

Sales - Time Condition in Contract for Removal of Growing Crop

Robert F. Boden

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Robert F. Boden, *Sales - Time Condition in Contract for Removal of Growing Crop*, 35 Marq. L. Rev. 393 (1952).
Available at: <http://scholarship.law.marquette.edu/mulr/vol35/iss4/9>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

benefit and that such benefit was the motivating reason for the transportation. The court placed much importance on the fact that the two sons of the defendants went along on the trip and that the share of expenses remained one-half each. It appears that had there been a sharing of the expenses in proportion to numbers, the plaintiff would be barred from recovery by the guest statute.

The advisability of adopting a similar statute in Wisconsin has been discussed in the *MARQUETTE LAW REVIEW*. It notes,¹³

“. . . These statutes generally limit the host's liability to cases of gross negligence. Consequently, they put at rest a great deal of legislation. They are real measures of economy in the cost of maintaining the judiciary. They are also a wholesome social influence in maintaining and encouraging a generous and altruistic relationship between those blessed with an automobile and those who cannot afford to own one. The subject recommends itself to legislative consideration.”

The failure of the legislature to adopt a guest statute in Wisconsin leads us to assume that it deems such action unnecessary. A search of the State Law Index reveals that at present a guest statute in some form is in force in twenty-five states¹⁴ and that a majority of these statutes were enacted between the years of 1933 and 1936 when the automobile began to fill the nation's highways. The Index also discloses that the last of these was enacted in 1939 and that none has been enacted since. Thus, the Wisconsin legislature may have acted wisely in not adopting a guest statute, as it appears that the present legal machinery governing the actions by a guest against his host is superior to that of the law proposed.

DONALD M. LOWRY

Sales — Time Condition in Contract for Removal of Growing Crop — A third party sold and conveyed certain lands to the defendants and sold to the plaintiffs nursery stock growing thereon. Plaintiffs and defendants then entered into a contract providing that plaintiffs should have the right to enter upon the land in question at any time until October 30, 1949, to remove the said nursery stock; that defendants would not damage, destroy or remove the stock prior to that date; and that plaintiffs could cultivate the stock up to, and would leave the land in good condition on, that date. Without excuse, except for illness immediately prior to October 30, 1949, plaintiffs failed to remove the stock before the day specified. However, they were ready, willing and able to do so three days later, and at all times thereafter, but

¹³ Meissner, Harry V., *Liability of Automobile Drivers to Gratuitous Passengers Under the Wisconsin Law*, 18 *MARQ. L. R.* 3, 19 (1933).

¹⁴ Ark., Cal., Colo., Del., Fla., Ill., Ind., Idaho, Kan., Ky., Mont., Neb., Nev., N.M., N.D., Ohio, Ore., S.C., S.D., Tex., Utah, Va., Vt., Wash., Wyo.

defendants refused them access to the property. Whereupon plaintiffs brought this action for damages for defendants' refusal to allow entry. The trial court overruled defendants' demurrer to the complaint, and they appealed. *Held*: Reversed. The law of timber deeds, under which plaintiffs' rights would clearly expire on the precise day named, has no application in view of the enactment of the Uniform Sales Act, but with regard to the subsidiary contract between the two buyers time was of the essence because of the continued reference thereto in the contract, indicating an intention by the parties that time be so regarded. *Jens v. Habeck*, 259 Wis. 338, 48 N.W. (2d) 473 (1951).

The first question presented by the principal case is whether the nursery stock was personal property or real estate coming within the rule of the so-called "timber cases." The law with regard to timber deeds and contracts for the sale of standing timber seems to be in hopeless conflict as between the various states on the problem of the nature of the interest of the grantee of timber rights.¹ However, the Wisconsin law (absent the Uniform Sales Act, the effect of which is to be considered) seems to be fairly well settled. It has been held that a deed of timber providing that the same shall be removed within a given time conveyed only so much of the timber as was removed within the time specified, but that timber cut within that time became personalty and title to it passed to the grantee, so that he might, within a reasonable time after the expiration of the date stipulated, go upon the premises and take the timber.² In short, it was held that the vendee's right was a license.³ However, it was entirely possible that the parties could by their contract elevate the right of the vendee to the status of an interest in land,⁴ apparently a profit a prendre (though the Wisconsin Court refrains from so cataloging it), subject to the condition subsequent that

¹ A comprehensive survey of the conflicting decisions may be found in the following series of 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. No attempt will be made here to explore the law of this subject outside of Wisconsin.

² *Golden v. Glock*, 57 Wis. 118, 15 N.W. 12, 46 Am. Rep. 32 (1883); *Hicks v. Smith*, 77 Wis. 146, 46 N.W. 133 (1890); *Keystone Lmbr. Co. v. Kolman*, 94 Wis. 465, 69 N.W. 165, 34 L.R.A. 821, 59 Am. St. Rep. 905 (1896); *Peshtigo Lmbr. Co. v. Ellis*, 122 Wis. 433, 100 N.W. 834 (1904); *Bretz v. R. Connor Co.*, 140 Wis. 269, 122 N.W. 717 (1909). In *Western L. & C. Co. v. Copper Riv. Lmbr. Co.*, 138 Wis. 404, 120 N.W. 277 (1909) a contract was construed as evincing an intention of the parties to give a period of grace and to allow the grantee a reasonable time after the date stipulated for removal, the intention being that a failure of strict performance should not work a forfeiture.

³ *Keystone Lmbr. Co. v. Kolman*, *ibid.* It has been held by some courts that where timber is conveyed by a proper deed the grantee takes an implied easement of necessity to enter and remove the timber. *Worthen v. Garno*, 182 Mass. 243, 65 N.E. 67 (1902); *Pine Tree Lmbr. Co. v. McKinley*, 83 Minn. 419, 86 N.W. 414 (1901); *Smith v. Va. L.C.&C. Co.*, 143 Va. 159, 129 S.E. 274 (1925); 3 *TIFFANY ON REAL PROPERTY* (3d ed.) §793.

⁴ *Williams v. Jones*, 131 Wis. 361, 111 N.W. 505 (1907); *Kneeland-McLurg L. Co. v. Lillie*, 156 Wis. 428, 145 N.W. 1093 (1914) (where the Court distinguishes the cases cited *supra*, note 2).

the timber be removed within the time stated.⁵ This rule was applied to a three party situation as between the vendee of the timber and the vendor's grantee of the land.⁶

However, the question is raised as to the effect of the Uniform Sales Act upon these rules. The crucial section provides as follows:

“‘Goods’ (as used in the Act) 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.”⁷

The question of broad, general scope which immediately presents itself is, of course, as to whether the statute completely overrules the “timber cases,” or at least modifies their application to a great extent by confining them to cases involving timber as such, excluding such items as nursery stock. However, it is not the purpose of this note to investigate a problem of such magnitude.⁸ Rather, the precise problem presented by the principal case is the effect of the Sales Act upon the three-party arrangement there involved, conceding the applicability of the “timber cases” in the absence of the Act.

Assuming, therefore, that the Sales Act operates upon the nursery stock (or other growing crop) by virtue of the phrase including “industrial growing crops” (i.e., *fructus industriales*) within the definition of

⁵ Schmidt v. Almon, 181 Wis. 244, 194 N.W. 168 (1923).

⁶ Strasson v. Montgomery, 32 Wis. 52 (1873).

⁷ Wis. STATS. (1949), Sec. 121.76(1) [U.S.A., Sec. 76(1)].

⁸ By assuming for the purposes of this article that the Uniform Sales Act definition of “goods” (Wis. STATS. (1949), Sec. 121.76(1); U.S.A. Sec. 76(1)) was sufficient in scope to modify or change the rule of the “timber cases,” the writer does not intend to minimize the problem presented. The Wisconsin Court in the principal case rather summarily held “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; and that as the nursery stock was personal property, the so-called ‘timber cases’ in Wisconsin are not applicable.” There are several arguments against this position, which may briefly be stated as follows: 1) The phrase “industrial growing crops” and the word “emblements” in section 121.76 refer to *fructus industriales*, which are defined as annual crops which owe their existence to the cultivation of man (BALLANTINE'S LAW DICTIONARY, pp. 429 and 533), and trees and nursery stock are not annual crops; 2) The phrase in section 121.76 regarding “things attached to or forming a part of the land” refers not to living things at all, but to fixtures and buildings, because of the express enumeration with regard to living things; 3) Statutes in derogation of the common law must be strictly construed, and a failure to specifically include trees and nursery stock along with emblements and *fructus industriales* indicates an intention not to affect the “timber cases.” See also Schaap v. Wolfe, 173 Wis. 351, 181 N.W. 214 (1921) (decided 10 years after the adoption of the Sales Act, where the Court followed the “timber cases” without reference to the Sales Act); Schmidt v. Almon, 181 Wis. 244, 194 N.W. 168 (1923) (regarding the taxability of trees as realty); Nelson & Sons Co. v. Dept. of Finance, 365 Ill. 401, 6 N.E. (2d) 632 (1937); 1 THOMPSON ON REAL PROPERTY §117.

personal property, no problem seems to be present under the facts of the principal case with respect to the contract entered into between the original landowner and the buyer of the crop. The Sales Act governed. Assuming further that by that contract title to the crop vested in the buyer,⁹ obviously title to the land sans crop passed to the buyer of the real estate, whereas, under the rule of the "timber cases," title to the land and crop would have gone to the buyer of the land (subject to the right of removal in the buyer of the crop and his ability to gain title thereby), since the buyer of the crop could gain no title to it before severance from the land.

But an application of the Sales Act to the original contracts of purchase is quite another thing from an application of the law of sales with respect to time conditions to the subsidiary contract entered into by the two buyers as to the right of and time for removal. It is obvious that that contract was not a sale, for as between themselves and in relation to the growing crop, the buyer of the land and the buyer of the crop were not in a seller-buyer relationship. They might have occupied such relation under the "timber cases," where the buyer of the land assumed title to the crop until cut.¹⁰ Under the Sales Act, it would seem that the parties assumed the status of licensor and licensee, in much the same manner that before the Sales Act a two party contract resulted in that relationship,¹¹ with the exception that, under the Act, title to the crop as a chattel interest initially rested in the licensee.¹² As such, the license would be, unlike the pre-Sales Act situation, irrevocable since coupled with an interest,¹³ but strictly limited to the time prescribed.¹⁴ There is no post-Sales Act case on this situation¹⁵ (other than the principal case), but the cases involving two party agreements for the sale of chattels upon the vendor's land, in so far as they hold that an irrevocable

⁹ WIS. STATS. (1949), Secs. 121.18, 121.19, especially Sec. 121.19(1) (U.S.A., Secs. 18, 19).

¹⁰ *Supra*, notes 2 and 6.

¹¹ *Keystone Lmbr. Co. v. Kolman, supra*, note 2.

¹² *Supra*, notes 7 and 9.

¹³ The doctrine of licenses, and the proposition that when they are coupled with an interest they are irrevocable, has been applied in situations involving a sale of chattels remaining on the vendor's premises. *Walker Furn. Co. v. Dyson*, 32 App. D.C. 90, 19 L.R.A. (N.S.) 606 (1908); *Parker v. Barlow*, 93 Ga. 700, 21 S.E. 213 (1894) (holding that upon the sale of cut timber lying upon the vendor's land, no time for removal being mentioned, the buyer had an irrevocable license to enter within a reasonable time and remove it); *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152 (1884); 3 *TIFFANY ON REAL PROPERTY* (3d ed.) §835; 33 *C.J.S. LICENSES* §92. Compare the theory of easement of necessity, *supra*, note 3.

¹⁴ The Wisconsin "timber cases," *supra*, notes 2 and 6, despite any effect the Uniform Sales Act might have with regard to their specific application to timber sales, are still authority for the proposition that a license is absolutely terminated at the date specified. See, especially, *Keystone Lmbr. Co. v. Kolman, supra*, note 2. See also *Purdum Naval Stores Co. v. Knight*, 129 Ga. 590, 59 S.E. 433 (1907).

¹⁵ *Strasson v. Montgomery, supra*, note 6, antedates the Sales Act by 38 years.

license to enter and remove the subject of the sale, provides a close analogy, title to the chattel in both instances being in the licensee-vendee.¹⁶ Under this view of the case, it appears that the ultimate decision of the Wisconsin Court in the principal case was right, at least upon authority, for the law of licenses is uniform to the effect that when a termination date is stipulated by the parties the license terminates at that time,¹⁷ without regard to any question of time being or not being of the essence.

But the Wisconsin Court did not base its decision upon the law of licenses, no mention of them being made in the decision. The Court felt it necessary to determine whether time was of the essence of the contract, and thus it would appear that it felt the law of contracts, or possibly more particularly the law of sales, applied. It would be well, therefore to consider the Court's holding with regard to time conditions in non-land contracts.

When it is said that time is of the essence of a contract it is meant that performance on or before the date set by the terms of the contract is so material that the slightest deviation in performance will amount, not only to a mere breach for which the promisor must respond in damages, but to a material breach which excuses the other party from performance and precludes the promisor from enforcing the contract.¹⁸

With regard to contracts for the sale of land it is well settled in Wisconsin, and indeed most everywhere, that time will not be regarded as of the essence by the mere inclusion in the contract of a date for performance, unless it is clear that the parties intended to make it so.¹⁹ The presence or absence of a further statement expressly providing that time is to be so regarded,²⁰ or stipulating as to the effect of a failure to perform on the date stated,²¹ is important. The question is essentially one of fact to be answered by a consideration of "the surrounding facts and circumstances, the situation of the parties, and the acts of the parties with respect to the subject matter,"²² This doctrine, which had its origin in equity and developed because of equity's proverbial abhorrence of a forfeiture, is today applicable both in actions at law and in suits in equity.²³

With regard to mercantile contracts, time historically was of the

¹⁶ *Supra* note 13.

¹⁷ *Supra*, note 14.

¹⁸ 3WILLISTON ON CONTRACTS §846.

¹⁹ *Hoffman v. Danielson*, 251 Wis. 34, 27 N.W. (2d) 759 (1947).

²⁰ *Hermansen v. Slatter*, 176 Wis. 476, 187 N.W. 177 (1922).

²¹ *Buntrock v. Hoffman*, 178 Wis. 5, 189 N.W. 572 (1922).

²² *Ibid.*

²³ *Miswald-Wilde Co. v. Armory Realty Co.*, 210 Wis. 53, 243 N.W. 492 (1933) (an action at law for damages for breach of land contracts); RESTATEMENT, CONTRACTS, §276.

essence of every contract, at least in actions at law.²⁴ However, it has been suggested that this rule has been greatly modified and indeed superceded by the equitable rule applicable to land contracts.²⁵ And the Uniform Sales Act is said to have had a profound effect upon the old rule in situations involving installment contracts by its provisions against forfeiture upon breach of time conditions.²⁶ The Restatement of Contracts has applied the equity rule of land contracts to mercantile contracts to the extent of providing that time is not of the essence of such contracts by the mere inclusion of a date for performance, but suggesting, however, that time is generally more material in mercantile than in land contracts.²⁷ The Restatement does not make time of the essence as a matter of law by the mere fact of its being mentioned, but rather looks to the facts, one of which is the subject matter of the contract.

It would appear that the basis for the distinction historically made between land and mercantile contracts lies in the subject matter of them. Land values are relatively stable, and, in the absence of special circumstances, whether performance is had today or tomorrow seems immaterial, as long as performance is rendered in a reasonable time. In these situations the courts of equity, from an early date, and later the courts of law refused to raise an irrebutable presumption that time was of the essence. However, the exact opposite *may* be true of *some* mercantile contracts where the subject matter is subject to sudden fluctuations in value, as is the case in contracts involving securities. In these situations the courts, at least the law courts, seemed less reluctant to create an irrebutable presumption. There is little question but that in many mercantile situations time is of the utmost materiality. However, the presence of that factor in *some* of these contracts does not seem to justify a blanket rule applicable to *all* such contracts, including those involving commodities as stable as land (such as the growing trees with which the principal case is concerned). Under an extension of the land rule to mercantile contracts, certainly the fluctuating value of the subject matter would be a special circumstance to be considered by the jury in determining the *fact* of the materiality of time. This principle has been recognized by courts tending to break away from the old common law rule. In *Farris v. Ferguson*,²⁸ an action *at law* by the seller for breach of a contract for the sale of animals and farm produce, where the buyer

²⁴ Kieckhefer Box Co. v. John Strange Paper Co., 180 Wis. 367, 189 N.W. 145, 193 N.W. 487 (1923); 2 WILLISTON ON SALES §453a.

²⁵ *Ibid.*

²⁶ WIS. STATS. (1949), Sec. 121.45(2) (U.S.A., Sec. 45(2)); Kieckhefer Box Co. v. John Strange Paper Co., *supra*, note 24.

²⁷ RESTATEMENT, CONTRACTS, §276.

²⁸ 146 Tenn. 498, 242 S.W. 873, 23 A.L.R. 624 (1922).

refused to accept payment a day after the stipulated date, the Court said, in reversing a judgment for the defendant:

“. . . the growing tendency has been to modify the harsh and often inequitable rule of the common law, and the courts now determine each case upon its own peculiar facts, the question as to whether time is of the essence of the contract being one of construction controlled by the intention of the parties.”

The Court pointed to fluctuating values and the possibility of loss, inconvenience or injury to a party by the short delay as considerations in determining the question of fact as to time.

The New York Appellate Term, in affirming a judgment for the plaintiff seller in an action at law for breach of a contract in the buyer's refusal to accept brick delivered one day late, said:²⁹

“The rule that time is to be regarded of the essence was originally designed to carry out the presumed intention of the parties. When it is clear that the application of this rule would be contrary to the intention of the parties, the reason for the application of the rule no longer exists, and the rule itself is inoperative. The adoption of a reasonable construction, which gives effect to the original intention of the parties, is more in harmony with the spirit and reason of the general rule than is adherence to a narrow and literal interpretation, which does not effectuate such intention.”³⁰

Other jurisdictions,³¹ including the 7th Federal Circuit, in a case coming out of Illinois,³² have reached the same conclusions, overthrowing the old rule and adopting an equity approach³³ without the aid of a statute. In some states statutes have adopted the liberal rule for application to all contracts in all actions.³⁴

Before the principal case, Wisconsin law appeared to be in accord with this liberal view. The Wisconsin Court seemed to recognize that

²⁹ *New Jersey Co. v. Nathaniel Wise Co.*, 55 Misc. 294, 105 N.Y.S. 231 (1907), affirmed by memorandum, 125 App. Div. 918, 109 N.Y.S. 1139 (1908). See also *Hubbard v. Rockaway Lunch Co.*, 131 Misc. 53, 225 N.Y.S. 638 (1928).

³⁰ It is to be noted that this court would not go the full length and adopt the equity land rule, which is a presumption against time being of the essence, but rather would adopt a contrary presumption, requiring evidence that time was not of the essence in personalty cases. The significant fact, however, is that the court discards the irrefutable presumption raised by the common law.

³¹ See *Bowser & Co. v. Crescent Filling Station*, 133 S.C. 281, 130 S.E. 870 (1926) where the court determined time was of the essence, but on a consideration of all the facts and circumstances; *Hernton v. Manger*, 85 Mont. 31, 277 P. 433 (1929).

³² *Colonial Sugars Co. v. Durand*, 286 F. 499 (7th Cir., 1923).

³³ Equity traditionally applied the same rule to land and mercantile contracts. *Consolidated Boiler Corp. v. Bogue Electric Co.*, 141 N.J.Eq. 550, 58 A. (2d) 759 (1950). See also 2 WILLISTON ON SALES §453a.

³⁴ GA. CIVIL CODE, Sec. 4268(8); *Cobb Lmbr. Co. v. Sunny South Grain Co.*, 36 Ga. App. 140, 135 S.E. 759 (1927); *Herring Motor Co. v. Behn*, 38 Ga. App. 756, 145 S.E. 474 (1928). The Uniform Sales Act has adopted the liberal view to installment situations, see *supra*, note 26.

time would not be of the essence as a matter of law merely because a time for performance was set in the contract and the contract was one involving personal property. In a case³⁵ concerning a contract for the sale of tavern fixtures and a stock of merchandise wherein the buyer refused to perform because of the seller's delay in performance, the Court held:

"A contract may not be rescinded for every breach thereof. A breach of a contract not so substantial as to defeat the object of the parties in making the contract does not entitle the other party to rescind. If time were of the essence of this contract, then failure to deliver possession on May 5th would have been a material breach of the contract that would have warranted a rescission. From the record here we must find that time was not of the essence and that there was not a breach of the agreement by the plaintiffs that warranted rescission of the contract by the defendants."

It is interesting to note that this case was decided only a few months before the principal case. It certainly indicates a rejection of the absolute presumption raised by the common law and a willingness to accept the equitable rule. At law and in equity an examination beyond the terms of the contract is, or has been, required. The mere mention of a performance date was insufficient, *per se*, to establish time as of the essence as a matter of law.

The principal case, an appeal from an order overruling a demurrer, now holds as a matter of law and without reference to "surrounding facts and circumstances," which indeed have yet to be shown, that the mention four times in a contract of a last date for the performance of four specified acts, without other provision as to the effect of non-performance by that date upon the rights of the parties, rendered time of the essence so that the plaintiff, tendering performance three days after it was due, had breached the contract to the degree that the defendant was entitled to a rescission. The Court said:

"That time was of the essence as to the matters which were to be performed by plaintiffs is clearly evident in view of the express and definite provisions in the contract . . ."³⁶

The effect of the decision may well be a reverter to the old common law rule, for there is nothing beyond the mere mention of time upon which to base the holding. There are three possible qualifications which might be attached to the decision, however. The first is that time was mentioned four times, but there is no case holding that mere repeated reference to time will make it of the essence, especially where, as here, the promisor had four separate acts to perform. The second is that the

³⁵ *Kampmann v. McInerney*, 258 Wis. 432, 46 N.W. (2d) 205 (1951).

³⁶ *Jens v. Habeck*, 259 Wis. 338, 48 N.W. (2d) 473 (1951).

promisor had no real excuse for non-performance, but the reference to this point in the Court's opinion seems to be merely in passing and the decision actually based upon the mention of time in the contract. Thirdly, the rule of this case might be limited to actions at law and the rule in equity, heretofore applied to law, left unaffected. But the conclusion seems inescapable that a change has been worked in the Wisconsin law of time conditions.

It is to be noted that, assuming the applicability of the Sales Act to the original contract between the landowner and the buyer of the crop by virtue of the provision including "industrial growing crops" as goods, the decision in the case necessarily works a forfeiture of the crop owner's interest, for under the Act title to the crop passed to him upon the execution of the contract.³⁷ The benefit of the trees passes to the landowner, who did not include the value thereof in his purchase price for the land. This results in an unjust enrichment to him, and is a controlling distinction between the situation under the Sales Act and under the "timber cases," and it follows whether the decision be rationalized under the principles of the law of licenses or of the law of sales with respect to the subsidiary contract between the two buyers. An opposite result as regards a forfeiture is reached under the rule of the "timber cases," where the grantee of timber rights is limited to such timber as he can remove in the time specified. Never having had title to any additional amount, a technical forfeiture, which presupposes an interest which would continue if not cut off, is prevented. The dissenting opinion of Mr. Justice Brown in the principal case vigorously opposes any result which would work an unreasonable forfeiture:³⁸

"For a failure to remove the stock by a designated time, which was not stated to be of the essence and which has not even been found to be material, the defendants propose to acquire without compensation that which they recognized was sold to the plaintiffs. It seems inequitable to sustain their position, and thus impose a forfeiture upon the plaintiffs, before the materiality of the date and the detriment to the defendants of delay have been passed upon after submission of evidence."

In conclusion, then, two grounds of objection to the rather brief and summary opinion of the Court are submitted (aside from any question of the general effect of the Sales Act upon the "timber cases"): 1) The failure of the Court to investigate with more particularity the applicability of the law of licenses to the subsidiary contract between the two buyers (upon the assumption that the Sales Act governed the original

³⁷ *Supra*, note 9.

³⁸ *Supra*, note 36 (dissenting opinion).

sale of the crop) ; and 2) The harsh rule as to time conditions adopted by the Court (upon the assumption that the law of contracts or sales and not licenses governed).

ROBERT F. BODEN

Wills—Revocation by Cancellation—Use of Lead Pencil as Indicating Testator's Intent.—The will as found amongst the personal effects of the testatrix contained certain penciled notations in her handwriting. In the residuary clause, which left all the residue to three cousins, she drew a pencil line through the phrase "Nellie Curtis of Waupaca" and at the end of the paragraph she wrote the word "dead." She failed, however, to do anything to the last line of the clause which read, "the last three named legatees are my first cousins." The contention of the contestant was that the bequest to Nellie Curtis had been revoked. The lower court admitted the will to probate with the exception of the bequest to Nellie Curtis. *Held*: Reversed. Such markings do not raise a presumption of revocation by cancellation and therefore the residuary clause as admitted to probate should include the bequest to Nellie Curtis. *In re Holcombe's Estate*, 259 Wis. 642, 49 N.W. (2d) 914 (1951).

In general, because of the danger of fraud, the separate states have enacted statutes providing specific requirements necessary to revoke a will. These statutes are generally similar and provide for revocation by physical acts done to the will, by a subsequent revoking instrument, and by certain changes in circumstances.¹ The Wisconsin statute, so far as it applies to revocation by physical acts, provides :

"No will nor any part thereof shall be revoked unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it . . ."²

By express language of the statute both an act of destruction plus a concurrent intention to revoke by that act are required.

Thus once a will has been proven to have been validly executed, it will be presumed that it continued unrevoked and the primary burden of proving a subsequent revocation rests upon the one asserting it.³ However, it is generally agreed that where the will is found amongst the testator's effects in such a state of mutilation or cancellation as would be a sufficient act of revocation if the intent to revoke were shown, then from the doing of such act the intent to revoke will be

¹ ATKINSON ON WILLS, p. 368.

² WIS. STATS. (1949), Sec. 228.14.

³ 2 PAGE ON WILLS, p. 718.