

c. 502; 1959 c. 233, 235, 443; 1959 c. 660 s. 75, 76.

Editor's Note: For cases construing 320.01 prior to the adoption of the prudent man investment rule in 1959 see those cited in Wis. Annotations, 1950 and Wis. Statutes, 1957.

Diversification requirements, as to stock substituted for original assets, are discussed in Will of Mueller, 28 W (2d) 26, 135 NW (2d) 854.

The prudent man investment rule. Rubloff, 1960 WLR 142.

320.02 History: 1959 c. 233; Stats. 1959 s. 320.02.

320.03 History: 1935 c. 363; Stats. 1935 s. 320.03; 1959 c. 233.

320.04 History: 1935 c. 363; Stats. 1935 s. 320.04; 1959 c. 233.

320.05 History: 1933 c. 379; Stats. 1933 s. 231.34; 1935 c. 363; Stats. 1935 s. 320.05; 1949 c. 331; 1959 c. 233.

320.06 History: 1959 c. 233; Stats. 1959 s. 320.06.

CHAPTER 321.

Bonds in County Courts.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 321 through 1969, including the effects of ch. 339, Laws 1969. Various provisions of ch. 321 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. 351.

321.01 History: R. S. 1849 c. 73 s. 1; R. S. 1849 c. 85 s. 23; R. S. 1858 c. 104 s. 1; R. S. 1858 c. 117 s. 23; R. S. 1878 s. 4013; Stats. 1898 s. 4013; 1907 c. 183; 1925 c. 4; Stats. 1925 s. 321.01; Court Rule VII; Sup. Ct. Order, 212 W xxxv; 1959 c. 414; 1969 c. 339.

Sec. 23, ch. 117, R. S. 1858, does not apply to an appeal bond given to the adverse party, but only to bonds required to run to the county judge. Bowles v. Page, 20 W 309.

321.015 History: R. S. 1849 c. 80 s. 28; R. S. 1858 c. 112 s. 30; R. S. 1878 s. 3967; Stats. 1898 s. 3967; 1919 c. 506; 1921 c. 590 s. 33; 1925 c. 4; Stats. 1925 s. 319.06; Sup. Ct. Order, 212 W xxxiii; Stats. 1933 s. 321.015; 1969 c. 339.

Where a new bond was given without notice or examination of the account, or compliance with the requirement in respect to the discharge of sureties, a release of the old bond was ineffective and the new bond merely cumulative. Brehm v. United States F. & G. Co. 124 W 339, 102 NW 36.

321.02 History: R. S. 1849 c. 80 s. 29, 30; R. S. 1849 c. 73 s. 2 to 5; R. S. 1858 c. 104 s. 2 to 5; R. S. 1858 c. 112 s. 31, 32; 1865 c. 484; R. S. 1878 s. 3968, 4014; 1891 c. 156; 1893 c. 71; Stats. 1898 s. 3968, 4014; 1913 c. 202; 1925 c. 4; Stats. 1925 s. 319.07, 321.02; Court Rule XXIII; 1933 c. 190 s. 79, 80, 81; Stats. 1933 s. 321.02; 1939 c. 513 s. 55; 1969 c. 339.

Editor's Note: On the historical background of sec. 3968, R. S. 1878, see Paine v. Jones, 93 W 70, 74, 67 NW 31, 32.

In an action on an administration bond, it is sufficient, in order to charge the surety, to show service of the final order of distribution on the administrator, a proper demand of payment made upon him, and his failure to pay as ordered; and it is not necessary to show any demand upon the surety. Elwell v. Prescott, 38 W 274.

Under the statute, the county judge may grant permission to bring suit in his name upon the administration bond, on an ex parte application of creditors whose demands the administrator has neglected or refused to pay as ordered; and such permission, granted in the form of an order, is sufficient, without notice given the administratrix or the surety, of the application therefor. Elwell v. Prescott, 38 W 274.

Under sec. 2, ch 104, R. S. 1858, an action on an executor's bond lay for a failure to account or to return an inventory. An action brought in the name of the county judge for the use of a creditor is treated as an action at the instance of the latter. Johannes v. Youngs, 45 W 445.

A breach of an administrator's bond results from his neglect to make or return an inventory or to administer the estate. Creditors may maintain an action in such a case. Ellis v. Johnson, 83 W 394, 53 NW 691.

An action for contribution between sureties on an executor's bond is not an action on such bond, and may be brought without leave of court. Hardell v. Carroll, 90 W 350, 63 NW 275.

A guardian is discharged when his guardianship terminates, and this occurs when a ward attains his majority, notwithstanding the trust relation in respect to property is not terminated. Paine v. Jones, 93 W 70, 67 NW 31.

In an action on a guardian's bond a complaint alleging the settlement of the guardian's final account, that the sum he should pay was determined, that an order had been entered for its payment and had not been complied with, is good. Schoenleber v. Burkhardt, 94 W 575, 69 NW 343.

An order for the payment of debts is not open to collateral attack, though made without notice to the executor or administrator, but is conclusive until reversed or set aside in a direct proceeding on all questions necessarily passed upon. An order permitting suit on the bond is also conclusive unless so reversed or set aside. Roberts v. Weadock, 98 W 400, 74 NW 93.

The objection that payment was not demanded or refused before the order directing payment was made can only be made on direct appeal from the order or in some other direct proceeding. Such demand and refusal are admitted by not denying an allegation in the complaint that the former was made and the latter refused. Roberts v. Weadock, 98 W 400, 74 NW 93.

An executor's liability continues until his account is settled and the estate fully administered. Wallber v. Wilmanns, 116 W 246, 93 NW 47.

A bond given by a guardian appointed without jurisdiction is void as a guardian's bond but enforceable as a common-law bond as far as accounting for property received by him is concerned, but the special limitation provided in sec. 3968, Stats. 1898, applies to the sureties. *Dudley v. Rice*, 119 W 97, 95 NW 936.

The guardian is discharged when the ward attains his majority, and the fact that the guardian was also the guardian of other minors appointed by the same order and as to which he has given the same bond does not change the situation. Sec. 3968 applies to a bond given for a sale of real estate. *Wescott v. Upham*, 127 W 590, 107 NW 2.

Where a will gave a life estate in both real and personal property to the wife of the testator, and a remainder to his son upon the condition that the son pay certain legacies, and the county court required the wife to give a trustee's bond for the personal property, an assignee of the legacies, which had not been paid, was not entitled to maintain an action against the surety on the bond, when there was no proof that the real property was insufficient to pay the legacies. *Otto v. United States F. & G. Co.* 213 W 340, 251 NW 217.

Where assets of an estate have been withheld from the inventory because of a conspiracy between the administrator and an heir, the surety of the administrator is entitled to recover from the administrator and the heir the amount it may be compelled to pay to the estate for the default of the administrator. *Martineau v. Mehlberg*, 221 W 347, 267 NW 9.

An action brought under 321.02 (2) on an administrator's bond must be prosecuted for the benefit of all concerned, and not for the sole benefit of an individual creditor. *Rasmussen v. Jensen*, 240 W 242, 3 NW (2d) 335.

Under 321.02 (1) (c) and (4), 321.07 and 296.08 (3), the circuit court has jurisdiction of an action brought, with the permission of the county court, by the successor guardian of the person and estate of an incompetent against the sureties on the bond of a deceased guardian for the latter's breach of duty and maladministration in the conduct of the guardianship, and against the same sureties on a special bond of the deceased guardian given in connection with an application in the county court to sell the ward's real estate, and against persons claiming rights under deeds sought to be set aside, although there has been no accounting and determination in the county court. *Cannon v. Berens*, 244 W 271, 12 NW (2d) 53.

The filing of the contingent claim may be timely under 321.02 (3), but such claim may be barred by 313.08 for failure to file it within the time fixed by the county court for the filing of claims. *Estate of Bocher*, 249 W 9, 23 NW (2d) 615.

The one-year extension of the limitation on an action against the sureties on a guardian's bond, provided in 321.02 (3), applies where an accounting proceeding is pending when the ward becomes 25 years of age. (In *Rew v. Marshek*, 240 W 273, a headnote erroneously states that an accounting proceeding must be pending when the ward becomes "21.") *Estate of Bocher*, 249 W 9, 23 NW (2d) 615.

Where the complaint in an action to recover

on administrator's bond alleged that the principal on the bond had defaulted in performance for which the surety had insured obligees, it showed that plaintiff obligees thereby acquired a right of action on the bond against the defendant surety, and the complaint was not subject to general demurrer for failing to allege certain procedural steps in settlement of estates involved. The complaint, showing that the defaulting administrator was appointed in 1928 and was removed in 1957, did not thereby show on its face an interval so great as to constitute laches which, as a matter of law, would defeat plaintiff obligees' action to recover on an administrator's bond, although laches might prove to be a proper defense on the trial of the action. *Mudroch v. Amsterdam Cas. Co.* 7 W (2d) 57, 95 NW (2d) 759.

321.03 History: R. S. 1849 c. 73 s. 6, 8; R. S. 1858 c. 104 s. 6, 8; R. S. 1878 s. 4015; Stats. 1898 s. 4015; 1907 c. 183; 1925 c. 4; Stats. 1925 s. 321.03; 1969 c. 339.

See note to 312.16, citing *Richter v. Leiby*, 99 W 512, 75 NW 82.

The action on the administrator's bond being in the name of the county judge, the judgment should specify the amount due each heir for whose benefit it was brought. *Cook v. Nelson*, 209 W 224, 244 NW 615.

321.04 History: R. S. 1849 c. 73 s. 7; R. S. 1858 c. 104 s. 7; R. S. 1878 s. 4016; Stats. 1898 s. 4016; 1925 c. 4; Stats. 1925 s. 321.04; 1969 c. 339.

Leave of court is not necessary to the bringing of an action for contribution between the sureties on an executor's bond. *Hardell v. Carroll*, 90 W 350, 63 NW 275.

It is not mandatory upon the court, in an application for leave to sue upon the bond of an executor, to grant the petition. Leave may be ex parte, or the court may in its discretion make an examination to determine whether or not it may be granted. *Estate of Hewitt*, 194 W 15, 215 NW 573.

321.05 History: R. S. 1849 c. 71 s. 12; R. S. 1849 c. 73 s. 9; R. S. 1858 c. 102 s. 12; R. S. 1858 c. 104 s. 9; R. S. 1878 s. 4017; Stats. 1898 s. 4017; 1925 c. 4; Stats. 1925 s. 321.05; Sup. Ct. Order, 245 W xi; 1969 c. 339.

321.06 History: R. S. 1849 c. 73 s. 10; R. S. 1858 c. 104 s. 10; R. S. 1878 s. 4018; Stats. 1898 s. 4018; 1925 c. 4; Stats. 1925 s. 321.06; 1969 c. 339.

321.07 History: R. S. 1849 c. 73 s. 12; R. S. 1858 c. 104 s. 12; R. S. 1878 s. 4019; Stats. 1898 s. 4019; 1925 c. 4; Stats. 1925 s. 321.07; 1969 c. 339.

321.08 History: R. S. 1849 c. 73 s. 11; R. S. 1858 c. 104 s. 11; R. S. 1878 s. 4020; Stats. 1898 s. 4020; 1925 c. 4; Stats. 1925 s. 321.08; 1969 c. 339.

CHAPTER 322.

Adoption of Adults.

322.01 History: 1955 c. 575; Stats. 1955 s. 322.01.