

CHAPTER 287.

Actions By and Against Executors, Administrators, Heirs and Legatees.

287.01 History: R. S. 1849 c. 103 s. 1, 2; R. S. 1858 c. 147 s. 1, 2; R. S. 1878 s. 3252; 1885 c. 368; Ann. Stats. 1889 s. 3252; Stats. 1898 s. 3252; 1925 c. 4; Stats. 1925 s. 287.01; 1935 c. 483 s. 38.

Revisor's Note, 1935: 287.01 has caused protracted litigation. *Lane v. Frawley*, 102 W 373. 331.01 has been repeatedly amended to effect a reversal of the construction which the court gave to 287.01, the latest amendment being chapter 53, Laws 1933. 287.01 is rewritten to obviate the danger of its being relied on as a survival statute. [Bill 75-S, s. 38]

Upon a cause of action on which his decedent had a complete right of action suit must be brought in a representative capacity. *Lawrence v. Vilas*, 20 W 381.

Sec. 3252, R. S. 1878, is not a survival statute. *Lane v. Frawley*, 102 W 373, 78 NW 593.

Secs. 3252 and 3170, Stats. 1921, authorize the bringing of an action against the executor or administrator of the wrongdoer, whether the plaintiff has or has not filed a claim in accordance with ch. 313. *Payne v. Meisser*, 176 W 432, 187 NW 194.

A cause of action for deceit which induced the conveyance of real estate survives to the personal representative rather than to the legatee. *Zartner v. Holzhauer*, 204 W 18, 234 NW 508.

A joint tort-feasor and his insurer may maintain an action against the administrator of a deceased tort-feasor and the insurer of the deceased for contribution of a proportionate share of the amount paid to the injured person by virtue of a judgment in an action against the suing joint tort-feasor, although the tort-feasor died 3 days after the accident and before the injured person commenced the action which resulted in such judgment. *De Brue v. Frank*, 213 W 280, 251 NW 494.

287.03 History: R. S. 1849 c. 103 s. 5, 7; R. S. 1858 c. 147 s. 5, 7; R. S. 1878 s. 3254; Stats. 1898 s. 3254; 1925 c. 4; Stats. 1925 s. 287.03; 1935 c. 483 s. 40.

287.05 History: R. S. 1849 c. 103 s. 12; R. S. 1858 c. 147 s. 12; R. S. 1878 s. 3256; Stats. 1898 s. 3256; 1925 c. 4; Stats. 1925 s. 287.05.

287.06 History: R. S. 1849 c. 70 s. 17, 18; R. S. 1849 c. 103 s. 13, 18; R. S. 1858 c. 101 s. 17, 18; R. S. 1858 c. 147 s. 13, 18; R. S. 1878 s. 3257, 3847; Stats. 1898 s. 3257, 3847; 1917 c. 566 s. 48; 1925 c. 4; Stats. 1925 s. 287.06, 313.11; Sup. Ct. Order, 212 W xxix; Stats. 1933 s. 287.06; 1935 c. 483 s. 42.

Revisor's Note, 1935: The right to maintain an action by an administrator is expressly extended to every cause of action which survived his decedent. That is now the law. 287.01. Execution by an administrator is authorized by 272.15. [Bill 75-S, s. 42]

An allegation that certain funds were held by A at the time of his death in trust for plaintiff, who had created the trust for her own benefit, and that defendants, A's executors,

had refused to account therefor and had converted them, showed a cause of action. *King v. Lawrence*, 14 W 238.

An administrator cannot bring an equitable action to obtain a deed of lands which belonged to intestate and of which defendants are alleged to have fraudulently acquired legal title. In such case they might sue on a bond, conditions of which were broken. *Webster v. Tibbitts*, 19 W 438.

Where the survivor of 2 partners, as part of division of assets of the firm, transferred his interest in a firm account to the executrix of the deceased partner, suit upon it was properly brought by her as executrix. *Lawrence v. Vilas*, 20 W 381.

An administrator may sue in his own name upon a note of the estate payable to the bearer. *Sandford v. McCreeedy*, 28 W 103.

A promissory note given for money of an estate loaned by the administratrix prior to issue of letters of administration, and payable to her order, will, at her election, inure to the benefit of the estate. Action for its conversion brought by her is evidence of election. *Kalckhoff v. Zoehrlaut*, 40 W 427.

Provisions relating to set-offs under sec. 3847, R. S. 1878, do not apply to actions to recover upon contracts made with the administrator or an action to recover assets belonging to the estate which have come to the hands of defendant after the intestate's death. *McLoughlin v. Winner*, 63 W 120, 23 NW 402.

Where a defendant counterclaims under sec. 3847, Stats. 1898, he must have a demand not barred. *Rust v. Fitzhugh*, 132 W 549, 112 NW 508.

A defendant in replevin by an administratrix to recover chattels taken possession of by him after the death of the owner, cannot offset or counterclaim a demand for rent. *Weissman v. Weissman*, 156 W 26, 145 NW 230.

In an action in the circuit court on a note by the executor of the payee, it was no defense that defendant was a legatee under the decedent's will and that the amount of his legacy would be more than sufficient to cancel the note sued on. *Will of Grover*, 197 W 347, 222 NW 228.

The statute authorizing executor or administrator to prosecute action for recovery of any claim which survived refers to an action to be prosecuted by an executor or administrator in a court of general jurisdiction. *Estate of George*, 225 W 251, 274 NW 294.

When the county court has no jurisdiction over the proceedings against the alleged debtor, but the record discloses the existence of a probable cause of action in favor of the estate, and the facts warrant, it is within the jurisdiction of the county court to authorize the administrator to begin an action against the debtor in a court of competent jurisdiction. *Will of Reinke*, 259 W 398, 48 NW (2d) 613.

287.07 History: R. S. 1849 c. 103 s. 11; R. S. 1858 c. 147 s. 11; R. S. 1878 s. 3258; Stats. 1898 s. 3258; 1925 c. 4; Stats. 1925 s. 287.07; 1935 c. 483 s. 43.

The executor of a deceased executor cannot be compelled to settle the accounts of the deceased. *Reed v. Wilson*, 73 W 497, 41 NW 716.

287.08 History: R. S. 1849 c. 103 s. 17; R. S. 1858 c. 147 s. 17; R. S. 1878 s. 3259; Stats. 1898 s. 3259; 1925 c. 4; Stats. 1925 s. 287.08; 1935 c. 483 s. 44.

An administrator may sue in individual or representative capacity for injury done to goods of his intestate between time of death and time of granting letters of administration. *Knox v. Bigelow*, 15 W 415.

Money illegally obtained by the widow of an intestate from his estate cannot be recovered by the administrator where it appears that she used it to pay preferred claims. Her failure to file a claim in the right of the preferred creditors did not impair her defense. *Merrill v. Comstock*, 154 W 434, 143 NW 313.

287.14 History: R. S. 1858 c. 147 s. 14, 15; R. S. 1878 s. 3265, 3266; Stats. 1898 s. 3265, 3266; 1925 c. 4; Stats. 1925 s. 287.14, 287.15; 1935 c. 483 s. 50; Stats. 1935 s. 287.14.

287.16 History: 1860 c. 28 s. 1; 1869 c. 20 s. 1; 1873 c. 266; 1875 c. 265 s. 1; R. S. 1878 s. 3267; Stats. 1898 s. 3267; 1925 c. 4; Stats. 1925 s. 287.16; 1935 c. 483 s. 51.

Revisers' Note, 1878: Section 1, chapter 28, Laws 1860, as amended by section 1, chapter 20, Laws 1869, amended by section 1, chapter 265, Laws 1875, rewritten, making it applicable only to executors and administrators, and extending its provision so as to give such executors and administrators the same powers as to the property and effects of the deceased in this state, so far as the maintaining and defending actions are concerned, as an executor or administrator appointed in this state would have in relation thereto. Words are also inserted to give powers, besides those relating to actions, over the trust estate; thus to embrace chapter 266, Laws 1873, and such similar provisions as are otherwise necessary.

The disability of a foreign executor before filing an authenticated copy of his appointment is mere disability and not want of title. Such disability, before letters are filed, can be taken advantage of by answer only by way of abatement. *Smith v. Peckham*, 39 W 414.

The executor of a deceased mortgagee acting under letters testamentary granted in another state may execute a power of sale in a mortgage of land in this state without having the will probated here. *Hayes v. Frey*, 54 W 503, 11 NW 695.

When the proper copy of the original appointment is duly filed in any county court the foreign executor or administrator is placed upon the same footing as a domestic administrator or executor, so far as capacity to sue in our courts is concerned. *Murray v. Norwood*, 77 W 405, 46 NW 499.

Secs. 3267 and 2295, Stats. 1898, are independent sections and intended to cover different situations. Sec. 3267 is intended to provide for cases where the executor or administrator must obtain authority to sell or convey lands, while sec. 2295 is intended to cover cases where by the terms of the will lands are devised or authority given to convey. *McIntosh v. Marathon L. Co.* 110 W 296, 85 NW 976.

Sec. 3267 does not authorize an administrator appointed in another state to sue for death by wrongful act, but secs. 4255 and 4256 do authorize such an action. *Robertson v. Chi-*

cago, St. P., M. & O. R. Co. 122 W 66, 99 NW 433.

No conditions are required of one appointed by a court of this state except that he be an executor or administrator. Where a pleading alleges the appointment of an executor or administrator the presumption is that the appointment resulted from proceedings in a court in this state, and that the executor or administrator functioned as such for a deceased resident of this state. *Lawver v. Lynch*, 191 W 99, 210 NW 410.

Trustees or personal representatives, who had been appointed in Michigan probate proceedings, and who had sold corporate stock to the herein defendant purchaser in such capacity, were not required to file their appointments in a Wisconsin county court in order that their assignments of their causes of action for unpaid deferred payments to the herein suing plaintiff seller be recognized in the Wisconsin court. *Caley v. Flegenhheimer*, 8 W (2d) 72, 98 NW (2d) 473.

An action by a foreign executor is construed to be by him as administrator only and not one brought in his own name upon a cause of action accruing to him in his representative capacity so that he could not bring an action in the federal court in Wisconsin where he had not filed an authenticated copy of his appointment. *Graham v. Lybrand*, 142 F 109.

287.17 History: R. S. 1849 c. 70 s. 15, 59, 60; R. S. 1858 c. 101 s. 15, 61, 62; 1862 c. 24 s. 2; R. S. 1878 s. 3845; Stats. 1898 s. 3845; 1899 c. 5 s. 1; Supl. 1906 s. 3845; 1925 c. 4; Stats. 1925 s. 313.09; Stats. 1933 s. 287.17; 1935 c. 483 s. 52; 1961 c. 495.

No action can be maintained against an executor or administrator upon a claim allowed unless, after the order of distribution, payment according to order is refused. *Price v. Dietrich*, 12 W 626.

In an action against an executor upon a promise of the testator, where there is nothing showing violation of duty which would make the executor personally liable, it is error to render a judgment against him *de bonis propriis*. *Woodward v. Howard*, 13 W 557.

The county court has jurisdiction in all matters of administration, settlement and distribution, and a court of equity should not take jurisdiction unless special facts are stated showing that a complete and adequate remedy cannot be had in the county court. *Hawley v. Tesch*, 72 W 299, 39 NW 483.

A personal judgment against an administrator in an action to enforce a laborer's lien on logs cannot be sustained. *Viles v. Green*, 91 W 217, 64 NW 845.

Sec. 3845 and 3844, R. S. 1878, can be given full effect by limiting them to such claims as can be effectively litigated in the county court, and in respect to which its jurisdiction is adequate. They do not require that claims against deceased stockholders in banks be presented to such court, when the determination of the liability of their estates therefor necessitates the making of the bank and other stockholders parties. *Gianella v. Bigelow*, 96 W 185, 71 NW 111.

The circuit court may take jurisdiction of an action to enforce a trust in lands in favor of wards. *Hill v. True*, 104 W 294, 80 NW 462.

Under sec. 3845, Stats. 1898, plaintiff must allege and prove that there is no time fixed by the county court for presentation of claims and that no notice had been given of limitation of time. *Gager v. Paul*, 111 W 638, 87 NW 875.

Distributees may sue an administrator to avoid a sale to himself individually. *Rowell v. Rowell*, 122 W 1, 99 NW 473.

An attorney may sue an administrator personally for the amount allowed as attorney fees in the final account, and in such action a promissory note given by the plaintiff may be counterclaimed. *Vaughn v. Walsh*, 122 W 486, 100 NW 840.

The determination of the circuit court that it has jurisdiction of an action against an executor will not be reversed unless clearly erroneous. Such court has jurisdiction where a suit is brought by the executors of a director of the corporation to wind up the affairs of such corporation and where the defendants attempt to recover for the corporation an amount due because of the wrongful act by a director. *Lindemann v. Rusk*, 125 W 210, 104 NW 119.

Executors and testamentary trustees, when they have real and serious doubts as to their duties, may, for their own protection, maintain an action in the circuit court for construction of a will. *Stephenson v. Norris*, 128 W 242, 197 NW 343.

A circuit court had jurisdiction of an action against an executor for replevin by one claiming under a gift causa mortis. *Hudson v. First T. Co.* 200 W 220, 228 NW 121.

The county court is entirely adequate to adjudicate a claim against the estate of a deceased stockholder of an insolvent bank in the regular course of the administration of his estate, and hence the circuit court should not assume jurisdiction. *Banking Comm. v. Muzik*, 216 W 596, 257 NW 174.

An executor taking possession of assets in his representative capacity may be sued therefor either in his representative capacity or personally. *Estate of Christopher*, 235 W 616, 293 NW 921.

Although a school district, having a claim against a deceased former school treasurer for the alleged embezzlement of school funds, might have waived its claim in tort and filed a claim against the deceased treasurer's estate in the county court on the theory of implied contract, it was not required to do so but, instead, it could prosecute its claim by an action for the conversion of the funds against the deceased treasurer's executrix. *School Dist. v. Brennan*, 236 W 91, 294 NW 558.

In an action brought against executors in the circuit court for the specific performance of an alleged contract between the plaintiff and the testator, wherein the plaintiff asked for the appointment of a receiver to take over and manage certain defendant corporations controlled by the executors under the will, the circuit court had and should have taken jurisdiction because the county court, in the matter of the appointment of a receiver, could not afford as adequate a remedy as the circuit court, and hence the complaint was not demurrable on the ground of another action pending in the county court, on the plaintiff's claim filed against the estate, involving the

same issues. *Holty v. Landauer*, 264 W 463, 59 NW (2d) 679.

287.18 History: R. S. 1858 c. 147 s. 25, 28; R. S. 1878 s. 3269; Stats. 1898 s. 3269; 1925 c. 4; Stats. 1925 s. 287.18; 1935 c. 483 s. 53.

See note to 893.19, on relief for fraud, citing *Clark v. Sloan*, 215 W 423, 254 NW 653.

287.19 History: R. S. 1849 c. 103 s. 26, 30 to 32; R. S. 1858 c. 147 s. 26, 30 to 32; R. S. 1878 s. 3270; Stats. 1898 s. 3270; 1925 c. 4; Stats. 1925 s. 287.19; 1935 c. 483 s. 54; 1969 c. 339.

Revisers' Note, 1878: Sections 26, 30, 31 and 32, chapter 147, R. S. 1858, combined and rewritten, and amended so as to direct that separate executions may be issued against each defendant for the amount rendered against him as upon a separate judgment. This is clearly more convenient than to have but one execution, and can do no harm to the defendants.

It is only when a decedent's estate has been distributed and the administrator discharged, and the owner of a contingent claim, since become absolute, has thus been deprived of his ability to present his claim within the time allowed by 313.23, that the claimant may maintain an action, under 287.18 and 287.19, directly against the heirs without filing his claim. *Banking Comm. v. Reinke*, 241 W 362, 6 NW (2d) 349.

287.20 History: R. S. 1849 c. 103 s. 27; R. S. 1858 c. 147 s. 27; R. S. 1878 s. 3271; Stats. 1898 s. 3271; 1925 c. 4; Stats. 1925 s. 287.20; 1935 c. 483 s. 55.

287.21 History: R. S. 1849 c. 103 s. 29; R. S. 1858 c. 147 s. 29; R. S. 1878 s. 3272; Stats. 1898 s. 3272; 1925 c. 4; Stats. 1925 s. 287.21; 1935 c. 483 s. 56.

Revisor's Note, 1935: The amendment puts legatees and devisees plainly on the same footing. Devisees are not now preferred to legatees, 313.25. [Bill 75-S, s. 56]

287.22 History: R. S. 1849 c. 103 s. 33; R. S. 1858 c. 147 s. 33; R. S. 1878 s. 3273; Stats. 1898 s. 3273; 1925 c. 4; Stats. 1925 s. 287.22; 1935 c. 483 s. 57.

287.26 History: R. S. 1849 c. 103 s. 35, 38; R. S. 1858 c. 147 s. 35, 38; R. S. 1878 s. 3277; Stats. 1898 s. 3277; 1925 c. 4; Stats. 1925 s. 287.26; 1935 c. 483 s. 61.

287.28 History: R. S. 1849 c. 103 s. 36, 59; R. S. 1858 c. 147 s. 36, 59; R. S. 1878 s. 3279; Stats. 1898 s. 3279; 1925 c. 4; Stats. 1925 s. 287.28; 1935 c. 483 s. 63.

287.29 History: R. S. 1849 c. 70 s. 54; R. S. 1849 c. 103 s. 37, 60; R. S. 1858 c. 101 s. 56; R. S. 1858 c. 147 s. 37, 60; R. S. 1878 s. 3280; Stats. 1898 s. 3280; 1925 c. 4; Stats. 1925 s. 287.29; 1935 c. 483 s. 65.

287.32 History: R. S. 1849 c. 103 s. 49; R. S. 1858 c. 147 s. 49; R. S. 1878 s. 3283; Stats. 1898 s. 3283; 1925 c. 4; Stats. 1925 s. 287.32.

287.36 History: R. S. 1849 c. 103 s. 39; R. S. 1858 c. 147 s. 39; R. S. 1878 s. 3287; Stats. 1898 s. 3287; 1925 c. 4; Stats. 1925 s. 287.36.

287.38 History: R. S. 1849 c. 103 s. 41; R. S. 1858 c. 147 s. 41; R. S. 1878 s. 3289; Stats. 1898 s. 3289; 1925 c. 4; Stats. 1925 s. 287.38.

287.39 History: R. S. 1849 c. 103 s. 42; R. S. 1858 c. 147 s. 42; R. S. 1878 s. 3290; Stats. 1898 s. 3290; 1925 c. 4; Stats. 1925 s. 287.39.

287.40 History: R. S. 1849 c. 103 s. 43; R. S. 1858 c. 147 s. 43; R. S. 1878 s. 3291; Stats. 1898 s. 3291; 1925 c. 4; Stats. 1925 s. 287.40.

287.41 History: R. S. 1849 c. 103 s. 64 to 68; R. S. 1858 c. 147 s. 64 to 68; R. S. 1878 s. 3292; Stats. 1898 s. 3292; 1925 c. 4; Stats. 1925 s. 287.41.

287.42 History: R. S. 1849 c. 70 s. 57; R. S. 1858 c. 101 s. 59; R. S. 1878 s. 3293; Stats. 1898 s. 3293; 1925 c. 4; Stats. 1925 s. 287.42.

287.43 History: R. S. 1849 c. 69 s. 15; R. S. 1858 c. 100 s. 15; R. S. 1878 s. 3832; Stats. 1898 s. 3832; 1925 c. 4; Stats. 1925 s. 312.13; 1933 c. 190 s. 15; Stats. 1933 s. 287.43; 1969 c. 339.

Editor's Note: This section is repealed, effective April 1, 1971, by ch. 339, Laws 1969. See the editor's note printed ahead of ch. 851 for information as to the provision in the new probate code which replaces it.

An executor or administrator cannot maintain an action against a person claiming to be decedent's widow to bar her from claiming dower in the real estate on the ground of the invalidity of the alleged marriage. Such question, it seems, may be raised upon the application for license to sell the realty. *Paige v. Fagan*, 61 W 667, 21 NW 786.

No action can be maintained by an administrator under sec. 3832, Stats. 1898, unless it is shown that there would be a deficiency of assets in the estate to meet proper claims against it. *Ecklor v. Wolcott*, 115 W 19, 90 NW 1081.

Sec. 3832, Stats. 1898, contemplates only the redress of wrongs to creditors after the decease of a debtor. An action where the wrong complained of was one committed by a person against a decedent does not fall within the section. *Borchert v. Borchert*, 132 W 593, 113 NW 35.

An administrator may maintain an action to set aside property transferred in fraud of creditors for the purpose of satisfying claims which were not in existence at the time the conveyance sought to be set aside was made but which were in contemplation. (Language in *Ecklor v. Wolcott*, 115 W 19, 90 NW 1080, to the contrary, overruled.) *Sawyer v. Metters*, 133 W 350, 113 NW 682.

To warrant a recovery under 312.13, Stats. 1929, there must be a deficiency of assets and that deficiency must be established by an adjudication of the claims against the estate. The filing of claims does not establish a deficiency. *Mann v. Grinwald*, 203 W 27, 223 NW 582.

Proceedings brought by an administratrix appointed more than 4 years after the death of the decedent to recover land alleged to have been fraudulently conveyed and to subject the same to the payment of debts was barred by 315.01, Stats. 1929. *School v. Adams*, 206 W 174, 239 NW 452.

The mere fact that realty was sold and mortgaged through dummies to make the title more marketable or otherwise serve the convenience of the parties does not show

fraud. In an administrator's or a creditor's action a conveyance may be set aside only if fraudulently made by a decedent with the intent to defeat or defraud his creditors. *Massey v. Richmond*, 208 W 239, 242 NW 507.

A question of fraud in a conveyance by a decedent is a question of fact for the trial court. *Rosenberg v. Goodman*, 185 F (2d) 235.

287.44 History: R. S. 1849 c. 69 s. 17; R. S. 1858 c. 100 s. 17; R. S. 1878 s. 3833; Stats. 1898 s. 3833; 1925 c. 4; Stats. 1925 s. 312.14; 1933 c. 190 s. 17; Stats. 1933 s. 287.44; 1969 c. 339.

Editor's Note: This section is repealed, effective April 1, 1971, by ch. 339, Laws 1969. See the editorial note printed ahead of ch. 851 for information as to the provision in the new probate code which replaces it.

CHAPTER 288.

Collection of Forfeitures.

288.01 History: R. S. 1849 c. 122 s. 9; R. S. 1858 c. 155 s. 1, 8; R. S. 1878 s. 3294; Stats. 1898 s. 3294; 1925 c. 4; Stats. 1925 s. 288.01; 1935 c. 483 s. 74.

Revisor's Note, 1935: "Other than a fine" is omitted and the wording changed so that a fine not coupled with imprisonment may be collected by civil action. A fine is in substance a forfeiture, if imprisonment in the alternative or in addition be not coupled with the fine. For violations of administrative statutes the civil action is often preferable to a criminal action. Payment of both fines and forfeitures may be compelled by imprisonment not exceeding six months. 353.25, 288.09. [Bill 75-S, s. 74]

A forfeiture incurred under the act to regulate and license the keeping of dogs (ch. 175, Laws 1860) was only enforceable by civil action. *Carter v. Dow*, 16 W 298; *Ives v. Jefferson County*, 18 W 167.

288.01, Stats. 1925, does not extend to penalties imposed for a violation of a municipal ordinance, forfeitures imposed by municipal ordinances being dealt with by 288.10. *Milwaukee v. Johnson*, 192 W 585, 213 NW 335.

288.02 History: R. S. 1849 c. 122 s. 2, 3, 5; R. S. 1858 c. 155 s. 2, 3, 5; R. S. 1878 s. 3295; Stats. 1898 s. 3295; 1925 c. 4; Stats. 1925 s. 288.02; 1935 c. 483 s. 75.

A complaint which assumes to state the specific facts creating the liability and concludes with the averment that the defendant thereupon became indebted, etc., is insufficient unless the facts specifically stated constitute a cause of action. *State v. Egerer*, 55 W 527, 13 NW 461.

In an action to recover a penalty for encroachment upon a highway an error in the complaint in referring to the section which imposes the penalty is immaterial where it alleges that the penalty became due on account of an encroachment upon a certain street in a certain village. *State v. Schwin*, 65 W 207, 26 NW 568.

A complaint is sufficient under sec. 3295, Stats. 1898, if it does not state the specific act relied upon. *State v. Childs*, 109 W 233, 85 NW 374.

An allegation that defendant as a member