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Sale of "Potential" in Florida

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SALE OF "POTENTIAL" IN FLORIDA

This note primarily considers the necessity of the actual or potential existence of a subject matter in order to perfect a valid sale or mortgage. A sale is effected only when there is a transfer of title, and it is essential that the goods that form the subject matter of the sale be in actual existence[1] or have a potential existence[2] at the time of the sale. If the subject matter does not meet these basic requirements there cannot be a valid sale.[3] Therefore a person not only can sell goods which he owns that are in actual existence but he can also sell things that have a potential existence.[4] Under this doctrine the buyer of a potential receives title to the potential when the contract is completed, while title to the actual goods vests automatically in the buyer when they come into existence. Thus in analyzing a sales transaction it is important to look first to the subject matter to determine whether the above requirements have been met.

HISTORICAL BACKGROUND

The early common law required that the subject matter of a transaction be in actual existence at the time of sale or mortgage.[5] Merchants of that day became displeased with this rigid requirement when it began to hamper flourishing English commerce. Means were found by the solicitors to modify the law.[6] The result was the adoption by the courts of the "doctrine of potential existence." This doctrine was used by the English courts to sustain the sale or mortgage of property potentially belonging to the mortgagor or vendor as an incident of property then in existence and actually belonging to him.[7]

1Low v. Andrews, 15 Fed. Cas. 1008 (No. 8559) (Cir. Ct. D. Mass. 1839); Robinson v. Hirschfelder, 59 Ala. 503 (1877); Huntington v. Chisholm, 61 Ga. 270 (1878).

2A thing is said to have potential existence when it is the natural product or growth or the expected increase of something already in existence. Dickey v. Waldo, 97 Mich. 255, 56 N.W. 608 (1893); see BENJAMIN, SALE OF PERSONAL PROPERTY §78 (8th ed. 1950).

3Low v. Andrews, 15 Fed. Cas. 1008 (No. 8559) (Cir. Ct. D. Mass. 1839).

4Long v. Hines, 40 Kan. 220, 19 Pac. 796 (1888); Dickey v. Waldo, 97 Mich. 255, 56 N.W. 608 (1893); Carter v. Rector, 88 Okla. 12, 210 Pac. 1035 (1922); Campbell v. Grant Co., 36 Tex. Civ. App. 641, 82 S.W. 794 (1904).

5Ludlum v. Rothchild, 41 Minn. 218, 43 N.W. 137 (1889).

6Barron v. San Angelo Nat'l Bank, 138 S.W. 142 (Tex. Civ. App. 1911).

7Ludlum v. Rothchild, 41 Minn. 218, 43 N.W. 137 (1889).

The leading case applying this doctrine is *Grantham v. Hawley,*[8] decided in 1615. The covenant of lease specifically granted the lessee the right to the growing crops on the land after termination of the lease. Subsequently the remainder interest was sold by the lessor to a third party, who also claimed the growing crops at the end of the term of the lease. In holding for the lessee, the court pointed out that since the lessor owned the land he also owned the potential crops from the land and could therefore grant the potential to the lessee. The title to the crops vested in the lessee as soon as they came into existence.

Since *Grantham v. Hawley,* it has been held that the unborn offspring of domestic animals may also be the subject of a valid contract of sale.[9] The wool on sheep has also been held to have been validly sold before it came into actual existence;[10] the same is true of dairy products.[11] Even a hope or expectation founded upon a right in being has been held to have a potential existence sufficient to be the subject of a sale;[12] however, a mere possibility or contingency is not sufficient.[13]

The transferor must have a present interest in property already existing of which the object or thing sold is the natural product or growth.[14] The right to the property when it comes into existence is a present vested right.[15] It is this vested right to the expected product of a vineyard, a grain field, or a cow which the buyer purchases. The title to the potential passes to the buyer when the agreement of sale is made; title to the grain will vest when it comes into existence. If there is less grain, milk, or wine produced than expected, the buyer has made a bad bargain; if there is an excess over the expected amount he has a good bargain. The risk of loss and the chance for gain are with the buyer after the title to the potential passes to him.

The doctrine as applied has usually been limited to cases involving growing crops or the offspring of animals or their products.[16]

8Hobart 132, 80 Eng. Rep. 281 (K.B.).

9McCarty v. Blevins, 13 Tenn. 195, 26 Am. Dec. 262 (1833).

10Barron v. San Angelo Nat'l Bank, 138 S.W. 142 (Tex. Civ. App. 1911).

11Conderman v. Smith, 41 Barb. 404 (Sup. Ct. N.Y. 1863).

12Dargan v. Hewlitt, 115 Ala. 510, 22 So. 128 (1897); Wheeler's Ex'rs v. Wheeler, 59 Ky. (2 Met.) 474, 74 Am. Dec. 421 (1859).

13Read v. Mosby, 87 Tenn. 759, 11 S.W. 940 (1889).

14Barron v. San Angelo Nat'l Bank, 138 S.W. 142 (Tex. Civ. App. 1911).

15See Farmers Loan and Trust Co. v. Long Beach Imp. Co., 27 Hun 89 (Sup. Ct. N.Y. 1882).

16*E.g.,* Arques v. Wasson, 51 Cal. 620 (1877); Hull v. Hull, 48 Conn. 250 (1880);

It has not ordinarily been extended to goods to be manufactured,[17] or to fish to be caught in the sea,[18] or to situations involving possibilities or contingencies rather than potentialities.[19] Some jurisdictions in the United States have failed to recognize the doctrine,[20] while others have held that a contract purporting to pass title presently to future goods is to be given effect only as a contract to sell.[21] This latter rule is codified in the Uniform Sales Act,[22] which states that title to the goods passes only when they come into existence and the seller unconditionally appropriates them to the contract by a subsequent act. When the seller fails to so appropriate, the title does not pass to the buyer and his remedies against the seller are those ordinarily available upon a breach of or default on a contract. In a sale of potential the seller does not have to appropriate the goods to the contract to effect passage of title. Title vests in the buyer automatically when the goods come into existence.

FLORIDA'S POSITION

Whether Florida follows the common law doctrine of potential existence is a highly speculative question. The sale of citrus on the tree prior to its maturity is common business practice.[23] This at least indicates acceptance by businessmen of the growing crop theory of the doctrine. The extent to which Florida courts accept or modify the doctrine, however, can be shown only by an analysis of the leading citrus cases in the area.

Gregg Maxcy, Inc. v. Bateman

In the leading case of *Gregg Maxcy, Inc. v. Bateman*[24] the sale

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Van Hoozer v. Cory, 34 Barb. 9 (Sup. Ct. N.Y. 1860).

17See Berkshire Cotton Mfg. Co. v. Cohen, 236 N.Y. 364, 140 N.E. 726 (1923); Clarkson v. Stevens, 106 U.S. 505 (1882); Andrews v. Durant, 11 N.Y. 35 (1854).

18Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357 (1871).

19Wheeler's Ex'rs v. Wheeler, 59 Ky. (2 Met.) 474, 74 Am. Dec. 421 (1859).

20See 1 WILLISTON, SALES §135 (2d ed. 1924), for a collection of the authorities.

21Low v. Pew, *supra* note 18; see Gile v. Lasselle, 89 Ore. 107, 171 Pac. 741 (1918); Davis-Watkins Dairymen's Mfg. Co. v. Cronin Dairy & Ice Cream Co., 186 Wis. 106, 202 N.W. 293 (1925).

22§5 (3).

23See Winter Haven Fruit Sales Corp. v. C. L. Bundy & Sons, 128 Fla. 324, 174 So. 726 (1937); Gregg Maxcy, Inc. v. Bateman, *infra* note 24; Metcalf v. R. D. Keene & Co., *infra* note 26; Roe v. Winter Haven Co., 104 Fla. 317, 140 So. 463 (1932).

24126 Fla. 747, 171 So. 811 (1937).

contract contained the provision that the plaintiff-grower "has this day sold" to the defendant-buyer all merchantable oranges and tangerines from certain groves. The contract was for the seasons of 1932-33 and 1933-34. The plaintiff-grower filed suit against the defendant-buyer for failure to harvest all the merchantable fruit and for using a jumbo size box instead of the standard field box. On appeal by the defendant, the Florida Supreme Court held that the lower court was correct in holding that the title had passed to the corporation-buyer before it took possession of the fruit. In upholding the contract of sale, the Court failed to mention specifically the doctrine of potential existence; but by recognizing this advance sale of a fruit crop it must have considered the seller to have had a present vested right to the fruit when it came into existence. This is the underlying principle of the doctrine of potential existence. The Court precluded the contract from being construed as a contract to sell when it stated that title passed without the buyer's taking possession.

In analyzing the above case the subject matter of the contract should be examined first. The corporation was bargaining for merchantable fruit, to be picked by it from groves owned by the seller. The subject of the contract was not yet in existence, but title to the fruit was held to have passed. Under the doctrine of potential existence, title to the potential itself passes when the contract is made but title to the fruit vests when the fruit comes into existence. It is uncertain whether the Court meant title to the fruit or title to the potential when it said that title had passed. Title to the merchantable fruit could not have passed because it was non-existent, but title to the potential could have passed; and perhaps this is what the Court intended to hold. It is not surprising, then, that in other cases the same Court has upheld fruit sales contracts when the subject matter was in various stages of growth.[25]

Deadline Provisions

A deadline provision setting a specific time limit in which the buyer must pick the fruit may present a problem for the unsuspecting grower who is not careful about the way in which this provision in the contract is written. The Supreme Court said in *Metcalf v. R. D. Keene & Co.*[26] that the buyer does not have to pick the fruit at any

[25]Cases cited note 23 *supra*.

[26]122 Fla. 27, 164 So. 704 (1935).

particular time so long as he completes the picking prior to the deadline specified in the contract. This case *indicates* that the buyer does not have a duty to pick merchantable fruit just to keep it from spoiling, so long at he meets the deadline. The concurring opinion stated that the duty was on the buyer to remove the fruit when it became merchantable, since the title to the fruit was in the buyer from the date of the contract.[27]

Further, it was said that the buyer did not have the right to allow the fruit to become overripe and spoil merely because the contract set a limit. It would seem unjust to allow a buyer in effect to evade a contract by allowing him to pick the fruit as it became merchantable if the contract price was favorable and not to pick it if it was unfavorable. In any event, the buyer would be required to pick the merchantable fruit on the trees by the deadline date. Usually this problem arises only when a picking deadline is established and the fruit, maturing before the deadline, will spoil if not picked immediately. In accordance with the indication of the majority opinion in the *Metcalf* case, the buyer would not be required to pick at any particular time so long as he complied with the deadline provision. The fact that the Court has spoken on the matter should emphasize the area of uncertainty and compel the grower to require that a contractual duty be placed upon the buyer to pick the fruit as it matures. In conjunction with this, the grower should include a deadline within which most of the crop will become merchantable and before it will begin to fall from the trees. The Court may tend to follow the concurring opinion in future cases because of the basic injustice done to the grower otherwise.

A word of caution seems appropriate at this point. In the *Gregg Maxcy* case there was no specific time limit within which the buyer had to pick the fruit. Since the Court was not concerned with this type of provision, it found that title passed to the buyer upon execution of the contract. Had there been a specific deadline the Court might have reached a different result, as indicated by the *Metcalf* decision. The dissenting opinion in *Gregg Maxcy*[28] was based on the general rule that title does not pass before actual delivery when something remains to be done for the purpose of ascertaining the quality, quantity, or price of the subject matter.[29] The majority re-

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[27]*Id.* at 33, 164 So. at 707.

[28]126 Fla. 747, 749, 171 So. 811, 812 (1937).

[29]See, *e.g.*, McCampbell Furniture Stores, Inc. v. Central Farmers' Trust Co., 117 Fla. 351, 158 So. 283 (1934); Tripp v. Wade, 82 Fla. 325, 89 So. 870 (1921).

jected this idea, perhaps on the basis of the absence of any picking deadline, saying that title passed to the buyer without his taking possession of the fruit. This is an indication of the Court's tendency to accept part of the doctrine of potential existence. On the other hand, it can be argued that the contract indicated that the parties intended title to pass prior to delivery and that the Court merely gave effect to that intent and did not adopt the potential existence doctrine.

Risk of Loss

Perhaps the most important reason for fruit growers in Florida to enter into contracts for the sale of their crops prior to maturity is to avoid the risk of damage to the fruit by a freeze. In the sale of personal property[30] the general rule is that the risk of loss is on the seller until title passes.[31] Under this rule the one having title when the freeze occurs will suffer the loss. If this is the only point under consideration by a court, the buyer will lose if title has passed to him. The cautious buyer may, however, avoid this by inserting a provision specifically excluding damaged fruit from the contract.[32] This clause may be interpreted as indicating that the parties intended the seller to bear the risk of loss. In the absence of a contract provision that can be construed to show a contrary intent, when a sale of potential has been made all risk of damage will be upon the buyer, since title to the potential has passed to him.

A modification of the doctrine which would allow title to pass when the subject matter comes into existence might be more appropriate in the fruit crop area. When the subject of the contract is merchantable fruit there would seem to be no problem in allocating the risk of loss to the buyer after the fruit matures and becomes merchantable. If the buyer fails to pick and the crop is damaged he will be the one to suffer the loss. On the other hand, prior to maturity the seller will have the risk of damage to the crop.

Unfortunately, the Court has not specifically adopted the doctrine of potential existence. In *Roe v. Winter Haven Co.*[33] the buyer de-

[30]In Florida growing fruit crops are considered chattels. See Owen v. Commissioner, 192 F.2d 1006 (5th Cir. 1952); Summerline v. Orange Shores, Inc., 97 Fla. 996, 122 So. 508 (1929).

[31]*E.g.*, E. C. Fitz & Co. v. Eldridge, 129 Fla. 647, 176 So. 539 (1937); see Greenwood Products Co. v. United States, 188 F.2d 401 (5th Cir. 1951).

[32]See Givens v. Vaughn-Griffin Packing Co., 146 Fla. 575, 1 So.2d 714 (1941).

[33]104 Fla. 317, 140 So. 463 (1932).

faulted by failing to pick, and the crop was thereafter damaged. The Court held that since title to the fruit had passed to the buyer when the sales agreement was made, the buyer should suffer the loss. In *Givins v. Vaughn-Griffin Packing Co.*[34] the contract set a date by which the fruit was to be picked; damaged fruit was specifically excluded. The loss, which occurred prior to the picking date, was said to be upon the seller. The contract contemplated that the seller bear the risk of damage between the time the contract was signed and the deadline for harvesting the crop. Contract provisions may be construed to show the intent of the parties as to the risk of loss. By approving the contract provision in the *Givens* case, the Court seems to be authorizing a reallocation of the risk of loss by the parties to the contract. Usually, under the theory of potential existence, when the contract of sale is made the title passes to the buyer and thereafter the buyer bears the risk of loss. But, according to the interpretation given this provision, the risk remains on the seller until the picking date. The Court has seemingly accepted sales of future crops as valid without determining that risk of loss must always follow the title. The Court allows the parties to contract around the risk of loss rule. If this result is what both parties desire, there is nothing wrong with such a construction provided the grower realizes that such a provision may be construed to place the risk upon him instead of the buyer. The safest procedure would be for the parties to specify in the contract who is to bear the risk. This is probably done in the majority of instances.

Duty to Mitigate

When a buyer defaults by failing to pick all of the merchantable fruit by the deadline established in the contract, the seller may be under a duty to resell the fruit to the greatest advantage. In *Winter Haven Fruit Sales Corp. v. C. H. Bundy and Sons*[35] the buyer failed to pick 4,000 boxes of citrus fruit by the deadline. The trial court allowed the grower to recover for the loss, since it was an executed contract and title had passed to the buyer. On appeal by the buyer, the Court reduced the recovery as excessive because of the fact that the grower had not mitigated his damages. The measure of damages was the difference between the contract price and the market price.

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[34] 146 Fla. 575, 1 So.2d 714 (1941).
[35] 128 Fla. 324, 174 So. 726 (1937).

There was evidence that the grower could have sold for a higher price than he finally received but refused to sell at that time, expecting the market price to increase. The Court seems to place a duty on the seller to keep the loss to a minimum by resale of the fruit at the optimum market price. In the *Bundy* case the Court found title to all merchantable fruit to be in the buyer and held him liable for not picking it. On technical grounds there seems to be little reason to require the grower to resell the crop when title has passed; it seems that such a resale would amount to a conversion. When title has passed the seller has an action for the purchase price. This may not be worth much, however, if the buyer is insolvent. The Court may not be saying that the seller has to mitigate damages but only that once the seller assumes the duty he must act reasonably; it may, however, be placing an additional duty on the seller, as bailee for the buyer, to resell to prevent a greater loss. From the standpoint of both parties the sales contract should specify any resale procedure to be followed.

Conclusion

The Florida Supreme Court seems to have accomplished the result of a sale of potential without any direct acceptance of the common law doctrine. At common law, when the subject was not in actual existence, the only manner prescribed to effect a present transfer was through the doctrine of potential existence. When a sale of potential was effectuated, title to the potential passed at that time, accompanied by risk of loss. The Florida Court seems to permit the parties to contract around the theory that risk follows title. Theoretically, an argument could be made that title to potential should not be effected without risk of loss; functionally, however, a contract construction may provide the parties with their bargained-for equivalent and therefore be of more value to them than strict adherence to the doctrine of potential existence. For example, a grower may desire to get a certain price per box for his fruit but the buyer may not desire to take the risk of a freeze. The grower, knowing that his grove is fairly safe from cold weather, may prefer to take a small risk in order to obtain the price he wants. In other words, the grower may be more afraid of the market than of a freeze.

The Court seems to have recognized the doctrine to the extent of applying it to growing fruit crops. It is altogether probable that it would apply the same principles to other crops grown in the state.

The increasing importance of Florida's agricultural products will mean that this doctrine may take on even more significance in the years to come. Pressure from commercial interests has brought about the desire to sell or mortgage crops that will mature months later.[36] This has enabled agricultural industries to corner the market by purchasing fruit and other crops of growers before they become merchantable. Usually the grower is willing to sell on this basis in order to get money to help finance the crop and to meet domestic needs. It seems advantageous to allow realization on future prospects by a present transfer. However, there are certain disadvantages which may arise that have caused other courts to be reluctant to accept this doctrine. Courts have usually placed limitations on present transfers of future property because of the possibility of fraud on creditors and subsequent purchasers and the uncertainty that could arise in regard to titles. With these limitations in mind, the sale of future goods will be advantageous for the grower and the buyer and, as an end result, will benefit the entire state.

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[36]A valid mortgage lien may be created on crops of citrus fruits to be grown in the future if there is a proper description of the lands on which the crops are to be grown and the mortgage has been recorded according to law. See Neal v. Bradenton Production Credit Ass'n, 146 Fla. 208, 200 So. 845 (1941); Weber v. Belle Mead Devel. Corp., 112 Fla. 368, 150 So. 594 (1933); FLA. STAT. §§700.01-.02 (1959). When not executed and recorded as required by statute the mortgage may still be valid as between the parties. Weber v. Belle Mead Devel. Corp., *supra*. But to be valid against a subsequent purchaser in good faith the mortgage must be recorded. Plant City Agric. Credit Co. v. Pool, 103 Fla. 806, 139 So. 595 (1931). A lien covering property that has not yet come into existence will attach only when the property comes into existence, however. See W. Hayward Export Co. v. Lee, 193 Fed. 647 (5th Cir. 1912). Generally a fruit crop mortgage takes precedence in the same manner as any other mortgage. Plant City Agric. Credit Co. v. Pool, *supra*. But it is important to note that if there is a mortgage on the real property a subsequent fruit crop mortgage will not be given preference over the real property mortgage if the fruit is not in existence. E. C. Fitz & Co. v. Eldridge, 129 Fla. 647, 176 So. 539 (1937); see Summerlin v. Orange Shores, 97 Fla. 996, 122 So. 508 (1929). *But see* Hughes v. Summit Realty Co., 120 Fla. 136, 162 So. 343 (1935). If the first mortgage covers real property and future crops, the second mortgage should not be preferred; but when there is only a real property mortgage the cases seem to indicate that a crop mortgage on the existing fruit will be preferred over the real property mortgage.