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.

Where a benefit certificate in a mutual benefit society was by the bylaws of the society payable to the legal heirs of the member, the widow was entitled to the same share in the certificate as a child. Thomas v. Supreme Lodge, 126 W 593, 105 NW 922.

The revision of 1878 did not change the rights of a widow who does not elect to take the provision made by law instead of the will, and she takes no share of the personalty under sec. 3935, Stats. 1898, whether disposed of by the will or not. The amendments of secs. 3935, 2171 and 2172 have not changed the rule of Hardy v. Scales, 54 W 452, 11 NW 590. Chapman v. Chapman, 128 W 413, 107 NW 668.

The rights given to a widow under sec. 3935, Stats. 1898, may be waived by a valid antenuptial agreement. Deller v. Deller, 141 W 255, 124 NW 278.

There is no duty on an executor or administrator to advance payment of a legacy to a donee or an inheritance to an heir until an order of distribution has been entered by the court, though he may do so at his own risk. Will of Grover, 197 W 347, 222 NW 228.

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 318.01 (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 318.01 (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.

See note under 72.01, (general), citing Will of Volkering, 253 W 186, 32 NW (2d) 263.

318.02 History: R. S. 1878 s. 3936; Stats. 1898 s. 3936; 1925 c. 4; Stats. 1925 s. 318.02; 1929 c. 516 s. 13; 1953 c. 61; 1957 c. 11; 1969 c. 339.

318.03 History: R. S. 1878 s. 3935, sub. 7, 3937; Stats. 1898 s. 3935 sub. 7, 3937; 1925 c. 4; 1925 c. 108; 1925 c. 454 s. 16; Stats. 1925 s. 318.01 (7), 318.03, 318.06 (6); 1929 c. 173 s. 2; 1929 c. 516 s. 13; Stats. 1929 s. 318.01 (2), 318.03, 318.06 (6); 1933 c. 190 s. 37; Stats. 1933 s. 318.03; 1943 c. 446; 1947 c. 9 s. 31; 1947 c. 320; 1949 c. 65; 1951 c. 699 s. 2 to 6; 1953 c. 479; 1959 c. 228 s. 66; 1969 c. c. 276; 1969 c. 339.

See note to sec. 18, art IV, concerning a local act governing 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.

Under 318.03 (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. Estate of Kuhn, 248 W 475, 22 NW (2d) 508.

Where the U.S. alien property custodian demanded certain intestate property on the ground that persons named by him as heirs were nationals and residents of an enemy country, but there was no determination of heirship, an order of the county court directing the public administrator to pay the distributive shares of such named persons to the attorney general of the United States was premature, and in such cases the state should be permitted to remain in the proceedings as a party interested in the matter of escheat, and an order should be entered only after the submission of proofs and a determination of heirship. Estate of Rade, 259 W 169, 47 NW (2d) 891.

Where the alien property custodian filed vesting orders and demanded certain intestate personal property on the ground that there were heirs who were nationals and residents of an enemy country, and the county court properly determined that there were such heirs, and entered an order directing the public administrator to pay the distributive shares to the attorney general of the United States as successor to the alien property custodian, the provision for escheat to the state if intestate property is not claimed "by the heir" within 120 days after the entry of final judgment did not apply, and the matter was concluded so far as any interest of the state in an escheat was concerned. Estate of Rade, 259 W 169, 47 NW (2d) 891.

Once it is established in the county court that there are heirs to escheated property paid into the state treasury, the state no longer has any right or interest in the property, and the attorney general has no duty or authority to contest the distribution of the estate to such heirs on the ground that other heirs may exist who have a better claim, since, if there are any heirs at all, the state has no

right to the property and it is then for the court to determine which of the heirs is entitled to it. Estate of Kavanaugh, 11 W (2d) 619, 106 NW (2d) 405.

Escheat in case of disappearance of a known heir is discussed in Estate of Smith, 16 W (2d) 118, 113 NW (2d) 841.

A claimant who had a hearing in county court on a claim of heirship could not make a further claim under 318.03 (4); the matter was res adjudicata. Estate of Radocay, 30 W (2d) 671, 142 NW (2d) 224.

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

The judgment of the county court 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.

Escheated personalty should be converted into cash and then paid to the state treasurer. Long-time bank certificates of deposit should not be accepted by the latter. 7 Atty. Gen. 448.

Escheated 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 the state treasury under present statutes. 24 Atty. Gen. 351.

See notes to 14.58, citing 26 Atty. Gen. 390 and 33 Atty. Gen. 86.

See note to 237.01, citing 56 Atty. Gen. 228.

318.04 History: R. S. 1849 c. 69 s. 15; R. S. 1858 c. 100 s. 15; R. S. 1878 s. 3938; Stats. 1898 c. 3938; 1925 c. 4; Stats. 1925 s. 318.04; 1935 c. 214 s. 8; 1969 c. 339.

318.06 History: R. S. 1849 c. 72 s. 2 to 4; R. S. 1858 c. 103 s. 2 to 4; R. S. 1878 s. 3940; Stats. 1898 s. 3940; 1903 c. 179 s. 1; Supl. 1906 s. 3940; 1907 c. 635; 1911 c. 271; 1913 c. 98; 1925 c. 4, 108; 1925 c. 454 s. 16; Stats. 1925 s. 318.06; 1931 c. 259; 1931 c. 476 s. 6; 1933 c. 190 s. 37; Court Rule XIX; Sup. Ct. Order, 232 W ix; 1943 c. 50, 446, 514; 1945 c. 264; 1947 c. 225; Sup. Ct. Order, 251 W vi; Sup. Ct. Order, 258 W vii; 1951 c. 703 s. 1; Sup. Ct. Order, 259 W v; 1955 c. 519, 550; Sup. Ct. Order, 275 W ix; 1969 c. 285 s. 22; 1969 c. 339; 1969 c. 411 s. 8.

Comment of Judicial Council, 1951: 318.06 (7) (b) as amended by Supreme Court Order 251 W vi effective April 1, 1948, required that no determination of heirship be made until after notice was "* * * given *by publication* as provided by section 324.18, * * * " (italics added). 324.18 (1) was amended by Supreme Court Order 259 W xiv effective July 1, 1951, to make mailing of notice to interested persons (except creditors) mandatory instead of permissive. This was done because of the decision in Mullane v. Central Hanover Bank & Trust Co. 70 S. Ct. 652. 318.06 (7) (b) was also amended by Supreme Court Order 259 W xiii effective July 1, 1951, by deleting the words *by publication* with the idea of showing that not only the publication mentioned in 324.18 (1) but also the mailing specified therein must be complied with. However, 318.06 (7) (b) is capable of the interpretation that notice given in *any* manner specified in 324.18 is sufficient. Personal service and waiver of notice are both covered in 324.18. If a determination of heirs is made after only personal service or waiver of notice there is always the possibility that there may be some interested person who is not personally served or who fails to sign the waiver. The determination would not be binding on such an interested person. It is preferable to make the determination of heirs binding on all interested parties by giving them constructive notice by publication and mailing. [Re Order effective May 1, 1952]

The mere order of the court to pay over all the property of the widow is not an adjudication that she is entitled to it. Tryon v. Farnsworth, 30 W 577.

A judgment assigning an estate is not conclusive on those not having notice or appearing; and the fact of notice of application for probate and notice that the final account would be adjusted on a certain day is insufficient. Ruth v. Oberbrunner, 40 W 238, 269.

Where notice is given as prescribed the judgment of assignment is binding upon the parties. Appeal of Schaeffner, 41 W 260, and 45 W 614.

Minors are not bound by the proceedings unless represented by guardian. O'Dell v. Rogers, 44 W 136.

Where an order is made adjusting a final account and requiring the balance of the estate to be paid to the heirs, but not determining who they are, an administrator de bonis non may be appointed. Oates v. Estate of Buckley, 49 W 592, 6 NW 321.

An order of distribution, procured by the fraud of an administrator, by which the estate is distributed to persons not entitled to it, may be revoked, provided that rights which have been confirmed by the statute of limitations will not be disturbed. Such order may be set aside on petition of one entitled to a share of the estate he being a minor when the original proceedings were had and not represented. The persons to whom the estate was distributed by the order are proper parties. Estate of Leavens, 65 W 440, 27 NW 324.

The effect of an order or judgment of distribution is not conclusive as against those claiming under the will, without notice or opportunity of being heard. Jones v. Roberts, 84 W 465, 54 NW 917.

The power of a county court to vacate a final order shown to have been procured by fraud is in the nature of a bill in equity to relieve against a judgment at law. The relief will be granted when the former judgment is inequitable, and the defendant was ignorant of the fact in question pending the proceedings, or was prevented from making his defense by fraud, accident or the acts of the opposite party, unmixed with negligence or fault on his part. Thomas v. Thomas, 88 W 88, 59 NW 504.

On petition of legatees and devisees the court may set aside a final order of distribution for fraud of the administrator in inducing them to convey to him the entire real and personal estate for about one-third its value,

they being residents of states distant from this. Creamer v. Ingalls, 89 W 112, 61 NW 82.

An order of distribution obtained by fraud may be set aside if rights confirmed by limitation will not thereby be affected. Such power may be exercised though there may be a remedy by appeal or by direct action against the perpetrator of the fraud. The facts justified the setting aside of the order. The presentation of a petition therefor soon after the facts became known and about 3 years after the testator's death, but less than one year after entry of judgment, was not too late. Estate of O'Neill, 90 W 480, 63 NW 1042.

A judgment which has been signed and entered may be corrected, upon application of the remainderman after the death of the life tenant, so as to conform to the judgment actually announced and rendered. Hall v. Hall, 98 W 193, 73 NW 1000.

The recitals of the amount due to various legatees made in the judgment is not conclusive upon them in an action brought by some legatees who had received worthless securities against others to recover their share of the estate. Maldaner v. Beurhaus, 108 W 25, 84 NW 25.

Where a testator willed his real and personal estate to his widow for life and directed that such estate be divided at her death among their surviving children, and on petition of the widow and with the knowledge and acquiescence of the children, the county court assigned the residue to the children as absolute vested remainders, subject to such life estate, and later the widow and the children conveyed the real estate as though the title was absolute and received the benefit thereof, and for more than 20 years never questioned in any manner the validity of the judgment of the county court, the children who survived the life tenant had, by their long acquiescence in the judgment and their conduct for many years, so inconsistent with their present contention that the title did not vest absolutely until the death of the life tenant and that testator's children then surviving took the entire estate, waived their right to claim the fund created by the sale of the interest of a remainderman who predeceased the life tenant. Estate of Ross, 181 W 125, 194 NW 151.

Where a final decree construing a will and assigning the estate has been made, on proper application and due notice, a question as to the proper construction of the will cannot be raised in a proceeding brought 4 years later to expunge from the record such final decree. Estate of Garbade, 187 W 105, 203 NW 748.

A trustee in bankruptcy of the 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 an order discharging executors and administrators from their duties and liabilities, as against the contention that they had conducted the estate in such disregard of testator's directions to sell assets and set up trust funds that the 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 Penney, 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 the 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 in 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.

Where a will gave to the testator's wife all of the testator's personal property, except as otherwise stipulated, and gave to third persons specified sums of money to be paid out of life policies payable to the testator's wife as beneficiary, and the testator's interest in a homestead held by himself and wife in joint tenancy, the widow, by her election to take under the will, created an equitable title in the devisees to whom her husband had devised the property held by her in her own right, and she thereafter held such property as a trustee for the benefit of the devisees to whom it had been willed and, although such property is not a part of the testator's estate, the county court has equitable jurisdiction to declare and enforce the rights of the parties, all of whom are before the court. If the widow in such case

refuses or fails to convey the title to a half interest in the homestead and to pay over an amount necessary to satisfy the legacies, the county court has complete jurisdiction to transfer it by judgment. State ex rel. Schaech v. Sheridan, 254 W 377, 36 NW (2d) 276.

A final judgment assigning the estate of a testator is a judicial declaration of the testator's intent, and is a construction of the will, and parties deeming themselves aggrieved by such construction, and contending that the decree has not expressed the testator's intent, may appeal; but when the statutory time for appeal has passed, a party may not have the judgment changed by showing that the assignment of the estate appears to be in conflict with the terms of the will. When the language of the judgment is ambiguous and its meaning obscure, the sense in which the trial court meant its language to be understood may be ascertained by an examination of evidentiary facts, among which may be the language adopted by the testator and the circumstances surrounding its adoption. Will of Yates, 259 W 263, 48 NW (2d) 601.

In assigning the estate of a testator, the court has the power to construe the will, and it cannot order an assignment without such construction. Where the construction placed on a will by the terms of the judgment assigning the estate is not ambiguous, it is not open to further construction. Estate of Fritsch, 259 W 295, 48 NW (2d) 606.

A judgment of the county court, which assigned the personal property of a testator in unambiguous terms to persons specifically named therein, was a final adjudication in respect to the personal property after the time for appeal had expired, so that it was not thereafter subject to either direct or collateral attack although erroneous. Will of Dolph, 260 W 291, 50 NW (2d) 448.

A judgment of the county court, so far as assigning the real estate of a testator "according to the will," was ambiguous and required construction; and it was open to construction in proceedings commenced after the time for appeal had expired but while the estate was still before the court; and in construing it, to ascertain the intent of the court, which must be assumed to have been the same as that of the testator, resort could be had to the terms of the will. Will of Dolph, 260 W 291, 50 NW (2d) 448.

By the use of the language "in accordance with paragraph Third of the will of said deceased" in a final judgment assigning an estate, the intention of the testator expressed in such paragraph was incorporated in the final judgment. Estate of Larson, 261 W 206, 52 NW (2d) 141.

Where a will created a trust for the benefit of the testator's widow during her lifetime, and directed that at the termination of the life estate the trustees were to deliver the remaining property to a named charitable corporation, a final decree assigning the property to the trustees of the life estate "pursuant to the will," was uncertain and ambiguous, so as to require construction after the county court had lost jurisdiction to modify it by a construction of the will, and, in aid of construing the final decree, the will was evidence to which the trial court could resort. Will of Hill, 261 W 290, 52 NW (2d) 867.

Where one provision of a will directed the trustees of a life estate for the benefit of the testator's widow to deliver the property to a named charitable corporation on the death of the widow, but later portions of the will provided that the property so delivered was to be held by the corporation "in trust" for specified uses and purposes, and designated the corporation as "corporate trustee," and called the property the "trust fund," the final decree, incorporating the will by reference, is construed as directing that the property should be assigned to and received by the corporation as a trustee, and not that the property should be taken by the corporation free from the imposition of any trust. As such trustee, the corporation would be governed by 323.01. Will of Hill, 261 W 290, 52 NW (2d) 867.

A final decree assigning a testator's estate is the judicial expression of the testator's intent and purpose as revealed by his last will, and is unconcerned with documents conceived and executed by others, particularly where the decree makes no reference to such instruments. Will of Hill, 261 W 290, 52 NW (2d) 867.

Although, technically, after a final decree assigning the estate of a testator has been entered and the time for appealing therefrom has expired, a construction of the will cannot be had and the proper procedure is to request a construction of the final decree in any controversy arising as to carrying out the provisions and directions of the will, nevertheless, resort must be had to the will and the will itself construed where the final decree is ambiguous or merely assigns the estate, or a portion thereof, in accordance with the terms of the will. Will of Greiling, 264 W 146, 59 NW (2d) 241.

In the administration of the estate of a testator whose will nominated his niece as executrix, a statement in the proof of heirship that there were no surviving collateral relatives except the niece, when in fact there were surviving brothers, sister, nephews and nieces, was not true, but such misstatement was immaterial and would not support a charge of fraud, where such brothers, etc., were not named in the will and could not take under it, and where, the testator being survived by a widow but no issue, such brothers, etc., were not heirs who could inherit under the statutes of descent in case of a complete or partial intestacy. Estate of Steuber, 270 W 426, 71 NW (2d) 272.

It is error to state in a judgment that the adopted daughter of the testatrix's sister named in the will was the sole "issue and lineal descendant" of such named sister, without reciting that this status was by virtue of the adoption, but such error was inconsequential where distribution was determined by the will. Estate of Rhodes, 271 W 342, 73 NW (2d) 602.

That part of the judgment determining heirship erred in including beneficiaries under the will in addition to heirs at law, who take intestate realty, and next of kin, who take intestate personalty, but such error was harmless where all those named in the judgment actually were heirs at law and next of kin and all took under the will. Estate of Rhodes, 271 W 342, 73 NW (2d) 602.

When paternity is at issue in a proceeding for the determination of pedigree or heirship, it need be proved only by a preponderance of the evidence. Estate of Engelhardt, 272 W 275, 75 NW (2d) 631.

The conduct of instigators of a written agreement entered into with other heirs-at-law by a sister of a testator whose will left practically all of his estate to her, which agreement provided for a different disposition of the estate "whether said will be admitted to probate, or not," but which agreement was withheld and not produced until after a decision of the supreme court affirming an order of the county court admitting the will to probate, constituted a fraud on the court and an imposition on such sister, so that the agreement should not be enforced against her. Estate of Draheim, 273 W 189, 77 NW (2d) 422.

A final judgment in probate, which assigned a class bequest to the testator's grandchildren living at the time of the testator's death, in trust to a trust company, subject to the terms and conditions set forth in the will, was not res adjudicata as to grandchildren who were born after the death of the testator and after the judgment and who became members of the class under the terms of the will. Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 489.

See note to 324.18, citing Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 489.

The property of a decedent passes, on his death, to his legatees and devisees, and the interest which they may acquire, whether by inheritance or by will, they acquire at the time of death. Will of Solbrig, 7 W (2d) 44, 96 NW (2d) 97.

Where an unappealed final decree assigning an estate to a trust for life of a widow and on her death "to the surviving children of deceased," a widow of a son who died after the testator but before the life tenant receives nothing and the court will not consider whether the decree correctly construed the will. Will of Falk, 12 W (2d) 247, 107 NW (2d) 134.

A final judgment of a county court administering the estate of decedent whose property had its situs within the county and in which county the intestate was domiciled, which judgment assigned a portion of the estate as an intestate share to a deceased person (albeit erroneously), was not void, since death of the intestate and her domicile were the jurisdictional facts which empowered the court to act and gave the judgment efficacy. Estate of Hatzl, 24 W (2d) 64, 127 NW (2d) 782, 129 NW (2d) 249.

Where distribution of an estate was made prior to judgment but in accordance with an agreement of the heirs and the determination of the court on inheritance taxes, the trial court could properly enter the judgment in accordance with the agreement, although a third party who had no notice has a prior claim to the estate. Estate of Wettig, 29 W (2d) 239, 138 NW (2d) 206, 139 NW (2d) 622.

Testimony of an attorney based on a "family tree report" did not satisfy 318.06 (7), Stats. 1965, where based on the report alone, for such testimony (being hearsay) did not constitute competent substantive proof required by the statute. The statute is not construed as excluding proof of documents or to require all proof of heirship to be oral, but a family tree report to be admissible as an official document must disclose such relationships in the document itself or by testimony in relation to it. Estate of Shega, 38 W (2d) 269, 156 NW (2d) 392.

Contract among descendents; jurisdiction of county court. 21 MLR 152.

318.065 History: 1943 c. 50; Stats. 1943 s. 318.065; 1969 c. 339.

318.07 History: Sup. Ct. Order, 25 W (2d) ix; Stats. 1965 s. 318.07; 1969 c. 339.

318.075 History: 1903 c. 179 s. 2; Supl. 1906 s. 3940a; 1925 c. 4; Stats. 1925 s. 318.07; Sup. Ct. Order, 212 W xxxii; Sup. Ct. Order, 25 W (2d) ix; Stats. 1965 s. 318.075; 1969 c. 339.

318.08 History: 1907 c. 141; Stats. 1911 s. 3940a; Stats. 1921 s. 3940b; 1925 c. 4; Stats. 1925 s. 318.08; 1933 c. 190 s. 39; Sup. Ct. Order, 232 W ix; 1969 c. 339.

Payments to be made under a trust created by a testator constitute a "legacy" under sec. 3940b, Stats. 1921, and any creditor of the absconding or nonresident beneficiary, including a divorced wife holding a judgment for alimony, may intervene and appropriate them. Such appropriation may be enforced after the estate has been administered and the executor discharged and all that remains is the administration of the trust. Estate of Wakefield, 182 W 208, 196 NW 541.

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 318.08, 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.

See note to 272.04, citing Stanley C. Hanks Co. v. Scherer, 259 W 148, 47 NW (2d) 905.

318.10 History: R. S. 1849 c. 72 s. 5, 7, 16; R. S. 1858 c. 103 s. 5, 7, 15; R. S. 1878 s. 3942; Stats. 1898 s. 3942; 1907 c. 340; 1925 c. 4; Stats. 1925 s. 318.10; 1933 c. 190 s. 41; 1969 c. 339.

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 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.

318.12 History: R. S. 1849 c. 72 s. 7; R. S. 1858 c. 103 s. 7; R. S. 1878 s. 3944; Stats. 1898 s. 3944; 1925 c. 4; Stats. 1925 s. 318.12; 1933 c. 190 s. 43; Sup. Ct. Order, 232 W ix; 1969 c. 339.

318.15 History: 1965 c. 65; Stats. 1965 s. 318.15; 1969 c. 339.

318.24 History: R. S. 1849 c. 63 s. 5; R. S. 1858 c. 92 s. 5; R. S. 1878 s. 3956; Stats. 1898 s. 3956; 1925 c. 4; Stats. 1925 s. 318.24; 1933 c. 190 s. 55; 1969 c. 339.

The doctrine of advancement is based upon an assumed desire of the donor to equalize the distribution of his estate, but does not apply to a testator's will, the assumption there being that all advancements have been considered and that the will expresses his desires as to distribution. The amount of an advancement can be deducted from the donee's share of the estate, but the donee cannot be charged with an excess over that share. In this respect the donee of an advancement differs from a legatee indebted to an estate. Where no mention of advancements is found in the will the county court has no jurisdiction to adjudicate the validity of an agreement among the beneficiaries that prior donations to them should be treated as advancements in the distribution of the estate; but such an agreement voluntarily entered into probably may be enforcible in a court of competent jurisdiction, but not in a county court. Estate of Sipchen, 180 W 504, 193 NW 385.

Under a will whereby the testatrix devised an estate to children equally on condition that any "indebtedness" to the testatrix should be deducted from the share of each, the amount of notes which were found attached to the will within a sealed envelope, together with a memorandum showing that testatrix had given $1,500 for notes after they had become barred by the statute of limitations, was deductible from the share of a child liable on the 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 to 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 History: R. S. 1849 c. 63 s. 6; R. S. 1858 c. 92 s. 6; R. S. 1878 s. 3957; Stats. 1898 s. 3957; 1925 c. 4; Stats. 1925 s. 318.25; 1933 c. 190 s. 56; 1969 c. 339.

318.26 History: R. S. 1849 c. 63 s. 7; R. S. 1858 c. 92 s. 7; R. S. 1878 s. 3958; Stats. 1898 s. 3958; 1925 c. 4; Stats. 1925 s. 318.26; 1933 c. 190 s. 57; 1969 c. 339.

318.27 History: R. S. 1849 c. 63 s. 8, 9; R. S. 1858 c. 92 s. 8, 9; R. S. 1878 s. 3959; Stats. 1898 s. 3959; 1925 c. 4; Stats. 1925 s. 318.27; 1933 c. 190 s. 58; 1969 c. 339.

Money charged on account is not an advancement. In re Ashley, 4 W 21. Land conveyed by a deed without anything to show that an advancement was intended is not an advancement. Bullard v. Bullard, 5 W 527.

A statement in a will that certain gifts were to be treated as advancments was insufficient to make them such, where no expression was made at the time and they were not charged by the intestate or acknowledged as such by the person receiving them. Ludington v. Patton, 121 W 649, 99 NW 614.

Parol evidence is not admissible to show an advancement. Schmidt v. Schmidt's Estate, 123 W 295, 101 NW 678.

Sec. 3959, Stats. 1898, excludes all other evidence to prove the advancement. The writing required by the statute must be contemporaneous with the gift. Arthur v. Arthur, 143 W 126, 126 NW 550.

A writing executed by a child, unsigned by the father, acknowledging receipt of her share of his estate, satisfied sec. 3959; and parol testimony was admissible to show that it was fair and for an adequate consideration. Estate of Fontaine, 181 W 407, 195 NW 393.

318.28 History: R. S. 1849 c. 63 s. 10; R. S. 1858 c. 92 s. 10; R. S. 1878 s. 3960; Stats. 1898 s. 3960; 1925 c. 4; Stats. 1925 s. 318.28; 1933 c. 190 s. 59; 1969 c. 339.

318.29 History: R. S. 1849 c. 72 s. 16; R. S. 1858 c. 103 s. 16; R. S. 1878 s. 3961; Stats. 1898 s. 3961; 1925 c. 4; Stats. 1925 s. 318.29; 1933 c. 190 s. 60; 1969 c. 339.

A judgment upon a petition presenting the question of advancement is final, though the widow was not a party to the proceeding. Watkins v. Brant, 46 W 419, 1 NW 82.

The finding of the court as to advancements is like the allowance of a claim; it is one of the acts to be done in the administration and settlement of the estate. It is not an original proceeding for which notice is to be given, in addition to that for the final settlement and distribution. A finding made pursuant to the general notice is conclusive upon a judgment creditor of the heir to whom the advancement was made, and upon the world. The adjudication relates back to the death of the person from whom the heir inherited. Liginger v. Field, 78 W 367, 47 NW 613.

318.30 History: 1943 c. 460; Stats. 1943 s. 318.30; Sup. Ct. Order, 258 W viii; 1969 c. 339.

318.31 History: 1951 c. 367; Stats. 1951 s. 318.31; 1969 c. 339.

Inheritance taxes are to be computed on the distributions provided for by the will, not by the compromise agreement. Attorneys' fees of the contestants of the will are not deductible as expenses of administration in computing inheritance taxes. Estate of Jorgensen, 267 W 1, 64 NW (2d) 430.

The right to dispose of property by will. Scheller, 37 MLR 92.

CHAPTER 319.

Guardians and Wards.

Editor's Note: Ch. 468, Laws 1957, repealed