

CHAPTER 287.

ACTIONS BY AND AGAINST EXECUTORS, ADMINISTRATORS, HEIRS AND LEGATEES.

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287.01 Tort actions on surviving causes. If the cause of action survives under chapter 331, the executors or administrators may maintain an action thereon against the wrongdoer, in every case where their decedent could if living, and, after the wrongdoer's death, against his executors or administrators. But this section shall not extend to actions for slander or libel. [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 No. 75 S. s. 38)

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

A joint tortfeasor and his insurer were

287.02 [Repealed by 1935 c. 483 s. 39]

287.03 Executors, etc., to be considered one. In actions or proceedings against executors or administrators they shall all be considered as representing their testator or intestate, and service of summons on one shall constitute service on all. Judgment shall be rendered as if all had been served and execution may be issued against the property of the testator or intestate as if all had appeared. But the plaintiff may actually serve each of them. [1935 c. 483 s. 40]

287.04 [Repealed by 1935 c. 483 s. 41]

287.05 Judgment not to bind realty. The real estate which belonged to any deceased person shall not be bound or in any way affected by any judgment against his executors or administrators, nor shall it be liable to be sold by virtue of any execution issued upon such judgment except as provided in section 266.25.

287.06 Executor may prosecute; set-off; judgment, how paid. (1) An executor or administrator may commence and prosecute an action and may prosecute any action commenced by his predecessor or decedent for the recovery of any claim or cause of action which survived and may have execution on any judgment. In such action the defendant may set off any claim pleadable as a counterclaim which he may have against the decedent, instead of presenting it to the court. If judgment shall be rendered in favor of the defendant the same shall be certified to the county court, and paid as other claims allowed against the estate.

(2) An administrator of effects which were left unadministered by a previous administration of the same estate may bring a writ of error or appeal upon any judgment against his predecessor or decedent and shall defend any writ of error or appeal brought upon any such judgment, and have the same remedies in the prosecution or defense of any action by or against his predecessor or his decedent and to collect and enforce any judgment as he

had. [Stats. 1931 s. 313.11; Supreme Court Order, effective Jan. 1, 1934; 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 No. 75 S, s. 42)

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

287.07 Executor's executor not to sue. An executor of the will of a deceased executor shall not meddle with the estate which the latter was intrusted with or take any charge or control thereof. [1935 c. 483 s. 43]

287.08 Liability as executor de son tort. No person shall be liable to an action as executor of his own wrong but the wrongdoer shall be responsible to the executors or administrators for the value of any property or effects wrongfully received or taken and for all damages caused by his acts to the estate of the decedent. [1935 c. 483 s. 44]

287.09 to 287.13 [Repealed by 1935 c. 483]

287.14 Rebuttal of inventory. (1) In any action or proceeding against executors or administrators, the inventory of property of the decedent filed by them shall be prima facie evidence of the property which has come to their possession or knowledge and of the value thereof.

(2) In such action the defendants shall not be charged with choses in action specified in their inventory unless it appear that the same have been collected or might have been collected with due diligence. [1935 c. 483 s. 50]

Revisor's Note, 1935: The changes are only verbal. (Bill No. 75 S, s. 50)

287.15 [Renumbered section 287.14 by 1935 c. 483 s. 50]

287.16 Foreign executors, empowered to act. When no executor or administrator has been appointed in this state, on the estate of any decedent not a resident of this state at the time of his death, a foreign executor or administrator thereof, upon filing his original appointment or a certified copy thereof in any county court in this state, may exercise any power over such estate, including sales and assignments, and prosecute and defend any action and proceeding relating thereto and have all the remedies and defenses in regard to the property and to collect any demands of such estate which an executor or administrator appointed in this state can have or exercise in relation thereto. [1935 c. 483 s. 51]

287.17 Actions against executors; when allowed; when not. No action shall be commenced against an executor or administrator, excepting actions for the recovery of specific property, or actions to establish, enforce or foreclose a lien on property, or to quiet title or remove a cloud on title, to construe wills, enforce the liability of stockholders, to avoid fraudulent conveyances, to pass the title to real property and other actions in which the county court cannot afford a remedy as adequate, complete, prompt or efficient as the circuit court. Nor shall any attachment or execution be issued against the estate of the decedent or the executor or administrator, until the expiration of the time limited for the payment of debts, except as provided in sections 266.25 and 272.14. [Stats. 1931 s. 313.09; 1935 c. 483 s. 52]

Note: 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 Commission v. Muzik, 216 W 596, 257 NW 174.

Section 313.08 does not bar an action against the estate of a deceased stockholder and all other stockholders for the stockholders' statutory personal liability for claims for services performed by employes of the corporation. Kreutzer v. Gallagher, 229 W 273, 282 NW 22.

An executor taking possession of assets in his representative capacity after the tes-

tator's death 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, could prosecute its claim by an action in tort for the conversion of the funds against the deceased treasurer's executrix in the circuit court, which would have jurisdiction. School District v. Brennan, 236 W 91, 294 NW 558.

287.18 Action to recover from heirs, legatees; parties defendant. Actions against the heirs or legatees and devisees of any deceased person to recover the value of any assets that may have been paid or delivered to them by any executor or administrator may be brought against all of the heirs or all of the legatees and devisees jointly or against one or more of them. If the action is not against all who are liable the rest shall be made parties on request of the defendant. [1935 c. 483 s. 53]

Note: See note to 330.19, citing Clark v. Sloan, 215 W 423, 254 NW 653.

Where double liability of bank stockholder under 221.42, Stats. 1931, accrued after

time limited for filing of accrued claims against the stockholder's estate had expired, and estate of deceased stockholder was distributed within three months after such

claim had accrued, commissioner was entitled to maintain action against distributees for amount of such double liability. *Schafer v. Bellin M. Hospital*, 219 W 495, 264 NW 177; *Banking Commission v. Best*, 219 W 526, 264 NW 176.

287.19 Action against heirs and legatees; what may be recovered; costs. If an action mentioned in section 287.18 be brought the plaintiff must show that he has been or will be unable, with due diligence, to collect his debt or some part thereof by proceedings in the county court or from the personal representatives of the decedent and that he brings his action pursuant to sections 313.22 to 313.25; and in such event the plaintiff may recover the value of all the assets received by all the defendants if necessary to satisfy his demand, and the amount of the recovery shall be apportioned among the defendants in proportion to the value of the property received by each of them; and the costs of the action shall be apportioned in like manner; but no allowance or deduction shall be made from such amount on account of other heirs or legatees or devisees to whom assets have also been delivered or paid. The judgment shall express the amount recovered against each defendant for damages and costs. [1935 c. 483 s. 54]

Revisor's Note, 1935: The action being for debt, the plaintiff should allege why he did not have it allowed and paid in the ordinary probate proceeding. (Bill No. 75 S, s. 54)

It is only when a decedent's estate has not only been assigned but has also in fact

been distributed and the administrator discharged, and the owner of a contingent claim, since become absolute, 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 Contribution among heirs. Any of the heirs against whom recovery shall be had pursuant to the preceding sections may maintain an action against the other heirs to whom any such assets may have been paid or delivered, jointly or against any of them separately, for a just and equal contribution; and shall be entitled to recover of each defendant an amount which shall be in the same proportion to the sum collected of the plaintiff as the value of the assets delivered to such defendant bore to the value of all the assets delivered to all the heirs. [1935 c. 483 s. 55]

287.21 Recovery against legatee; contribution. (1) If the action be brought against all the legatees and devisees the plaintiff shall not recover unless he show, in addition to the facts required to be shown in an action against the heirs: that no assets were delivered by the executor or administrator to the heirs; or that the value of such assets has been recovered by some other creditor; or that such assets are not sufficient to satisfy the demands of the plaintiff; and in the last case he shall be entitled to recover the deficiency.

(2) If the action be brought against a preferred legatee or devisee or a preferred class the plaintiff must also show the same matters as to the legatee or devisee or class to whom the defendants are preferred as is above required to be shown as to the heirs. And any legatee or devisee against whom recovery shall be had may maintain an action for contribution against others of the same class as heirs may among themselves.

(3) Specific legacies and devises are preferred to residuary ones. [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 No. 75 S, s. 56)

287.22 Payment a discharge. In case of any judgment against several heirs or legatees or devisees the payment or satisfaction of the amount recovered against any one of the defendants shall discharge such defendant from the judgment and from execution thereon. [1935 c. 483 s. 57]

287.23 to 287.25 [Repealed by 1935 c. 483]

287.26 Accounts as evidence. The account of the executor or administrator, settled by the proper county court, may be used in any action brought under the provisions of this chapter as presumptive evidence of any matter of fact stated therein. [1935 c. 483 s. 61]

287.27 [Repealed by 1935 c. 483 s. 62]

287.28 Limit of liability. When part of the plaintiff's debt has been collected he can recover only the residue remaining unpaid; and when the action is against the devisees and legatees he shall recover only such part thereof as shall not be recoverable from the heirs. [1935 c. 483 s. 63]

287.285 [1931 c. 139; renumbered section 313.15 (4) (b) by 1935 c. 483 s. 64]

287.29 Debts charged upon realty not affected. Nothing in this chapter shall affect the liability of heirs or beneficiaries for any debt of their decedent, which was by his will expressly charged upon property or made payable exclusively out of particular property or of any beneficiary made exclusively liable for any such debt. [1935 c. 483 s. 65]

287.30, 287.31 [Repealed by 1935 c. 483]

287.32 Judgment, how collected. If any real estate which descended or was devised to any defendant shall not be aliened by him before the filing of a notice of the pendency

of the action the court shall adjudge that the debt of the plaintiff, or the portion thereof which he is entitled to recover against such defendant, shall be levied out of such real estate so descended or devised, and not otherwise.

287.33 to 287.35 [*Repealed by 1935 c. 483*]

287.36 Debts, order of payment. When the next of kin, legatees, heirs or devisees are liable for demands against the decedent as prescribed in this chapter they shall be given preference in the payment of the same and shall be liable therefor in the following order:

(1) Debts entitled to preference under the laws of the United States.

(2) Judgments docketed against the decedent, according to the priority thereof, respectively.

(3) All other debts arising or growing out of any contract.

287.37 [*Repealed by 1935 c. 483 s. 72*]

287.38 Defenses. The next of kin, legatee, heirs and devisees may show that there are debts of a prior class unsatisfied or that there are unpaid debts of the same class with that on which the action is brought; and if it appear that the value of the personal property delivered to them or of the real estate descended or devised to them does not exceed the debts of a prior class judgment shall be rendered in their favor.

287.39 Extent of liability. If the personal property delivered to such next of kin or legatee, or if the real estate descended or devised to such heirs or devisees, exceed the amount of debts which are entitled to a preference over the debt for which the action is brought judgment shall be rendered against them only for such a sum as shall be a just proportion to the other debts of the same class with that on which the action is brought.

287.40 Preferred debts deducted. If any debt of a prior class to that on which the action is brought, or of the same class, shall have been paid by any next of kin, legatees, heirs or devisees they may give evidence of such payment, and the amount of debts so paid shall be estimated in ascertaining the amount to be recovered in the same manner as if such debts were outstanding and unpaid as prescribed in sections 287.38 and 287.39.

287.41 Rights and liabilities of posthumous child and witness to will. A child born after the making of a will who is entitled to succeed to a portion of the real or personal property or both of the testator, or a witness to a will who is entitled to recover any portion of such property from the legatees or devisees, shall have the same rights and remedies to compel a distribution of the personal property and partition of the real estate or to recover of the legatees or devisees such portion of the property as belongs to him, or to compel a contribution from other persons interested in the estate, or to gain possession of the property, as any other persons who are entitled to any part of such estate and shall be equally liable to the creditors of the decedent under the provisions of this chapter.

287.42 Estate of deceased heir liable. If any of the heirs, devisees, legatees or next of kin shall die without having paid his just share of the debts of his decedent his estate shall be liable therefor, as for his own debt, to the extent to which he would have been liable if living.

287.43 Recovery of property fraudulently sold by decedents. When there shall be a deficiency of assets in the hands of an executor or administrator and the decedent shall have conveyed any property or any interest therein, with intent to defraud his creditors or to avoid any duty, or shall have executed conveyances void as against creditors, the executor or administrator shall prosecute an action for the recovery of the same, and may recover for the benefit of creditors all property so fraudulently conveyed. [*Stats. 1931 s. 312.13; 1933 c. 190 s. 15*]

287.44 Creditors to give security. No executor or administrator shall be bound to sue as provided in section 287.43, except on the application of creditors, nor unless they shall pay such part of the costs and expenses or give such security to the executor or administrator therefor as the county court shall deem just and equitable. [*Stats. 1931 s. 312.14; 1933 c. 190 s. 17*]