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poses of the law. The doctrines of public policy and the policy against circumvention of the law will preclude undesirable results. By keeping in mind that the conflicts rule is merely a guide based on past experience we can understand how the court can examine all the laws which may be applicable before characterizing the issue. The conflicts rule will also provide a means of working towards universality of results in cases where similar interests are involved. Once the similarity of institutions and concepts is realized through a study of comparative law, the way is open to the universal adoption of connecting factors. In this method lies the future of the conflict of laws.[55]

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EFFECT OF THE FORM OF THE BILL OF LADING ON PASSAGE OF TITLE IN LOUISIANA

SECTION 40 (B) UNIFORM BILLS OF LADING ACT:[1]

> "Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

Under the common law[2] as well as the law of Louisiana[3] a sale of specific goods is presumed to transfer the property therein as soon as the contract is completed, although the price has not yet been paid nor delivery of possession effected. Likewise, when

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55. As to the necessity of universality in conflicts rules, see Levy-Ullmann, La Doctrine Universaliste en Matière de Conflit des Lois, in Barbey, op. cit. supra note 45, at vii-xix.

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1. La. Act 94 of 1912, § 40(b) [Dart's Stats. (1939) § 8104(b)].

2. Crug v. Gorham, 74 Conn. 541, 51 Atl. 519 (1902); Warner v. Warner, 30 Ind. App. 578, 66 N.E. 760 (1903). See E. L. Welch Co. v. Lobart Elevator Co., 122 Minn. 432, 436, 142 N.W. 828, 830 (1913); 1 Williston, Sales (2 ed. 1924) 529, 530, 531, § 264.

3. 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."

the contract is for the sale of unascertained goods, property passes to the vendee when the goods are appropriated to the contract.[4] Such an appropriation takes place when the goods are delivered to a common carrier for transportation to the buyer, and therefore the risk of loss in transit is upon him.[5]

At common law, in the absence of statute, when goods are shipped under a bill of lading in which the seller is named as consignee, he is deemed not to have appropriated the goods to the contract. Title remains in him and he must bear the risk of loss in transit.[6] The Uniform Sales Act, Section 20(2)[7] of which is almost identical to Section 40(b) of the Uniform Bills of Lading Act, professes to change this rule.

Although Louisiana has not adopted the Sales Act, it has adopted the Uniform Bills of Lading Act containing Section 40(b);[8] and therefore the common law authorities applying Section 20(2) of the Sales Act are pertinent in this state.

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4. Mechem, Sales (1901) 594, § 721: "Upon the making of a contract for the sale of a part of a larger mass of goods . . . or of goods thereafter to be supplied, no particular goods, however, being designated, it is clear that no present title does or can thereby pass. The contract at this point is purely executory, and it cannot be effectual to transfer title until it has become attached to some specific goods upon which it can operate. What is essential now is the *appropriation* of the goods to the contract, and when this occurs the contract becomes executed and the title is transferred."

Id. at 597, § 726: "In general, however, that act or series of acts constitutes an appropriation which fully and finally designates the particular chattel upon which the contract is to operate."

The "appropriation" rule is followed by Louisiana. State v. Shields, 110 La. 547, 34 So. 673 (1903); Egwood Co. v. Falkenhagen, 151 La. 1072, 92 So. 703 (1922); Art. 2458, La. Civil Code of 1870. Cf. Arts. 1916, 1917, La. Civil Code of 1870, which provide that if the thing to be sold is to be taken from a larger mass which is "determined and certain" the risk of loss is on the buyer.

5. Hunter v. Randolph, 128 N.C. 91, 38 S.E. 288 (1901); Greif Bro. v. Seligman, 82 S.W. 533 (Tex. Civ. App. 1904); Vold, Sales (1931) 203-204; 1 Williston, Sales (2 ed. 1924) 582, § 278. This rule has been followed by the Louisiana courts: State v. Shields, 110 La. 547, 34 So. 673 (1903); Milan's Spot Cash Wholesale House v. Nomey, 154 So. 466 (La. App. 1934).

6. Chapman v. Nitrate Agencies Co., 225 Ala. 650, 144 So. 810 (1932); Richardson v. Fowler, 154 Ark. 92, 241 S.W. 887 (1922); John Meeter & Sons v. Paragould Wholesale Grocer Co., 158 Ark. 128, 249 S.W. 982 (1923); Brandenstein v. Geo. Rasmussen Co., 192 Ill. App. 545 (1915); Roaring Fork Potatoe Growers v. Clemons Produce Co., 193 Mo. App. 653, 187 S.W. 617 (1916); Penneman v. Winder, 180 N.C. 73, 103 S.E. 908 (1920). Contra: Pennington Produce Co. v. Browning, 293 S.W. 935 (Tex. Civ. App. 1927). But cf. Malone v. Dawson, 117 Tex. 37, 5 S.W. (2d) 965 (1928).

7. Section 20(2) of the Uniform Sales Act provides: "Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

8. La. Act 94 of 1912, § 40(b) [Dart's Stats. (1939) § 8104(b)].

Under the Sales Act, other jurisdictions have held that in a contract for the sale of unascertained goods delivery of the subject matter to a common carrier has the effect of transferring title with the accompanying risk of loss to the vendee at the point of shipment, even though the bill of lading names the vendor as consignee.[9] The theory is that, since title would have passed were it not for the form of the bill of lading, the reservation of property by the vendor must be deemed, under Section 20(2), Uniform Sales Act, to be for the sole purpose of securing performance by the vendee.

Despite the fact that other jurisdictions appear to have attained a satisfactory unanimity in their interpretations of Section 20(2), Uniform Sales Act,[10] Louisiana apparently has taken a contrary view.[11] In *California Fruit Exchange v. John Meyer, Inc.*[12] there was a contract for the sale of peaches. The vendor in California placed the peaches on board a carrier and shipped them to New Orleans under a bill of lading naming the seller as consignee; a notation on the waybill instructed the carrier to allow inspection without the bill of lading. The peaches were damaged in transit and the buyer refused to accept them. The seller instituted suit, claiming a breach of contract by the buyer. In holding that title to the peaches did not pass to the buyer and that therefore the seller should bear the risk of loss, the court stated that the provisions of Section 40(b) were subordinate to the intention of the parties and that the facts of the case showed that the parties intended that title should pass at New Orleans,

9. Alderman Bros. Co. v. Westinghouse Air Brake Co., 92 Conn. 419, 103 Atl. 267 (1918); Standard Casing Co. v. California Casing Co., 233 N.Y. 413, 135 N.E. 834 (1922); Braufman v. Bender, 58 N.D. 165, 225 N.W. 69 (1929). Contra: Motch & Merriweather Machinery Co. v. Sidney Machine Tool Co., 15 Ohio App. 266 (1919). See also Rylance v. James Walker Co., 129 Md. 475, 99 Atl. 597 (1916), holding that "Where . . . the form of the bill [made to the seller or to his order] of lading is not the *only* evidence of the intention of the seller to reserve the property in the goods, the form of the bill of lading cannot be interpreted as intended only for the purpose of securing performance of the contract." (129 Md. 475, 483, 99 Atl. 597, 599.)

10. See cases cited in note 9, supra.

11. California Fruit Exchange v. John Meyer, Inc., 166 La. 9, 116 So. 375 (1928); Gerde-Newman Co. v. Louisiana Stores, Inc., 144 So. 756 (La. App. 1932). See also State v. Federal Sales Co., 172 La. 921, 136 So. 4 (1931). In that case goods were shipped under a bill of lading made to seller's order. The state attempted to seize the goods to satisfy a claim against the buyer. The court held that the goods remained the property of the seller and were therefore not subject to seizure. In so holding the court relied upon the first sentence in Section 40(b) and made no reference to the qualification of that sentence in the second sentence. It would appear, however, that since the seller retained the right to possession until payment that his security title in the goods would be sufficient to preclude any seizure.

12. 166 La. 9, 116 So. 575 (1928).

the point of delivery. In reaching this conclusion of fact, the court relied upon a custom among New Orleans fruit merchants to buy only after inspection, which custom had been acquiesced in by the seller on previous occasions;[13] emphasis was placed on the form of the bill of lading[14] and the fact that inspection was allowed.[15]

Section 40(b) of the Uniform Bills of Lading Act is but a rule of presumption, and it is therefore subordinate to the intention of the parties.[16] It is doubtless true that a custom not to *buy* until inspection would be a sufficient showing that the parties intended to suspend the operation of that section of the Uniform Bills of Lading Act. However, it is believed that reservation of the privilege of inspection is of itself not enough to show an intention inconsistent with the provisions of Section 40(b). The reservation of *view and trial* which is specifically dealt with in Article 2460 of the Louisiana Civil Code[17] operates to suspend perfection of the sale until the vendee is satisfied with the object of the contract. Where the parties have already agreed as to the quantity and quality of the thing to be sold the reservation of a privilege of inspection is not within the contemplation of Article 2460. The distinction between the reservation of *view and trial* of Article 2460[18] and that of mere reservation of the privilege of

13. "The uncontradicted testimony in the record is that the universal custom among the wholesale dealers in fruits in New Orleans is to buy only upon arrival and after inspection of the fruit. This custom had always been observed between the New Orleans merchants and the plaintiff. . . ." (166 La. 9, 12, 116 So. 575, 576.)

14. "The bill of lading shows that the shipment was consigned to the shipper . . . at the point of destination. . . .

"Why is it, if the agreement was that the title to the peaches was to pass from the seller to the buyer at the moment of delivery to the carrier, the bill of lading was not drawn to the consignee or its order? Plaintiff's explanation that it was not done because of its desire to secure the payment of the purchase price is not convincing. The same object could have been attained by attaching to a draft the bill of lading running to the consignee, deliverable only upon payment of the draft." (166 La. 9, 13, 116 So. 575, 576.)

15. "Again, by whom was the inspection to be permitted. . .? If by defendant, then its contention that it had reserved the privilege of inspecting and rejecting is corroborated; if by the plaintiff, then its contention that the peaches became defendant's property at the point of shipment loses its force." (166 La. 9, 13, 116 So. 575, 576.)

16. California Fruit Exchange v. John Meyer, Inc., 166 La. 9, 116 So. 575 (1928). See Standard Casing Co. v. California Casing Co., 233 N.Y. 413, 416, 135 N.E. 834 (1922), stating that the provisions of § 20(2) of the Uniform Sales Act are subordinate to intention.

17. Art. 2460, La. Civil Code of 1870: "Things, of which the buyer reserves to himself the *view and trial*, although the price be agreed on, are not sold, until the buyer be satisfied with the trial, *which is a kind of suspensive condition to the sale.*" (Italics supplied.)

18. Art. 2460, La. Civil Code of 1870.

inspection when the quantity and quality are already agreed upon is well brought out in the case of *Brown-McReynolds Lumber Company v. Commonwealth Bonding and Casualty Company.*[19] There the court said:

> "That article [2460] supposes the case of an object bargained for conditionally, and clearly says so. Here there was no conditional sale; *the contract was absolute for so many feet of lumber of, such a grade, and the only inspection contemplated was for the purpose of ascertaining that the lumber actually delivered was of the grade and quality purchased.*"[20] (Italics supplied.)

It would seem then that, whenever the quantity and quality of the object of a contract to sell are agreed upon, a reservation of the privilege of inspection should not be considered as a suspensive condition. The purpose of such reservation is merely to determine whether or not the vendor has complied with the contract by shipping goods of the quantity and quality ordered.

The implication of the *Meyer* case,[21] that a seller who ships goods under a bill of lading naming himself as consignee is presumed to retain full ownership of the goods, does not accord with the interpretation placed on Section 20(2) of the Uniform Sales Act (or Section 40(b), Uniform Bills of Lading Act) in other jurisdictions. Logically, the interpretation of the *Meyer* case cannot be justified. The obvious intention of Section 40(b) is to remove any presumption of retention by the seller of a property in the goods for purposes other than security. Since delivery to a carrier for purposes of fulfilling the contract of sale generally has the effect of transferring title to the buyer,[22] it would appear that naming the seller as consignee in the bill of lading merely creates, under Section 40(b), a presumption that the seller retained property in the goods *for purposes of security only.* However, the rule of the *Meyer* case has been followed by a subsequent holding in *Gerde-Newman & Co. v. Louisiana Stores, Inc.*[23] In that case there was a contract to sell goods. The seller placed the goods on board a carrier and shipped them under a bill ot lading naming itself as consignee. The goods were lost in transit, and the seller sued to recover the purchase price. The court in-

19. 11 Orl. App. 49 (La. App. 1913).

20. Id. at 51. For the same interpretation of the reservation of the privilege of inspection, see Standard Casing Co. v. California Casing Co., 233 N.Y. 413, 135 N.E. 834 (1922).

21. 166 La. 9, 116 So. 575 (1928).

22. See authorities cited in note 5, supra.

23. 144 So. 756 (La. App. 1932).

terpreted Section 40(b) to mean that, when there is an *express* agreement between the parties that title should pass upon delivery to a carrier, the mere form of the bill of lading would not defeat that intention; but that the burden is on the seller to show such agreement. In the absence of this showing, shipment under a bill of lading made to the seller or to his order will not pass title to the buyer. It is submitted that the interpretation placed upon Section 40(b) in the *Gerde-Newman*[24] and *Meyer* cases[25] represents an incorrect application of that section. This interpretation might be explained, however, by reference to the holding of the Court of Appeal in *U. Koen & Co. v. New Winnfield Drug Co.*[26] The court there stated that in the absence of an agreement by the parties that title should pass at the point of shipment or proof of a bill of lading directing that shipment be made to the buyer, title does not pass when the seller delivers the goods to a carrier. Perhaps the *U. Koen* case means simply that title does not pass unless the bill of lading directs that shipment be made to the buyer where no other evidence of the seller's intention to fulfill the contract with the buyer can be shown. If this be true, the decision is eminently correct, for there would be no proof of *appropriation.* However, it is not unlikely that the case establishes the rule that delivery to a carrier will not effect a passage of title unless there can be shown an express agreement to that effect between the parties, or unless the bill of lading directed that shipment be made to the buyer. If this latter interpretation is correct, it is believed that the case is erroneously decided. Such a rule would be in the teeth of the *appropriation* rule established by the Louisiana Civil Code[27] and jurisprudence.[28] Nevertheless, if the strong language of the *U. Koen* case[29] is a true statement of Louisiana law, then the result reached in the *Meyer* case[30] and the *Gerde-Newman* case[31] must necessarily follow. It could not

24. Ibid.
25. 166 La. 9, 116 So. 575 (1928).
26. 125 So. 764 (La. App. 1930).
27. Art. 2458, La. Civil Code of 1870.
28. State v. Shields, 110 La. 547, 34 So. 673 (1903); Egwood Co. v. Falkenhagen, 151 La. 1072, 92 So. 703 (1922).
29. "Plaintiff carried the burden of proof to show that the title or ownership of the property passed to defendant when it was delivered to the carrier, and, in the absence of evidence establishing that such was the agreement of the parties, or that the bill of lading directed that the shipment be delivered to defendant, *it cannot be presumed that the title or ownership of the property passed to defendant on delivery to the carrier. . . .*" (Italics supplied.) (125 So. 764, 765.)
30. 166 La. 9, 116 So. 575 (1928).
31. 144 So. 756 (La. App. 1932).

then be said that in those cases title would have passed except for the form of the bill of lading; a necessary requisite to passage of title—that the bill of lading directed that shipment be made to the buyer—would be lacking. In the absence of an express agreement, therefore, the first sentence of Section 40(b)[32] would stand alone, and the qualification of the second sentence[33] would be entirely inapplicable.

It is submitted that so long as it appears that delivery to a carrier was made for purposes of fulfilling the contract to sell, it is unsound to require that the bill of lading direct that shipment be made to the buyer. Such a requirement would be a departure from the *appropriation* rule. Under the *appropriation* theory, it would seem that the form of the bill is mere evidence of an intention to appropriate to the contract, and this intention may be shown by other circumstances.

Another difficulty, peculiar to Louisiana, is encountered in applying Section 40(b), Uniform Bills of Lading Act. In *California Fruit Exchange v. John Meyer, Inc.*,[34] the Court of Appeal stated that Louisiana does not recognize divided incidents of ownership. The theory is, that under the civil law, *ownership* imports absolute and complete dominion over the subject matter thereof. It was held therefore that a seller who ships goods under a bill of lading naming himself as consignee, having retained property for purposes of security, must be deemed to have retained full title. In reaching this conclusion the court relied upon Articles 488[35] and 489[36] of the Louisiana Civil Code. Article 488 reads as follows:

> "Ownership is the right by which a thing belongs to someone in particular, to the exclusion of all other persons."

Article 489 provides:

> "The ownership of a thing is vested in him who has the immediate dominion of it, and not in him who has a mere beneficiary right in it."

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32. La. Act 94 of 1912, § 40(b) [Dart's Stats. (1939) § 8104(b)]. "Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. . . ."

33. La. Act 94 of 1912, § 40(b) [Dart's Stats. (1939) § 8104(b)]: ". . . But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

34. 8 La. App. 198 (1927).

35. Art. 488, La. Civil Code of 1870.

36. Art. 489, La. Civil Code of 1870.

These articles, when considered without reference to other parts of the Code, appear to bear out the holding of the appellate court in the *Meyer* case.[37] However, Article 2487[38] of the Louisiana Civil Code provides:

> "The seller is not bound to make a delivery of the thing, if the buyer does not pay the price and the seller has not granted him any term for the payment."

Since the right to possession may be regarded as an *incident of ownership* it would seem that Article 2487 expressly provides for the very kind of divided incidents of ownership contemplated in Section 40 (b) of the Uniform Bills of Lading Act. The effect of both Article 2487 and of Section 40 (b) upon ownership of the thing is that both provisions recognize a qualified right to possession apart from ownership. Since Article 2487 is *specific,* whereas Articles 488 and 489 are *general* in their provisions, the former should constitute an exception to Articles 488 and 489. From this it may be said that the statement of the Court of Appeal in the *Meyer* case, that Louisiana law does not recognize divided incidents of ownership, is at least questionable. In considering the *Meyer* case on certiorari[39] the Supreme Court found it unnecessary to pass upon the question of divided incidents of ownership.[40] This might be regarded as an indication that the Supreme Court does not agree with the ruling of the Court of Appeal. But even conceding that divided incidents of ownership are inconsistent with civilian principles of property and with the provisions of the Louisiana Civil Code, it is submitted that Section 40 (b) of the Uniform Bills of Lading Act, as the more recent expression of the legislative will, should be given the full effect intended by the legislature. The second sentence of Section 40 (b) provides:

> "But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, *the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligation under the contract.*" (Italics supplied.)

It is obvious that the necessary intendment of this sentence is to provide for divided incidents of ownership.

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37. 8 La. App. 198 (1927).
38. Art. 2487, La. Civil Code of 1870.
39. 166 La. 9, 116 So. 575 (1928).
40. The court found that the parties intended that title should pass at the point of delivery. It was unnecessary, therefore, to decide on the question of divided incidents of ownership. The *Meyers* case is discussed in more detail in another part of this comment.

CONCLUSION

In conclusion it is submitted: (1) That is is exceedingly doubtful that the principles of the civil law are inconsistent with divided incidents of ownership of the kind provided for in Section 40(b), Uniform Bills of Lading Act. If, however, there is any inconsistency, Section 40(b) should be given the effect of superseding those principles to the extent that such inconsistency exists. (2) Section 40(b) was intended to remove any presumption of retention of property *for purposes other than security* which may have formerly existed by virtue of the fact that the bill of lading named the seller as consignee. It follows that the seller's naming himself as consignee should not prevent the transfer of title to goods which otherwise would have been effectively appropriated to the contract on delivery to the carrier, and that all the seller should be deemed to retain is a property in the goods for purposes of security only.

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