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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol17/iss2/5
NOTES
A CHANGE EFFECTED IN THE SALES LAW OF KENTUCKY BY THE RECENT ADOPTION OF THE UNIFORM SALES ACT*

The recent adoption by the Legislature of Kentucky of the Uniform Sales Act has brought about some interesting changes in the law of sales in Kentucky. One change which will doubtless be very noticeable in the future has to do with the doctrine of potential existence. This doctrine has long been recognized in England and consequently America, but at the present day has been modified in many respects by reason of the Sales Acts.

To get an idea of the subject matter as a whole, it is necessary to have first an understanding of this doctrine of potential existence, and then it will be easy to note the change that has been effected by the Sales Act.

Things have a potential existence which are the natural product or the expected increase of something already belonging to the seller. There is a conflict of authority on the question as to what constitutes a potential existence of a chattel so as to render it the subject matter of sale. It has been recognized from an early date that the future wool grown on sheep owned by the seller at the time of the sale may be the subject of a valid sale, vesting such wool and the title thereto in the purchaser as soon as it comes into existence.¹ The same was true in regard to a crop of hay to be grown on a certain field, or again the milk that a certain number of cows would yield in a month.

Explaining further, it is well settled that a transmutation of title to the property sold is an essential element of a sale, as distinguished from an executory contract of sale, and therefore in order to make a complete sale of property whereby the title would pass from the seller to the buyer, it is necessary that the thing which is the subject of the sale should have an actual or

*This is the second of a series of articles concerning the changes effected in the law of Kentucky by virtue of the Uniform Sales Act passed at the last session of the Kentucky Legislature. The first article, appearing in the November, 1928 issue written by George Ragland and entitled "The Uniform Sales Act in Kentucky" dealt with the important change in the theory of documents of title.

potential existence at the date of the sale. For example, in the case of 
Hutchinson, McChesney and Co. v. Ford it was held that a mortgage of a crop to be raised on a farm during a certain term passes no title if the crop was not sown when the mortgage was executed, and a mortgagee has no claim against a purchaser of the crop for it or for its value.

On the other hand property may be the subject of a sale if it has a potential or possible existence, as the product or increase of that which is in existence and the right to it when it shall come into existence is a present vested right. In all such cases the thing sold has a potential existence, and the hopes or expectations of means founded on a right in esse is the object of sale.

In the United States the doctrine of potential possession has received frequent recognition from the courts, especially in transfer of crops to be thereafter grown. Nearly all the cases relate to mortgages, but so far as concerns the legal title, there seems no difference unless created by statute between the power of the owner of land to mortgage and to sell the crops growing thereon.

It is held in most states that the owner of land may mortgage a future crop. In a few states, including Kentucky, the crop must be actually planted in order that the mortgage shall be valid. The courts follow the same rule in the young of animals. It is assumed that the same doctrine that is here applied in illustration of mortgages is applicable in sales.

In all the cases the thing sold must be established or based on a thing in esse. A mere possibility in or growing out of the property cannot be made the subject of a valid sale or transfer. In Wheeler v. Wheeler, a son contracted to sell his interest in his father's estate to his brother. The court said: 'The thing sold must have an actual or potential existence. A hope or expectation of means founded on a right in being may be the sub-

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2 23 R. C. L. 1244.
3 Williston on Sales, Sec. 135.
6 Supra, note 2.
ject of a sale because in such case there is a potential existence. But a mere possibility or contingency not founded upon the right coupled with an interest, cannot be."

But a person can make only an executory agreement to sell and not an actual sale where the subject of the contract is something to be acquired in the future, such as wool from sheep or the milk of any cows, which he may buy within a specified time.⁸

In *Low v. Pew*⁹ for instance, one has no potential property in a catch of fish he expects to make even though he has a ship and nets and other appliances necessary for catching fish. He has no property actual or potential until they are caught, and cannot pass any property right in them until that time.

It seems that the Sales Act has a tendency to abolish potential possession from the law of sales. Professor Williston says: "The conclusion of the draughtsman of the English Sale of Goods Act seems sound, 'That there is no national distinction between one class of future goods and another.'"¹⁰ Consequently the American Sales Act makes no exception to the general rule as to future goods in favor of goods of which the seller has potential possession. The buyer of such goods cannot acquire under provision of this act more than an equitable property right. He will not acquire even this, moreover, except in jurisdictions which give such a right in regard to future goods of other kinds. As mortgages, however, are not covered by the Sales Act except in a few instances where it is so specially stated, the power to make an effective mortgage of crops or other future goods is not affected by the Act.

In the Uniform Sales Act as passed by the Kentucky Legislature under "Subject Matter of Contract," sec. 5, "Existing and Future Goods," sub-sec. 3, the language is as follows: "Where parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods." It appears that under the Uniform Sales Act the potential existence doctrine of sales in Kentucky is apparently abolished. This seems to accord with the view of a writer in the California Law Review who says, "The doctrine of potential existence is a com-

⁹ Supra, note 8.
¹⁰ Williston on Sales, Sec. 135.
mon law fiction. There is no doubt of the possibility both at common law and under our law today of contracting to sell goods which the seller does not own at the time.' But it is obvious in the nature of the case that it is impossible for the seller to transfer presently title to goods to which he has no ownership at the time of sale. As he has no title he can give none.\(^1\)

The common law made no exception to this rule in the case of crops and the young of animals, which the seller as the owner of root and stem was afterward to acquire, and gave it a wider effect than a contract to sell. The doctrine was laid down in the leading case of *Graham v. Hawley*,\(^3\) that the crops of specified land, the future young of specific animals, or the wool to be clipped in the future from specified sheep, can be bargained and sold at law because the seller has potential possession.

In England in 1846 it was applied against an attaching creditor of crops who was deprived of the property attached because it had been mortgaged by the occupant of the land before it came into existence.\(^4\)

The effect of this doctrine, obviously based on fiction, is not only that the legal title to the future property passes to the buyer as soon as the property comes into existence, but that this title is regarded as relating back to the time of the agreement. The American Sales Act makes no exception to the general rule as to future goods in favor of goods to which the seller has potential possession. The Sales Act therefore apparently abolishes the doctrine of potential possession from the law of sales, which however has no application to mortgages.

So far as sales are concerned the adoption of the Uniform Sales Act in Kentucky makes the sale of future goods, whether they have potential existence or not, nothing more than an agreement to sell. The abolition of the doctrine may be wise. If the ordinary doctrines applicable to real and personal property do not afford as much protection as is desirable to transactions relating to crops or animals the extent of the right of the

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\(^1\) 7 Calif. L. Rev. 140.
\(^2\) *Emerson v. European R. R. Co.*, 67 Mo. 357.
\(^3\) 161 Hab. 132.
seller should be exactly defined and more closely limited than is done under the doctrine of potential possession.

Kentucky in adopting the Uniform Sales Act has fallen in line with the majority of the states in adopting uniform laws. By virtue of this particular act it may be said in conclusion that the recognition given by Kentucky courts heretofore to the sale of goods only in potential existence is abolished and that such agreements will hereafter be treated not as sales, but only as contracts to sell.

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