TITLE XX.

Real Property, and the Nature and Qualities of Estates Therein.

CHAPTER 230.

NATURE AND QUALITIES OF ESTATES IN REAL PROPERTY, AND RESTRICTIONS ON ALIENATION.

230.01 Enumeration of estates. Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance.

230.02 Estate in fee simple. Every estate of inheritance shall continue to be termed a fee simple or fee, and every such estate when not defeasible or conditional shall be a fee simple absolute or an absolute fee.

Note: If the deed of cemetery lots conveys an estate in land it conveys an estate of inheritance, which is one in fee simple under this section, and is assignable; and if such deed does not create an estate in land, the right of burial transferred by it to the grantees is a contractual right, which is a property right and is assignable. Feest v. Hillcrest Cemetery, Inc., 247 W 160, 19 NW (2d) 246.

230.03 Estate in fee tail. In all cases where any person or persons would if this act had not been passed, at any time hereafter become seized in fee tail of any lands, tenements or hereditaments by virtue of any devise, gift, grant or other conveyance heretofore made or hereafter to be made or by any other means whatsoever, such person or persons, instead of becoming seized thereof in fee tail, shall be deemed and adjudged to be seized thereof as an allodium.

230.04 Effect of conveyances by tenant in tail. Where lands, tenements or hereditaments heretofore have been devised, granted or otherwise conveyed by a tenant in tail and the person or persons to whom such devise, grant or other conveyance hath been made, his, her or their heirs or assigns hath or have, from the time such devise took effect or from the time such grant or other conveyance was made to the day of passing this act, been in the uninterrupted possession of such lands, tenements or hereditaments and claiming and holding the same under or by virtue of such devise, grant or other conveyance, they shall be deemed as good, legal and effectual, to all intents and purposes, as if such tenant in tail had, at the time of making such devise, grant or other conveyance, been seized of such lands, tenements or hereditaments allodially, any law to the contrary hereof notwithstanding.

230.05 Estates, how denominated. Estates of inheritance and for life shall be denominated estates of freehold; estates for years shall be denominated chattels real; and estates at will or by sufferance shall be chattel interests but shall not be liable as such to sale on execution.

230.06 Estates for life of third person. An estate for the life of a third person, whether limited to heirs or otherwise, is deemed a freehold only during the life of the

owner thereof, but after his death it is deemed a chattel real which is an asset in the hands of his personal representative. [*1941 c. 290*]

230.07 Division of estates as to time. Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy.

230.08 Estates in possession and in expectancy. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.

230.09 Estates in expectancy. Estates in expectancy are divided into:
(1) Estates commencing at a future day, denominated future estates; and
(2) Reversions.

230.10 Future estate. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

230.11 Remainders. When a future estate is dependent upon a precedent estate it may be termed a remainder, and may be created and transferred by that name.

230.12 Reversions. A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

230.13 Vested and contingent estates. Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right, by virtue of it, to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain. [*1931 c. 72 s. 2*]

Note: The law favors the early vesting of estates, and an estate or interest therein created by will vests at the time of the testator's death unless there is expressed in the will a reasonably clear intention to the contrary. The time of vesting of a postponed legacy depends upon whether merely the enjoyment thereof or the substance of the gift is postponed; where the postponement attaches to the substance the vesting is postponed, but where the postponement relates merely to the enjoyment the gift vests as of the date of the testator's death. Will of Fouks, 206 W 69, 238 NW 869.

Under a will devising a life estate in real estate to the testator's son, and providing that, in the event of the son's decease, the son's wife if living should have the property during her widowhood, and that if she should remarry or die or ceased to occupy the property the estate should vest in fee simple in the son's child or children then living, and that in default of such living child or children the estate should go to other named devisees, the interest of the son's child was only contingent and this contingent remainder could vest only after the termination of his father's life estate and on the termination of his mother's estate, so that, such child having predeceased his father, the remainder never vested in the child, and hence the child's surviving wife had no interest in the property as his heir at law. Malzahn v. Teagar, 235 W 631, 294 NW 36.

Where a will gave a life estate to the testator's widow, and provided that on her death the estate "shall descend" in equal shares to the testator's daughter and son, and to them and their heirs forever, the children of any deceased child to have the share which their parents would have taken if living, the estate in remainder to the testator's daughter and son vested at the death of the testator, although the enjoyment was postponed, and hence, on the death of the testator's daughter without children prior to the death of the testator's widow, the daughter's interest passed to her surviving husband as her only heir at law. [In re Albiston's Estate, 117 W 272; In re Moran's Will, 118 W 177; and Cashman v. Ross, 155 W 558, overruled so far as in conflict with the rule in Will of Roth, 191 W 366.] Will of Reimers, 242 W 233, 7 NW (2d) 857.

The provision giving the testator's estate remaining "at the time of the death of my wife" to the named executor, and authorizing him to dispose thereof as he saw fit, without any condition in the will that he must be alive when the testator's wife died, did not prevent the estate in the remainder from vesting in the executor during his lifetime, but merely postponed the use and enjoyment thereof, and gave the executor a vested estate on the testator's death although the executor predeceased the testator's widow. Estate of Wadleigh, 250 W 284, 26 NW (2d) 667.

230.14 Suspension of power of alienation. Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed. Limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property; provided, however, that this limitation upon interests in personal property shall not apply to any instrument which shall have taken effect prior to July, 1925.

Note: A devise of real property in trust which provided that the income of the trust estate should be paid to the testator's sister during her life, and that after her death the trust estate should be held for the benefit of her children until they arrived respectively at the age of 30 years, was not invalid as violating secs. 2038, 2039, Stats. 1909, the latter of which limited suspension of the absolute power of alienation to 2 lives in being at the creation of the estate and 21 years thereafter, where the trustee's power to sell any of the property comprising the trust estate was absolute and the matter rested as wholly within his discretion as if he were in fact the owner in fee simple. Will of Butter, 239 W 249, 1 NW (2d) 87.

230.15 Limit of suspension. The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the con-

tinuance of a life or lives in being at the creation of the estate and thirty years thereafter, except when real estate is given, granted or devised to a charitable use or to literary or charitable corporations which shall have been organized under the laws of this state, for their sole use and benefit, or to any cemetery corporation, society or association, nor shall this section apply to gifts, grants, devises or bequests absolute, limited or in trust, for the advancement of medical science, to a state society of physicians and surgeons incorporated under the laws of this state. [*1931 c. 72 s. 2*]

230.16 to 230.21 [*Repealed by 1931 c. 72 s. 1*]

230.22 Meaning of "heirs" and "issue." When a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.

Note: The words "heirs and assigns" are not necessary to the creation of an equitable servitude which will pass with the land, but the use of those words is a strong indication of the purpose of the grantor although not controlling. Clark v. Guy Drews Post, 247 W 48, 18 NW (2d) 322.

230.23 Limitations on chattels real. All the provisions in this chapter contained, relative to future estates, shall be construed to apply to limitations of chattels real as well as freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

230.24 Commencing in futuro. Subject to the rules established in the preceding sections of this chapter a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years and a remainder limited thereon.

230.25 Alternative estates. Two or more future estates may also be created to take effect in the alternative, so that if the first in order should fail to vest the next in succession shall be substituted for it and take effect accordingly.

230.26 Improbable contingency. No future estate, otherwise valid, shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.

230.27 Abridging precedent estate. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation and shall have the same effect as such a limitation would have by law.

230.28 Rule in Shelley's Case abolished. When a remainder shall be limited to the heirs or heirs of the body of a person to whom a life estate in the same premises shall be given the persons who, on the termination of the life estate, shall be the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers by virtue of the remainder so limited to them.

230.29 Remainders abridging first estate. When a remainder on an estate for life or for years shall not be limited on a contingency defeating or avoiding such precedent estate it shall be construed as intended to take effect only on the death of the first taker or the expiration by lapse of time of such term of years.

230.30 Rights of posthumous children. When a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if born before the death of the parents.

230.31 Effect of birth of, on future estates. A future estate depending on the contingency of the death of any persons without heirs or issue or children shall be defeated by the birth of a posthumous child of such person capable of taking by descent.

230.32 Expectant estates not defeated. No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise.

Note: The grantor's delivery to a husband and wife of a deed running to the husband and wife, during the wife's lifetime, and after her death to the children of the husband, parties of the second part, was a delivery to all of the second parties, so that whatever the husband and wife had caused to be vested in the children by such delivery they could not take away from the children. The deed is construed in accordance with the intent and meaning stated and hence to vest title to the premises after the death of the wife in the children. Mathy v. Mathy, 234 W 557, 291 NW 761.

230.33 When, may be defeated. Section 230.32 shall not be construed to prevent an expectant estate from being defeated in any manner or by any act or means which the party creating such estate shall, in the creation thereof, have provided or authorized; nor shall an expectant estate thus liable to be defeated be, on that ground, adjudged void in its creation.

230.34 Premature determination of precedent estate. No remainder valid in its creation shall be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterward happen the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

230.35 Qualities of expectant estates. Expectant estates are descendible, devisable and alienable in the same manner as estates in possession.

Note: This section allows the alienation of contingent remainders. First Wisconsin Trust Co. v. Taylor, 242 W 127, 7 NW (2d) 707.

230.36 Rents and profits. Disposition of the rents and profits of lands, to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this chapter in relation to future estates in land.

230.37 Accumulation of profits of lands. An accumulation of rents and profits of real estate for the benefit of one or more persons may be directed by any will or deed, sufficient to pass real estate, as follows:

(1) If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise it must be made for the benefit of one or more minors then in being and terminate at the expiration of their minority.

(2) If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise it shall commence within the time in this chapter permitted for the vesting of future estates and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

(3) For the sole benefit of a literary or charitable corporation which shall have been organized under the laws of this state, but such accumulation must terminate upon the expiration of twenty-one years from the time when the same shall be directed to commence.

Note: This section was not affected by the amendment to 230.14 relating to the suspension of the power of alienation of property. This section does not prohibit accumulations of income from personal property or property which must be considered personal, under the doctrine of equitable conversion which doctrine was applied in this case. In re Schilling's Will, 205 W 259, 237 NW 122.

230.38 Directions for accumulation void, when. If in either of the cases mentioned in section 230.37 the direction for such accumulation shall be for a longer time than is therein prescribed or than during the minority of the persons intended to be benefited thereby it shall be void as to such additional time, and all directions for the accumulations of rents and profits of real estate, except such as are herein allowed, shall be void.

230.39 Application of profits to support of children. When such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate and such infants shall be destitute of other sufficient means of support and education the circuit court, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education.

230.40 Rents, right of owner of next estate. When, in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation or of the ownership, during the continuance of which the rents and profits shall be undisposed of and no valid direction for their accumulation is given, such rents and profits shall belong to the person presumptively entitled to the next eventual estate.

Note: That the will made no provision for the disposition of the income from the trust estate except for two years following the death of the testator did not make the trust void, since the rents and profits belong to the person presumptively entitled to the next eventual estate. Will of Stack, 214 W 98, 251 NW 470.

A will, devising the real estate in trust to two of the testator's three sons for the lives of two sons named and for twenty-one years thereafter, and providing that at the termination of the trust the real estate should be divided equally among the sons, is construed as giving the sons who survived one of the named sons a vested remainder in the trust estate, subject to be divested by death prior to the termination of the trust; and the surviving sons were the presumptive owners of the next eventual estate in the trust property. Will of Stack, 222 W 1, 267 NW 284.

Under a will leaving the residue of the testator's estate in trust for 20 years for the benefit of his son and daughter and other adult persons, and expressing the wish that the farms and other properties included in the trust be operated for the estate, and directing that the trust income in excess of a certain amount should be accumulated, and that at the end of 20 years the trust should terminate and any real estate or securities should be converted into cash for distribution to residuary legatees, there was no absolute duty on the part of the trustees to sell any of the real estate, and no necessity for sale to carry out the scheme of the will, until the end of the trust period, and the testator's intent was that the real estate should be held in the trust; hence there was no "equitable conversion" of the real estate so as to remove the provision of the will for accumulation of income from the operation of 230.37 and 230.38, permitting an accumulation of profits of real estate only for the benefit of minors and certain corporations. The void accumulation of income constituted residue of the testator's estate undisposed of by the will, and it went to the

son and daughter either as intestate property because they were the heirs or to them as the persons "presumptively entitled to the next eventual estate" to be distributed as realized. Estate of Hustad, 236 W 615, 296 NW 74.

230.41 Expectant estate, when created. The delivery of the grant, where an expectant estate is created by grant, and where it is created by devise, the death of the testator, shall be deemed the time of the creation of the estate.

230.42 Expectant estates abolished. All expectant estates, except such as are enumerated and defined in this chapter, are abolished.

230.43 Severalty, joint tenancy, in common. Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy and in common; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of these statutes.

Note: A joint tenancy is not destroyed by one tenant contracting to transfer the whole property to a third person. Kurowski v. Retail Hardware M. F. Ins. Co., 203 W 644, 234 NW 900.

230.44 Estates in common. All grants and devises of land made to two or more persons, except as provided in section 230.45, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

Note: A husband and wife contracting to purchase land became joint tenants and could select a homestead from such land. Eaton Center Co-op. C. Co. v. Kalkofen, 209 W. 170, 244 NW 620.

A deed, introductory clause of which recited conveyance to two persons "and the survivor of either," held to create estate in joint tenancy; there being no irreconcilable conflict between such clause and the clause conveying land to grantees, their heirs and assigns. Weber v. Nedin, 210 W 39, 246 NW 307.

Where the grantee refused to accept the deed to him alone and insisted upon having a deed running to himself and wife and such a deed was executed and accepted, it created a joint tenancy. Wanek v. Kott, 228 W 314, 280 NW 304.

Estates by the entirety do not exist. In re Richardson's Estate, 229 W 426, 282 NW 585.

A deed to sisters reciting in the introduction that it was to them "as tenants in the entirety" elsewhere describing the grantees as "the said parties of the second part, their assigns, the survivor, her heirs and assigns forever" created a joint tenancy. In re Richardson's Estate, 229 W 426, 282 NW 585.

230.45 (3), Stats. 1943, modifies the last clause of 230.44, providing that an instrument must "expressly" declare that a joint tenancy is being created, even though the 4 unities are present. Under 230.45 (3), if the language used is such as to "evince" an intent on the part of the grantor to create a joint tenancy, it is a sufficient declaration. Hass v. Hass, 248 W 212, 21 NW (2d) 398, 22 NW (2d) 151.

Tenants in common as well as joint tenants hold jointly, and hence the word "jointly" in a deed does not connote joint tenancy as does the word "survivor." The type of survivorship incident to a tenancy in common for the joint lives of the parties with the remainder in the survivor, which may be created by deed, cannot be destroyed by the act of one of the parties, whereas the right of survivorship incident to a joint tenancy is destroyed by a conveyance by one joint tenant of his interest in the property. Hass v. Hass, 248 W 212, 21 NW (2d) 398, 22 NW (2d) 151.

230.45 Joint tenancies. (1) Section 230.44 shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

(2) Any deed, transfer or assignment of real or personal property from husband to wife or from wife to husband which conveys an interest in the grantor's lands or personal property and by its terms evinces an intent on the part of the grantor to create a joint tenancy between grantor and grantee shall be held and construed to create such joint tenancy, and any husband and wife who are grantor and grantee in any such deed, transfer or assignment heretofore given shall hold the property described in such deed, transfer or assignment as joint tenants.

(3) Any deed to 2 or more grantees, including any deed in which the grantor is also one of the grantees, which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy. [*1933 c. 437; 1945 c. 195; 1947 c. 140*]

Note: Deed unqualifiedly conveying land to husband and wife created joint tenancy; hence deceased wife's heirs were not entitled to partition of land as tenants in common with husband's second wife as devisee under husband's will. Haas v. Williams, 218 W 429, 261 NW 216.

A joint tenancy can be severed and the right of survivorship defeated by a joint tenant conveying or alienating his interest, and a joint tenancy does not prevent the legislature from providing that a lien incurred against the interest of a joint tenant with his consent during his lifetime may be enforced against the property following his decease. Goff v. Yauman, 237 W 643, 298 NW 179.

Whether a severance of a joint tenant's interest is effected by the joint tenant's voluntary conveyance to a third party, who thereby becomes a tenant in common with the other cotenants, or by such a conveyance to a joint tenant, who becomes the sole owner (if the conveyance is not invalid as to others than the parties thereto), there is severed and destroyed by the conveyance the unity of title and, consequently, the joint tenancy for all purposes, including the right of survivorship. Campbell v. Drozdowicz, 243 W 354, 10 NW (2d) 158.

Once property held by husband and wife in joint tenancy ceases to be a homestead, the husband can sever the joint tenancy by a conveyance of his interest. Radtke v. Radtke, 247 W 330, 19 NW (2d) 169.

230.45 (3), Stats. 1943, did not apply as to a deed by the owner of real estate to herself and her son of "a life estate as joint tenants during their joint lives and an absolute fee forever in the remainder to the survivor of

them," since the grantor could not grant to herself or convey any interest or estate to herself and the unities of time and title were absent, but the deed, although not creating a joint tenancy, did create a tenancy in common for the joint lives of the parties with a vested remainder in the survivor, and the intent of the parties thereby given effect; and the right of the son to the personal property described in the deed was governed by the same considerations, so that on the death of the mother the son became the sole owner of the personal property. Hass v. Hass, 248 W 212, 21 NW (2d) 398, 22 NW (2d) 151.

The signing of a land contract by a husband and wife for the sale of premises owned by them as joint tenants did not constitute a severance of the joint estate, and the husband's interest in joint tenancy passed to his wife on his death, so that the wife, having signed the land contract of her own free will, was bound by it to execute a warranty deed on payment of the amount of her equity, and her deed would pass her after-acquired title. Simon v. Chartier, 250 W 642, 27 NW (2d) 752.

230.455 Liens not to defeat right of survivorship. No real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to the provisions of chapter 289 or other lien or charge upon the joint tenancy interest of a joint tenant to any joint tenancy shall defeat the right of survivorship in such joint tenancy, but the joint tenancy interest of such joint tenant to which upon his death the surviving joint tenant succeeds shall be subject to such real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to the provisions of chapter 289 or other lien or charge. All judgments, certificates or decrees of courts of competent jurisdiction heretofore entered terminating joint tenancies or assigning such property under a will or an administration of the estate of any such beneficiary shall be binding upon all interested parties 2 years after August 22, 1945 unless within said 2-year period application is made to such court to set aside or modify such judgment, certificate or decree. [*1945 c. 549; 1947 c. 143*]

230.46 Nominal conditions disregarded. When any conditions annexed to a grant or conveyance of land are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.

230.47 Certificate of the termination of life estate and survivorship. (1) Whenever a person has died or shall hereafter die who was during his or her lifetime entitled to an estate for life in any real estate in this state or whenever one joint tenant or tenant by the entirety in any real estate has died or may hereafter die leaving surviving his cotenant, upon application by duly verified petition of any person interested in such real estate to the county court of the residence of the deceased (or if the deceased was a nonresident, of the county where the real estate is situated), the county judge may issue under the seal of the county court, a certificate, setting forth the fact of the death of such life tenant, or of such joint tenant, or tenant by the entirety, and the termination of such life estate, or the right of survivorship of any joint tenant or tenant by the entirety and other facts essential to a determination of the rights of the parties interested, which certificate when recorded in the office of the register of deeds of the county in which such real estate is situated shall be prima facie evidence of the facts therein recited.

(2) An administrator or executor shall include in his inventory the interest which the decedent owned as such joint tenant, or tenant by the entirety, or life estate before his death. The county court shall adjudicate in the final judgment or order for assignment regarding the termination of such joint tenancy, tenancy by the entirety, or life estate and regarding such other facts as are essential to a full and final determination of the rights of the parties interested. [*1945 c. 286*]

230.48 Termination of joint tenancy in personalty. (1) Upon the death of one or more or all joint tenants or tenants by the entirety, in any real estate mortgage or in any real estate mortgage note, bank account, stock, bond, chose in action or other personal property, any surviving cotenant or any person interested in such real estate mortgage or real estate mortgage note, bank account, stock, bond, chose in action or other personal property may petition the county court of the county where decedent resided during his lifetime or if the deceased was a nonresident, of the county where the property is located for a certificate of the termination of either such tenancy and of his survivorship. Upon such application the same proceedings shall be had, and a similar certificate issued as is provided in section 230.47 and with like effect.

(2) An administrator or executor shall include in his inventory the interest which the decedent owned as such joint tenant, or tenant by the entirety in any real estate mortgage note, bank account, stock, bond, chose in action or other personal property before his death. The county court shall adjudicate in the final judgment or order for assignment regarding the termination of such joint tenancy, or tenancy by the entirety and regarding such other facts as are essential to a full determination of the rights of the parties interested. [*1935 c. 69; 1945 c. 355*]