CHAPTER 314.

Assignments of Homesteads.

Editor's Note: The legislative histories which follow are the histories of the three sections of ch. 314 through 1969, including the effects of ch. 339, Laws 1969. One section (314.06) is restated in a new probate code, effective April 1, 1971, and is cited in the editor's note printed in this volume ahead of the histories for ch. 851.

314.05 History: R. S. 1878 s. 3873; Stats. 1898 s. 3873; 1925 c. 4; Stats. 1925 s. 314.05; Court Rule XVII; Sup. Ct. Order, 212 W xxx; Stats. 1933 s. 314.05, 314.055; 1935 c. 176 s. 4, 4a; Stats. 1935 s. 314.05; Sup. Ct. Order, 232 W viii; 1949 c. 245; 1969 c. 339.

314.06 History: 1913 c. 596; Stats. 1913 s. 3871m; 1925 c. 4; Stats. 1925 s. 314.06; 1969 c. 339.

See note to 313.08, citing Kleinschmidt v. Kleinschmidt, 167 W 450, 167 NW 827.

The rule, where it has not been changed by statute, is that an annuity created either by contract or by will is not apportionable, except in some instances where the provision was made for the support of the beneficiary. Will of Petit, 246 W 620, 18 NW (2d) 339.

314.07 History: Court Rule XXXI; Sup. Ct. Order, 212 W xix; Stats. 1933 s. 314.07; 1969 c. 339.

CHAPTER 315.

Determination of Descent of Lands.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 315 through 1969, including the effects of ch. 339, Laws 1969. Various provisions of ch. 315 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.

315.02 History: 1881 c. 286 s. 2, 3; Ann. Stats. 1889 s. 3873a sub. 2, 3; Stats. 1898 s. 3873b; 1917 c. 88; 1925 c. 4; Stats. 1925 s. 315.02; 1927 c. 47; 1949 c. 363; 1969 c. 339.

Comment of Advisory Committee, 1949: Application to determine descent of lands cannot be made under present 315.02 except where there is no personal property, and then only after 6 months from the death of the decedent, no administration having been granted. The proceeding is frequently used many years after decedent's death and careful examiners of title might question whether there had been personal property. Why should a petitioner for determination of descent have to wait 6 months from the decedent's death, and why should the proceeding depend upon the existence or nonexistence of personal property? A possible reason for the wait of 6 months is to give a reasonable time for application for administration or to see if a will is proposed for probate. But 311.02 allows 30 days for heirs to apply for administration and allows creditors 60 days. Thereafter others interested in probating an intestate estate may apply. When 315.02 was created (ch. 286, Laws 1881), the problem did not involve inheritance taxes. The proposed amendment changes the word "application" to "petition," a more appropriate term. It provides that the petition may be made 60 days after decedent's death, whether or not there was personal property. It authorizes a dual proceeding to determine both the heirs and the question of inheritance taxes. [Bill 413-S]

315.03 History: 1881 c. 286 s. 4; Ann. Stats. 1889 s. 3873a sub. 4; 1895 c. 354; Stats. 1898 s. 3873c; 1917 c. 566 s. 50; 1925 c. 4; Stats. 1925 s. 315.03; 1935 c. 176 s. 7; Sup. Ct. Order, 232 W viii; 1969 c. 339.

315.04 History: 1881 c. 286 s. 5; Ann. Stats. 1889 s. 3873a sub. 5; Stats. 1898 s. 3873d; 1925 c. 4; Stats. 1925 s. 315.04; 1969 c. 339.

Editor's Note: Will of Knoepfle, 243 W 572, 11 NW (2d) 127, the court intimates (without deciding) that there is no warrant in the law for the prevalent practice of appointing a guardian ad litem for unknown minors or incompetents, and that if appointed he has no standing in court.

315.05 History: 1881 c. 286 s. 6; Ann. Stats. 1889 s. 3873a sub. 6; Stats. 1898 s. 3873e; 1925 c. 4; Stats. 1925 s. 315.05; 1969 c. 339.

315.06 History: 1881 c. 286 s. 7; Ann. Stats. 1889 s. 3873a sub. 7; Stats. 1898 s. 3873f; 1925 c. 4; Stats. 1925 s. 315.06; 1937 c. 34; 1943 c. 514; 1943 c. 553 s. 39; 1969 c. 339.

CHAPTER 316.

Sale of Lands by Executors and Administrators; Specific Performance.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 316 through 1969, including the effects of ch. 339, Laws 1969. Sections 316.45, 316.46, 316.48, 316.49 and 316.50 are redesignated as secs. 296.50 to 296.58, effective April 1, 1971. Various other provisions of ch. 316 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.

316.01 History: R. S. 1849 c. 65 s. 1; R. S. 1858 c. 94 s. 1; R. S. 1878 s. 3874; 1881 c. 286 s. 1; Ann. Stats. 1889 s. 3837a sub. 1, 3874; Stats. 1898 s. 3873a, 3874; 1901 c. 112; Supl. 1906 s. 3874a; 1913 c. 480; 1917 c. 566 s. 49; 1919 c. 162; 1925 c. 4; Stats. 1925 s. 315.01, 316.01; 1931 c. 51 s. 1; 1933 c. 122; 1935 c. 176 s. 6; Stats. 1935 s. 316.01; 1941 c. 77; 1957 c. 198; 1959 c. 450; 1969 c. 339.

The fact that the homestead was sold without authority will not avoid a distinct sale of another tract made at the same time. Mohr v. Porter, 51 W 487, 8 NW 364.

A sale by a foreign probate court of the property of a living person as the property of one deceased does not affect the rights of the owner. Walker v. Daly, 80 W 222, 49 NW 812.

Where a woman dies leaving children, her homestead cannot be sold to pay the expenses

of administration. Milwaukee T. Co. v. Clark R. Co. 146 W 230, 131 NW 358.

The right of the creditors to be paid from the estate of a married woman is superior to the estate of the husband by curtesy. Schmidt v. Raymond, 148 W 271, 134 NW 361.

Under 315.01, Stats. 1929, where there is a deficiency of personal assets in the hands of the administrator, land fraudulently conveyed by a decedent becomes an equitable asset for the payment of his debts, liable coextensively with lands of which he died seized, within the 3-year period of limitation therein contained. (Language in Fisk v. Jenewein, 75 W 254, 44 NW 515, disapproved.) This section and 315.02 are construed as providing a clear title after the stated 3-year period, and as barring all right to proceedings in the county court thereafter to embarrass that title. Scholl v. Adams, 206 W 174, 239 NW 452.

The widow who was the sole beneficiary of the testator was not estopped from setting up the 3-year limitation barring liens on testator's realty after 3 years from his death because of her delay and maladministration while acting as executrix, since creditors, regardless of what the widow did or omitted to do, could have proceeded to have the testator's realty used for payment of their claims within 3 years after his death. Estate of Koebel, 225 W 342, 274 NW 262.

Ch. 316, Stats. 1929, has no application where the will under which the proceedings are had provides for equitable conversion of the real estate. Ottstadt v. Jardine, 229 W 85, 281 NW 644.

316.01 (2), Stats. 1955, is a statute of limitations, and it cannot be pleaded against a city's claim arising out of relief payments, regardless of the age of the claim. 44 Atty. Gen. 181.

316.02 History: R. S. 1849 c. 65 s. 2; R. S. 1858 c. 94 s. 2; R. S. 1878 s. 3875; 1880 c. 65; Ann. Stats. 1889 s. 3875; Stats. 1898 s. 3875; 1913 c. 480; 1919 c. 162; 1925 c. 4; Stats. 1925 s. 316.02; 1931 c. 51 s. 2; 1949 c. 192; Sup. Ct. Order, 258 W vii; 1959 c. 450; 1969 c. 339.

Comment of Advisory Committee, 1949: The amendment to 316.02 requires that the petition for sale of real estate for the best interests of the estate or heirs show how the sale would serve those interests. The addition to 316.51 is to validate title to real estate previously sold under the "best interest" clause. [Bill 235-S]

The failure to state the value of the personal estate in the petition is not fatal to the sale. Reynolds v. Schmidt, 20 W 374.

316.03 History: R. S. 1849 c. 65 s. 3; R. S. 1858 c. 94 s. 3; R. S. 1878 s. 3876; 1891 c. 342; Stats. 1898 s. 3876; 1907 c. 660; 1913 c. 480; 1919 c. 162; 1925 c. 4; Stats. 1925 s. 316.03; 1931 c. 51 s. 3; Sup. Ct. Order, 232 W viii; 1953 c. 140; 1959 c. 450; 1969 c. 339.

316.07 History: R. S. 1849 c. 65 s. 6; R. S. 1858 c. 94 s. 8; R. S. 1878 s. 3880; Stats. 1898 s. 3880; 1925 c. 4; Stats. 1925 s. 316.07; 1931 c. 51 s. 7; 1969 c. 339.

See note to 319.22, citing Guardianship of Breault, 22 W (2d) 114, 125 NW (2d) 397.

316.09 History: R. S. 1858 c. 94 s. 13 to 15; R. S. 1878 s. 3882; Stats. 1898 s. 3882; 1925 c. 4; Stats. 1925 s. 316.09; 1931 c. 51 s. 9; 1969 c. 339.

An executor or administrator may lease real estate so long as his right of possession lasts. Edwards v. Evans, 16 W 181.

316.10 History: R. S. 1849 c. 65 s. 12; R. S. 1858 c. 94 s. 16; R. S. 1878 s. 3883; 1891 c. 112; Stats. 1898 s. 3883; 1925 c. 4; Stats. 1925 s. 316.10; 1931 c. 51 s. 10; 1953 c. 140; 1957 c. 281; 1959 c. 450; 1969 c. 339.

The same presumptions are to be indulged in favor of the proceedings of a probate court as obtain in respect to courts of general jurisdiction. Jackson v. Astor, 1 Pin. 137; Stitzman v. Pacquette, 13 W 291. See also Comstock v. Crawford, 3 Wall. (US) 396.

316.105 History: 1959 c. 450; Stats. 1959 s. 316.105; 1969 c. 339.

316.11 History: 1863 c. 88; R. S. 1878 s. 3884; Stats. 1898 s. 3884; 1913 c. 480; 1925 c. 4; Stats. 1925 s. 316.11; 1931 c. 51 s. 11; 1949 c. 245; 1951 c. 727; 1969 c. 339.

An order for a sale of land under sec. 3884, Stats. 1898, is invalid where it does not provide that the entire estate or interest including the interest of the mortgagee be sold. This defect cannot be cured by an order nunc pro tunc after the land has been advertised for sale pursuant to the written order and sold. Milwaukee T. Co. v. Clark R. Co. 146 W 230, 131 NW 358.

316.12 History: R. S. 1858 c. 94 s. 17; R. S. 1878 s. 3885; Stats. 1898 s. 3885; 1925 c. 4; Stats. 1925 s. 316.12; 1929 c. 210 s. 9; 1931 c. 51 s. 12; 1969 c. 339.

The probate court has the power to determine a disputed right to dower on the application for license to sell the real estate. Paige v. Fagan, 61 W 667, 21 NW 786.

316.13 History: R. S. 1858 c. 94 s. 18, 19; R. S. 1878 s. 3886; Stats. 1898 s. 3886; 1925 c. 4; Stats. 1925 s. 316.13; 1931 c. 51 s. 13; 1969 c. 339.

316.14 History: R. S. 1858 c. 94 s. 20; R. S. 1878 s. 3887; Stats. 1898 s. 3887; 1925 c. 4; Stats. 1925 s. 316.14; 1931 c. 51 s. 14; 1969 c. 339.

The oath required by the statute is essential to the validity of a sale. Wilkinson v. Filby, 24 W 441.

Sureties on the bond of an administrator are liable for the amount of the proceeds of the sale unaccounted for by him and for the costs, except attorney's fees, necessarily resulting from the proceedings brought to secure the amount due. Mann v. Everts, 64 W 372, 25 NW 209.

316.15 History: R. S. 1858 c. 94 s. 21; R. S. 1878 s. 3888; Stats. 1898 s. 3888; 1925 c. 4; Stats. 1925 s. 316.15; 1931 c. 51 s. 15; 1969 c. 339.

316.16 History: R. S. 1858 c. 94 s. 22; R. S. 1878 s. 3889; Stats. 1898 s. 3889; 1925 c. 4; Stats. 1925 s. 316.16; 1931 c. 51 s. 16; 1969 c. 339.

The discretion to extend the time of making a sale may be exercised at any time within

the 2-year limit. The 2 years do not commence to run until the order and license have been made. Mackin v. Hobbs, 116 W 528, 93 NW 462.

316.17 History: 1931 c. 51 s. 17; Stats. 1931 s. 316.17; 1949 c. 301; 1965 c. 490; 1969 c. 339.

Comment of Advisory Committee, 1949: The purpose of the amendment to (2) is to make the meaning more obvious by using more precise language. The words "confirm" and "confirmation" have raised doubts in some minds. [Bill 30-S]

316.18 History: R. S. 1849 c. 65 s. 16; R. S. 1858 c. 94 s. 24; R. S. 1878 s. 3891; Stats. 1898 s. 3891; 1907 c. 660; 1925 c. 4; Stats. 1925 s. 316.18; 1931 c. 51 s. 18; 1965 c. 252; 1969 c. 339.

The first publication and the posting must be at least 21 days before the sale. Chase v. Ross, 36 W 267; McCrubb v. Bray, 36 W 333.

316.19 History: R. S. 1849 c. 65 s. 17; R. S. 1858 c. 94 s. 25; R. S. 1878 s. 3892; Stats. 1898 s. 3892; 1925 c. 4; Stats. 1925 s. 316.19; 1931 c. 51 s. 19; 1965 c. 252; 1969 c. 339.

316.20 History: R. S. 1849 c. 65 s. 23; R. S. 1858 c. 94 s. 32; R. S. 1878 s. 3893; Stats. 1898 s. 3893; 1925 c. 4; Stats. 1925 s. 316.20; 1931 c. 51 s. 20; 1969 c. 339.

316.21 History: R. S. 1849 c. 65 s. 24, 25; R. S. 1858 c. 94 s. 33, 34; R. S. 1878 s. 3894; Stats. 1898 s. 3894; 1925 c. 4; Stats. 1925 s. 316.21; 1931 c. 51 s. 21; 1965 c. 252; 1969 c. 339.

An adjournment from day to day for want of bidders may be made without a new notice. Sitzman v. Pacquette, 13 W 291.

316.22 History: R. S. 1849 c. 65 s. 19; R. S. 1858 c. 94 s. 28; R. S. 1878 s. 3895; Stats. 1898 s. 3895; 1925 c. 4; Stats. 1925 s. 316.22; 1931 c. 51 s. 22; 1969 c. 339.

316.23 History: R. S. 1849 c. 65 s. 20, 21; R. S. 1858 c. 94 s. 29, 30; R. S. 1878 s. 3896; Stats. 1898 s. 3896; 1925 c. 4; Stats. 1925 s. 316.23; Court Rule XVI s. 4; Sup. Ct. Order, 212 W xxxi; Sup. Ct. Order, 232 W viii; 1943 c. 416; 1955 c. 322; 1969 c. 339.

The recital of all material facts in the deed makes the deed prima facie evidence of their existence. Chase v. Whiting, 30 W 544.

Where a purchase was induced by false representation of the width of the street on which the land was situated, the sale could be rescinded even though the administrator had paid out the purchase money with the knowledge and consent of the purchaser in the payment of liens upon the property. Greiling v. McLean's Estate, 128 W 440, 107 NW 339.

See note to 323.06, citing Estate of Strass, 11 W (2d) 410, 105 NW (2d) 553.

Sale of trust property; receipt of higher offer before confirmation. 1961 WLR 338.

316.235 History: 1951 c. 705; Stats. 1951 s. 316.235; 1953 c. 440; 1969 c. 339.

316.24 History: R. S. 1849 c. 65 s. 32; R. S. 1858 c. 94 s. 41; 1862 c. 145; R. S. 1878 s. 3897; Stats. 1898 s. 3897; 1925 c. 4; Stats. 1925 s. 316.24; 1931 c. 51 s. 24; 1947 c. 14; 1969 c. 339.

Mortgaged land having been sold by the administrator, without any reservation or exception in the deed, it is presumed to be subject to the mortgage. Edgerton v. Schneider, 26 W 385.

316.25 History: R. S. 1849 c. 65 s. 31; R. S. 1858 c. 94 s. 40, 42; R. S. 1878 s. 3898; Stats. 1898 s. 3898; 1925 c. 4; Stats. 1925 s. 316.25; 1931 c. 51 s. 25; 1969 c. 339.

316.26 History: R. S. 1849 c. 65 s. 26; R. S. 1858 c. 94 s. 35; 1873 c. 30; R. S. 1878 s. 3899; Stats. 1898 s. 3899; 1925 c. 4; Stats. 1925 s. 316.26; 1931 c. 51 s. 26; 1969 c. 339.

If a legacy is charged upon land and there has been no denial or repudiation of the trust, the statute of limitations does not apply nor does any presumption of payment arise from the lapse of time. Williams v. Williams, 82 W 393, 52 NW 429.

Even where the will charges specifically devised real estate with the payment of legacies and debts, the general rule is that, in the absence of other provisions of the will, which show that the testator intends to exonerate the personalty from liability for legacies, either absolutely, or until after the proceeds of the realty have been applied to this purpose, the proceeds of the personalty must be applied before the proceeds of the realty on which the legacies are charged. The land is merely given in aid of the personalty. Estate of Esch, 4 W (2d) 577, 91 NW (2d) 233.

316.27 History: R. S. 1849 c. 65 s. 27; R. S. 1858 c. 94 s. 36; R. S. 1878 s. 3900; Stats. 1898 s. 3900; 1925 c. 4; Stats. 1925 s. 316.27; 1931 c. 51 s. 27; 1969 c. 339.

316.28 History: R. S. 1849 c. 65 s. 28, 29; R. S. 1858 c. 94 s. 37, 38; R. S. 1878 s. 3901; Stats. 1898 s. 3901; 1925 c. 4; Stats. 1925 s. 316.28; 1931 c. 51 s. 28; 1969 c. 339.

316.29 History: R. S. 1849 c. 65 s. 30; R. S. 1858 c. 94 s. 39; R. S. 1878 s. 3902; Stats. 1898 s. 3902; 1925 c. 4; Stats. 1925 s. 316.29; 1931 c. 51 s. 29; 1969 c. 339.

316.30 History: R. S. 1849 c. 65 s. 33; R. S. 1858 c. 94 s. 43, 44; R. S. 1878 s. 3903; Stats. 1898 s. 3903; 1925 c. 4; Stats. 1925 s. 316.30; 1929 c. 270 s. 44; 1929 c. 502; 1931 c. 51 s. 30; 1969 c. 339.

316.31 History: R. S. 1858 c. 94 s. 45, 46; R. S. 1878 s. 3904; Stats. 1898 s. 3904; 1925 c. 4; Stats. 1925 s. 316.31; 1929 c. 270 s. 44; 1929 c. 502; 1931 c. 51 s. 31; 1969 c. 339.

316.32 History: R. S. 1858 c. 94 s. 47; R. S. 1878 s. 3905; Stats. 1898 s. 3905; 1925 c. 4; Stats. 1925 s. 316.32; 1929 c. 270 s. 44; 1929 c. 502; 1931 c. 51 s. 32; 1969 c. 339.

316.33 History: 1861 c. 127 s. 1; R. S. 1878 s. 3906; Stats. 1898 s. 3906; 1925 c. 4; Stats. 1925 s. 316.33; 1929 c. 270 s. 44; 1929 c. 502; 1931 c. 51 s. 33; 1969 c. 339.

If the want of jurisdiction appears on the face of the record the sale is void. But where the jurisdictional facts appear the proceedings have the same force as other court records. Blodgett v. Hitt, 29 W 169; Farrington v. Wilson, 29 W 383.

316.39 History: 1931 c. 51 s. 38a; Stats. 1931 s. 316.39; 1963 c. 302; 1969 c. 339.

316.40 History: 1931 c. 51 s. 39; Stats. 1931 s. 316.40; 1969 c. 339.

316.41 History: 1931 c. 51 s. 40; Stats. 1931 s. 316.41; 1951 c. 275; 1955 c. 156; 1957 c. 468; 1969 c. 339.

316.43 History: 1931 c. 51 s. 41; Stats. 1931 s. 316.43; 1969 c. 339.

316.45 History: R. S. 1849 c. 64 s. 22; R. S. 1849 c. 65 s. 50; R. S. 1858 c. 93 s. 22; R. S. 1858 c. 94 s. 60, 61; R. S. 1878 s. 3918; Stats. 1898 s. 3918; 1925 c. 4; Stats. 1925 s. 316.45; 1931 c. 51 s. 42; 1931 c. 79 s. 31; 1969 c. 339.

In the absence of the statutory limitation the heir would be barred by 10 years' adverse possession under the administrator's deed. Jones v. Billstein, 28 W 221. The statute runs from the time of sale. Jones v. Lathrop, 28 W 339.

Sec. 3918, R. S. 1878, bars an action by a cestui que trust who fails within 5 years after attaining his majority to bring an action for land devised in trust subject to the payment of debts and which was sold by the executor for that purpose, the purchaser being in possession under the executor's deed from 1866 to 1891. Turner v. Scheiber, 89 W 1, 61 NW 280.

The fact that a cestui que trust is barred by sec. 3918, Stats. 1898, from bringing an action to recover real estate sold by his trustee does not prevent him from confirming the sale and requiring the trustee to account. McClear v. Root, 147 W 60, 132 NW 539.

Where an administratrix arranged with another person to buy for her property belonging to the estate and took possession of such property, the right of such other person or one claiming under him to claim the invalidity of her possession was barred under sec. 3918, Stats. 1898. Keilly v. Severson, 149 W 251, 135 NW 875.

After such 5 years the court itself cannot revise or correct its former proceedings so as to divest the title acquired by the sale. Betts v. Shotton, 27 W 667; Will of Hoya, 173 W 196, 180 NW 940.

316.46 History: R. S. 1849 c. 64 s. 23; R. S. 1849 c. 65 s. 52; R. S. 1858 c. 93 s. 23; R. S. 1858 c. 94 s. 62; R. S. 1878 s. 3919; Stats. 1898 s. 3919; 1925 c. 4; Stats. 1925 s. 316.46; 1931 c. 51 s. 43; 1969 c. 339.

Editor's Note: This section was in force in Michigan in 1838 (R. S. 1838, part 2, title 5, ch. 1, sec. 36) and was borrowed from Massachusetts (R. S. 1836, ch. 71, sec. 38).

A sale of more land than was necessary to raise the sum specified will not affect sales previously made. Emery v. Vroman, 19 W 689.

The omission to state in the petition the amount of debts and the value of personal property is immaterial. Reynolds v. Schmidt, 20 W 394.

If the grant of administration or issue of letters is void the sale is also void, as where an administrator de bonis non with the will annexed made the sale and the record and evidence did not show any probate of the will. Chase v. Ross, 36 W 267.

If any one of the requirements of the statute is wanting the sale is void. McGrubb v. Bray, 36 W 333.

The fact that the homestead was sold will not avoid a distinct sale made at the same time to another. Mohr v. Porter, 51 W 487, 8 NW 364.

Whenever the court has jurisdiction and the facts herein required appear the sale is valid no matter how irregular. Mohr v. Porter, 51 W 487, 8 NW 364.

A sale of land by executors cannot be avoided by the heirs because one of the executors did not swear to the inventory or the assets and debts. Melms v. Pfister, 59 W 186, 18 NW 255.

A guardian's bond recited that she had been licensed "to sell all the real estate" which had come to her wards, and specifically described certain lands, but omitted reference to lands in another county. The bond was conditioned that the obligor should account for the proceeds of the sale "of said real estate." The sale of lands which were not described in the bond and which belonged to the wards was void. (Mohr v. Porter, 51 W 487, 8 NW 364, distinguished.) Weld v. Johnson M. Co. 84 W 537, 54 NW 998.

316.47 History: 1933 c. 190 s. 35; Stats. 1933 s. 316.47; 1969 c. 339.

316.48 History: R. S. 1849 c. 64 s. 24; R. S. 1849 c. 65 s. 63; R. S. 1858 c. 93 s. 24; R. S. 1858 c. 94 s. 63; R. S. 1878 s. 3920; Stats. 1898 s. 3920; 1925 c. 4; Stats. 1925 s. 316.48; 1931 c. 51 s. 45; 1969 c. 339.

The rule of liability in case of conversion of trust funds, though inadvertently done, is enforced with great strictness. It is the duty of an executor, administrator or trustee to deal with the funds in his hands as such, precisely as if he were in the place of the cestui que trust. If he deals with them as his own and does not keep them entirely separate he is liable for loss. Where an administrator deposited money of the estate in a bank which was considered safe, informing the teller that the money belonged to the estate, but taking a certificate of deposit in his own name, which he kept separate from his own papers, he was liable on the subsequent failure of the bank. Williams v. Williams, 55 W 300, 13 NW 274.

316.49 History: R. S. 1849 c. 64 s. 25; R. S. 1849 c. 65 s. 54; R. S. 1858 c. 93 s. 25; R. S. 1858 c. 94 s. 64; R. S. 1878 s. 3921; Stats. 1898 s. 3921; 1925 c. 4; Stats. 1925 s. 316.49; 1931 c. 51 s. 46; 1969 c. 339.

316.50 History: R. S. 1849 c. 65 s. 55; R. S. 1858 c. 94 s. 65; R. S. 1878 s. 3922; Stats. 1898 s. 3922; 1925 c. 4; Stats. 1925 s. 316.50; 1931 c. 51 s. 47; 1931 c. 79 s. 32; 1969 c. 339.

316.51 History: 1931 c. 51 s. 48; Stats. 1931 s. 316.51; 1949 c. 192; 1969 c. 339.

316.52 History: 1953 c. 440; Stats. 1953 s. 316.52; 1969 c. 339.

Editor's Note: 316.52, Stats. 1953, created by ch. 440, Laws 1953, superseded so much of 296.02, Stats. 1951, as empowered a circuit or county court to authorize or compel the specific performance of any contract made by

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.

316.54 History: 1953 c. 440; Stats. 1953 s. 316.54; 1969 c. 339.

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-