CHAPTER 318.

ALLOWANCES, DISTRIBUTION, PARTITION.

318.01 Distribution of personalty. (1) RESIDUE. The residue, if any, of the personal estate of any intestate and the residue of the personal estate of a testator, not disposed of by his will and not required for the purposes mentioned in section 313.15, shall be distributed in the same proportions, and to the same persons, and for the same purposes, as prescribed for the descent and disposition of real estate in chapter 237, except that when the deceased shall leave a widow or widower and lawful issue the widow or widower shall be entitled to receive the same share of such residue as a child of such deceased, when there is only one child, and in all other cases one-third of such residue.

(3) ALLOWANCE FOR CARE OF GRAVE. In case there shall be no known heir or legatee or devisee residing in this state or in case there is no husband, widow or descendant, or no parent, brother or sister dependent upon the estate of the deceased, the court may order the executor or administrator to pay not to exceed one hundred dollars for perpetual care of the grave of the deceased as provided by subsection (9) of section 157.11.

(4) ALLOWANCE FOR TOMBSTONE. In case no provision is made in the will for a tombstone or monument or marker at the grave of the decedent, and none has been erected, the executor or administrator may expend a reasonable sum for a tombstone or monument or marker at the grave of his decedent. The expenditure shall be subject to the approval of the court and shall be classed as funeral expenses. [*1933 c. 190 s. 37; 1943 c. 316*]

Cross Reference: For county court orders concerning perpetual care of graves, see 157.11 and 157.125.

Note: The rule declared in Schuman v. Schuman, 80 W 479, 482, 60 NW 670 (November, 1891), was changed by chapter 23, Laws 1893, amending 237.01 (5). The decision held that said subsection did not apply to the distribution of personalty but the legislature made it applicable.

The law presumes that every gift, whether in trust or not, is accepted until the contrary is proved. Estate of Mead, 227 W 311, 277 NW 694, 279 NW 18.

In an administrator's action for the death of his decedent, an item of damages to pay for a grave marker was not a part of allowable funeral expenses, and was improperly allowed; the provision of (4) permitting an administrator to expend a reasonable sum for a grave marker, and classifying this expenditure as "funeral expenses," merely makes such classification for purposes of estate accounting and has no application to the recovery of funeral expenses in a death action. Hamilton v. Reinemann, 233 W 572, 290 NW 194.

In the absence of provision in the will, the authority of the executor to expend money for a monument is referable to (4), and if he contracts for a monument without the advice or approval of the county court he acts at his own risk and he cannot thereby conclude the court from exercising its discretion as to approval of the expenditure. The county court's allowance of only $500 on an expenditure of $875 made by an executor for a monument and markers for a deceased farmer who left an estate of $20,000 was not an abuse of discretion. Will of Poole, 235 W 625, 293 NW 918.

318.02 Rights of state, notice to attorney-general. In all cases mentioned in subsections (1) and (2) of section 318.03 it shall be the duty of the county court having jurisdiction thereof to notify the attorney-general of the interest or probable interest of the state in such estate immediately after the same shall come to the knowledge of such court; and the attorney-general shall appear for and protect the interests of the state therein.

318.03 Escheats and unclaimed legacies and shares. (1) HEIRS UNKNOWN. In case there shall be no known heir of the decedent, the residue of the estate, not disposed of by will, shall escheat and shall be ordered paid into the state school fund.

(2) RENOUNCED OR REFUSED LEGACIES. (a) If any legacy other than a bequest of the residue or any interest therein, be renounced or refused, such legacy shall not escheat but in the absence of other directions in the will, shall become part of the residue of the estate.

(b) If any legacy consisting of the residue of an estate or any interest therein including legacies which have become a part of the residue under paragraph (a) shall be renounced or refused, such residue or legacy of an interest therein shall not escheat but in the absence of other directions in the will, shall descend or be distributed as intestate property.

(3) UNCLAIMED LEGACIES AND SHARES; ESCHEAT. Except as provided in section 331.42, if any share of intestate property including property distributable as intestate property under subsection (2) shall not be claimed by the heir within 120 days after the entry of final judgment by the county court, or within such time as shall be designated in said final judgment, the executor or administrator shall convert the same into money and pay it to the state treasurer for the state school fund, and it shall be a part of said fund until and unless refunded as prescribed by subsection (4).

(4) APPLICATION FOR REFUND. The moneys received by the state treasurer pursuant to subsections (1) and (3) shall be paid to the owner on proof of his right thereto. The claimant may, within 7 years after the date of publication by the treasurer of notice of receipt thereof as provided by section 14.42 (15), file in the county court in which the estate was settled, a petition alleging the basis of his claim to the residue or to the legacy or share. The court shall order a hearing upon the petition; and 20 days' notice thereof shall be given by the claimant to the attorney-general, who shall appear for the state at the hearing. If the claim is established it shall be allowed without interest; and the court shall so certify to the director of budget and accounts, who shall audit and the state treasurer shall pay the same. [*Stats. 1931 s. 318.01 (2), 318.03, 318.06 (6); 1933 c. 190 s. 37; 1943 c. 446; 1947 c. 9, 320*]

Note: See note to sec. 18, art. IV, Const., relating to escheats of personal property in Milwaukee county, citing Estate of Bulewicz, 212 W 426, 249 NW 534.

The presumption of death which arises from the absence of a person for 7 years without being heard from exists without search by his relatives to find him or to ascertain whether he is alive. Where the county court properly determined, on the presumption of death arising from an absence of 7 years, that a residuary legatee was dead at the time of the death of the testator, the court properly ordered distribution of his share to the surviving residuary legatees in accordance with the terms of the will, since 318.03 (2), Stats. 1941, relating to the payment of "unclaimed" legacies into the state treasury, was inapplicable in such case. [Estate of Bloch, 227 W 468, explained.] Estate of Satow, 240 W 622, 4 NW (2d) 147.

Escheat property turned over to trust company as provided by 318.06 (6), Stats. 1925 (revised and renumbered 318.03 in 1933), may be ordered paid into state treasury under present statutes. 24 Atty. Gen. 351.

See notes to 14.42, citing 33 Atty. Gen. 86 and 89.

The right to maintain an action to recover escheated property depends wholly upon statute; and in such an action the 5-year limitation in 318.03, Stats. 1931, applies. Gorny v. Trustees of Milwaukee County Orphans Board, 93 F (2d) 107.

The county court's judgment escheating an estate to the county orphans' board under an unconstitutional statute was not res judicata on the merits of the heir's claim for refund thereof in a suit to establish their right to the estate. Gorny v. Trustees of Milwaukee County Orphans' Board, 14 F Supp. 450.

Under (2), a legacy of Wisconsin property by a Wisconsin testator to a stepson, residing in Russia, was distributable to the state, and not to the Russian consulate, where no one appeared to claim the legacy except the Russian consulate, and its authorization to appear did not purport to authorize an appearance on behalf of the named legatee but only on behalf of the testator's "next of kin," which did not include the stepson. [1945] Estate of Kuhn, 248 W 475, 22 NW (2d) 508.

318.04 Lands distributed as personalty. If any land held by an executor or administrator as mentioned in sections 312.10 and 312.13 shall not be sold by him as therein provided it shall be assigned and distributed to the same persons and in the same proportions as if it had been part of the personal estate of the deceased; and if, upon such distribution, the estate shall come to two or more persons partition thereof may be made between them in like manner as if it were real estate which the deceased held in his lifetime. [*1935 c. 214 s. 8*]

318.05 [*Repealed by 1933 c. 190 s. 38*]

318.06 Estates, assigning residue. (1) DEDUCTIONS BEFORE JUDGMENT. After the payment of the debts, funeral charges and expenses of administration and after deducting all the allowances provided for in this chapter or when sufficient effects shall be reserved in the hands of the executor or administrator for the above purposes, the county court shall, by a judgment assign the residue of the estate, if any, to such persons as by law are entitled to the same.

(2) RIGHTS OF PARTIES. Such judgment may be made on the application of the executor or administrator or of any person interested in the estate. The court shall name therein the persons and assign to each the portion to which he is entitled. The right to recover any such portion from the executor or administrator or from any other person is hereby given to the person entitled thereto.

(3) JUDGMENT AS EVIDENCE. Any finding or determination as to heirship or assignment of real estate in any such judgment shall be presumptive evidence of any fact so found and of the right to the portion of any estate so assigned and shall be conclusive evi-

dence thereof as to all persons to whom notice shall have been given as provided in section 324.18, or who have appeared in any such proceeding and as to all persons claiming under them.

(4) TO APPLY TO REALTY. This section shall apply to all real estate described in any such judgment whether or not in the possession of the executor or administrator, and such judgment shall describe the real estate to be assigned and a certified copy of said judgment describing such real estate, or an abridgment or abstract of such judgment as provided in section 318.065, shall be recorded by the executor or administrator in the office of the register of deeds in each county wherein such real estate is located.

(5) ORDER OF DISCHARGE. Upon filing vouchers showing compliance with the foregoing judgment, the court shall enter an order finding such fact, discharging the executor or administrator and making the judgment absolute. Such order, or a certified copy thereof, shall be presumptive evidence of the facts therein adjudicated.

(7) PROOF OF HEIRSHIP. (a) No order shall be made assigning the residue of any estate until proof is filed that notice of such proceeding has been given or waived as provided by section 324.18, nor until the testimony or deposition of one or more witnesses is reduced to writing and filed, and the court is, from such evidence, fully satisfied as to who are the persons entitled to such residue.

(b) No order shall be made determining who are the heirs of any deceased person until proof is filed that notice of the taking of proof of heirs has been given by publication as provided by section 324.18, nor until the testimony or deposition of one or more witnesses is reduced to writing and filed, and the court is, from such evidence, fully satisfied as to who are the heirs of such person. Application to take proof of heirs may be included in the petition for administration, petition for probate, petition for final settlement, or in a separate petition, and the notice may be included in the notice published of the hearing on either of said petitions or in the notice to creditors, as the court shall order.

(8) DISPOSITION OF MONEY OR OTHER PROPERTY WHERE PAYMENT OR TRANSFER IS PROHIBITED. Where the laws of the United States or executive orders or regulations pursuant thereto prohibit payment, conveyance, transfer, assignment or delivery of property or interest therein to a legatee, devisee, distributee, ward or beneficiary of an estate or trust or to any person on his behalf, the county court or other court having jurisdiction thereof, after due notice to such person as prescribed by section 324.18, may, by judgment or decree, authorize such disposition of such property or interest therein as is or may be permissible under or in conformity with the laws, executive orders or regulations of the United States of America.

(9) PARTITION. Property passing by descent or by will to persons as joint tenants or tenants in common may be partitioned among such persons by the judgment of the county court assigning such property, provided a petition therefor is filed with the court prior to such judgment signed by all parties interested in the property involved. Such petition shall be supported by a stipulation signed by all persons interested in the property in the manner provided by section 235.19 which stipulation shall set out the manner in which the property is to be divided and the agreement of all persons interested therein in such division. This subsection shall be applicable to the property of estates which has not been assigned by judgment of the court filed prior to June 9, 1945 and shall validate all partitions of property accomplished prior to said date in the manner herein provided.

(10) ASSIGNING PURSUANT TO CONTRACT. If any person having an interest in an estate shall assign all or part of his interest therein (other than an interest not assignable by the specific language of a will) as collateral or otherwise and the assignee shall serve a copy thereof on the executor or administrator of the estate and shall file the assignment with the county court having jurisdiction of the estate before the entry of the final decree or judgment therein, the county court shall assign to such assignee in the final decree or judgment in the estate the legacy, share or portion included within such assignment to the extent that such assignment is valid as determined by said court, after giving effect to any credits to which the assignor may be entitled. [*1931 c. 259; 1931 c. 476 s. 6; 1933 c. 190 s. 37; Court Rule XIX; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1940; 1943 c. 50, 446, 514; 1945 c. 264; 1947 c. 225; Supreme Court Order, effective April 1, 1948*]

Note: A trustee in bankruptcy of the person appointed trustee under the will, seeking to set aside the appointment and recover assets in the hands of the appointee's surety, had no interest in the testator's estate entitling him to have the final judgment of distribution and assignment set aside. Such judgment, having been entered many years prior to the bankruptcy, and never having been appealed from by any of the parties in interest, was final and conclusive as to the assets of the testator's estate. Estate of Wittwer, 216 W 432, 257 NW 626.

The final decree of the county court distributing the estate of a testator does not of itself transfer the title to property, but merely determines the persons entitled thereto and their respective interests therein. Latsch v. Bethke, 222 W 485, 269 NW 243.

The county court had jurisdiction to enter order discharging executors and admin-

istrators from their duties and liabilities, as against contention that they had conducted estate in such disregard of testator's directions to sell assets and set up trust funds that court had no jurisdiction to approve such conduct; and hence such order of discharge, however erroneous, until set aside, protected executors and administrators from citation for examination and from liability for alleged waste. Estate of Penny, 225 W 455, 274 NW 247.

Where the only account filed by a bank as trustee of a testamentary trust, which it had administered for 12 years, disclosed that certain mortgages were included in the trust fund, but no disclosure was made, in the account or on the hearing or otherwise, of the fact that the bank had owned the mortgages and sold them to itself as trustee in violation of its duty as trustee, and neither the county court nor any of the interested parties had any knowledge of such facts when an order was entered approving the final account and assigning the mortgages to the distributees of the trust fund, the county court, in proceedings brought by the distributees after the time for appeal had expired, should have set aside such order for fraud on the court for the bank's concealment of the fact of its self-dealing as trustee, and surcharged the bank as trustee, unless the distributees were barred from asserting such fraud by laches or by ratification or by other conduct subsequent to the order. Will of Cosgrove, 236 W 554, 295 NW 784.

Title to trust real estate passes under the will creating the trust to the named trustees without any order of court assigning the property to them. Estate of Trowbridge, 244 W 519, 13 NW (2d) 66.

The entry of a judgment assigning the estate of an intestate, in uncontested proceedings, on proof of heirship taken in open court before the register of probate, instead of before the county court itself, constituted no more than an irregularity and harmless error, and a party appealing from an order refusing to open the judgment had no standing to review the alleged error where the question was not raised in the lower court. Estate of Gunderson, 251 W 41, 27 NW (2d) 896.

318.061 Legacy or distributive share of minor, when guardian not needed; other small legacies and shares. (1) If the legacy or distributive share of the estate to which a minor is entitled does not exceed $500, the court may, without the appointment of a guardian, authorize the deposit thereof in a savings account in some bank to be paid to the guardian when appointed or to the minor upon his attaining the age of 21 years; or the court may authorize the payment or delivery thereof to the natural guardian of the minor or to the person who maintains the minor or to the minor himself.

(2) The court may apply the provisions of this section to any legatee or distributee whose legacy or share does not exceed $500. [*1947 c. 535*]

318.065 Abridged judgment, recording. (1) There may be recorded in the office of the register of deeds in lieu of a certified copy of the final judgment assigning an estate an abridgment or abstract of such final judgment relating to and confined to such portions of such final judgment as may relate to or affect real estate. The judge of the court assigning such estate shall certify as to the truth and accuracy of such abridgment or abstract which shall include the following matters set out in such final judgment:

(a) A general recital of those facts pertaining to the hearing, allowance of final account, and the filing of a final judgment therein.

(b) The findings of fact relating to

1. The death of the deceased.
2. His testacy or intestacy.
3. The payment of inheritance tax, claims and charges against such estate.
4. The survivors or beneficiaries.

(c) The description of that portion of his property which may relate to or affect real estate.

(d) The assignment of such property.

(e) Such other matters set out in the final judgment as may be deemed necessary.

(2) The certification and recording of such abridgment or abstract shall have the same force and effect as to the property described therein as the certification and recording of the entire final judgment. [*1943 c. 50*]

318.07 Receipts from guardians. If a legatee or distributee of an estate be a minor or an incompetent person and has a general guardian the executor or administrator shall take from such guardian on delivery of the legacy or share, a receipt and file the same with the court of probate and such court shall transmit a certified copy of such receipt to the court which appointed such guardian. [*Supreme Court Order, effective Jan. 1, 1934*]

318.08 Remedy of creditors of nonresident heirs and legatees; service of citation. (1) Whenever any legacy or distributive share of any estate belongs to any debtor who has absconded from or is a nonresident of this state, any of his creditors may petition to intervene in the probate proceedings to compel the application of said legacy or distributive share to the payment of his debt, and whenever it shall be necessary a citation to such debtor to appear at a time certain may be served by publication.

(2) Such citation shall be served in the manner provided by section 324.18.

(3) Upon due proof of service of, and at the time fixed in said citation, said court shall proceed to consider such petition, and take proof, and grant such relief thereunder as shall be just, and any order, judgment or determination made in said proceedings shall

be binding upon said debtor. If the claim is not a judgment and any issue shall arise in said proceedings relating to said debt, the court may stay such proceedings pending the final determination of said issue. The court may at any time require the petitioner to give a bond in such sum and with such sureties for costs and damages as it may deem proper. [*1933 c. 190 s. 39; Supreme Court Order, effective Jan. 1, 1940*]

Note: Where the receiver in the sequestration action against the corporation had been discharged and the judgment was personally against the president of the corporation and the recovery of the stated amounts in the judgment was to be for the benefit of all of the creditors of the corporation and all moneys collected were to be distributed under the order of the court, the creditor designated in the judgment to recover said amounts was the appropriate party to maintain a proceeding in the county court under this section, for the interception of the judgment debtor's distributive share of his mother's estate for the benefit of all of said creditors. Estate of Weil, 249 W 385, 24 NW (2d) 662.

318.09 [*Repealed by 1933 c. 190 s. 40*]

318.10 Partition of residue, when necessary, judgment. (1) When the court shall assign the residue of any personal estate to two or more persons, it shall not be necessary to make partition or distribution of such estate; but when partition is requested by any party in interest prior to final judgment, and it appearing to the satisfaction of the court that partition can be made without damage or prejudice to the owners, partition may be made by three disinterested persons to be appointed by the court. Said court shall issue its warrant to them and they shall be sworn to a faithful discharge of their duties.

(2) Such partition, when completed and approved, shall be incorporated in and made a part of the final judgment. [*1933 c. 190 s. 41*]

Revisor's Note, 1933: If the partition is completed it should go into the judgment. Where the property is not divisible no partition should be ordered. The owners should be obliged to resort to regular partition, chapters 276 and 277. (Bill No. 123 S, s. 41)

Under 318.10 to 318.18, Stats. 1927, relating to the partition and distribution of the residue of estates by commissioners appointed for such purpose, the county court could withhold the entry of the final judgment or decree and incorporate the partition and distribution in that final judgment, or the court could accept and establish the report of the commissioners. Estate of Butts, 222 W 425, 268 NW 122.

318.11 [*Repealed by 1933 c. 190 s. 42*]

318.12 Notice of appointment of commissioners. Notice of the time and place of hearing the application for the appointment of commissioners shall be given as provided by section 324.18. [*1933 c. 190 s. 43; Supreme Court Order, effective Jan. 1, 1940*]

318.13 to 318.23 [*Repealed by 1933 c. 190*]

318.24 Advancements part of estate. Any estate, real or personal, that may have been given by an intestate as an advancement to any lineal descendant shall be considered as a part of the estate of the intestate, upon the division and distribution thereof among his heirs, and shall be taken by such descendant toward his share of the estate. [*1933 c. 190 s. 55*]

Note: Under will whereby testatrix devised estate to children equally on condition that any "indebtedness" to testatrix should be deducted from share of each, amount of notes which were found attached to will within sealed envelope, together with memorandum showing that testatrix had given $1,500 for notes after they had become barred by statute of limitations, held deductible from share of child liable on notes. Estate of Weiss, 224 W 192, 271 NW 918.

318.24 to 318.29, relating to advancements, apply only to intestate estates. By his execution of a will the testator is conclusively presumed to have intended that all money previously given to a legatee, although intended as advancements, should not be treated as advancements in the disposition of his estate, in the absence of stating in the will that they should be so treated; and such conclusive presumption applies equally in payments made after the date of the will, since a will speaks from the time of the testator's death. Estate of Pardee, 240 W 19, 1 NW (2d) 803.

318.25 Advancement, how applied. If the advancement shall exceed the share of the heir he shall be excluded from any further portion of the estate, but he shall not be required to refund any part of such advancement. [*1933 c. 190 s. 56*]

318.26 Equalization of shares; not to be refunded. If such advancement be made in real estate the value thereof shall, for the purposes mentioned in section 318.25, be considered a part of the real estate to be divided; and if it be in personal estate it shall be considered as a part of the personal estate; if in either case it shall exceed the share of real or personal estate respectively that would have come to the heir so advanced he shall not be required to refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal to those of the other heirs who are in the same degree with him. [*1933 c. 190 s. 57*]

318.27 Gifts, when advancements; how valued. All gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made or if charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant. If the value of the estate so advanced shall be expressed in the conveyance or in the charge thereof made by the intestate or in

the acknowledgment of the party receiving it such value shall govern in the division and distribution of the estate; otherwise it shall be estimated according to its value when given, as nearly as the same can be ascertained. [*1933 c. 190 s. 58*]

318.28 Advancement to ancestor to affect child. If any child or other lineal descendant, so advanced, shall die before the intestate, leaving issue, the advancement shall be taken into consideration in the division and distribution of the estate; and the amount thereof shall be allowed accordingly by the representatives of the heir so advanced in like manner as if the advancement had been made directly to them. [*1933 c. 109 s. 59*]

318.29 Advancements, questions for court. All questions as to advancements shall be determined by the county court, and shall be specified in the judgment assigning the estate. [*1933 c. 190 s. 60*]

318.30 Partition. (1) Whenever any heir or devisee is entitled to maintain an action under chapter 276 to partition any real estate received by descent or devise, he may, at any time prior to the entry of the order of final settlement and distribution in the estate of the person from whom he derives such real estate, petition the court in which such estate is pending for a partition or sale of such real estate and a division of the proceeds among the persons entitled to receive the same. Such petition shall be verified and shall contain a description of the real estate to be partitioned or sold and the names of all persons interested therein (including any person who may have an inchoate dower right therein).

(2) The court shall by order fix the time and place for hearing such petition and notice thereof shall be given as provided by section 324.18, except that all interested persons residing within the state shall be served with notice in the manner a summons is served in circuit court other than by publication.

(3) Upon the hearing, if the court shall find that actual partition of said premises can be made without great prejudice to the owners it shall by order appoint 3 disinterested persons commissioners to make the partition according to the interests of the parties. In making partition the commissioners shall proceed according to chapter 276 so far as applicable and not inconsistent with this section. Upon confirmation of their report, judgment of partition according thereto shall be made a part of the final order of distribution in said estate.

(4) If the court shall find that actual partition of said premises cannot be made or cannot be made without great prejudice to the owners, it shall order a sale thereof to be made, either at public or private sale, by the administrator or executor of the estate who shall give such additional bond as the court shall order. Notice of public sale shall be given as provided for the sale of real estate under chapter 316.

(5) Report of sale shall be filed and an order entered fixing the time and place for hearing on the same and notice thereof shall be given by mail to all persons interested at least 5 days before the hearing.

(6) Upon confirmation of such sale the administrator or executor by order shall be authorized and directed to make a conveyance of said property to the purchaser.

(7) All costs of the proceeding and sale including attorney fees, administrator or executor fees, cost of serving and publishing notices, cost of abstract and in case the court authorizes the employment of a real estate broker a reasonable fee for him, shall be allowed by the court and paid out of the proceeds of the sale and the balance thereof shall be distributed in the order of final settlement in said estate to the persons entitled thereto. [*1943 c. 460*]