."

34. 11 nov. 1812, Sirey 1813.1.52. In accord with this opinion is 16 Duranton, op. cit. supra note 22, at 119-121, nº 92. The case was referred to without contradiction in 14 Merlin, Répertoire Universel et Raisonné de Jurisprudence (4 ed. 1815) 526, vº Vente § 4.

35. 5 Aubry et Rau, op. cit. supra note 20, at 20-21, § 349; 19 Baudry-Lacantinerie, op. cit. supra note 22, at 150-152, nº 150; 1 Guillouard, op. cit. supra note 20, at 46, nº 33; 10 Huc, op. cit. supra note 22, at 33, nº 18; 6 Marcadé, op. cit. supra note 22, at 157-159; 10 Planiol et Ripert, op. cit. supra note 20, at 331-332, nº 300; 5 Troplong, op. cit. supra note 22, at 89-90, nºs 83-86.

36. 14 Fenet, op. cit. supra note 21, at 21, 85, 153, 182, 183.

Undoubtedly this is the correct position and fortunately it seems to have been recognized in Louisiana.[37]

In the case where an entire mass of objects is sold at a price to be determined by weighing, counting, or measuring, the question of passage of title becomes more perplexing. This question is not considered by the group of French commentators[38] who view this situation as a lump sale. Of the commentators who consider this case a sale by weight, count, or measure, the majority conclude that the sale is imperfect until the weighing, counting, or measuring and that title like risks, passes only when the sale has been perfected by the weighing, counting, or measuring.[39] This position was adopted by the Louisiana Supreme Court in *Lambeth v. Wells*.[40] In that case several bales of cotton were to be taken in partial satisfaction of a debt. The price of the cotton was to be determined by weight. After the cotton had been delivered to the buyer and before it was weighed the cotton was seized by a creditor of the seller. The court held that the transfer of the title had never been consummated because the cotton had never been weighed and therefore the creditors of the seller could seize the cotton in the hands of the buyer. In cases where cotton was sold by the pound and the weighing and delivery took place simultaneously, the Louisiana Supreme Court consistently took the view that title passed at the time of this transaction rather than at the time of the contract.[41] Some dicta is to be found in these cases to the effect that title passes at the time of the delivery,[42] but in such cases the weighing and delivery was simultaneous.

Laurent[43] and Colmet de Santerre[44] disagree with that solution. They contend that since the thing sold is individualized and determined, title should pass immediately upon the consent of the parties although the risks would remain on the seller until the price is ascertained by weighing, counting, or measur-

37. See Abat & Cushman v. Atkinson, 21 La. Ann. 414 (1869).

38. See authorities cited supra note 20.

39. 19 Baudry-Lacantinerie, op. cit. supra note 22, at 150-152, nº 150; 10 Huc, op. cit. supra note 22, at 33, nº 18; 6 Marcadé, op. cit. supra note 22, at 157-159; 1 Troplong, op. cit. supra note 22, at 89-98, nºs 83-88.

40. 12 Rob. 51 (La. 1845).

41. Larue & Prevost v. Rugely, 10 La. Ann. 242 (1855); Rhea v. Otto, 19 La. Ann. 123 (1867); Paton v. Newman, 51 La. Ann. 1428, 26 So. 576 (1899).

42. See, for example, Larue & Prevost v. Rugely, 10 La. Ann. 242, 243 (1855).

43. 24 Laurent, op. cit. supra note 22, at 143, nº 139.

44. 7 Demante et Colmet de Santerre, op. cit. supra note 22, at 8-9, nº 7, *bis* II.

ing.[45] The early Louisiana case of *Shuff v. Morgan*[46] supports disregarded and it is definitely out of line with the many later that position; however, that case seems to have been generally decisions of the Louisiana courts.[47]

Although the contract may never be consummated by a weighing, counting, or measuring, it is nevertheless binding.[48] If the buyer refuses to accept the goods the seller is entitled to damages, usually the difference between the contract price and the price which the seller was later able to obtain for the same merchandise. If the seller refuses to perform the buyer is entitled to compel specific performance or obtain damages, usually the latter, because the contract is generally breached actively by the seller transferring the same goods to another buyer. Although the courts will not estimate the amount of goods in a mass in order to determine the price after the goods have been destroyed, they should be less reluctant to undertake the task in the case of wilful and active breach of the contract, since the party who fails to perform is in bad faith.

The case of *Penick and Ford v. Waguespack & Haydel*[49] presented to the Louisiana Supreme Court an opportunity to apply the latter principle. In that case a crop of molasses was sold at a price per gallon and the seller was sued for damages after he had disposed of part of the crop to a second buyer. The court properly awarded damages, but did so by considering the contract a completed sale. Chief Justice O'Niell in his dissenting opinion[50] correctly viewed the contract as an imperfect sale by weight, count, or measure, but apparently overlooked the fact that under

45. Ibid.

46. 9 Mart. (O.S.) 592 (La. 1821).

47. See cases cited supra notes 25, 40, 41.

48. On this point there is no difference of opinion among the French commentators. Illustrative of the French view is 19 Baudry-Lacantinerie, op. cit. supra note 22, at 152, nº 151: "One sees in summary that when a sale is made by weight, count, or measure, it is not perfect either in point of view of transport of risks, or even in point of view of transfer of ownership, until the goods have been weighed, counted, or measured.

"But from all other points of view, the contract is perfect. It creates reciprocal obligations upon both parties; the buyer can demand the deliverance of the things sold and has a right to damages if the seller does not execute his agreement (art. 1585); in the inverse sense, although the law does not say it, the vendor can offer the delivery to the buyer, compel him to do it or let him do the weighing, the counting, or the measuring, and require of him the payment of the price."

To the same effect see 5 Aubry et Rau, op. cit. supra note 20, at 21-22, § 349; 10 Planiol et Ripert, op. cit. supra note 20, at 331, nº 300; 1 Troplong, op. cit. supra note 22, at 89-90, nº 84. See also note 17, supra.

49. 148 La. 39, 86 So. 605 (1920).

50. 86 So. at 608 et seq.

the express terms of Article 2458,[51] the buyer is entitled to damages when the seller breaks such a contract although the goods have never been weighed, counted, or measured. However, Justice O'Niell's dissent might be sustained on some of the other grounds upon which he relied.[52]

Total Destruction

According to the majority of French authorities, the Code makes no distinction between partial and total destruction in dealing with a sale by weight, count, or measure. Hence partial and total destruction are to be treated alike and the loss falls entirely upon the seller until after the weighing, counting, or measuring.[53] No one quarrels with the result in the case where an entire mass is sold at a price to be determined by weight, count, or measure. However, in the case where a certain number of units sold are to be taken from a limited mass, a few commentators[54] hold to the view that in the case of total destruction, the buyer should bear *his share* of the loss. They argue that this is the logical conclusion to be drawn from the general principles of total destruction. Since performance by the seller has become impossible, he is excused from his obligation, but not so with the buyer who remains capable of discharging his obligation to pay the price.[55] This minority view sems to have been codified in Louisiana law by Article 1916[56] of the Louisiana Civil Code:

> ". . . when the object of the contract, although indeterminate in itself, makes part of a whole that is determinate and certain and the whole . . . is lost or destroyed by inevitable accident before delivery, the loss will fall on the creditor of the thing sold. A sale of ten bales, of the hundred bales of cotton in a particular store, is an example of this rule; and if all the

51. La. Civil Code of 1870.

52. Justice O'Niell argued that the sale was subject to a suspensive condition and further that it was impossible for the seller to store the molasses on his premises beyond the date at which the buyer failed to send for the molasses.

53. 19 Baudry-Lacantinerie, op. cit. supra note 22, at 149-150, nº 149; 16 Duranton, op. cit. supra note 22, at 116-117, nº 88; 10 Huc, op. cit. supra note 22, at 30, nº 16; 24 Laurent, op. cit. supra note 22, at 143, nº 139; 10 Planiol et Ripert, op. cit. supra note 13, at 332, nº 300.

54. 7 Demante et Colmet de Santerre, op. cit. supra note 22, at 11-12, nº 7, *bis* IV; 1 Guillouard, op. cit. supra note 13, at 46-47, nº 33.

55. The principle that the seller is relieved of his obligation due to the impossibility of performance, after total destruction of the goods to be sold, has been severely criticized at common law. See 1 Williston, The Law Governing Sales of Goods (2 ed. 1924) 301-303, § 162.

56. La. Civil Code of 1870.

cotton be destroyed by fire, the accident will discharge the seller from the obligation of delivering it."

The words "the loss will fall on the creditor of the thing sold" clearly settle the question that the buyer must sustain the loss *of the part* of the thing sold. Reference to the probable source of Article 1916[57] might support an argument that even this article did not contemplate the sale by weight, count, or measure, but that it envisaged a situation where a selection or a choice of a certain one or two things that might vary in value was involved as distinguished from a sale of fungible or absolutely homogeneous merchandise.[58] However, regardless of the intended meaning of the legal philosophers from whose minds the article was probably derived, the present form of Article 1916 seems quite clearly to cover the type of sale by weight, count, or measure, where a certain number of units are sold from a designated mass. Given this interpretation, the article stands as a reasonable modification of the arbitrary rule. When both parties have agreed upon the sale of goods to be taken from a certain mass, the price is known because the amount to be sold is known. Although the goods have never been separated, there can be no doubt that when

57. Ibid. See 3 Louisiana Legal Archives, loc. cit. supra note 1, for redactors at close of section. Due to the close similarity of 4 Toullier, Le Droit Civil Français (derniere ed. 1833) 190, §§ 444, 445, to Articles 1915 and 1916 of the Louisiana Civil Code of 1870, together with the fact that Toullier is credited as the source of a great number of the Louisiana Civil Code articles in the section dealing with obligations, has led the author of this comment to the conclusion that Articles 1915 and 1916 were derived from an earlier edition of Toullier.

58. 4 Toullier, op. cit. supra note 57, at 190, § 445. This can be translated as follows: "If yet the object of the obligation, although indeterminate by itself, makes part of a determined quantity of certain things, the obligation could be extinguished by the complete extinction of all things. I have promised you two casks of wine which are in a certain one of my cellars, or in my cellar, if I have only one. All these wines perish by a fire or fortuitous event; my obligation is extinguished. See Pothier, nº 623; as in alternative obligations, the debtor is liberated if both the things comprised in the alternative perish (1193)."

Then at page 192, § 448, Toullier says: "It is still necessary to distinguish the different kinds of sales; for when the things are sold by weight, count, or measure, the sale is not perfect, *in the sense* that the things sold are *at the risk* of the seller until they have been weighed, counted, or measured (1585).

"But it seems that it is not necessary to extend this disposition beyond its precise case, and that it has no other object than to cast the risks and the loss of the things sold on the seller, until they have been weighed or measured. If, by later events, things come to the point where the contract cannot take place, for example, if the two parties, or one of them dies or becomes insane, the contract does not subsist the less in favor of their heirs or against them. This is the result of the final disposition of the same article, which gives to the buyer the faculty of demanding the execution of the contract."

The same apparent inconsistency is to be found by comparing 1 Pothier, A Treatise on the Law of Obligations (Evans Transl. 3 Am. ed. 1853) 480, 481, nº 623, with 1 Pothier, op. cit. supra note 12, at 190 et seq., nº 309.

the entire mass is destroyed, the goods intended for the purchaser perishes. The buyer should not be able to escape liability merely because the goods had never been separated.

Article 1916 should be liberally construed to give full effect to its purpose. For example, the article speaks of the thing sold being part of a thing that is determinate and certain. If *A* sells *B* 200 bushels of the corn that is in *A's* granary and the entire amount is destroyed by fire, is it necessary that the amount of corn in *A's* granary be precisely known or would it be sufficient that *A* could establish that there were more than 200 bushels in the granary before the fire? If Article 1916 were strictly construed it would be inapplicable here since the wheat in the granary was never "determinate and certain." Article 2458 would govern and the entire loss would be on the seller. On the other hand, if the spirit of Article 1916 is applied it would be sufficient to prove that the granary contained more than two hundred bushels. It is submitted that for the purpose of Article 1916, so long as there is a larger amount from which a smaller amount is to be taken, the larger amount should be considered determinate and certain if it were sufficiently determinate and certain to be the object of a lump sale.

The same considerations would come into play in another situation. Suppose *A* sells *B* two hundred bushels of corn at one dollar per bushel to be taken from the one thousand bushels of corn in *A's* granary. If the granary then burns and all but twenty-five bushels of corn are destroyed, is the buyer liable for the one hundred seventy-five bushels that he has agreed to buy that must have perished in the fire? Article 1916 speaks of total loss. If Article 1916 is not applicable then once again Article 2458 will cause the entire loss to fall upon the seller. Here again the spirit of the article rather than its literal phraseology should rule. The buyer should be compelled to pay for the two hundred bushels he agreed to buy, and he should be entitled to whatever corn is left. This is the conclusion reached in the case of alternative sales.[59] Another analogy might be drawn to the sale of specific goods. It may be argued that the uncertainty of the goods sold is remedied at the instant the first eight hundred bushels have been destroyed. It may be argued that the remaining two hundred bushels belong to the buyer.

59. Articles 2071, 2072, 2073, 2472, 2473, La. Civil Code of 1870.

How Should the Weighing, Counting, or Measuring Be Done?

If the parties have agreed upon the method of weighing, counting, or measuring in the contract of sale, the weighing, counting, or measuring will have to be done in the manner provided in the contract in order for title and risks to pass to the buyer.[60] If the contract is silent on the subject, the weighing, counting, or measuring must be done contradictorily in order to be effective.[61] Of course, if one party or the other is in default, it might well be that the other could at least ascertain the amount of damages to which he will be entitled by weighing, counting, or measuring the goods sold. The contradictory weighing, counting, or measuring may be dispensed with in some cases as a result of local custom or the custom of a trade or profession. Sometimes it will suffice that the weighing is done by a public weigher.[62] The weighing, counting, or measuring should ordinarily be done at the place of delivery.[63]

The essentials of a valid weighing, counting, or measuring have several times been considered by Louisiana courts in connection with the sale of bales of cotton. Custom has played an important part in the method by which these sales have been conducted. Often the bales of cotton were sold by exhibiting samples from each bale and the cotton sold at a price per pound. The customary procedure was for the seller to simply give the buyer an order directing the warehouseman to permit the buyer to inspect the cotton and afterwards to weigh and deliver it on the buyer's order.[64] The buyer was entitled to inspect the cotton before the weighing and title passed only after the cotton had been weighed by the warehouseman, who was considered the seller's weigher. At the weighing, the buyer was entitled to be represented by his own weigher. The French requirement of a contradictory weighing was thereby satisfied and title passed at the time of the weighing and delivery.

Lump Sales

In the case of a lump sale, it is clear that title and risks pass immediately upon the consent of the parties.[65] If *A* sells *B* all

60. 5 Aubry et Rau, op. cit. supra note 20, at 22, § 349; 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 22, at 153, nº 152; 10 Planiol et Ripert, op. cit. supra note 13, at 334, nº 301.
61. Ibid.
62. Ibid.
63. Ibid.
64. See cases cited in note 41, supra.
65. Art. 2459, La. Civil Code of 1870: "If, on the contrary, the goods, pro-

the sugar in *A's* warehouse for one hundred and fifty dollars and in the course of the transaction tells *B* that there were fifteen hundred pounds in the warehouse, this would still be a lump sale. However, the statement of quantity would give the buyer a right to demand a supplement to the amount sold or a diminution of the price if less than fifteen hundred pounds were found in the warehouse.[66] On the other hand, if an excess over and above the fifteen hundred pounds is found to exist, there is no right of the seller to demand a supplement of the price, since he agreed to sell the whole for one hundred and fifty dollars. In effect, the seller has assured the buyer that there will be at least fifteen hundred pounds of sugar in the warehouse.[67]

COMMON LAW

At common law, the English decisions[68] as well as the early American decisions held that title to the goods sold did not pass until after the weighing, counting or measuring when an entire mass of goods was sold by weight, count, or measure.[69] This rule was codified by the English Sales of Goods Act which fixed a rebuttable presumption that title was intended to pass at the time of the weighing, counting, or measuring.[70] Later American cases adopted the view that the courts should follow the intentions of the parties exclusively without fixing a presumption one way or the other.[71] In line with the latter view the English rule

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duce or other objects, have been sold in a lump, the sale is perfect, though these objects may not have been weighed, counted or measured." Art. 1586, French Civil Code; Smith v. Huie-Hodge Lumber Co., 123 La. 959, 49 So. 655 (1909). See also Art. 2456, La. Civil Code of 1870.

66. 19 Baudry-Lacantinerie et Saignat, op. cit. supra note 22, at 154-155, nº 153; 6 Marcadé, op. cit. supra note 22, at 156-157; 1 Troplong, op. cit. supra note 22, at 104-105, nº 92. Compare 1 Pothier, op. cit. supra note 58, at 193, nº 310.

67. 1 Troplong, op. cit. supra note 22, at 105, nº 92: "As the seller, he should know the extent of the thing . . . and if he is ignorant of it, this ignorance of his own act is not excusable."

68. Hanson v. Meyer, 6 East. 615, 102 Eng. Reprint 1425 (1805).

69. Deadwyler & Co. v. Karow & Forrer, 131 Ga. 227, 62 S.E. 172, 19 L.R.A.(N.S.) 197 (1908); Gibson v. Ray, 28 Ky. L. Rep. 444, 89 S.W. 474 (Ky. App. 1905).

70. English Sale of Goods Act of 1893, § 18, rule 3:

"Unless a different intention appears; . . .

"Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or a thing be done, and the buyer has notice thereof."

71. McDermott v. Kimball Lumber Co., 102 Ark. 344, 144 S.W. 524, 39 L.R.A.(N.S.) 461 (1912); Semple v. Northern Hardwood Lumber Co., 115 N.W. 899 (Iowa 1908); Gill v. Benjamin, 64 Wis. 362, 25 N.W. 445, 54 Am. Rep. 619 (1885).

was purposely omitted from the Uniform Sales Act.[72] The result seems to be that the majority of American courts will be guided by the facts and circumstances of the individual case, in determining when title passes.[73]

Prior to the middle of the nineteenth century, it was generally settled in both England and America that there could be no completed sale of a specific amount of goods to be taken from a larger mass. Title would not pass until the goods to be sold had been separated from the mass and put in a condition subject to delivery.[74] An exception to this rule grew in America. If the parties so intended, a sale could be consummated immediately if the mass from which the quantity sold was to be taken was of a homogeneous nature without a great variation in quality.[75] In spite of a large number of decisions to the contrary,[76] this exception became a part of the Uniform Sales Act.[77] Section 6 (2) provides for a case where there is a sale of a specific number, weight, or measure of *fungible* goods in mass. In such cases, the sale is complete upon the agreement of the parties. Some problems are likely to arise over fungibility. For example, are bales of cotton that vary substantially in weight fungible?[78] The most

72. Commissioners' note (1931) 1 U.L.A. 149: "This rule of presumption is artificial and has been discarded in New York and some other states." To the same effect see 1 Williston, op. cit. supra note 55, at 536, § 266; Vold, Handbook of the Law of Sales (1931) 155-156.

73. See, for example, Gopcevic v. California Packing Corp., 64 Cal. App. 132, 220 Pac. 1078 (1923), where the terms of the contract were held to imply that title to a prune crop did not pass until they had been weighed and the price paid.

Circumstances such as payment of the price or a large part of it, allowing the purchaser credit, or immediate delivery of the goods, serve as strong evidence that title was intended to pass. 1 Williston, op. cit. supra note 55, at 539-543, § 269.

74. Notes (1910) 26 L.R.A.(N.S.) 54; (1908) 9 Ann. Cas. 26; 1 Williston, op. cit. supra note 55, at 278-280.

75. Chapman v. Shepherd, 39 Conn. 413 (1872); Kingman v. Holmquist, 36 Kan. 735, 14 Pac. 168 (1887); Kimberly v. Patchin, 19 N.Y. 330, 75 Am. Dec. 334 (1859); O'Keefe v. Leistikow, 14 N.D. 355, 104 N.W. 515, 9 Ann. Cas. 25 (1905). Compare the early case of Pleasants v. Pendleton, 27 Va. 473, 18 Am. Dec. 726 (1828), where a sale of 119 barrels of flour to be taken from 123 barrels of flour was held to pass title. See also Notes (1908) 9 Ann. Cas. 29; (1910) 26 L.R.A.(N.S.) 57; 1 Williston, op. cit. supra note 55, at 280-282, §§ 150-152.

76. Fleming v. State, 106 Ga. 359, 32 S.E. 338 (1899); Mellinger v. Hunt, 94 Iowa 351, 62 N.W. (1895); Woods v. McGee, 7 Ohio 127, 30 Am. Dec. 202 (1836). See Carpenter v. Glass, 67 Ark. 135, 53 S.W. 678 (1899).

77. The present stage of the law on such sales at common law is treated in Woodward, Cases on the Law of Sales (3 ed. 1933) 161-176.

78. Bales of cotton were held to be fungible in In re Heyward-Williams Co., 284 Fed. 983(S.D. Ga., 1923), noted in (1923) 11 Calif. L. Rev. 290. A contrary result was reached in Interstate Banking & Trust Co. v. Brown, 235 Fed. 32, 148 C.C.A. 526 (1916). Section 76 of the Uniform Sales Act defines

logical suggestion on this point seems to be that the courts should look to the intentions of the parties in an effort to see whether they regarded the goods as fungible.[79]

Although risks are usually governed by the intentions of the parties at common law, in the absence of an express or clearly implied agreement to the contrary, the courts will presume that risks pass at the same time title passes.[80] The result is that the rule *res perit domino* is usually applicable. Naturally, however, if the party in possession is at fault, the risk of loss would be on him.[81] However, in many cases, the parties may find it convenient for the seller to assume the risk until the buyer has actually received the goods or in conditional sales until the price is paid.[82]

RUSSELL B. LONG

WHAT IS THE EFFECT OF A RATIFICATION OF AN AGENT'S UNAUTHORIZED CONTRACT?

A wide diversity of opinion exists among the various American jurisdictions as to the effect of the ratification of an agent's unauthorized contract. In order to present the questions involved, the following hypothetical case is presented. On the first day of the month, *A*, agent acting on behalf of *P*, purchased five hundred bales of cotton from *T* at seventeen cents a pound. On the second *P* discovered that *A* had made this purchase. On the fourteenth, the day before delivery was to be made, *P* wired a ratification of the purchase to *T*. During the period between the original purchase and ratification the price of cotton had risen to twenty cents a pound. When *T* received the wire of ratification he immediately wired *P* that since *A* did not have authority

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fungible goods as those "of which any unit is from its nature or mercantile usage treated as the equivalent of any other unit."

Query: Should the "fungible goods" qualification be implied in sales of goods by weight, count, or measure at civil law? The point would not be important in regard to passage of title and risks, since they pass only after the weighing, counting, or measuring. However, the point could have some effect as to the necessity of a contradictory weighing, counting, or measuring.

79. Vold, op. cit. supra note 72, at 186-187.

80. Uniform Sales Act, § 22; Williston, op. cit. supra note 55, at 693-694, § 301.

81. Compare Section 22(b) of the Uniform Sales Act with Article 1915 of the Louisiana Civil Code of 1870. The risk of loss will be upon the party in default.

82. Williston, op. cit. supra note 55, at 694 et seq., §§ 302 et seq.