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SALES— THE EFFECT OF THE UNIFORM SALES ACT ON CONTRACTS FOR THE SALE OF STANDING TIMBER

The rights of a grantee of a deed conveying standing timber have been the subject of much litigation.¹ Whenever and wherever the problem has arisen, it has resulted in a great deal of confusion so that many jurisdictions have developed their own peculiar rules. Any attempt to reconcile these views would be a hopeless task. Even an effort to state with certainty or to show a logical evolution of the present law in one jurisdiction would be met with quite a bit of difficulty since courts have frequently reversed or qualified previous rulings. Thus it can be seen that any statutory enactment which would help to clarify and unify these rules would be very desirable. Recently, the Wisconsin Supreme Court may have indicated that such a statute was now in effect in Wisconsin when it rather summarily stated:

“. . . that the Uniform Sales Act has changed the law in Wisconsin so that industrial growing crops, growing trees, and other nursery stock 'attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale' are to be considered 'goods' and are consequently personal property.”²

The purpose of this comment is to attempt to determine what effect the Sales Act should have upon a contract to sell standing timber and what effect was given it in the *Jens Case*. Before doing this, it will be necessary to point out the various common law rules which have been applied to the “timber cases” throughout the United States and to set forth with as much certainty as possible the common law in Wisconsin.

COMMON LAW RULES THROUGHOUT THE UNITED STATES

All states will agree that growing trees are realty and by being cut they are converted into personalty, but there is a sharp division of authority as to the status of growing trees which have been contracted to be sold.³ A majority of the states look to the inherent nature of the subject matter as things permanently attached to the land and consider them as realty until they have been cut.⁴ On the other hand there is a strong minority view, advanced by such states as Texas, Kentucky, Pennsylvania, and Maryland, holding that where the contract of sale contemplates immediate severance of the trees, they will be considered

¹ See Notes 15 A.L.R. 41; 31 A.L.R. 944; 42 A.L.R. 641; 71 A.L.R. 143; 164 A.L.R. 423.

² *Jens v. Habeck*, 259 Wis. 338, 48 N.W. 2d 473 (1951).

³ 50 C. J. PROPERTY §45.

⁴ *Hirth v. Graham*, 50 Ohio St. 57, 33 N.E. 90 (1893).

personalty from the date of the contract.⁵ The basis of this rule is apparently the equitable doctrine that that which was intended to be done will be considered as having been done. The intent of the parties to such a contract is clearly that the trees be treated as personalty. Therefore it would seem that the minority is logically the sounder view and the trend has been in that direction.⁶

Generally the law of the "timber cases" is concerned with two main problems; when no time is stated for removal of the trees, is a fee absolute in the trees granted or must they be removed within a reasonable time; and what is the effect of a failure to remove the trees within the time fixed for removal on the rights of the grantee.

On the problem of the time for removal, the intent of the parties is held to govern. As a general rule a reasonable time is allowed and a grant in perpetuity will not be implied unless such can be clearly seen to have been the intention of the parties.⁷ The wording in deeds construed as conveying a fee in the trees has usually been of two types, one in which the right is given to cut the timber which may at any-time grow on a certain piece of land, and the other granting a right forever to cut the timber standing at the time of the grant in which case certain trees are often specified.⁸ If an immediate severance of the trees is indicated by the contract only a reasonable time is allowed for removal when no time is stated.⁹ What is a reasonable time depends on the circumstances attending the making of the contract, and the location, nature, accessibility, and uses of the land and the timber.¹⁰ Some states have adopted special rules which vary the requirement as to a reasonable time. In Louisiana the time must be fixed by the court on petition of the landowner and the grantee's rights are not forfeited until such time expires.¹¹ Other states have imposed the requirement of notice to the grantee either before the reasonable time starts to run or before it is terminated.¹² Wisconsin, in the case of reservations, has distinguished between a reservation of the timber and one of merely the right to cut, calling the former an exception and the latter

⁵ *Supra*, note 3.

⁶ Scott, *Specific Performance of a Contract to Sell Standing Timber for Immediate Severance*, 17 KEN. L. J. 48 (1928).

⁷ *Supra*, note 1.

⁸ *New River Lumber Co. v. Blue Ridge Lumber Co.*, 146 Tenn. 181, 240 S.W. 763 (1922).

⁹ *Davis v. Conn.* 161 S.W. 39 (Tex. 1913).

¹⁰ *Wilson Cypress Co. v. Stevens*, 106 Fla. 717, 143 So. 661 (1932).

¹¹ *Simmons v. Tremont Lumber Co.*, 144 La. 719, 81 So. 263 (1919).

¹² *Greg v. Berdsall*, 53 Barb. (N.Y.) 402 (1863); *Patterson v. Graham*, 164 Pa. 234, 30 Atl. 247 (1894); *St. James v. Erskine*, 155 Mich. 606, 119 N.W. 897 (1909); *Ormond Min. Co. v. Bessemer City Cotton Mills*, 143 N.C. 307, 55 S.E. 700 (1906).

a reservation of a mere license requiring a reasonable time for removal.¹³

The question of the rights of the purchaser after the time for removal has expired has been dealt with quite frequently by the courts. It is by far the majority rule that both the license and the right to the timber are lost by the expiration of the time.¹⁴ One of two reasons is usually given for the rule, either that a defeasible fee in the timber was granted or that the grantee got merely a license to enter and cut, and on cutting, title was obtained. Many courts have used both reasons at different times with much confusion resulting.¹⁵

The minority rule followed in only a few jurisdictions is that the license is lost but not the right to the timber. This results in the unfortunate situation of the grantee owning the timber but having no right to remove it, and is apparently due to the reluctance of some courts to decree a forfeiture. For example, California courts will use this rule if they determine that the parties did not intend that there should be a forfeiture,¹⁶ Indiana has said that title is not lost in the absence of a forfeiture clause,¹⁷ and Pennsylvania has held that where no time for removal is fixed and a reasonable time expires, no forfeiture results and only the license is lost.¹⁸

Another problem which sometimes arises is whether timber cut but not removed within the time fixed reverts. Since almost all courts will agree that after the timber is cut, it is the personal property of the grantee, it is generally held that title to such timber does not revert.¹⁹ Some courts then allow a reasonable time for removal after the period specified while others hold the property is unlawfully on the land of the grantee.²⁰ Even courts which hold that title to such timber reverts ordinarily will not apply the rule when the timber has been manufactured to some extent.²¹

¹³ *Bardon v. O'Brien*, 140 Wis. 191, 120 N.W. 827 (1909); *Williams v. Jones*, 131 Wis. 361, 111 N.W. 505 (1907); *Martin v. Gilson*, 37 Wis. 360 (1875); *Rich v. Zielsdorf*, 22 Wis. 544 (1868).

¹⁴ *Supra*, note 1.

¹⁵ *Compare Ackley v. Elliot*, 198 App. Div. 965, 190 N.Y. Supp. 56 (1921) with *Nichols v. Lane*, 192 N.Y. Supp. 362 (1922); *compare Lancaster v. Roth*, 155 S.W. 597 (Tex. 1913) with *Davis v. Conn*, 161 S.W. 39 (Tex. 1913).

¹⁶ *Anderson v. Palladine*, 37 Cal. App. 256, 178 Pac. 553 (1919).

¹⁷ *Advance Veneer & Lumber Co. v. Hornaday*, 49 Ind. App. 83, 96 N.E. 784 (1911).

¹⁸ *Saltonsall v. Little*, 90 Pa. 422, 35 Am. Rep. 683 (1879).

¹⁹ *Clark v. Aldrich*, 278 Fed. 941 (1st Cir. 1922).

²⁰ *Osborne v. Eldridge*, 130 Or. 385, 280 Pac. 497 (1929). *Contra*: *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242 (1901).

²¹ *Johnson v. Truitt*, 122 Ga. 327, 50 S.E. 135 (1905); *Butler v. McPherson*, 95 Miss. 635, 49 So. 257 (1909); *Hubbard v. Burton*, 75 Mo. 65 (1881); *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667 (1908).

THE LAW OF THE "TIMBER CASES" IN WISCONSIN

The Wisconsin court has held many times that standing timber under a contract of sale is an interest in realty. One of the early cases and the one which is generally referred to as settling the question for Wisconsin is *Daniels v. Bailey*.²² There an oral contract was made for the sale of timber to be removed during the two ensuing winters. The plaintiff claimed that since immediate severance was contemplated the contract was for the sale of personal property and was valid. But the court held that although an immediate severance was intended, the timber by its nature was an interest in land and the contract was unenforceable. The sole departure from this rule was made in the case of *Cadle v. McLean*²³ in which it was held that a sale of timber under a conditional sales agreement was a sale of personalty to take effect as and when the timber was cut. However five years later in *Lillie v. Dunbar*²⁴ the court went back to the rule of the *Bailey Case* and expressly overruled *Cadle v. McLean* and this case has been continually followed.

Wisconsin has also frequently followed one of its earliest cases on the rights of the purchaser after the time for removal has expired, *Strasson v. Montgomery*.²⁵ In that case it was held that only so much timber was conveyed as the grantee could remove within the time stated for removal. The deed, itself, granted a mere license and title to the trees was obtained by cutting and removing them. However in a few cases, the court has called the grantee's interest a defeasible interest in realty and more than a mere license.²⁶ Still in either case when the time for removal had run, all rights of the grantee were terminated. In *Golden v. Glock*²⁷ the court further held that although the deed conveyed only the timber which could be removed within the time stated, the manufacture of the trees into stave bolts so essentially changed their character as to constitute a constructive removal. Hence the stave bolts remaining on the land did not revert and the grantee had an implied license to remove them. Still later in *Hicks v. Smith*,²⁸ the court went a step farther and held that ordinary timber left lying on the land after the license had expired did not revert since the mere cutting converted it into the personal property of the grantee and he could go on the land to remove it for a reasonable time afterwards.

²² 43 Wis. 566 (1878).

²³ 48 Wis. 630 (1880).

²⁴ 62 Wis. 198, 22 N.W. 467 (1885).

²⁵ 32 Wis. 52 (1873).

²⁶ *Kneeland-McLurg L. Co. v. Lillie*, 156 Wis. 428, 145 N.W. 1093 (1914); *Schmidt v. Almon*, 181 Wis. 244, 194 N.W. 168 (1923).

²⁷ 57 Wis. 118, 15 N.W. 12, 46 Am. Rep. 32 (1883).

²⁸ 77 Wis. 146, 46 N.W. 133 (1890).

Thus it can be seen that Wisconsin has avoided much of the confusion prevalent in other states by rather consistently following its early decisions on this subject and consequently a fairly well defined body of law has been derived.

THE EFFECT GIVEN THE UNIFORM SALES ACT IN THE JENS CASE

The *Jens Case*²⁹ concerned the rights of a purchaser of nursery stock who had failed to remove it within the time given for removal. The court held that the law of the "timber cases," under which the rights of the purchaser would have clearly expired on the day named was not applicable because the Uniform Sales Act had changed the law in Wisconsin. The question which immediately arises is whether the court in noticing this change made its ruling broad enough to imply a change in the "timber cases" so that an extension of the rule thereto can be probably expected. Prior to this case, nursery stock was generally treated as realty in Wisconsin.³⁰ However, as the court pointed out, there is also authority holding it to be *fructus industriales* and considering it as personal property. The three justices dissenting called such trees an industrial growing crop under the Act rather than bringing them within the phrase "things attached to and forming a part of the land which are agreed to be severed before sale or under the contract of sale." But the majority did not base its ruling upon such a classification. Both phrases were used and growing trees were mentioned separately so as to apparently include all growing trees rather than saying "industrial growing crops, *and* growing trees and other nursery stock." Hence the court's ruling is apparently broad enough to be applied to the "timber cases." Thus an examination of other authorities to determine the effect which has been given the Sales Act in this respect becomes relevant.

The English Sale of Goods Act, 1893, was a forerunner of the Uniform Sales Act in the United States. The English common law on the nature of standing timber under a contract of sale before the passage of their Act was based on the case of *Marchall v. Green*.³¹ That case concerned an oral contract for the sale of thirty-two trees to be taken away as soon as possible. The court held that the contract was enforceable because it was for the sale of personalty and it had been partially performed. In so ruling the court distinguished between cases where the trees were intended to remain in the land and derive a benefit therefrom, and those where an immediate severance was contemplated saying:

²⁹ *Supra*, note 2.

³⁰ Note, 1 WIS. L. R. 170 (1921).

³¹ 1 C.P.D. 35 (1875).

"Where the thing sold is to derive no benefit from the land and it is to be taken away immediately, the contract is not for an interest in land."

The Uniform Sales Act was patterned after the English Sale of Goods Act and copies therefrom the definition of "goods."

"Goods include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to and forming a part of the land which are agreed to be severed before sale or under the contract of sale."

The intention of the Act was not to revise or reform the then existing law governing the sale of goods but rather to restate it.³² Therefore as Williston suggests the Act copying as it has the English Act must have intended to adopt the English common law rule as laid down in *Marshall v. Green*.³³ Hence it becomes significant to examine English cases on the status of standing timber under a contract of sale since the passage of the English Act to see what effect has been given it. Unfortunately there is an apparent scarcity of reported English cases directly bearing on this point. However one such case has been discussed a few times.³⁴ This case concerned an oral contract to purchase timber for immediate severance. The grantee had been ousted before the severance was completed. The court there held that the grantee's right was different from a mere revocable license such as a license to enter and shoot but was irrevocable since the grantee had an interest in the timber before it was cut and they further said:

". . . the effect of the Sale of Goods Act, 1893, has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale."

Canada has also adopted a Sale of Goods Act which was patterned after the English Act and copied the definition of "Goods" therefrom. Hence Canadian rulings on the effect of their statute are also pertinent. In *Fredkin v. Clines*³⁵ the court made the statement that:

"By this definition ('Goods' under their Act) we are to consider as goods things attached to or forming a part of the land which are agreed to be severed under the contract of sale . . . If, therefore, growing trees, or natural grass be sold for the purpose of being cut and taken away, pursuant to the contract, they are goods under this definition."

In another case worth mentioning,³⁶ the purchaser of the land brought

³² *Ford v. Waldorf System Inc.*, 57 R.I. 13, 188 Atl. 633 (1936).

³³ 1 WILLISTON ON SALES §62 (2d ed. 1924).

³⁴ *Jones v. Tankerville*, 2 Ch. 440 (1909).

³⁵ 18 MAN. L. R. 249 (1909). Bracketed material added.

³⁶ *Hingley v. Lynds*, 44 D.L.R. 743 (1918).

action for unlawful entry against a prior purchaser of the timber. With six justices sitting the court was evenly divided, one justice holding that the contract was either for an interest in land with an irrevocable license or a sale of goods, under the Act; two justices holding that the Act had changed the law so that a sale of standing trees must be held to be a sale of goods under the Act in determining the rights of the parties, and the trees become goods before severance because they were to be severed under the contract; and the three remaining justices holding that this contract came under the Act but was merely a contract to sell and was not to take effect until the trees were cut. The property in the "goods" could not pass until they came into existence, that is, until the trees were severed. In this view the purchaser of the timber had no interest therein until it was cut. The opinion rendered by the two justices in giving more than such limited effect to the Act seems more logical and can be traced back to the theory of *Marshall v. Green*.³⁷

American courts have been slow to recognize the effects of the Uniform Sales Act on these contracts. However some of the leading textwriters in the United States suggest that the Act should be interpreted to have an effect thereon. In the Restatement of Contracts it is said:

"Under the circumstances stated in Clause (c) (agreed to be severed before sale or under the contract of sale) even *fructus naturales* have been held withdrawn from the operation of the provision of the statute (State of Frauds) relating to land."³⁸

In his work on sales Mr. Williston says:

". . . the Sales Act copying as it has, the definition of 'goods,' so far as concerns this question, from the English Statute, has adopted the English rule that any growing object attached to the soil is to be treated as goods, if by the terms of the contract it is to be immediately severed."³⁹

Other American textwriters which seem to follow this view include Tiffany and Burdick.⁴⁰

Comments in law review articles have also approved of the change. In one such article it is said:

"Where the Sales Act has been adopted there certainly should be no doubt as to the status of such contracts . . . Unquestionably there is no ambiguity couched in this phrase (the definition of 'goods' in the Act) and it is hard to see how any

³⁷ *Supra*, note 31.

³⁸ RESTATEMENT, CONTRACTS §200 (1932). Bracketed material added.

³⁹ *Supra*, note 33.

⁴⁰ BURDICK ON SALES 3d ed. pp. 29-30; TIFFANY ON SALES p. 76.

court deciding a case involving a sale of timber for immediate severance could go astray in its interpretation."⁴¹

In most of the cases which have been decided since the adoption of the Uniform Sales Act throughout the United States, the effect of the Act has not been put into issue and the courts have based their rulings on previously decided cases within their jurisdictions. Hence those courts which have held the right transferred was an interest in realty have continued to do so, and those following the immediate severance rule have referred to earlier cases and not to the Act.⁴² However a few courts have either mentioned its possible effect as dicta or have partially based their rulings thereon. In *Reid v. Kerr*⁴³ the issue was whether the timber was realty or personalty. The court in a lengthy discussion of the effect of the Act pointed out its source as the English Act and the case of *Marshall v. Green*,⁴⁴ and also the apparent differences of opinion between various courts since the passage of the Act, but escaped making a ruling on this point because the contract there did not necessarily call for a severance of the trees at all. In another case,⁴⁵ involving an oral contract to purchase standing timber to be removed within two years, all parties and the court apparently went on the assumption that the trees before being cut were personal property because the only issue was whether a check was received in part payment to satisfy the requirements of the Statute of Frauds. In still another case⁴⁶ decided in 1948 involving the validity of an oral contract for the sale and immediate removal of standing timber, the court referred to authorities which have recognized a change due to the Act such as Williston on Contracts⁴⁷ and the Restatement of Contracts⁴⁸ and also to others which have failed to do so, and concludes by saying:

"We will not further pursue this quest. We conclude that the sale was that of personal property, and not within the Statute of Frauds."

Therefore while American courts have been slow to recognize the changes made by the Act, they have begun to do so and a gradual accession to this view can probably be expected.

⁴¹ *Supra*, note 6. Bracketed material added. See, 6 CORNELL L. Q. 426 (1921).

⁴² Considered as realty: *Elmonte Inv. Co. v. Shaefer Bros. Logging Co.*, 192 Wash. 1, 72 P. 2d 311 (1937); *Steller v. Thomas*, 232 Minn. 275, 45 N.W. 2d 537 (1950); *New River Lumber Co. v. Blue Ridge Lumber Co.*, 146 Tenn. 181, 240 S.W. 763 (1922). Considered as personalty: *Patton v. Lucy*, 285 Ky. 694, 148 S.W. 2d 1039 (1941); *Seabolt v. Christian*, 82 Ga. App. 167, 60 S.E. 2d 540 (1950).

⁴³ 175 Ore. 192, 152 P. 2d 417 (1944).

⁴⁴ *Supra*, note 31.

⁴⁵ *Dutton v. Bennett*, 256 Mass. 397, 152 N.E. 621 (1926).

⁴⁶ *Rankin v. Ridge*, 53 N.M. 33, 201 P. 2d 359 (1948).

⁴⁷ 2 WILLISTON ON CONTRACTS §516 (Rev. ed. 1936).

⁴⁸ *Supra*, note 38.

Since the passage of the Act in Wisconsin, the Supreme Court has referred to standing trees under a contract of sale as constituting an interest in realty in a couple of cases in which this point was not directly brought into issue. In one case the court ruled that the trees were taxable to the landowner rather than the purchaser since all the purchaser got was a defeasible interest, and in the other that the purchaser was more than a mere licensee and could maintain an action of trespass.⁴⁹ In both cases the status of the trees as realty was not contested and the court summarily called them realty by referring to *Lillie v. Dunbar*⁵⁰ and other cases of long standing. The case which generally has been held to set forth the Wisconsin viewpoint is *Schaap v. Wolf*,⁵¹ decided ten years after the adoption of the Sales Act in Wisconsin. That case concerned a written contract for the immediate severance of timber which was orally agreed to be extended over another year. In their decision the court referred to such old cases as *Daniels v. Bailey*⁵² and said:

“That a contract for the sale of standing timber relates to an interest in land and comes within the Statutes of Frauds is well settled in this state.”

This case is often mentioned in discussions of this point. In *Reid v. Kerr*⁵³ the Oregon Court said that although the Sales Act was not mentioned in the *Wolf Case* such an erudite court as Wisconsin's must have realized the effect of the Act and considered it inapplicable. However it must be pointed out that the grantee of the deed did not contest this point but rather relied on the contention that the oral agreement was but an extension of the time of performance and the grantor was estopped from setting up the Statute as a defense. Hence this case involved no lengthy discussion of the point and is not as strong as some would make it out to be. Furthermore it has not escaped criticism from those who believe such a ruling destroys the obvious intent of the Sales Act.⁵⁴ Thus it can be seen that since this question was not directly brought into issue in the *Wolf Case* and the court held that the law was well settled by the early cases on this subject, it is possible that they did not appreciate the significance of the Sales Act. It was not until three years later that Williston made note of the apparent change brought about.⁵⁵ His view seems more logical in that it gives effect to the apparent intent of the parties. Wisconsin has followed an intention theory in a subsequent case involving a con-

⁴⁹ *Supra*, note 26.

⁵⁰ *Supra*, note 24.

⁵¹ 173 Wis. 351, 181 N.W. 214 (1921).

⁵² *Supra*, note 22.

⁵³ *Supra*, note 43.

⁵⁴ 6 CORNELL L. Q. 426 (1921).

⁵⁵ *Supra*, note 33.

tract for the sale and removal of machinery attached to the land,⁵⁶ and there is apparently no reason why this idea could not be applied in the case of timber. Hence it is probable that the court may have changed its attitude since its ruling in the *Wolf Case* thirty years ago.

THE EFFECT OF THE APPLICATION OF THE UNIFORM SALES ACT TO THE TIMBER CASES

As stated previously the Uniform Sales Act being based ultimately on the rule of *Marshall v. Green* adopted an immediate severance rule similar to that used in some of the states. The Act itself indicates no necessity for an immediate severance so long as a severance is contemplated some time or other. Hence Williston and other writers at first did not think this was necessary.⁵⁷ However in his latest word on sales Williston holds that in the light of the origin of the Act, it must be implied that an immediate severance is necessary.⁵⁸ Since the Act incorporates this rule in states following it as a part of their common law, no change would be made. However in the majority of states, including Wisconsin, the "timber cases" would be overruled in that a contract contemplating an immediate severance would be held to take effect as a sale of personal property. Some authorities which have recognized the immediate severance rule have given it only a limited effect in holding that the sale does not take place until the trees are cut and in order to effectuate a valid conveyance before then the instrument must be in writing and executed with the formalities necessary to transfer an interest in land.⁵⁹ However this is not the true rule as laid down by *Marshall v Green* and adopted by the Sales Act. Under this rule Section 4 of the Sales Act should govern rather than the section of the Statute of Frauds relating to realty.⁶⁰

"This contract is unconditional. It is for the sale of specific goods, namely all the cullings on the lot. The goods were in a deliverable state, that is to say, there was nothing to be done by the seller to put them in a deliverable state; the purchaser was to go and get them. I think the title to the trees passed to the defendant when the contract was made."⁶¹

Furthermore, the rights of the grantee would probably be held to be terminated upon failure to remove the trees within the time specified since courts following the immediate severance rule have generally taken the view that the extent of the grant is limited to the agreed

⁵⁶ *Boscobel v. Muscada Mfg. Co.*, 175 Wis. 62, 183 N.W. 963 (1921).

⁵⁷ *Supra*, note 54.

⁵⁸ Note change made in 1 WILLISTON ON SALES §62 (Rev. ed. 1948).

⁵⁹ 2 TIFFANY, ON REAL PROPERTY, §596 (3d ed. 1939).

⁶⁰ *Vold, The Application of the Statute of Frauds under the Uniform Sales Act*, 15 MINN. L. R. 391, 398 (1931).

⁶¹ *Supra*, note 36.

time and determined thereby.⁶² Thus in Wisconsin the practical change effected in this respect would be slight since Wisconsin has always held that the rights of the grantee did not extend beyond the time fixed whether the reasoning therefor was based on a determinable fee doctrine or the rule that only a license was granted. Furthermore the rule of *Hicks v Smith*⁶³ would survive because it was based on the ruling that the cut timber was the personal property of the purchaser.

Many other changes would be made such as the enforceability of oral warranties of title, implied warranties, and specific performance of the contract which are beyond the scope of this comment.

CONCLUSION

In conclusion it must be stated that the court in the *Jens Case* clearly did not rule that the "timber cases" were overruled by the Sales Act but rather found that the law of these cases was not applicable to nursery stock since this came under the Act either as something attached to the soil which was agreed to be severed under the contract of sale or as an industrial growing crop. However it is not too improbable that the court, if it had been called upon to make such a ruling, would have done so since leading textwriters in the United States consider the Act as being applicable and courts in England, Canada, and the United States have ruled that their Sales Acts are controlling. Furthermore it must be noted that the Wisconsin Court has established a reputation for keeping abreast of most changes in judicial thought and also that it has frequently considered Williston to be a weighty authority. Therefore by expressly mentioning growing trees within its ruling the court may well have laid the stepping stone by which it can cross over the "timber cases" to a new and more logical position.

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⁶² *Supra*, note 9.
⁶³ *Supra*, note 28.