any person who died before the performance thereof.

An assignee may have a contract enforced. Minert v. Emerick, 6 W 355. See also Denton v. White, 26 W 679.

Where an action for specific performance had been begun and the land was conveyed by the defendant, the action could be revived upon his death by a supplemental complaint against the executor or administrator but not against the heirs. Fleming v. Ellison, 124 W 36, 102 NW 398.

296.02, Stats. 1925, applies to an action brought by a vendor as well as to one brought by a vendee; a vendor may bring his action in circuit court in cases where no executor or administrator has been appointed, or where no order has been made in county court limiting the time to present claims; where the vendor has failed to file his claim in county court full performance cannot be decreed in the circuit court as the claim for deficiency is barred. Harris v. Halverson, 192 W 71, 211 NW 295.

The findings that the contract was made will not be overthrown on appeal unless contrary to the clear preponderance of the evidence. Statements of decedent that the niece and her husband had no claim to the farm were self-serving declarations and incompetent. Decedent's statements that the farm would go to the niece on his death were competent and properly received as declarations against interest. Estate of Powell, 206 W 513, 240 NW 122.

The contract relied on not being one for the conveyance of decedent's entire interest in the land, but being for the conveyance of an undivided interest, claimant's joint occupancy of the land with decedent was sufficient possession under the contract to support specific performance. In such case, a part of the consideration for the contract having been that the son would continue to stay on the land during the father's lifetime, the contract was not fully performed by the son until the father's death; and the action for specific performance having been brought after the father died is not barred by 330.18 (4), nor by laches. Estate of Shinoe, 212 W 481, 250 NW 505.

The will did not require the executors, in taking action on a land contract on which a legatee was indebted to the testator, to resort to strict foreclosure, but the executors had the same rights and remedies which the vendor would have if living, and they could elect to sue for the unpaid purchase price of the land covered by the contract. On breach of the conditions of a land contract, the vendor may elect to sue for the unpaid purchase money, or to sue for specific performance of the contract, or to declare the contract at an end. Estate of Greeneway, 236 W 503, 295 NW 761.

The evidence sustained the granting of a decree for specific performance of an executory contract for the sale and conveyance of land. Estate of Gabler, 265 W 31, 60 NW (2d) 342.

316.53 History: 1953 c. 440; Stats. 1953 s. 316.53; 1969 c. 339.

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Where an action for specific performance had been begun and the land was conveyed by the defendant, the action could be revived upon his death against the executor or administrator but not against the heirs. Fleming v. Ellison, 124 W 36, 102 NW 398.

316.55 History: 1953 c. 440; Stats. 1953 s. 316.55; 1969 c. 339.

A vendee purchasing the fee, where the vendor had only a life estate, had color of title sufficient to entitle him to taxes and improvements in ejectment. Dorer v. Hood, 113 W 607, 88 NW 1009.

CHAPTER 317.

Accounts of Executors and Administrators.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 317 through 1969, including the effects of ch. 339, Laws 1969. Various provisions of ch. 317 are restated in a new probate code, effective April 1, 1971. For more detailed information concerning the effects of ch. 339, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 851.

317.01 History: R. S. 1849 c. 71 s. 1; R. S. 1858 c. 102 s. 1, 7; R. S. 1878 s. 3923; Stats. 1898 s. 3923; 1925 c. 4; Stats. 1925 s. 317.01; Court Rule XV s. 2; Sup. Ct. Order, 212 W xxxi; Sup. Ct. Order, 258 W vii; 1969 c. 339.

If a judicial sale of real estate be void the administrator is not to be charged with the proceeds. King v. Whiton, 15 W 684.

If the heirs raise the crops the administrator is not to account for them. Converse v. Ketchum, 18 W 202.

An executor need not account for personal chattels included in a devise of real and personal estate to the widow for life and directing its sale after her death, which chattels were sold or destroyed by her during her lifetime. If she dies possessed thereof the executor must resume possession. Where a widow was executrix and legatee her receipt of the property is as legatee; and her coexecutor is not liable for her conversion of a reversionary interest belonging to the estate. If such coexecutor sells such property for her benefit he acts as her agent and not as executor. Golder v. Littlejohn, 30 W 344.

Where a trustee is required to invest the trust fund in United States bonds or real estate security the interest which he might have obtained on real estate security of a proper character is the measure of his liability for a failure to invest the fund. Andrew v. Schmidt, 64 W 664, 26 NW 190.

Interest paid on mortgages on lands coming into the possession of the executor and taxes paid by him on the lands should be credited to his account, which should be charged with the rents received by him. Will of Hurley, 193 W 20, 213 NW 639.

An executor may deduct from legacies any amounts the legatees legally owe the estate; but since under 330.27, Stats. 1929, the running of the statutes of limitation operates as an extinguishment of the debt, a debt due the estate but barred by limitations prior to the death of the testator may not be deducted from a legacy, in the absence of a contrary inten-

tion expressed in the will. Will of Weidig, 207 W 107, 240 NW 832.

Debts owing from an executor to a testator automatically become assets in the executor's hands upon his acceptance of the executorship, regardless of the insolvency of the executor at the time of his acceptance or thereafter, for which the executor and his surety are liable. The fact that a bank, appointed executor during the national bank holiday, tendered its resignation about 4 months later when the bank was closed permanently did not estop the bank from later asserting that it never had acted as executor or accepted the appointment. Estate of Howey, 216 W 94, 256 NW 620.

An executor, liable to an estate for notes owing from him to the testator, is liable for interest at the rates fixed by the notes. Estate of Tuttle, 242 W 144, 7 NW (2d) 575.

A claim for attorney's fees may be filed against the estate of a decedent where equitable considerations or exceptional circumstances exist. Estate of Sheldon, 249 W 430, 24 NW (2d) 875.

The evidence warranted a finding that requested reports filed by the executor of a widow's estate as to the widow's handling of her husband's estate under a will appointing her as executrix and giving her an absolute life estate in his property with the right to invade the principal, and under which she was not required to file and did not file any annual reports, were as accurate and detailed as the data available to her executor permitted; and, such executor admitting that he knew nothing of his own knowledge about her handling of her husband's estate, and his only sources of information having been equally available to the residuary legatees under the husband's will, no purpose would be served in allowing their further examination of such executor with regard to an accounting. Estate of Larson, 261 W 206, 52 NW (2d) 141.

Under some circumstances an administrator or ancillary administrator may take possession of real estate, but he has no duty to do so unless necessary to pay debts or expenses; if he does not he is not accountable for the real estate or any income from it. Estate of Rieman, 272 W 378, 75 NW (2d) 564.

317.02 History: R. S. 1849 c. 71 s. 2, 3, 5, 6; R. S. 1858 c. 102 s. 2, 3, 5, 6; R. S. 1878 s. 3924; Stats. 1898 s. 3924; 1925 c. 4; Stats. 1925 s. 317.02; 1969 c. 339.

On a sale under order of court, the price at which the property is sold is to be accounted for. Williams v. Ely, 13 W 1.

An administrator may sell without an order, but is liable for the appraised value if he sells for less. Munteith v. Rahn, 14 W 210.

An administrator may sell a stock of liquors of the estate without a license from the municipality. Williams v. Throop, 17 W 463.

287.14 and 317.02, Stats. 1939, do not relieve an executor, where debts owing from him to the testator have been appraised and inventoried at less than face value, from the rule of liability for the face value of such debts, since such debts are to be treated under the rule as paid and as cash in the executor's hands. Estate of Tuttle, 242 W 144, 7 NW (2d) 575.

317.03 History: R. S. 1849 c. 71 s. 7; R. S. 1858 c. 102 s. 7; R. S. 1878 s. 3925; Stats. 1898 s. 3925; 1925 c. 4; Stats. 1925 s. 317.03; 1935 c. 176 s. 8; 1969 c. 339.

Where a son-coexecutor, desirous of purchasing the decedent's homestead, took possession of the property under an agreement with his sister-coexecutor to pay her $55 per month as her share of the fair rental value of the property, he did not take possession as an executor nor, so far as the sister's interest in the property was concerned, as an heir or devisee, but he became the sister's tenant, and his liability on account of the $55 per month was to the sister and not to the estate, so that the trial court erred in charging him in the executors' account for the use of the premises. Will of Fehlhaber, 272 W 327, 75 NW (2d) 444.

317.04 History: R. S. 1849 c. 71 s. 8; R. S. 1858 c. 102 s. 8; R. S. 1878 s. 3926; Stats. 1898 s. 3926; 1925 c. 4; Stats. 1925 s. 317.04; 1933 c. 335; 1969 c. 339.

Ch. 335, Laws 1933, amending 317.04, Stats. 1931, so as to excuse an executrix from liability for waste if statutory cause for delay in filing accounting and settling estate exists and good faith is displayed, is not applicable to a cause of action which accrued prior to the date of its enactment. Will of Robinson, 218 W 596, 261 NW 725.

The amendment made by ch. 335, Laws 1935, is limited in its application to liabilities arising or accruing after its enactment. Estate of Onstad, 224 W 332, 271 NW 652.

The remedy provided by 317.04 is for the benefit of the estate; and no creditor for his sole benefit can recover damages for waste caused by an administrator. Rasmussen v. Jensen, 240 W 242, 3 NW (2d) 335.

317.05 History: R. S. 1849 c. 71 s. 9; R. S. 1858 c. 102 s. 9; R. S. 1878 s. 3927; Stats. 1898 s. 3927; 1925 c. 4; Stats. 1925 s. 317.05; 1969 c. 339.

Failure to account within the specified time is a breach of the bond. Johannes v. Youngs, 45 W 445.

Charges in the account for moneys paid to heirs without authority are no part of the estate, and the administrator cannot be examined in relation to them. They are merely personal claims against the heirs, not to be allowed in the account. Estate of Fitzgerald, 57 W 508, 15 NW 794.

It is the duty of an executor to carry out the terms of the will, and he may properly incur expense for legal services only when he cannot safely proceed further without the advice of counsel; but he is not expected to prepare papers relating to court proceedings. His account for counsel fees should disclose the nature of the services rendered, the time expended, and any other element necessary to a proper determination of the amount to be allowed. In determining what is a reasonable allowance to an executor's attorneys, there may be taken into account the amount and character of the services, the labor, time and trouble involved, the nature and importance of the litigation, the age, experience and standing of the attorney, the result of the litigation, and whether the fee is certain or

on a contingent basis, but the fee should not be based entirely on the value of the estate, nor include an allowance for time expended in performing duties which the executor should have performed. Will of Willing, 190 W 406, 209 NW 602.

The statute giving courts discretion to require further accounts of administration applies only as to currently acting administrator or executor, not after final decree of discharge. Estate of Penney, 225 W 455, 274 NW 247.

317.06 History: 1909 c. 233; Stats. 1911 s. 3927m; 1925 c. 4; Stats. 1925 s. 317.06; Sup. Ct. Order, 212 W xxxi; Sup. Ct. Order, 271 W xi; 1969 c. 283, 339.

In the absence of a reverter clause, a charitable trust created by will cannot be defeated by failure of executors or trustees to carry it out; and courts will appoint successor trustees to carry out the trust when deceased trustees have failed to do so. Estate of Mead, 227 W 311, 277 NW 694, 279 NW 18.

317.07 History: R. S. 1858 c. 102 s. 10; R. S. 1878 s. 3928; Stats. 1898 s. 3928; 1925 c. 4; Stats. 1925 s. 317.07; 1935 c. 176 s. 9; 1969 c. 339.

317.08 History: R. S. 1849 c. 71 s. 10, 11; R. S. 1858 c. 102 s. 10, 11; R. S. 1858 c. 133 s. 24; R. S. 1878 s. 3929; Stats. 1898 s. 3929; 1907 c. 660; 1925 c. 4; Stats. 1925 s. 317.08; 1937 c. 224; 1959 c. 262; 1969 c. 339.

A previously expressed intention to waive compensation by the administrator will not affect his right thereto. King v. Whiton, 15 W 684.

In cases of unusual difficulty the better practice is to itemize the claim for compensation. If that is not done the opposing party may move that it be itemized. The claim will not be rejected because it was not itemized if such objections are not made, especially if it was itemized on the trial. Ford v. Ford, 88 W 122, 59 NW 464.

The statute contemplates that the court shall exercise its sound discretion on the matter of extra compensation. The question is, What does the court, in view of the evidence and its own knowledge of the facts, judge reasonable? Ford v. Ford, 88 W 122, 59 NW 464.

Where the services extended over a period of 7 years, and the estate, by investments and reinvestments, was increased about $16,000 after satisfying the provision made by the testator for his widow and the expenses of administration, the services could be considered extraordinary. Schinz v. Schinz, 90 W 236, 63 NW 162.

Where the executor takes charge of considerable real estate and spends time in looking after the same, and performs legal services in setting up the estate, he is entitled to extra compensation. The matters for which compensation is claimed should be presented in such form that the questions involved can be passed upon in detail. Sloan v. Duffy, 117 W 480, 94 NW 342.

The allowances to the administrator and the duty of the court relative thereto are discussed in Mackin v. Hobbs, 126 W 216, 105 NW 305.

An estate is not directly liable to an attorney who has rendered services in the administration of such estate upon the request of the legal representative of the deceased, unless the representative is insolvent and unable to pay. Estate of Arneberg, 184 W 570, 200 NW 557.

The large value of an estate is a factor to be considered in making an allowance, because it measures, to some extent, the responsibility resting on the attorney, but does not warrant an excessive allowance. Will of Matthews, 174 W 220, 182 NW 744; Will of Willing, 190 W 406, 209 NW 602.

The county court, on continued failure of an executor and trustee to render an account, should have on its own motion immediately cited the trustee to render an account. An executor and trustee guilty of gross neglect in administration of an estate are not entitled to fees and expenses. Where an executor has been derelict in duty, allowance for necessary expenses and commissions is within discretion of the court. Will of Leonard, 202 W 117, 230 NW 715.

Where the executor failed to keep a clear and distinct account and to close the estate promptly and efficiently, a disallowance of a claim of the executor for attorney's fees and auditing costs was proper. In re Roebken's Will, 230 W 215, 283 NW 815.

On an unsuccessful appeal by a residuary legatee and beneficiaries under a testamentary trust from a judgment allowing the administrator's accounts, appointing a trustee of the trust, and assigning the property in accordance with the will, the respondent administrator, having no funds belonging to the estate available to pay its expenses on the appeal, is entitled to be paid, out of the trust funds assigned by the judgment, the amount of such expenses as it necessarily and reasonably incurred on the appeal, including its attorney's fees. Nowicki v. Northwestern Nat. Cas. Co. 244 W 632, 12 NW (2d) 918.

As a general rule, where a lawyer becomes executor or administrator, his compensation as such is in full for his services, although he exercises his professional skill therein; and although he performs duties which he might properly have hired an attorney to perform, he is not entitled to attorney fees therefor; but there is no requirement that an administrator act as attorney for the estate without compensation merely because he is qualified to do so. Estate of Ehlen, 18 W (2d) 400, 118 NW (2d) 877.

Ch. 224, Laws 1937, increasing fees for executors and administrators, applies to accounts allowed and settled subsequently to the effective date of that act, even though services may have been rendered prior thereto. 26 Atty. Gen. 367.

317.09 History: R. S. 1849 c. 71 s. 13; R. S. 1858 c. 102 s. 13; R. S. 1878 s. 3930; 1895 c. 219; Stats. 1898 s. 3930; 1899 c. 351 s. 43; Supl. 1906 s. 3930; 1925 c. 4; Stats. 1925 s. 317.09; 1969 c. 339.

The estate is chargeable with costs of litigation only when it is for the benefit of the estate and not when the executor has a personal interest therein as where an adminis-

tratrix brought suit to establish the title of the estate to certain land in order to obtain her dower therein and where she defends a suit to remove her from the trust on the ground that she was not the widow. Cameron v. Cameron, 15 W 1.

Sec. 13, ch. 102, R. S. 1858, relates only to proceedings in probate courts. Knox v. Bigelow, 15 W 415.

An executor may be allowed reasonable attorneys' fees and costs in action to construe the will. Heiss v. Murphy, 43 W 45.

Attorney's fees and incidental expenses incurred in the course of a personal action brought by the widow against the executor are properly disallowed, as are such expenses if unnecessarily incurred. Attorney's fees and disbursements incurred by a guardian ad litem who was a necessary party to litigation instituted by others, and who had no property except his prospective interest in the estate, are properly payable therefrom as a part of the expense of its settlement. Ford v. Ford, 88 W 122, 59 NW 464.

317.10 History: 1905 c. 232; Supl. 1906 s. 3930a; 1907 c. 660 s. 2; 1925 c. 4; Stats. 1925 s. 317.10; Sup. Ct. Order, 212 W xxxi; Sup. Ct. Order, 232 W viii; 1969 c. 339.

Where an executor owed his intestate upon a note and held claims against her for rent and for money expended for her benefit, and within the time for filing claims he indorsed his claims as payments on the note but never filed them for allowance, the claims, if just, might be allowed on final accounting and the indorsements might be treated as payments of them. Estate of Morgan, 152 W 138, 139 NW 745.

317.105 History: 1955 c. 422; Stats. 1955 s. 317.105; 1969 c. 339.

317.11 History: R. S. 1849 c. 71 s. 14; R. S. 1849 c. 72 s. 1; R. S. 1858 c. 102 s. 14; R. S. 1878 s. 3931; 1895 c. 377 s. 2; Stats. 1898 s. 3931; 1925 c. 4; Stats. 1925 s. 317.11; Court Rule XV s. 1; Sup. Ct. Order, 212 W xxxii; Sup. Ct. Order, 232 W ix; 1969 c. 339.

An heir may maintain an action to set aside an administrator's account for his fraud in obtaining the allowance of a claim against the estate. McLashlan v. Staples, 13 W 448.

A county court may allow an executor's or administrator's account upon notice at any time before his final account is rendered, and such a settlement and allowance is conclusive as to all matters embraced in it, and can be impeached or reopened only for fraud or mistake. Schinz v. Schinz, 90 W 236, 63 NW 162.

See note to 253.10, citing In re Trustees of Milwaukee County Orphans' Board, 218 W 518, 261 NW 676.

317.13 History: 1870 c. 1 s. 1; R. S. 1878 s. 3933; Stats. 1898 s. 3933; 1925 c. 4; Stats. 1925 s. 317.13; 1969 c. 339.

317.14 History: 1870 c. 1 s. 2; R. S. 1878 s. 3934; Stats. 1898 s. 3934; 1925 c. 4; Stats. 1925 s. 317.14; Sup. Ct. Order, 212 W xxxii; 1969 c. 339.

The executor of a deceased executor cannot be compelled to settle the account of the latter. Such account is to be settled by the court on proofs furnished by the moving party. Reed v. Wilson, 73 W 497, 41 NW 716. See also Reed v. Wilson, 75 W 39, 43 NW 560.

317.15 History: Court Rule XV s. 4; Sup. Ct. Order, 212 W xxxii; Stats. 1933 s. 317.15; 1969 c. 339.

Unless objections are filed to an account, the items objected to cannot be questioned on appeal. Estate of Astrach, 25 W (2d) 331, 130 NW (2d) 878.

CHAPTER 318.

Allowances, Distribution, Partition.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 318 through 1969, including the effects of ch. 339, Laws 1969. Various provisions of ch. 318 are restated in a new probate code, effective April 1, 1971. For more detailed information concerning the effects of ch. 339, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 851.

318.01 History: R. S. 1849 c. 68 s. 1; R. S. 1858 c. 99 s. 1; R. S. 1878 s. 3935; Stats. 1898 s. 3935; 1913 c. 520; 1917 c. 44; 1925 c. 4; Stats. 1925 s. 318.01; 1929 c. 173 s. 2, 3; 1929 c. 188; 1933 c. 190 s. 37; 1943 c. 316; 1961 c. 264; 1963 c. 384; 1969 c. 339.

Editor's Note: The rule declared in Schuman v. Schuman, 80 W 479, 60 NW 670 (1891), to the effect that sec. 2270 (5), R. S. 1878, did not apply to the distribution of personalty, was changed by ch. 23, Laws 1893. Sec. 2270, R. S. 1878, as amended was replaced by sec. 2270, Stats. 1898, and that section was redesignated as 237.01, Stats. 1925.

Sec. 1, ch. 99, R. S. 1858, must be construed as referring to the general statute of descents, and as requiring such distribution to be made to the next of kin, whether of the whole or half blood, without regard to the source from which the estate came. Estate of Kirkendall, 43 W 167.

On appeal from the final order distributing decedent's estate and adjudging it to be settled the order should be set aside only so far as it is necessary to adjust the rights of the parties. Baker v. Baker, 57 W 382, 15 NW 425.

Advances made by an administrator to an heir under an agreement that they should be regarded as partial payments of the amount coming to such heir from the estate may be so regarded and applied upon final distribution, although the heir may have given a promissory note to the administrator for a part of such advances. If the heir dies before the order of distribution the account for such advances need not be presented as a claim against his estate. Lyle v. Williams, 65 W 231, 26 NW 447.

Although ch. 123, Laws 1895, is retrospective in its language, it cannot affect the distribution of an estate of a person who died before its enactment, since the rights of legatees become vested when a will is probated and relate back to the time of the testator's death. Jochem v. Dutcher, 104 W 611, 80 NW 949.