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THE TRANSFER OF PROPERTY AND RISK IN THE SALE OF FUNGIBLES

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I.

By the sale of fungibles we are to understand the sale of those goods, mainly primary products and food-stuffs, which are estimated by weight, number or measure.[1] Article 1474 of the Quebec civil code[2] divides the sale of such goods into two categories: the sale by weight, number or measure, and the sale *en bloc*,[3] but it does not define either of them. Since they differ in their effect on the transfer of property and risk, it is important to be able to distinguish them. The precise nature of the distinction has been, however, one of the most controversial questions in the doctrine and jurisprudence of Quebec. A similar conflict of opinion has existed in France since the enactment of the French code.

The sale is clearly one by weight, number or measure when the particular goods to be sold have not been identified at the time of the contract, but are,

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[1]ERSKINE, PRINCIPLES OF THE LAW OF SCOTLAND (12th ed.), 296: "Whatever receives its estimation in number, weight, or measure, is a fungible, as corn, wine, current coin &c." The term "fungibles", though not strictly applicable to a sale of *specific* goods, is a convenient designation of the kind of goods under consideration.

[2]Art. 1474: "When things moveable are sold by weight, number or measure, and not in the lump, the sale is not perfect until they have been weighed, counted or measured; but the buyer may demand the delivery of them or damages according to circumstances."

"Lorsque des choses mobilières sont vendues au poids, au compte ou à la mesure, et non en bloc, la vente n'est parfaite que lorsqu'elles ont été pesées, comptées ou mesurées; mais l'acheteur peut en demander la délivrance ou des dommages-intérêts, suivant les circonstances."

[3]The French expression will be used throughout in preference to the English translation "in the lump".

in the language of the civil code, uncertain or indeterminate.[4] The sale is unquestionably one *en bloc* when a specific lot of fungible goods is sold for a lump sum. The difficulty is presented by a third case: the sale of a specific lot of goods, not for a lump sum, but for a price which is estimated at so much per unit. It is necessary to weigh, count or measure the goods in this case, not to determine the thing sold, but to ascertain the total price. The time at which property and risk will pass to the buyer in such a sale depends on whether it is a sale by measure or one *en bloc*.

It is the purpose of the present article to examine the answer which the Quebec courts have given to this question, and then to pass to a brief consideration of the rules which govern the transfer of property and risk in sales by measure.

II.

The distinctive character which the civil law problem of sale *en bloc* has assumed in Quebec derives in part from the necessity of reconciling several articles in the code: the general provisions in the title of Obligations as to when ownership is transferred in contracts for the alienation of things, both certain and uncertain, and the particular provisions in the title of Sale.[5]

The general rules are found in articles 1025, 1026 and 1027 C.C. The alienation of a thing *certain* and *determinate* makes the purchaser owner of it by the consent of the parties, without the necessity of delivery.[6] On the other hand, if the thing to be delivered is *uncertain* or *indeterminate*, the creditor does not become owner of it until it is made certain and determinate and he has been legally notified that it is so.[7] Where a person has obliged himself to two persons to deliver to each of them a thing which is purely moveable property, that one of the two which has been put in actual possession...is preferred and remains owner of the thing although his title be posterior in date, provided, however, that his possession is in good faith.[8]

Articles 1472 and 1474 C.C. in the title of sale do not speak of the transfer of ownership as such, but of the *perfection* of the sale. The general rule is that the sale is perfected by the consent alone of the parties, although the thing sold is not then delivered.[9] When, however, things moveable are sold by weight, number or measure, and not in the lump, *(en bloc)*, the sale is not perfect until they have been weighed, counted or measured; although the

[4]Art. 1026 C.C.

[5]Art. 1138 of the French code does not present quite the same problem in relation to arts. 1583, 1585 and 1586. There is no French article corresponding to article 1026 of the Quebec code.

[6]Art. 1025 C.C.

[7]Art. 1026 C.C.

[8]Art. 1027 C.C.

[9]Art. 1472 C.C.

buyer may demand the delivery of them or damages according to the circumstances.[10]

The transfer of risk in Quebec civil law takes place, in the absence of agreement or usage to the contrary, at the same time as the transfer of ownership. The maxim *res perit domino* is thus applicable to the contract of sale in Quebec. This is nowhere explicit in the code, but it is clearly to be inferred from the title of obligations where the question of risk is dealt with. There, it is provided that when the certain specific thing which is the object of an obligation perishes, or the delivery of it becomes from any other cause impossible, without any act or fault of the debtor, and before he is in default, the obligation is extinguished.[11] It is also extinguished although the debtor is in default, if the thing would equally have perished in the possession of the creditor, unless in either of the above mentioned cases the debtor has expressly bound himself for fortuitous events.[12] Similarly, it is provided that the debtor of a certain specific thing is discharged by the delivery of the thing in the condition in which it is at the time of the delivery, provided that the *deterioration* in the thing has not been caused by any act or fault for which he is responsible, and that previously to the deterioration he was not in default.[13] Until delivery the debtor is obliged to keep the thing with the care of a prudent administrator *(bon père de famille)*.[14]

That the codifiers were adopting the principle of *res perit domino* is clearly indicated, moreover, by their comments on article 1474 C.C., where they show themselves anxious to avoid any mistaken separation of ownership and risk such as certain French authors were led to advocate in sales by measure as a result of the peculiar wording of article 1585 C.N.[15] This particular passage in the codifiers' report has had an important bearing on the discussion of what constitutes a sale *en bloc*. This question will now be examined in some detail.

III.

The problem of sale *en bloc*, or the transfer of ownership in a specific lot of merchandise which is sold, not for a lump sum, but at so much per unit of weight, count or measure, is surely one of the most interesting in the field of comparative law. It illustrates in English law the operation of *stare decisis* on

[10]Art. 1474 C.C.

[11]Art. 1200 C.C.

[12]*Ibid.*

[13]Art. 1150 C.C. See also art. 1087 C.C.

[14]Art. 1064 C.C.

[15]Art. 1585 C.N.: "Lorsque des marchandises ne sont pas vendues en bloc, mais au poids, au compte ou à la mesure, la vente n'est point parfaite, en ce sens que les choses vendues sont aux risques du vendeur jusqu'à ce qu'elles soient pesées, comptées ou mesurées; mais l'acheteur peut en demander ou la délivrance ou des dommages-intérêts, s'il y a lieu, en cas d'inexécution de l'engagement."

the early reception of an imperfectly digested civil law rule; in the law of France and Quebec, the eventual abandonment of that rule by the courts because a satisfactory rationale, grounded in principle rather than mere weight of authority, could not be found for it. While the change in the French jurisprudence seems to have attracted little or no attention in the common law world, it has had a decisive influence in Quebec.

In Quebec until 1923, although the jurisprudence was by no means uniform,[16] the weight of judicial opinion was that such a sale did not transfer ownership until the goods had been weighed, counted, or measured and the total price ascertained.[17] This view rested on an assumption — drawn from the codifiers' comments on article 1474[18] — that the expression "vente en bloc" was to be interpreted by reference to Pothier[19] and authors like Troplong[20] and Marcadé[21] who had adopted his definition of the sale *per aversionem* as one "en bloc pour un seul et même prix," and like him, treated the sale of a specific lot of merchandise at so much a unit as a sale by measure.

This assumption was seriously challenged for the first time in 1923 by the decision of the Quebec Court of Appeal in what has since become the leading case of *Cohen* v. *Bonnier*.[22] It was held by the majority of the court, with two judges dissenting, that ownership had passed at the time of the contract in a specific lot of scrap iron sold at so much a ton, although the iron had still to be weighed to determine its total price.

Dorion J., who delivered the principal opinion of the majority, denied that there was any warrant in the report of the codifiers for applying Pothier's

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[16]E.g., *Brown* v. *Lauzon* (1905), 28 Que. S.C. 10; (1906), 30 Que. S.C. 178.

[17]*Hurley* v. *Gamache* (1919), 25 R.L. n.s. 432; *Benoit* v. *Dieulefet et Messier* (1919), 57 Que. S.C. 354.

[18]Cod. Rep. v. 2, p. 8: "Article 3 (1474) follows article 1585 C.N., except that it omits the words 'in the sense that the things sold are at the risk of the seller.' — This qualification of the rule declared in the article has occasioned much doubt and conflict of opinion among the commentators. On the one hand it has been contended that the declaration that the sale of things to be weighed, measured or counted is not perfect until this has been done was limited by the expression alluded to, simply to the effect of continuing the risk of the thing in the seller — but that the property passed nevertheless to the buyer. On the other hand this expression is held not to limit the general enunciation of the rule, but to be merely illustrative of it, — and accordingly that the sale passes no property and is in no sense perfect until the weighing, measuring or counting has taken place. — This is the opinion of Troplong, Marcadé and others, and seems to have been the intention of the authors of the article as reported by Fenet. — The Commissioners have adopted this view, which is indeed in harmony with Pothier's expression of the rule, and they have in consequence omitted the qualifying words cited, in order to avoid any ambiguity upon the subject."

[19]*Vente*, Nos. 308, 309.

[20]*Vente*, No. 90.

[21]EXPLICATION THÉORIQUE ET PRATIQUE DU CODE NAPOLÉON, Vol. 6, p. 150 et seq.

[22](1924), 36 Que. K.B. 1. For decision of Superior Court see (1922-23), 3 C.B.R. 241, 70 D.L.R. 85.

definition of the sale *per aversionem*[23] to the interpretation of article 1474 C.C. In his opinion, the codifiers' comments on this article did not touch on the question of sale *en bloc;* their references to Pothier, Troplong and Marcadé dealt with quite another matter. The question which the court had to decide was answered to his satisfaction by the text of the code itself. It was plainly stated in article 1025 C.C. that ownership in a thing certain and determinate, such as a specific lot of merchandise which is materially distinct from any other, passed by consent alone. Article 1474 C.C. which merely contained the particular rule applicable to the contract of sale, had to be reconciled with this general provision. Why introduce the qualification for "vente en bloc" into article 1474 C.C. at all, unless it were contemplated that weighing, counting or measuring would at some point be necessary, which is not the case if the total price has already been determined?

At one point it was even said by Dorion J. that the qualification in article 1474 was conjunctive rather than disjunctive; a sale could be by measure and *en bloc* at the same time.[24] (The sale *en bloc* in such a case would be a special kind of sale by measure, one in which measurement would be necessary to determine the price, but not the thing sold.) This view has no grammatical foundation, for the phrase "and not in the lump" appears in both the English and French versions as a non-restrictive modifier set off by commas. Nor is it consistent with the earlier definitions by Dorion J. of the sale by measure and the sale *en bloc* as separate and mutually exclusive things. "La vente à la mesure c'est la vente de tant de mesures à tant la mesure: et c'est la mesure qui règle toute la vente. La vente en bloc c'est la vente de tout pour le prix du tout, même si ce prix doit être calculé d'après la quantité."

Though perhaps not essential to his conclusion, this particular argument of Dorion J. forms part of the general attempt to demonstrate that there is no significant difference between the texts of the Quebec and French codes which would justify a difference in the jurisprudence of the two systems on the question of sale *en bloc*. For after concluding that the Quebec codifiers offer no guidance on the question and that it is one to be determined solely by reference to the text of the code, Dorion J. is finally influenced to take the position he does by the fact that it is the one which the French courts themselves adopted after a long period in which Pothier's definition was dominant.[25] The argument from article 1474 that a sale can be both by measure and *en bloc* is frankly designed to meet a possible objection to following the French

[23]The expression, as used in Roman law, is usually translated "for a lump sum".

[24](1924), 36 Que. K.B. 1, 10.

[25]Dijon, 13 décembre 1867, S. 68.2.311; Cass-Req. 18 mars 1902, S. 1902.1.519; Lyon, 1er juillet 1931. S. 1932.2.42; AUBRY ET RAU (6th ed.) vol. 5, p. 21, note (39-2); COLIN & CAPITANT, COURS ÉLÉMENTAIRES DE DROIT CIVIL FRANÇAIS (10th ed.) vol. 2, No. 837 II; PLANIOL & RIPET, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS (1932) vol. 10, No. 299.

decisions based on the fact that in addition to article 1585 C.N. which corresponds to article 1474 in Quebec, the French code contains an article 1586 which reads: "Si au contraire, les marchandises ont été vendues *en bloc*, la vente est parfaite, *quoique les marchandises n'aient pas encore été pesées, comptées ou mesurées.*"[26]

There was a strong dissenting judgment in the *Cohen* case by Lafontaine C.J. He took a different view of the facts, holding that the sale was not one of a certain and determinate thing.[27] His long opinion on the meaning of sale *en bloc* is of interest, however, because once again it is based on the assumption that the codifiers' comments on article 1474 C.C. call for the application of Pothier's definition. It is, therefore, necessary to consider this disputed passage in the codifiers' report.[28]

On the face of it, the codifiers had but one purpose in the passage of their report which deals with article 1474 C.C. and that was to explain and justify the omission of the words "en ce sens que les choses vendues sont aux risques du vendeur jusqu'à ce qu'elles soient pesées, comptées ou mesurées," found in the corresponding article 1585 of the French Code. These words had given rise to much difference of opinion in France and had led some to argue that even in a sale by measure, ownership passed to the buyer at the time of the contract, although risk remained with the seller until the goods were weighed, counted or measured.[29] Our codifiers express themselves in favour of the contrary opinion, that "the sale passes no property and is in no sense perfect until the weighing, measuring or counting has taken place." This, they say, is the opinion of Troplong, Marcadé and others, and it is "in harmony with Pothier's expression of the rule."

The reference to Pothier is at first sight puzzling, because of course when he wrote, a perfect sale did not have the effect of transferring ownership without further formality, although it did transfer risk. It is, therefore, difficult to see how any "rule" which he expressed can have a direct bearing on the controversy raised in France by the peculiar wording of article 1585 C.N., unless it be his repeated emphasis that as long as the goods sold must

[26]Italics are the author's.

[27]This was the view taken in the Superior Court (see note 22, *supra*) on the ground that the agreement stated, "The entire lot of scrap is 350 tons." This was held to mean that the intention was to purchase 350 tons and no more. The majority in the Court of Appeal seem to have attached no particular significance to this statement. They declared the appellant to be the owner of the entire lot of scrap and to have the right to delivery of the excess over 350 tons upon payment of the additional price.

[28]See note 18, *supra*.

[29]For a list of these authors see MARCADÉ, *op. cit.* pp. 151-153. See also LAURENT, Vol. 24, Nos. 136 et seq; Colmet de Santerre, Vol. VII, p. 11, No. 7, bis II; MOYLE, CONTRACT OF SALE IN THE CIVIL LAW, (Oxford 1892), p. 85; note to Dijon, 13 décembre 1867, S. 68.3.311; Valery, note to Aix, 11 juin 1908, D. 1910.2.305; note to Lyon, 1er juillet 1931, S. 1932.2.42.

be weighed, counted or measured, the sale "n'est point parfaite."[30] The passage in which he discusses the requirements of a perfect sale does, on the other hand, contain a very clear expression of the rule that the sale of goods estimated by weight, number or measure is not perfect until not only the thing sold but the total price has been made certain and determinate. Is this the "rule" to which the codifiers refer?

However that may be, it is important to realize that there was in France at the time of Troplong and Marcadé a difference of opinion, not only as to whether ownership was separable from risk in sales by measure, but as to whether the sale of a certain lot of merchandise at so much per unit of weight, count or measure was a sale *en bloc;* and a closer examination of the first question suggests that it was not altogether unrelated to the second one, at least in the minds of certain authors. Duvergier,[31] one of those who contended on the basis of the wording of article 1585 C.N. that ownership passed at the time of the contract, although risk remained with the seller until the goods were measured, seems to have confined this opinion precisely to the sale of a certain, determinate lot of merchandise at so much per unit of weight, number or measure. Indeed, it is difficult to understand how anyone could have seriously argued that ownership could pass in unascertained goods, although the separation of ownership and risk also seems to have been applied to what certain authors have called a *genus limitatum,* — the sale of a certain quantity only in a specific lot of merchandise.[32]

It may, therefore, be reasonable to assume that in their consideration of article 1585 of the French Code, there was present to the minds of our codifiers the difference of opinion which existed even in the time of Troplong and Marcadé, and was fully ripened when the code was drafted, as to what constituted a sale *en bloc;* and hence to argue that by adopting the opinion of these authors, the codifiers must be understood to have rejected the suggestion that even ownership should pass in the sale of a certain lot of fungible goods before they have been weighed, counted or measured.

Whether this is a plausible inference or not, it is at least significant that while citing Troplong and Marcadé in connection with the separation of ownership and risk, the codifiers did not see fit to make any reference to the question of sale *en bloc,* although both these authors express very decided opinions in favour of Pothier's definition of such a sale after a full review of the authorities for and against it. It should be pointed out, however, that in addition to citing Troplong and Marcadé to support their conclusion on the question of ownership and risk, the codifiers rely as well on Fenet. There Treilhard is reported to have said during the discussions in the Conseil d'Etat that article 1585 C.N., as originally proposed, was not sufficiently precise,

[30] *Vente,* No. 308.

[31] I *Vente,* Nos. 83, 90; Cf. GUILLOUARD, *Vente* I, No. 29.

[32] DURANTON, Vol. 16, No. 92. Cf. LAURENT, Vol. 24, No. 139.

"car, si l'on achète tout ce qui se trouve dans un magasin à raison de tant la mesure, il ne reste d'incertitude que sur la quotité; la chose et le prix sont déterminés."[33] It is this remark, apparently, which caused an express exception to be made in article 1585 C.N. for the sale *en bloc*. Moreover, in the list of authorities consulted by the codifiers[34] and cited under article 1474 C.C. itself, as distinct from the passage of comment in their report, the specific reference to Troplong, unlike that to Pothier (and possibly Marcadé) is not to a section in which the sale *en bloc* is discussed.

In so far, therefore, as the report of the codifiers is concerned, the evidence can hardly be said to be conclusive for either side of the controversy, although it is probably fair to say that the weight rather tends towards those who claim that Pothier should be our guide on this question. There is at least a strong presumption that the codifiers did not intend to make any change in the law.

Reference to the codifiers, however, presupposes that the text of the code is not clear. This was denied by Dorion J. in *Cohen* v. *Bonnier*, and the prevailing view today is succinctly summed up by his statement: "Nous ne croyons pas qu'un texte de Pothier puisse l'emporter sur le texte du code civil." The argument is that while the code does not define what it means by sale *en bloc*, and it is necessary to look elsewhere for a definition, the definition must be one which accords with the other provisions of the code concerning the transfer of property. As the majority in *Cohen* v. *Bonnier* see it, the problem is how to reconcile an interpretation of article 1474 C.C. which is based on Pothier's definition of the sale *en bloc* with article 1025 C.C. which provides that ownership in a thing certain and determinate passes by consent alone.

The exponents of Pothier's view are obliged, it would seem, to argue that they cannot be reconciled except by recognizing that article 1474 C.C. contains, for the case of sale, a qualification of the general principle in 1025. Article 1474 C.C. is concerned not merely with the determination of the thing sold, but with what is called the "perfection" of the sale. The sale of a thing uncertain or indeterminate is not exactly synonymous with a sale by weight, number or measure. They are not co-extensive expressions. A sale by weight, number or measure is one in which weighing, counting or measuring is in any way to determine the perfection of the sale by perfecting or completing the essential obligations of the parties to it: the seller's obligation to deliver the thing sold; the buyer's obligation to pay the price. This is only achieved by rendering the objects of such obligations, thing and price, certain and determinate. And it is only the perfect sale in this sense which passes ownership and risk.

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[33]FENET, vol. XIV, p. 21.

[34]L. 8, *De periculo et comm. rei venditae;* L. 35.5, *De. contr. empt.* — POTHIER, *Vente,* No. 308; MARCADÉ, vol. VI, p. 149. TROPLONG, *Vente,* Nos. 86, 87; 14 FENET, pp. 4, 21, 85, 153, 182, 183; C.N. 1585.

Thus the sale of a specific lot of merchandise at so much per unit of weight, number or measure is the sale of a thing certain and determinate (unless one is prepared to argue, as some have done, that the thing is not "determinate" until its quantity or *"importance"* is known),[35] but it is at the same time a sale by weight, number or measure. It is precisely because a sale of fungibles — unlike a gift, for example — is imperfect until not merely the object to be transferred but the total price has been made certain and determinate that there is any need at all for an article 1474 C.C. to complete the general rules of 1025 and 1026 C.C. Article 1474 C.C. is a provision applying to fungible goods whether they be specific or unascertained.

Various attempts have been made to discover and formulate the principle underlying Pothier's rule, but none of them, judging by the measure of disagreement, has been entirely satisfactory. In any approach to an understanding of the rule it is important to treat the expression "perfect sale" with some caution. It is necessary to make three essential distinctions. First, there is the formation of the agreement to sell, or what the common law calls an "executory agreement", a contract giving rise to obligations, but not of itself transferring property. For this "imperfect" sale to have binding effect, it is only necessary that the price be ascertainable.[36] Then there is the sense in which the word "perfect" is used to state that a sale produces its principle effect, the transfer of property. (The word "sale" itself is frequently used in this sense, to denote not so much the contract or agreement as the transfer of property pure and simple.) And indeed, it would seem that this is the sense in which "perfected" and "perfect" are used in articles 1472 and 1474 of the Quebec code. Finally, the word "perfect" is used, as it is by the Romans and Pothier to characterize the contract which produces this effect.

The Roman law, from which Pothier drew his rule, appears to have treated the sale of a specific lot of goods for a price which is estimated at so much per unit of weight, count or measure as a *conditional* sale.[37] This is the view taken by such French commentators as Domat,[38] Troplong,[39] and Pardessus.[40] By fixing the unit price only the parties are presumed to have made the perfection of the sale subject to the suspensive condition of measurement by which the total price is to be ascertained. Troplong[41] goes further: in his view the parties have agreed that it is to be a sale, not of the mass of goods which existed at the time of the contract, but of each unit which is actually measured out from the mass as it exists at the time of measurement, after shrinkage and

[35]TROPLONG, *Vente*, No. 90; MARCADÉ, vol. 6, p. 151; HUC, vol. 10, No. 19.
[36]*Beaudoin* v. *Rodrigue* [1952] Que. K.B. 83.
[37]D. 18. 1.35.5. ZULUETA, *The Roman Law of Sale* (1945), p. 32.
[38]I *Vente*, II, § 4, art. 7.
[39]*Vente*, No. 90.
[40]DROIT COMMERCIAL, No. 292.
[41]*Vente*, No. 90.

other changes which may have taken place in the interval. The thing to be sold is not truly certain and determinate before measurement has taken place. There is a suggestion of this view in the Roman texts.[42]

Whether or not one is prepared to go as far as Troplong, the view which treats the sale as being a conditional one in the general sense expressed above has the merit of relating the problem to the intention of the parties rather than confusing it with formation or validity of contract.[43] The statement that a perfect sale requires a price that is certain and determinate has caused a good deal of argument at cross-purposes.[44] The value of the term "conditional," as employed by Troplong and others, has been largely obscured, however, by the confusion with which other authors have surrounded it in their insistence on a separation of ownership and risk.[45] Duvergier, who is one of those holding that ownership, as distinct from risk, passes at the time of contract, even though the total price has still to be determined, admits nevertheless that it is illogical to base this assertion on the view that the sale is subject to a suspensive condition.[46] The effect of such a condition is to postpone the transfer of ownership. Unfortunately, he is less convincing as to the basis on which he allows ownership to pass while leaving risk with the seller.

In his use of the term "perfect" Pothier seems to be referring to the character of the obligations at a given time. Risk (and since his time, property) should not be transferred to the buyer until his obligation to pay the price is perfect or complete, that is, until the object of that obligation is made certain and determinate. By what logic or equity should a man be burdened with a risk of which he does not know the extent? By what reasoning should a seller have an action for the price before the buyer is obliged to pay it? The buyer cannot be obliged to pay it before it has been ascertained, according to the intention of the parties. It is not ascertained and the parties are not in agreement as to what the risk is before the specific lot of goods has been weighed, counted or measured, unless the quantity of the goods and the total price have been estimated subject to correction by subsequent measurement. In the latter case there is a sale *per aversionem* after Pothier's

[42]D. 18.1.35.5: "Sabinus et Cassius tunc perfici emptionem existimant, cum adnumerata admensa adpensave sint, quia venditio quasi sub hac condicione videtur fieri, ut in singulos metretas aut in singulos modios quos quasve admensus eris, aut in singulas libras quas adpenderis, aut in singula corpora quae adnumeraveris." D. 18.6.8: " . . . et si id quod venierit appareat, quid quale quantum sit, sit et pretium et pure venit, perfecta est emptio . . . "

[43]BAUDRY-LACANTINERIE ET SAIGNAT, *Vente*, No. 150; HUC, vol. 10, No. 17.

[44]Valery, note to Aix, 11 juin 1908, D. 1910.2.305. Cf. Dijon, 13 déc. 1867, S. 68.2.311: " . . . le prix de la vente quoique non encore connu exactement, est certain dans ses éléments et doit résulter d'un simple calcul dont les bases sont immuablement fixées; que c'est là ce qui constitue le prix certain . . . " See BLACKBURN, TREATISE ON THE EFFECT OF THE CONTRACT OF SALE, (3rd ed. 1910) pp. 186, 265.

[45]See note 29, *supra*.

[46]I *Vente*, Nos. 82, 83, Cf. MIGNAULT, LE DROIT CIVIL CANADIEN, Vol. 7, p. 20.

own example.[47] The parties have agreed on a price which shall determine the buyer's obligation in the event the goods are destroyed before they have been finally weighed, counted or measured.

The fact that such a sale is made subject to the right of subsequent adjustment in the price, should final measurement disclose the need,[48] is perhaps an answer to the argument of Dorion J. in *Cohen* v. *Bonnier* that it should not be necessary to make any qualification for the sale *en bloc* in article 1474 C.C. if by that expression is understood a sale in which the total price is fixed. It is this ultimate measurement, or verification, required despite the estimate of total price that makes even the wording of article 1586 C.N. reconciliable with Pothier's rule. The sale *en bloc* can be one in which weighing, counting or measuring is necessary for some purpose, but it is not one in which these operations are necessary for the perfection of the sale. The law is satisfied so long as the parties have shown an *intention* to transfer risk immediately by estimating the total price.[49] These are but inferences drawn from Pothier's remarks in an attempt to state the basis on which the case for his view must be made. For while it may be permissible to argue that article 1474 C.C. contains a qualification of the rule in 1025 C.C., there must be an inner logic and consistency to article 1474 C.C. itself.

As with the remarks of the codifiers, so then with the text of the code: neither side can claim that the evidence points conclusively to its own view. Putting aside the argument of the last paragraph, — if, as Dorion J. contended, there is no need for the qualification in article 1474 when Pothier's rule is applied, it is equally true to say that the *entire* article is made unnecessary by the court of appeal's interpretation. Sales by measure are then fully covered by article 1026 C.C. as sales of uncertain or indeterminate things.

What are the issues of policy and commercial convenience which should influence the choice of a solution to this problem? Most of the authors writing since the promulgation of the French code in support of Pothier's rule have emphasized the impossibility of determining the total price of the goods in the event that they are destroyed before being weighed, counted or measured.[50] Others, while conceding the practical difficulty of proof, have insisted that

[47] *Vente*, No. 309.

[48] This point, however, is not undisputed. See discussion by MARCADÉ, Vol. 6, p. 151; TROPLONG, I *Vente*, No. 92; HUC, Vol. 10, No. 18; DUVERGIER, I *Vente*, No. 91; PARDESSUS, DROIT COMMERCIAL, No. 292. Cf. Arts. 1501-1503 C.C.

[49] *Bertrand* v. *Blouin & Drouin & Deserres* (1907), 32 Que. S.C. 396; *La Compagnie A Bois Bédard* v. *The Eagle Lumber Company* (1923), 35 Que. K.B. 483. BENJAMIN ON SALE (8th ed. 1950) p. 310; *Logan* v. *Le Mesurier* (1847), 6 Moore's P.C. 116; *Martineau et al* v. *Kitching* (1872), 7 Q.B. 436.

[50] HUC, Vol. 10, No. 17; BEAUDRY-LACANTINERIE ET SAIGNAT, op. cit., No. 148; PLANIOL, (7th ed.), Vol. 62, No. 1363; LAURENT, Vol. XXIV, No. 139; LYON-CAEN ET RENAULT, TRAITÉ DE DROIT COMMERCIAL, (5th ed.), Vol. 3, No. 132. This point is also stressed by a Louisiana commentator, C. F. B. (1929-30), 4 Tulane Law Review 149. See also in Quebec, "Lex", (1924), 2 Revue du Droit 265.

it is not a sufficient reason for suspending the operation of the fundamental principle according to which property and risk in a thing certain and determinate pass by consent alone. The difficulty, they say, must be left to the rules of evidence.[51] The principle that risk should not pass until the parties are agreed upon it according to the manner provided in their contract would seem a stronger basis for criticism than the practical difficulty of proof.

Favouring the rule of the modern jurisprudence there is what seems to be a more important consideration: the kind of right which the buyer is to have in the event the seller goes bankrupt before the goods have been weighed, counted or measured. It has been held in Quebec that where ownership has not passed, the buyer does not have the right to demand delivery from the seller's trustee in bankruptcy, but has only a claim for damages, ranking as an ordinary creditor.[52] The trustee cannot be forced to execute the seller's contract, for that would be a payment. On the other hand, of course, if the buyer had a *jus in re* and not a mere *jus ad rem* he could revendicate the goods as owner.[53] The distinction may not amount to much when the goods are still in the possession of the seller and he is solvent. Then the buyer has the right to demand delivery and, if necessary, to have the goods weighed, counted or measured in the seller's default; it is not a *jus in re* but it can be converted into one. But as the issue arises most often when the seller is in bankruptcy, it is not to be wondered that authors who could not contemplate a transfer of risk before the extent of it had been established in the manner prescribed by the parties should have tried so hard to justify a separation of ownership and risk.[54] We seem to have a case for which the maxim *res perit domino* does not provide a very satisfactory answer.

If it were logically defensible in the present context of the law, a separation of ownership and risk would certainly provide a solution for the sale of a specific lot of merchandise at so much per unit of weight, count or measure. Indeed, there is a note of reservation in the judgment of Rivard J., one of the judges making up the majority in *Cohen* v. *Bonnier,* which suggests that he might have had such a distinction in mind. "Sous l'empire de notre article 1474 C.C.," he declares, "lorsqu'il s'agit simplement de savoir si la propriété a été transférée, il doit suffire, pour parfaire la vente en bloc, que le prix de l'unité de mesure ait été fixé."[55] But such a distinction is clearly excluded by the codifiers' comments on article 1474 C.C. Moreover, — and this is a further argument from the text of the code in favour of the majority's opinion in the

[51]GUILLOUARD, I *Vente,* No. 30; PLANIOL ET RIPERT, (1932) Vol. 10, No. 300. For the same opinion at common law see *Martineau* v. *Kitching* (1872), 7 Q.B. 436, at 456-457; Cf. WILLISTON ON CONTRACTS, Vol. 4, No. 950, note 6.

[52]*Villeneuve* v. *Kent* (1892), 1 Q.B. 136; *Curtis* v. *Millier* (1898), 7 Q.B. 415. Cf. *In re Tardif Ex parte Boulanger* (1922-23), 3 C.B.R. 169 (S.C.)

[53]DURANTON, Vol. 16, No. 92.

[54]See note 29, *supra.*

[55](1924), 36 Que. K.B. 1, at 15.

Cohen case — it runs counter to article 1200 C.C., which provides that when the certain, specific thing which is the object of an obligation perishes, or the delivery of it becomes from any other cause impossible, without any act or fault of the debtor and before he is in default, the obligation is extinguished. Pothier himself clearly meant by this that the loss of the thing should fall on the buyer.[56] How are we to reconcile this with his theory of the sale *en bloc?*

In all probability the Romans and Pothier felt that the sale of a specific lot of merchandise at so much per unit of weight, count or measure was a proper case for attenuation of the much criticised rule of *periculum emptoris.* But when ownership, and not merely risk, passes by consent alone, the same considerations do not apply, at least not with the same force. The balance of equity, commercial convenience and security are against depriving the buyer of a right of ownership simply because the seller has not weighed, counted or measured the goods. The practical difficulty of proof in the case of loss falls, after all, on the seller.

The decision in *Cohen* v. *Bonnier* was followed by the Quebec court of appeal two years later,[57] but once again there was a strong dissent. Allard J., taking much the same view as Lafontaine C.J. had taken in the earlier case, expressed the following opinion of the *Cohen* holding: "Cette décision me paraît renverser toute une jurisprudence solidement établie par une suite d'arrêts rendus depuis le code. Elle me semble aussi faire table rase de tous les principes posés dans l'ancien droit particulièrement dans l'oeuvre de Pothier, elle me paraît faire une distinction où notre article 1474 n'en fait pas, elle me paraît contraire à l'esprit et au texte de ce dernier article."[58]

This was to be the last strong note of protest. The case of *Tardif* v. *Fortier & Moreau*[59] and other recent decisions[60] show the new line of jurisprudence to be firmly established in the provincial courts. As in France, the authors appear to be divided, but the weight of opinion is clearly against the view taken by the courts.[61] Writing in 1936, M. Antonio Perrault was still able to say, "La question reste ouverte",[62] but that is no longer true of the provincial court of appeal. If the question is to be re-opened it will have to be in the Supreme Court of Canada.

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[56]*Vente,* Nos. 56, 279.

[57]*Pelletier* v. *Tremblay* (1925), 39 Que. K.B. 473.

[58]At p. 482.

[59][1946], Que. K.B. 356.

[60]*National Fruit Exchange Inc.* v. *Greenshields* [1946] Que. S.C. 263; *Levesque* v. *Tremblay* [1947] Que. K.B. 684, 687; *Beaudoin et Sylvain et J. W. MacDonald Limited* [1953] Que. S.C. 156; Cf. *Lauriault* v. *Levesque et Boisee* [1944] Que. S.C. 37, at 39, 40; *Simard* v. *Quebec Veneer Industries Co. Limited* [1945] R.L. 203, at 207, 214.

[61]MIGNAULT, Vol. 7, p. 20, note 1; LANGELIER, COURS DE DROIT CIVIL, Vol. 5, p. 11; Dorion, (1923), 2 Revue du Droit 116, 317; PERREAULT, TRAITÉ DE DROIT COMMERCIAL DE QUÉBEC, Vol. 2, c. 3; TRUDEL, TRAITÉ DU DROIT CIVIL DE QUÉBEC, Vol. 7, p. 361.

[62]*Op. cit.,* p. 38.

The Supreme Court had an opportunity to decide the question of sale *en bloc* around 1890 in the case of *Ross* v. *Hannan*,[63] but it was able to avoid the necessity of doing so. The case involved the sale of 1643 boxes of cheese at 10½ cents a pound. The buyer "selected, examined and set apart the cheeses, ordered a large number to be removed from the second floor to the ground floor and coopered a large number of boxes." The cheese was to be weighed later to determine its total price. As far as one can judge from the account of the facts contained in the reported decisions of all three courts, the case was definitely one in which the goods to be sold had been made certain and determinate. At any rate, all but one of the judges appear to have proceeded on this assumption. It was originally understood that the buyer would take the cheese away on a Friday, but he asked permission to leave it in the seller's warehouse until the Monday. The seller agreed to this. Between Friday and Monday, before the cheese could be weighed, it was damaged by flood. The issue was who should bear the loss.

In the Superior Court[64] Torrance J. gave judgment for the seller after declaring that the problem was not to choose between conflicting French theories of the sale *en bloc,* but to discover the intention of the parties in the particular case. His judgment was reversed in appeal by the Court of Queen's Bench[65] with two judges dissenting. The sale was held to be one by weight and not *en bloc*. Pothier's definition was applied.

The seller's appeal to the Supreme Court was unanimously dismissed, but Pothier's rule was not the common ground of judgment. Of the five judges who decided the case, Sir Ritchie C.J., Fournier J. and Taschereau J. took the position that even if one assumed ownership to have passed, the loss should fall on the seller because he could have prevented the damage had he exercised the care of a prudent administrator.[66] The Chief Justice, however, did not even agree that the sale was one of a certain and determinate thing, though this appears to have been a misunderstanding of the facts. Fournier J. declared that the correct definition of the sale *en bloc* was the one which was found in Pothier, Troplong and Marcadé since these authors had been cited by the codifiers. Taschereau J. expressed no opinion on this question.

Of the other members of the court, Strong J. agreed that the judgment of the Court of Queen's Bench should be affirmed but gave no reasons, and Patterson J., deciding the case on completely different grounds from those of his colleagues, had this to say about the question of sale *en bloc:* "The authority of Pothier and other writers referred to by the respondent would certainly put a sale of an entire lot at so much a pound on the same footing as a sale at so much a pound of so many pounds out of a larger bulk, as

[63](1890), 19 S.C.R. 227.
[64]M.L.R., 2 S.C. 397.
[65]M.L.R., 6 Q.B. 222.
[66]Art. 1064 C.C.

opposed to a sale *per aversionem* or *en bloc*. I do not find it easy to grasp the principle on which that doctrine rests, and there may be good ground for the appellant's contention against its being accepted as being now the law, but the present case scarcely calls for a determination of the question."

The question of *sale en bloc* has, therefore, still to be dealt with by the Supreme Court. Today the court would have the larger perspective afforded by a further half century of doctrinal and judicial examination of the problem. At the time *Ross* v. *Hannan* was decided the change in the French jurisprudence, by which the Quebec courts have since been greatly influenced, had only begun to take place and was hardly apparent.

IV.

Articles 2458 and 2459 of the civil code of Louisiana are English versions, with only minor variation, of articles 1585 and 1586 C.N., but the courts of Louisiana appear to have followed Pothier's rule and to have been unaffected by the change in the French jurisprudence.[67]

The rule which the courts of France and Quebec have rejected has also managed to survive, albeit in modified form,[68] in the more protective judicial atmosphere of the common law, where it has finally been codified in the Sale of Goods Acts of England[69] and the other provinces of Canada.[70] The rule was criticized by Blackburn as one which had been "somewhat hastily adopted from the civil law."[71] Indeed, it seems to have lost its doctrinal roots in transplanting and instead of being defended on Pothier's grounds as flowing logically from an objective requirement of the perfect sale, has assumed the

[67]*Goodwyn* v. *Pritchard* 10 La. Ann. 249; *Peterkin* v. *Martin* 30 La. Ann. 894; *Milliken & Farwell* v. *American Sugar Refining Co.* 143 La. 667; *Kohler* v. *Huth Const. Co. Inc.* 168 La. 827; C.F.B. (1929-30) 4 Tulane Law Review 149; 77 C.J.S. p. 1035; Williston on Contracts, v. 4, no. 950, note 5; Cf. Saunders, Lectures on the Civil Code of Louisiana, 1925, p. 472.

[68]The courts came to adopt the view that the transfer of ownership should only be suspended when the thing to be done for ascertaining the price was to be done by the *seller*. For the progressive formulation of the rule at common law see: *Hanson* v. *Meyer* (1803) 6 East 614; *Simmons* v. *Swift* (1826) 5 B & C 857; *Gilmour* v. *Supple* (1858) 11 Moore P. C. 551; *Turley* v. *Bates* (1863) 2 H. & C. 200; *Martineau* v. *Kitching* (1872) 7 .Q.B. 436. Chalmers' Sale of Goods Act, 12 ed. pp. 73-74.

[69]1893, 56 & 57 Vict. ch. 71, s. 18, Rule 3: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer . . . 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 thing be done, and the buyer has notice thereof." (This rule was omitted from the United States Uniform Sales Act).

[70]E.g. Ontario, 1950 R.S.O. c. 345, s. 19, Rule 3.

[71]*Op. cit.* p. 185.

form of a rule of interpretation for ascertaining the intention of the parties.[72] The fundamental rule of the Sale of Goods Act is that the property in specific or ascertained goods is transferred to the buyer "when the parties to the contract intend it to be transferred";[73] the civil law posits such transfer as an *effect* of what it calls the *perfect* sale. From a practical point of view, the distinction is probably of little or no consequence; from the theoretical or doctrinal point of view, it means that English law has not had to bother with the civilians' quarrel as to whether, in this particular case at least, a certain and determinate price is essential to a sale, as distinct from a mere agreement to sell. This may well explain the survival of the rule in English law.

It goes without saying, however, that the Quebec courts are just as concerned to discover the intention of the parties, for the rules concerning the transfer of property and risk are not rules of public order (although it is in the very nature of things that ownership cannot be transferred before the goods have been made certain and determinate.) Ordinarily, in a contract for the sale of a specific lot of merchandise at so much per unit of weight, number or measure, property and risk will pass to the buyer when the contract is made, but the courts will give effect to the clear expression of a contrary intention. In *Logan* v. *Le Mesurier*,[74] a Quebec case decided by the Privy Council before the enactment of the civil code, Lord Brougham laid bare what was then and still is the common ground shared by the two systems of law on this question: "The question must always be, what was the intention of the parties in this respect; and that is, of course, to be collected from the terms of the contract. If those terms do not show an intention of immediately passing the property until something is done by the seller, before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until the thing is done. It is unnecessary to go through the cases relating to these positions. None of them will be found at all to impugn them. Indeed, taken together, they clearly support it, as does the old French, and Civil Law."[75]

Today, when there is, in the langnage of the Sale of Goods Act, "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 presumption of English law is that the parties did not intend the property to pass before such thing or act be done; the presumption of Quebec law is that ownership and risk are to pass when the contract is made.

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[72]*Martineau* v. *Kitching* (1872), 7 Q.B. 436.

[73]U.K. Act, s. 17.

[74](1847), 6 Moore P.C. 116, at 132-133.

[75]For French authors emphasizing the intention of the parties as the only rule see DUVERGIER, I, No. 91; PARDESSUS, DROIT COMMERCIAL, No. 292; DELAMARRE ET LE POITVIN, Vol. 4, No. 120. See also *Sapery* v. *Simon et al*, (1909), 15 R.L. n.s. 120 (C.A.)

V.

The time at which ownership and risk will pass in goods which are sold by weight, number or measure, and not *en bloc,* will depend, first of all, on the terms of the particular contract, including frequently the implied terms of commercial usage. There are few general principles to be drawn from a study of the reported cases. Lord Brougham's dictum in *Logan* v. *Le Mesurier* that it is always a question of the intention of the parties to be collected from the terms of the contract is particularly true of what the common law calls the appropriation of unascertained goods. The oft-quoted characterization of the common law on this subject by Cresswell J. in *Gilmour* v. *Supple*[76] would not be an unfair description of the Quebec cases. "It is impossible," he said, "to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers, or their representatives, have, with equal ingenuity, endeavoured to show that they had, or had not, acquired the property in that for which they contracted; and Judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of the mshould not appear altogether reconcileable with each other."

There are, nevertheless, in the code, the doctrine and the jurisprudence one or two general rules for the guidance of the courts where the parties have not determined the question by their own stipulations. According to article 1474 C.C. the sale is not perfect so as to transfer ownership until the goods have been weighed, counted or measured. The precise manner in which a particular kind of goods must be weighed, counted or measured is a matter for agreement or usage,[77] subject always to the federal legislation regulating weights and measures.[78] Despite the terms of this article, however, it is not enough simply to make the goods certain and determinate; the buyer will not become owner until he has been "legally notified" that they are so. This additional requirement is found in article 1026 C.C., the general provision governing all contracts for the alienation of things which are uncertain or indeterminate at the time the contract is made.

Article 1026, which has no counterpart in the French code, was apparently inspired by a passage in Toullier[79] that criticizes article 1138 C.N. for its failure to distinguish between certain and uncertain goods and suggests that

[76](1858), 11 Moore P.C. 551.

[77]*Joyal* v. *Beaucage* (1921), 59 Que. S.C. 211; *Bellavance* v. *Black Lumber Manufacturing* (1929), 35 R.L. n.s. 368; *Fuguère* v. *Tremblay* (1944), Que. K.B. 673

[78]1952 R.S.C. c. 292.

[79]DROIT CIVIL FRANÇAIS, Vol. 7, No. 460.

it would be made more complete by the addition of a paragraph such as the following: "Quant aux choses incertaines ou indéterminées, le créancier n'en devient propriétaire que lorsqu'elles sont devenues certaines, ou lorsque le débiteur les a déterminées et lui a valablement fait connaître sa détermination."

In drafting article 1474 C.C. the Quebec codifiers followed, with certain modifications to which reference has already been made, the wording of article 1585 C.N., and they neglected to reproduce the requirement of notice found in article 1026. Our courts have not, however, attached any particular significance to this discrepancy between the two articles, and where the question of notice has arisen they have taken it for granted that the rule of 1026 applied to the contract of sale.[80] The reason for the rule is obvious enough. The buyer has a right to know when his responsibility as owner begins; it would be wrong to invest him with the ownership and risk of property before he is aware of the fact and able to insure the goods or take other measures which he may consider necessary for his protection.[81]

The absence of the requirement of notice in article 1474 C.C. and 1585 C.N., and the tendency of the courts when stating the rule governing the transfer of ownership in sales by measure to use in most cases the terms of article 1474 alone, is probably explained by the existence of another rule, long recognized by the doctrine and the jurisprudence. It is the rule that in the absence of an express agreement or usage to the contrary, the operations by which unascertained or generic goods are made certain and determinate must be carried out in the presence of both parties or their representatives. In a word, the definitive operations by which ownership and risk are to pass must be, to use the French expression, "des opérations contradictoires".[82]

In the ordinary case envisaged by the doctrine the buyer will, therefore, necessarily have knowledge of the moment at which ownership and risk pass. But in practice the selection or determination of the goods is very often left to one of the parties, usually the seller,[83] with the buyer reserving his recourses on arrival. (It will be noted that in the paragraph proposed by

[80]*The King* v. *Dominion Cartridge Company Ltd.* [1923] Ex. C.R. 93; *F. A. Rodden & Co. Limited, Ross, es-qualité* v. *Cohn Hall Marx Co. and Bryce and Terminal Warehousing Co. Limited* (1929), 46 Que. K.B. 42; *Levesque* v. *Tremblay* [1947] Que. K.B. 684, 687, 690, 694.

[81]TRUDEL, *op. cit.* p. 357.

[82]GUILLOUARD, I *Vente*, No. 35; BAUDRY-LACANTINERIE ET SAIGNAT, Vol. 17, No. 152; PLANIOL ET RIPERT, Vol. 10, No. 301; *La Compagnie Champoux* v. *The Brompton Pulp and Paper Company* (1910), 38 Que. S.C. 261; *Paradis* v. *Duclos* (1911), 20 Que. K.B. 97; *Joyal* v. *Beaucage* (1921), 59 Que. S.C. 211; *Simard* v. *Quebec Industries Co. Limited* [1945] R.L. 203, at 210; *Beaudoin & Sylvain & J. W. Macdonald Ltd.* [1953] Que. S.C. 156, at 165. Cf. *Côté* v. *The James Richardson Company Ltd.* (1906), 15 Que. K.B. 359; *Rivard* v. *Gallichan* [1947] R.L. 1, at 3.

[83]In *Coté* v. *The James Richardson Company Ltd., supra,* it was held that the *seller* had waived his right to an "opération contradictoire".

Toullier notice is specified for the case where the *debtor,* or seller, has made the determination of the goods.) The parties may agree that ownership shall not pass until the weight, count, or measurement of the goods has been verified by the buyer at destination,[84] but a right to inspect the goods on arrival does not necessarily suspend the transfer of ownership and risk.[85]

As long as the buyer has had actual knowledge of the appropriation of the goods to the contract it is unimportant how he obtained such knowledge; the sufficiency of the notice given by the seller will only be in issue when it is proved that the buyer did not have knowledge in fact.[86]

In sales F.O.B. and C.I.F., where out of necessity the selection and appropriation of the goods is left by a well established usage to the seller,[87] the carrier is the buyer's agent to receive the notice required by article 1026 C.C.,[88] though not, of course, to accept the goods as conforming in point of quantity or quality to the contract. Ownership will pass, therefore, in the usual sale F.O.B. or C.I.F. of unascertained goods at the time of shipment by operation of the civil law rules. Independently of ownership, however, the risk of loss or damage in transit is assumed by the buyer as a matter of contract.[89] At

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[84]*Paradis* v. *Duclos* (1911), 20 Que. K.B. 97; *Braithwaite* v. *Keddy* (1925), 38 Que. K.B. 404.

[85]It has been held that in a sale F.O.B. when the buyer is not present or represented at the shipping point or because of the nature of the goods it is impractical to inspect them there, he has a right to inspect them on arrival: *Brown* v. *Gagnon* (1921), Que. S.C. 102 (C.R.); *Goudreau* v. *Standford Ltd.* (1923), 61 Que. S.C. 83. Cf. *Brace, McKay & Co. Ltd.,* v. *Shmidt* (1921), 31 Que. K.B. 1, at 17. The term "F.O.B." is defined in the standard confirmation of sale used in the fruit and vegetable industry as follows: "The buyer has the right of inspection at destination before the goods are paid for, but only for the purpose of determining that the produce shipped complied with the terms of the contract or order at time of shipment, subject to the provision covering suitable shipping condition. This right of inspection does not convey or imply any right of rejection by the buyer because of any loss, damage, deterioration, or change which has occurred in transit." On the other hand, "F.O.B. Subject Inspection and Acceptance Arrival" means that the seller is "to assume all risks of loss or damage in transit not caused by the buyer who has the right to inspect the goods upon arrival and to reject them if upon such inspection they are found not to meet the specifications of the contract of sale at destination."

[86]TRUDEL, *op. cit.* Vol. 2, p. 358.

[87]*Vipond* v. *Montefusco* (1917), 26 Que. K.B. 490, at 494.

[88]*F. A. Rodden & Co. Limited, Ross, es-qualité* v. *Cohn Hall Marx Co. and Bryce Terminal Warehousing Co. Limited* (1929), 46 Que. K.B. 42. Morin, *La Vente C.I.F. dans notre droit civil,* (1945), 5 Revue du Barreau p. 108 at 110.

[89]*Stock* v. *Inglis* (1884), 12 Q.B.D. 564. It is doubtful, however, whether the term F.O.B. by itself is enough to *postpone* the transfer of risk. It has been held in several American cases that the mere stipulation of F.O.B. with nothing more did not prevent risk from passing in *specific* goods at the time of contract: *Washington Electric Cooperative Inc.* v. *Norry Electric Corp.* 193 F. 2d. 412; *Sadler Machinery Co.* v. *Ohio Nat. Inc.* 202 F. 2d. 887. See also the Ontario case of *Craig* v. *Beardmore* (1904), 7 O.L.R. 674. Cf. C.J.S. Vol. 77, p. 1084. Revised American Trade Definitions, 1941, Knauth, Ocean Bills of Lading (4th ed. 1953) p. 342.

common law it is recognized that the risk in such contracts will pass to the buyer upon shipment even though the transfer of ownership has been postponed,[90] and there is no reason in Quebec law why such a separation of ownership and risk should not be applied where it is clearly the intention of the parties. But it has been held by the Quebec courts that the transfer of ownership in a sale F.O.B. of unascertained goods is not suspended by the mere fact that the seller has the bill of lading made out to his own or his agent's order to assure payment or acceptance of the draft before the goods are released to the buyer.[91] This practice does not create a presumption, as in the law of England and the other provinces of Canada, that the right of disposal or *jus dispondendi* has been reserved.[92]

Where the seller's obligation is not merely to deliver the goods to a carrier but to put them down at destination, ownership will not ordinarily pass to the buyer until he has received them. Such is the case usually where goods are ordered from a manufacturer and there is no special agreement concerning ownership and risk. This is true whether one applies the rule of article 1026 C.C.,[93] or, as may sometimes be the case,[94] the transaction can be treated as a contract "à faire" — what the Romans called a lease and hire of work *per averionem,* but which recognized as partaking more of the nature of a sale. In such a contract where the manufacturer or workman supplies the materials and the thing is to be perfected and delivered as a whole for a fixed price, the risk of the thing before delivery is on the workman, according to the principle of *res perit domino.*[95]

It is difficult to go further in the realm of general principle. Each case turns on its own facts. Most of the reported cases in Quebec deal with the sale of lumber or pulpwood, which constitute the basis of the province's most important industry. These cases frequently involve not only the application of articles 1026 and 1474, but of article 1027, which provides that where a thing has been sold to two or more persons, that one who has taken possession of it in good faith is deemed to be the owner. When lumber is not sold *en bloc* it is often extremely difficult to decide according to the terms of the contract, the conduct of the parties and all the circumstances of the case, what operations must be considered definitive for the purpose of transferring ownership and risk.

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[90]HALSBURY, vol. 29, pp. 223-224; 226.

[91]*Vipond* v. *Montefusco* (1917), 26 Que. K.B. 490, at 492; *Brace McKay & Co. Ltd.* v. *Shmidt,* (1921), 31 Que. K.B. 1, at 5-6; *Eastern Fruit Co.* v. *Associated Growers of British Columbia* (1933), 55 Que. K.B. 104, at 107-108. Cf. *MacGillivray* v. *Watt* (1886) 31 L.C.J. 49, 278.

[92]Sales of Goods Act, 56 & 57 Vict. c. 71, s. 19 (2).

[93]*The King* v. *Dominion Cartridge Company Ltd.* [1923] Ex. C.R. 93.

[94]*Quyon Milling Company* v. *Eddy Company* (1925), 39 Que. K.B. 341, at 350; *Landry Pulpwood Company Ltd.* v. *La Banque Canadienne Nationale* [1927] S.C.R. 605, at 614.

[95]1684 C.C. MIGNAULT, Vol. 7, pp. 401-402.

The fact that cut lumber has been marked or stamped with the purchaser's sign has been held to raise a presumption that he is the owner of it[96] — it is certainly an important circumstance — but it does not always mean that the sale is perfect or that the buyer has taken possession.[97] It may have been done simply for purposes of identification to protect the buyer for advances which he has made to the seller. As a general rule, lumber or pulpwood sold by description is only made certain and determinate so as to transfer ownership and risk by a measurement and counting after it has been culled and properly sorted for size, quality and other specifications of the contract. Until the sorting or *triage* is complete, and the actual quality contracted for has been measured and counted out, ownership does not pass. Preliminary or approximate measurements to verify whether there is sufficient wood to meet the requirements of the contract,[98] to determine the right to advances,[99] *pour fins de droit de coupe,*[100] or other reasons, do not make the goods certain and determinate. The final measurement must take place at the precise time and place agreed upon in the contract.[101]

The Quebec cases on the sale of lumber and pulpwood show that while our law underwent an important change when ownership in a certain and determinate thing was made to pass by consent alone, in commercial transactions where the sale of unascertained goods predominates, delivery does in fact still play an important role in determining the issue of ownership and risk. Technically, there need be no delivery or displacement of the goods for ownership to pass, so long as they have been made certain and determinate and the buyer has been legally notified that they are so. But in the absence of special agreement, the rule is that the goods must be weighed, counted or measured where they are to be delivered,[102] and in practice final determination does not usually take place before the point of delivery, actual or constructive. Because of the requirement of notice and an "opération contradictoire" the courts often have difficulty deciding that ownership has passed before the buyer is actually put in possession and is conclusively presumed to have accepted the goods.

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[96]*Dallaire* v. *Gauthier* (1903), 24 Que. S.C. 495; *King* v. *Dupuis* 28 S.C.R. 388 at 403-404.

[97]*Quyon Milling Company Limited* v. *The E. B. Eddy Company Limited* [1926] S.C.R. 194; *Landry Pulpwood Company* v. *Banque Canadienne Nationale* [1927] S.C.R. 605; *Bellavance* v. *Black Lake Lumber Manufacturing Co.* (1929), 35 R.L. 368; *Cote* v. *Brisson* (1930), 49 Que. K.B. 117; *Simard* v. *Quebec Veneer Industries Co. Limited* [1945] R.L. 203. Cf. *Rivard* v. *Gallichan* [1947] R.L. 1; *Gallichan* v. *Rivard* [1947] R.L. 4; *Lauriault* v. *Levesque & Boisse* (1944), Que. S.C. 37.

[98]*Villeneuve* v. *Kent* (1892), 1 Que. Q.B. 136.

[99]*Curtis* v. *Millier* (1898), 7 Que. Q.B. 415; *Théberge* v. *Lavoie* (1908), 15 R. de J. 279.

[100]*Simard* v. *Quebec Veneer Industries Co. Limited* [1945] R.L. 203.

[101]*Loiselle* v. *Boivin* (1910), 16 R. de J. 50.

[102]*Joyal* v. *Beaucage* (1921), 59 Que. S.C. 211.