CHAPTER 331.

MISCELLANEOUS GENERAL PROVISIONS.

331.01 What actions survive. In addition to the actions which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereof, for the recovery of the possession of real estate and for the unlawful withholding of the possession thereof, for assault and battery, false imprisonment or other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance thereof, or to quiet the title thereto, and for a specific performance of contracts relating to real estate. Actions for wrongful death shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person.

331.02 Measure of damages against executor. When any action mentioned in section 331.01 shall be prosecuted to judgment against the executor or administrator the plaintiff shall be entitled to recover only for the value of the goods taken or for the damages actually sustained, without any vindictive or exemplary damages or damages for alleged outrage to the feelings of the injured party.

331.03 Recovery for death by wrongful act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state.

Where a husband and wife and child were riding in an automobile driven by the husband when it collided with another car and the wife was instantly killed and there was no cause of action in favor of her estate, and the child died a few days later, and the husband died several months later, and no action had been commenced before the death of the husband, the parents of the deceased wife were entitled to bring an action against the driver of the other car for the wrongful death of their daughter, for pecuniary loss and for loss of society; it being immaterial that the husband, if a joint tortfeasor, had no right of action for such death, since the parents' right of action was not a transfer of the husband's right but was a new and independent right given by the statutes. Arendt v. Kratz, 258 W 437, 46 NW (2d) 219.

Where the estate of a deceased injured person had no cause of action under 331.03, 331.04, relating to actions for wrongful death, such sections gave causes of action to the surviving spouse, and if that spouse died without exercising the right there was no survival of the spouse's right or transfer of it to his or her personal representatives or heirs, but a new right was established in the

relative of the injured person next in order as provided by 331.04; and if that beneficiary died in turn without having begun an action, the relative next in order to him obtained his own right to sue, and so on until the chain of statutory beneficiaries came to an end. Under such statutes, each beneficiary in turn was to proceed for himself for the damages he sustained and he did not recover either on the cause of action or for the loss sustained by any preceding beneficiary, whether the claim was for pecuniary loss or for loss of society. Arendt v. Kratz, 258 W 437, 46 NW (2d) 219.

If the provision "that such action shall be brought for a death caused in this state" is construed to deny the right to bring in Wisconsin an action for wrongful death, based on a death occurring in another state, in which state a statutory right of action for such wrongful death exists, the statute violates the full faith and credit clause (Art. IV, Sec. 1) of the federal constitution. Hughes v. Fetter, 341 US 609; 95 L.Ed. 1212; 71 S. Ct. 980 (reversing Hughes v. Fetter, 257 W 35, 42 NW (2d) 452).

331.031 Recovery from estate of wrongdoer. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case, the wrongdoer who would have been liable if death had not ensued, although such wrongdoer shall die prior to the time of death of such injured person, shall be liable to an action for damages notwithstanding his prior death and notwithstanding the death of the person injured; provided that such action shall be brought for a death caused in this state. Any right of action which may accrue by such injury to the person of another although the death of the wrongdoer occurred prior thereto shall be enforced by bringing an action against the executor or administrator or personal representative of such deceased wrongdoer.

331.04 Plaintiff in wrongful death action; damages limited. (1) An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.

(2) The amount recovered shall belong and be paid to the spouse of the deceased; if no spouse survives, to the deceased's lineal heirs as determined by section 237.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien wife and minor children shall be entitled to the benefits of this section.

(3) If separate actions are brought for the same wrongful death, they shall be consolidated on motion of any party. Unless such consolidation is so effected that a single judgment within the limits hereinafter provided may be entered protecting the defendant or defendants and so that satisfaction of such judgment shall extinguish all liability for the wrongful death, no action shall be permitted to proceed except that of the personal representative.

(4) Judgment for damages for pecuniary injury from wrongful death shall not exceed $15,000. Additional damages not to exceed $2,500 for loss of society and companionship may be awarded to spouse or parents of deceased. In any case where a decedent leaves dependent children under 15 years of age, the above maximum limit for pecuniary loss recoverable shall be increased $1,500 on account of each child but not exceeding a total increase of $7,500.

(5) If the personal representative brings the action he may also recover funeral expenses; if a relative brings the action he may recover funeral expenses on behalf of himself or of any relative specified in this section who has paid or assumed liability for such expenses.

(6) Where the wrongful death of a person creates a cause of action in favor of the decedent's estate and also a cause of action in favor of a spouse or relatives as provided in this section, such spouse or relatives may waive and satisfy the estate's cause of action in connection with or as part of a settlement and discharge of the cause of action of the spouse or relatives.

(7) Damages found by a jury in excess of either maximum amount specified above shall be reduced by the court to such maximum. The aggregate of such maximum amounts shall be diminished under the provisions of section 331.045 if the deceased or person entitled to recover is found negligent.

History: 1951 c. 634.

An award of $2,500 to a 30-year-old farmer for loss of the services of his 19-year-old wife, killed in an automobile collision, was inadequate under the facts and in view of the present economic value of the dollar, and the trial court was warranted in determining that the sum of $5,000 was the least amount that an unprejudiced jury, properly instructed, would award. Wolfe v. Briggs, 260 W 443, 50 NW (2d) 680.

(3) does not require that an action brought by a husband for the death of his wife in an accident involving an automobile operated by the plaintiff be temporarily abated on the ground that the wife's estate had a separate cause of action for damages to the car because the title to the car was in her name; there being no evidence that the car was damaged or that the wife's estate claimed to have a cause of action therefor, and such a cause of action not being one for wrongful death. Dahl v. Harwood, 263 W 1, 56 NW (2d) 557.

Under evidence as to the decedent's earnings of close to $500 per month, as to his life expectancy of 34 years, and as to his stability and good habits, the sum of $15,000 fixed by the jury as the value of the

support and financial benefit which his widow probably would have received if he had lived was not excessive, and did not indicate passion or prejudice on the part of the jury. Johnson v. Sipe, 263 W 191, 56 NW (2d) 852.

The purpose of 331.04 (1), (3), as amended so as to provide that an action for wrongful death may be brought by the personal representative of the deceased person or by the deceased's beneficiary or both, but that separate actions for the same death shall be consolidated so that satisfaction of a single judgment shall extinguish all liability therefor, is to alleviate the hardships that were frequently suffered by beneficiaries under the old procedure and to avoid a multiplicity of suits which might be brought, and thereunder the personal representative may bring an action in behalf of the relatives for damages due to the death. Where the personal representative brought an action for pain and suffering of a deceased widower fatally injured in an accident, and also for pecuniary loss suffered by the deceased's children, and the personal representative was authorized to bring such action by all of the children except one, and such other child is barred by operation of the statute of limitations (330.21 (3)) from starting an action, a contention of the defendant on appeal, that where only an estate action is commenced there is no protection for the defendant against actions by beneficiaries and that the judgment will not be binding on them since they are not parties, is moot. Swanson v. State Farm Mut. Automobile Ins. Co. 264 W 274, 58 NW (2d) 664.

Under the circumstances shown, $1,000 is the highest amount at which a fair-minded jury, properly instructed, would probably assess the mother's damages for pecuniary loss for the death of her 18-year-old daughter, instead of the lowest amount as recited in the trial court's order reducing the jury's award to $1,000, and the order should have given to the defendants the option to consent to the entry of judgment for such amount or submit to a new trial, instead of giving the option to the plaintiff, and such order is modified by the supreme court to so provide. Costello v. Schult, 265 W 243, 61 NW (2d) 296.

Where the evidence in an action for the death of an 18-year-old daughter established that the daughter, employed and living with her widowed mother, had paid nothing for her maintenance and had otherwise contributed very little to the mother, and there was nothing in the record to warrant an inference that the daughter would have contributed more before or after reaching her majority, the jury's award of $5,000 for pecuniary loss was excessive, and was properly reduced by the trial court to $1,000. Costello v. Schult, 265 W 243, 61 NW (2d) 296.

331.045 Comparative negligence; when bars recovery. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

See note to 85.40, citing Mitchell v. Williams, 258 W 351, 46 NW (2d) 325.

Where, in an action by an automobile occupant against the drivers of both automobiles involved in a collision, the jury found the one defendant negligent as to lookout and as to control, but found that such negligence was not causal, and the jury nevertheless apportioned 40 per cent of the combined negligence of both defendants to such defendant, the verdict was inconsistent as to the defendants, requiring a new trial as between them. Wojan v. Igl, 259 W 511, 49 NW (2d) 420.

Ordinarily, the existence of negligence and the comparison of the negligence of adverse parties are questions for the jury. When it appears as a matter of law that the negligence of the plaintiff is as great as or greater than that of the defendant, it is the duty of the court to so hold, but instances of this kind are rare. Wasikowski v. Chicago & N. W. R. Co. 259 W 522, 49 NW (2d) 481.

The supreme court will rarely disturb a jury's comparison of the negligence of the parties, and the instances in which it can be said as a matter of law that the negligence of the plaintiff is equal to or greater than that of the defendant will ordinarily be limited to cases where the negligence of each is of precisely the same kind and character, but each case must be considered on its peculiar facts. Quady v. Sickl, 260 W 348, 51 NW (2d) 3, 52 NW (2d) 134.

In an action for injuries sustained by a 5-year-old boy when he ran out into the path of the defendant's automobile within a street intersection while following an older boy who had succeeded in crossing in front of the car, wherein the jury found both the injured boy and the defendant motorist causally negligent as to lookout but charged 62 per cent of the total causal negligence to the boy and only 38 per cent to the motorist, the granting of a new trial in the interest of justice was not an abuse of discretion under the evidence. What is ordinary care in the case of an adult, experienced driver is different from ordinary care on the part of a child so young that he has barely reached an age where he can be held to any standard of care whatever. Hanson v. Binder, 260 W 464, 50 NW (2d) 676.

The duty of parents to protect their child is the duty of both parents, and it is not divisible so that either parent has half a duty, or some other fraction, for the breach of which he or she may be penalized, to that extent but no more. In an action by parents against the driver of a truck which ran over and killed the plaintiff's 20-month-old child in a driveway at a cheese factory operated by the father and also used as family living quarters, the evidence required the conclusion that the duty of the parents to protect the child was joint, that the opportunity to protect was equal, and that as a matter of law neither the obligation nor the breach of it was divisible, so that the trial court correctly required the jury to compare the negligence of the truck driver with that of the parents as a unit and not with that of each parent separately. Reber v. Hanson, 260 W 632, 51 NW (2d) 505.

The jury's findings that the plaintiff pedestrian's causal negligence, in respect to lookout, was only 10 per cent, and that the defendant motorist's causal negligence, in respect to lookout and failing to yield the right of way, was 90 per cent, did not fix such grossly disproportionate percentages in the circumstances as to justify the supreme court in substituting its judgment for that of the jury and the trial court. Jankovich v. Arens, 262 W 210, 54 NW (2d) 909.

The evidence supported the jury's findings that both drivers involved in a collision were causally negligent as to management and control and that the causal negligence of the driver-son with whom the plaintiff-mother was riding was as great as the causal negligence of the driver of the other car, so that the driver-son could not recover from the other driver, and hence, since the causal negligence of the driver-son was imputed to the plaintiff-mother because they were engaged in a joint venture in their jointly owned car at the time of the collision, the plaintiff-mother could not recover from such other driver. Johnsen v. Peirce, 262 W 367, 55 NW (2d) 394.

See note to 270.27, citing Topham v. Casey, 262 W 580, 55 NW (2d) 892

The combined negligence of the plaintiff, who was in the car and was negligent in respect to lookout, and of the plaintiff's wife who was pushing the car and was negligent in respect to her position on the highway when struck by the defendant's

car, did not equal or exceed the defendant's negligence in respect to lookout, management and control, and speed, as a matter of law, and the issue of comparative negligence was solely for the jury. Dahl v. Harwood, 263 W 1, 56 NW (2d) 557.

This section applies to actions under 81.15, citing Trobaugh v. Milwaukee, 265 W 475, 61 NW (2d) 866.

There should be applied in a safe-place case a test different from that to be applied in a common-law negligence case, since 101.01 (11) imposes a higher duty on an employer than does the law respecting common-law negligence. Maus v. Bloss, 265 W 627, 62 NW (2d) 708.

If the issue of causal negligence is for the jury and the party inquired about is exonerated but the jury in its comparison of negligence erroneously attributes to such party some degree of causal negligence, the verdict is inconsistent, and a new trial must be granted. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

If it is determined that the party inquired about is free from causal negligence as a matter of law and the jury has exonerated him but has also attributed to him some degree of casual negligence, then the trial court should strike the answer to the question on comparison as surplusage and grant judgment accordingly. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

If but one element of negligence is submitted to the jury and the court can find as a matter of law that the party inquired about is guilty of causal negligence and the jury finds that he is not, and in answer to the question on comparative negligence attributes to him some degree of causal negligence, the court should change the answer to the question which inquires as to his conduct from "No" to "Yes" and permit the jury's comparison to stand with judgment accordingly. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

Counsel should request the trial court to send the jury back to resolve an inconsistent verdict, but the failure of counsel to do so does not necessarily waive the inconsistency. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

The apportionment of the negligence of parties involved in an automobile collision is ordinarily for the jury, and instances in which a court can rule that their negligences are equal as a matter of law will be extremely rare, and will ordinarily be limited to cases where the negligence of each is of precisely the same kind and character. Kraskey v. Johnson, 266 W 201, 63 NW (2d) 112.

Where a driver, because of failure to look, did nothing to avoid a collision, his negligence is solely in regard to lookout and not management and control. Weber v. Mayer, 266 W 241, 63 NW (2d) 318.

A child less than 5½ years old is incapable of contributory negligence as a matter of law. Shaske v. Hron, 266 W 384, 63 NW (2d) 706.

Under proper circumstances, a trial court may decide as a matter of law that the negligence of one party is equal to or exceeds that of another; but, nevertheless, comparison of negligence is peculiarly a jury, not a court, question; and the supreme court cannot approve an alteration by the trial court of less than 7 per cent in the percentages allotted by the jury, when thereby the liability of a party is not affected in any respect except the amount payable. McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

Under the evidence in an action arising out of a collision betwen a truck and a northbound station wagon just south of a highway intersection, the driver of the truck, killed in the accident, was causally negligent as a matter of law in respect to the manner in which he turned to the left and proceeded across the northbound lane of the highway, and such negligence contributed more to the accident as a matter of law than the negligence, if any, of the northbound driver in respect to lookout. Donahue v. Western Casualty & Surety Co. 268 W 193, 67 NW (2d) 265.

Where the driver of a tractor-trailer unit attempted to turn his vehicle around at night on an incline in a no-passing zone within 200 feet from the brow of a hill, and the jury determined on conflicting evidence that he was negligent in failing to give adequate warning to the driver of a vehicle which came over the hill, the negligence of the latter driver in colliding with the stalled vehicle was not at least 50 per cent of the total negligence as a matter of law, and the comparison of negligence was properly for the jury to determine. Jennings v. Mueller Transportation Co. 268 W 622, 68 NW (2d) 565.

Where the evidence was sufficient to sustain findings of causal negligence against the plaintiff guest and against the defendant host, but the evidence did not sustain a finding of 10 per cent causal negligence against the defendant driver of the truck involved, a new comparison of negligence must be had between the plaintiff guest and the defendant host. Callan v. Wick, 269 W 68, 68 NW (2d) 438.

Question of comparative negligence is for jury, and courts are reluctant to change jury's apportionment. In this case, involving motorist and pedestrian crossing country highway, 50-50 apportionment sustained. Cherney v. Holmes, 185 F (2d) 718.

If plaintiff's negligence is established comparison of negligence is ordinarily for jury. Cases where it can be said that plaintiff's negligence is equal to or greater than defendant's will ordinarily be limited to those where negligence of each is of same kind and character. Lang v. Rogney, 201 F (2d) 88.

Where evidence shows that overtaken driver violated 85.16 (2) in not seeing that he could deviate from lane safely and 85.175 (1) in not seeing that he could turn safely, he was guilty of negligence in management and control and such finding did not duplicate finding of negligence in lookout. Werner Transfer Co. v. Zimmerman, 201 F (2d) 687.

331.05 Damages in actions for libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

(2) Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The

first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

History: 1951 c. 651.

331.055 Gaming contracts void. All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances or other securities, where the whole or any part of the consideration of such promise, agreement, note, bill, bond, mortgage, conveyance or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be absolutely void; provided, however, that contracts of insurance made in good faith for the security or indemnity of the party insured shall be lawful and valid.

History: 1955 c. 696 s. 198.

331.056 Recovery of money wagered. Any person who, by playing at any game or by betting or wagering on any game, election, horse or other race, ball playing, cock fighting, fight, sport or pastime or on the issue or event thereof, or on any future contingent or unknown occurrence or result in respect to anything whatever, shall have put up, staked or deposited with any stakeholder or third person any money, property or thing in action, or shall have lost and delivered the same to any winner thereof may, within 3 months after such putting up, staking or depositing, sue for and recover the same from such stakeholder or third person whether such money, property or thing in action has been lost or won or whether it has been delivered over by such stakeholder or third person to the winner or not, and may, within 6 months after any such delivery by such person or stakeholder, sue for and recover such money, property or thing in action from the winner thereof if the same has been delivered over to such winner; and if he shall not so sue for and recover such money, property or thing in action within the time above limited then any other person may, in his behalf and in his name, sue for and recover the same for the use and benefit of his family or his heirs, in case of his death, from such stakeholder or third person if the same is still held by him, within 6 months after such putting up, staking or depositing, or from the winner thereof within one year from the delivery thereof to such winner.

History: 1955 c. 696 s. 196.

331.057 Action against judicial officer for loss caused by misconduct. Any judicial officer who causes to be brought in a court over which he presides any action or proceeding upon a claim placed in his hands as agent or attorney for collection shall be liable in a civil action to the person against whom such action or proceeding was brought for the full amount of damages and costs recovered on such claim.

History: 1955 c. 696.

331.06 Recovery of divisible personalty. When personal property is divisible and owned by tenants in common and one tenant in common shall claim and hold possession of more than his share or proportion thereof his cotenant, after making a demand in writing, may sue for and recover his share or the value thereof; and the court may direct the jury, if necessary, in any such action to find what specific articles or what share or interest belongs to the respective parties, and the court shall enter up judgment in form for one or both of the parties against the other, according to such verdict.

331.07 Set-offs. In the following cases a demand by one party may be set off against and as a defense, in whole or in part, to demands by the other:

(1) It must be a demand arising upon a judgment or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other contract having a penalty the sum equitably due by virtue of its conditions only shall be set off.

(2) It must be due to him in his own right, either as being the original creditor or payee or as being the assignee and owner of the demand.

(3) It must have existed at the time of the commencement of the action, and must then have belonged to the party claiming to set off the same.

(4) It can be allowed only in actions founded upon demands which could themselves be the subject of set-off according to law.

(5) If the action or counterclaim be founded upon a contract, other than a negotiable promissory note or bill of exchange, which has been assigned to the party a demand existing against such party or any assignor of such contract, at the time of his assignment thereof and belonging to the opposite party, in good faith before notice of such assignment, may be set off to the amount otherwise recoverable upon such contract if the demand be such as might have been set off against the party or assignor while the contract belonged to him.

(6) If the action be upon a negotiable promissory note or bill of exchange which has been assigned to the party after it became due a set-off to the extent of the amount otherwise recoverable thereon may be made of a demand existing against any person who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor while the note or bill belonged to him.

(7) Judgments for the payment of money may be set off by the court, pro tanto, when the parties in interest are identical, upon motion, in the action in which the mover is the judgment debtor and notice of motion and proof of service thereof filed in said action shall stay execution till the motion is disposed of and any assignment during said time shall not prejudice the rights of any party. If the actions are in different courts, the moving party shall, at or prior to the entry of the order of set-off, tender to the other party a proper satisfaction.

331.08 Set-off in actions by trustees, etc. If the party against whom the set-off is claimed be a trustee or a person expressly authorized by statute to sue so much of a demand existing against those whom the party represents or for whose benefit he sues may be set off as will satisfy the claim, if the same might have been set off in an action by those beneficially interested.

331.09 Set-off in actions by executors, etc. In actions brought by executors and administrators demands existing against their testators or intestates, and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.

331.10 Set-off in actions against same. In actions against executors and administrators and against trustees and others sued in their representative character the defendants may set off demands belonging to their testators or intestates or those whom they represent, in the same manner as the persons so represented would have been entitled to set off the same in an action against them.

331.11 Judgment on set-offs. If the amount of a set-off, duly established, be equal to the plaintiff's debt or demand judgment shall be entered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand the plaintiff shall have judgment for the residue only.

331.12 Judgment for balance. If there be found a balance due from the plaintiff in the action to the defendant judgment shall be rendered for the defendant to the amount thereof; but no such judgment shall be rendered against the plaintiff for any balance due from any other person.

331.13 How set-off pleaded. In actions in courts of record a set-off claimed by the defendant shall be pleaded as a counterclaim and regulated by the rules of pleading and practice applicable to counterclaims. When a counterclaim is upon a cause of action derived by assignment a set-off of a demand against the assignor, and set-off which in any case may be made to a counterclaim, shall be pleaded, by reply, as a defense to the counterclaim.

The pleadings and affidavits on the plaintiff's motion for summary judgment in an action to recover on a promissory note presented issues of fact which could not be determined on such a motion. The sufficiency of a pleading is not determined on a motion for summary judgment where it appears that issues of fact are presented. Schneeberger v. Dugan, 261 W 177, 52 NW (2d) 150.

In an equitable action for an accounting, the defendant, to have the advantage of any balance that may be found in his favor, need not plead a setoff or counterclaim. Miller v. Joannes, 262 W 425, 55 NW (2d) 375.

331.14 Tender may be pleaded. The payment or tender of payment of the whole sum due on any contract for the payment of money, although made after the money has become due and payable, may be pleaded to an action subsequently brought in like manner and with the like effect as if such tender or payment had been made at the time prescribed in the contract.

331.15 After action. A tender also may be made after an action is brought on such contract of the whole sum then due thereon, with the legal costs of suit incurred up to the time, at any time before the action is called for trial. It may be made to the plaintiff or his attorney, and if not accepted the defendant may plead the same by answer or supple-

mental answer, in like manner as if it had been made before the commencement of the action, bringing into court the money so tendered for costs as well as for debt or damages.

331.16 Proceedings on acceptance of tender. If such tender be accepted the plaintiff or his attorney shall, at the request of the defendant, sign a stipulation of discontinuance of the action for such reason and shall deliver it to the defendant; and also a certificate or notice thereof to the officer who has any process against the defendant, if requested; and if any further costs shall be incurred for any service made by the officer after tender accepted and before he receives notice thereof the defendant shall pay the same to the officer or the tender shall be invalid.

331.17 Involuntary trespass. A tender may also be made in all cases of involuntary trespass, except timber trespass as defined in section 26.04, before action is commenced; and when in the opinion of the court or jury a sufficient amount was tendered to the party injured, his agent or attorney for the trespass complained of, judgment shall be entered against the plaintiff for costs; provided, that the defendant kept his tender good by paying the money into court at the trial for the use of the plaintiff.

331.171 Payment into court of tender; record of deposits. (1) When tender of payment in full is made and pleaded, the defendant shall pay the same into court before the trial of the action is commenced and notify the opposite party in writing, or be deprived of all benefit of such tender. When the sum so tendered and paid into court shall be sufficient, the defendant shall recover the taxable costs of the action, if the tender was prior to the commencement of the action; and he shall recover such costs from the time of the tender, if the tender was after suit commenced.

(2) When any party, pursuant to an order or to law, deposits any money or property with the clerk of court, such clerk shall record in the minute book the fact of such deposit, describing the money or property and stating the date of the deposit, by whom made, under what order or for what purpose and shall deliver a certificate of such facts to the depositor, with the volume and page of the record indorsed thereon.

331.19 When legal notice published in adjoining county. Whenever a legal notice is required by law to be published in a newspaper in any county and no public newspaper shall be printed therein, or when there shall be but one such newspaper and the publisher thereof shall refuse to publish such notice, such notice shall, unless otherwise specially provided, be deemed required by law to be published in a newspaper printed in an adjoining county, if there be any such; and proof by affidavit of the reason why such publication was made in an adjoining county shall accompany the proof of publication or the order for publication, when any is necessary, may be made or amended by the court or judge so as to designate a newspaper in an adjoining county, upon affidavit showing the necessity therefor. Whenever publication is made in an adjoining county, under this section, copies of the notice shall be posted in at least three public places in the first county. Whenever a legal notice is required by law to be published in a newspaper in any county having a village or city situated partly in said county and partly in an adjoining county where there is no newspaper printed in such village or city within the county first mentioned, but there shall be a newspaper published in such village or city within such adjoining county, such notice may be published in such last mentioned newspaper, and no copies of such notice need be posted, but such newspaper publication shall be sufficient.

331.20 Legal notices, newspapers eligible to publish. (1) No publisher of any newspaper or other medium of distribution in the state of Wisconsin shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice, advertisement or report of any kind or description required to be published by or in pursuance to any law or by order of any court unless, for at least two years immediately before the date of such notice, advertisement or report, such newspaper has had all the requirements enabling it to be entered by the United States post office department as entitled to second class mailing privileges and has had a bona fide paid circulation to actual subscribers of not less than three hundred copies at each publication, if in villages or in cities of the third and fourth class, and one thousand copies in cities of the first and second class, and further that such newspaper shall have been regularly and continuously published in such city, village, township or county from which such legal notice, advertisement or report is received, for at least two years immediately before the date of such notice, advertisement or report, providing that the two years' requirement shall not apply to papers in existence in their present location on May 24, 1931. A newspaper in the contemplation of this section is a publication appearing at regular intervals, which shall be at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, and designed for the information of the general reader. Such definition shall include a daily newspaper published in a county having a population of five hundred thousand or more, devoted principally to business

news and publishing of records, which has been designated by the courts of record of said county for publication of legal notices for a period of six years or more immediately prior to January 1, 1931.

(2) Any person charged with the duty of causing legal notices, advertisements or reports to be published, and who shall cause any legal notice, advertisement or report, to be published in any newspaper or any other publication not eligible to so publish under the requirements of subsection (1) hereof, or who shall fail to cause such legal notice, advertisement or report to be published in any medium whatsoever, shall be guilty of a misdemeanor, and shall be punished by a fine of not to exceed the sum of one hundred dollars for each offense. Every daily publication of such newspaper or other publication containing such legal notice, advertisement or report, or in which such notice, advertisement or report should have been published according to law, shall constitute a separate offense hereunder.

(3) When any newspaper in the state of Wisconsin which on January 1, 1942, shall have been eligible under the requirements of subsection (1) to have published therein legal notices, advertisements or reports required to be published by or in pursuance to any law or by order of any court, and which shall thereafter for any cause attributable to the present war lose such eligibility, the publisher thereof may, any time thereafter before the expiration of one year after the termination of the present war, as proclaimed by the President or Congress of the United States, resume publishing in such newspaper any such legal notices, advertisements or reports and make charges therefor so long as such newspaper shall at the time of such resumption and thereafter when such notices, advertisements or reports are published therein, have all the requirements enabling it to be entered by the United States post-office department as entitled to second class mailing privileges, a bona fide paid circulation to actual subscribers as required in subsection (1), and shall be regularly and continuously published in the city, village, township or county from which such legal notices, advertisements or reports are received. The provisions of this subsection shall supersede any provision of law in conflict therewith.

See note to 176.09, citing 39 Atty. Gen. 347.

331.21 Discontinuance of paper before publication completed. Whenever a legal notice shall be required or ordered to be published in a particular newspaper in any county and such newspaper shall cease to be printed and published in said county before the publication of such legal notice shall be commenced, or when commenced shall so cease before such publication is completed, the order for publication, when one is required in the first instance, may be amended by order of the court or judge, on proof of the fact by affidavit, so as to designate another newspaper, as may be necessary; and if no order is required in the first instance such publication may be made or completed in any other newspaper; and any time during which such notice shall be published in the first newspaper shall be reckoned a part of the time required for the publication thereof, proof of which may be made by affidavit of any person acquainted with the facts. The second newspaper may be one published in an adjoining county in the cases mentioned in section 331.19.

331.22 Change of name of paper. Whenever a legal notice shall be required or ordered to be published in a particular newspaper and the name of such newspaper shall be changed before such publication is commenced or before it shall be completed the publication shall be made or continued in the newspaper under its new name with the same effect as if the name had not been changed. The proof of the publication shall state the change of name and specify the period of publication in such newspaper under each name.

331.23 Computation of time, Sundays, legal holidays. (1) The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event, of which notice is given, is to happen or which completes the full period required for publication.

(2) The time within which an act is to be done or proceeding had or taken, as prescribed by the rules of procedure, shall be computed by excluding the first day and including the last; if the last day be Sunday or a legal holiday the party shall have the next secular day in which to do the act or take such proceeding.

331.24 Forfeiture for refusal to publish. If the publisher or printer of a newspaper shall, after payment or tender of his legal fees therefor, refuse or wilfully neglect to publish any legal notice required in pursuance of law or a lawful order of publication to be published in his newspaper, being able to make such publication, he shall forfeit twenty-five dollars, one half to the party prosecuting therefor.

331.25 Fees for publishing. (1) The fees for publishing a legal notice shall be not more than $1.25 per folio for the first insertion, and 90 cents per folio for each insertion after the first. The newspaper may increase such rates up to 10 per cent for each 4,000 of circulation or fraction thereof above 8,000 of circulation, based on previous year-end

circulation figures, not to exceed, however, an additional increase of 50 per cent. Where compensation is required to be based upon the square, the fees per square shall be the same as the fees per folio herein provided.

(2) Provided that in all newspapers published in counties containing more than two hundred thousand population the fees for the publication of a legal notice may be equal to, but not in excess of, the regular publishing rate actually required from time to time of private advertisers for similar advertising matter.

(3) No fee shall be paid and no public funds shall be used for subsidizing any privately owned medium of distribution, or for payment for any public advertising or notice in any privately owned medium of distribution which has not previously qualified as a public newspaper for a period of 2 years as defined in this chapter.

History: 1955 c. 398.

Under (1), the compensation of the printer may be computed on a per square basis only where statute relating to the publication provides that compensation is to be upon that basis. 42 Atty. Gen. 3.

331.26 Legal notice defined. Sections 331.19, 331.21 to 331.25 and the term legal notice as used therein embrace every summons, order, citation, notice of sale or other notice and every other advertisement of any description required to be published by law or in pursuance of any law or of any order of any court.

331.27 Publication on Sunday; need not be on same day each week. Any notice, advertisement, statement or publication required by law or the order of any court to be printed or published in any newspaper may be printed and published in a newspaper printed on Sunday, and such printing and publication shall be a lawful publication and a full compliance with the order of the court or officer ordering such publication, the same to all intents and purposes as though the same had been printed and published in a newspaper printed on a secular day; and any such notice, advertisement, statement or publication that may, by law or the order of any court, be required to be published for any given number of weeks may be published on any day in each week of such term, and if so published as many weeks and as many times in each week as may be required by such law or order, the same shall be as lawful a publication thereof and as full a compliance with the order of such court or officer as if the same had been printed and published on the same day of each such week.

331.275 Sunday publications lawful. (1) In any action to recover compensation for newspaper advertising, it shall be no defense that such advertising was published or printed in a newspaper, dated, printed or issued on the first day of the week.

(2) In any action to recover compensation for labor performed on any newspaper, dated, published or issued on the first day of the week, it shall be no defense that such labor was performed on the first day of the week.

History: 1955 c. 696 s. 298.

331.28 Remedies not merged. When the violation of a right admits of both a civil and criminal remedy the right to prosecute the one is not merged in the other.

331.29 Process not to be served Sunday. No person shall serve or execute any civil process from midnight preceding to midnight following the first day of the week; and any such service shall be void; and any person serving or executing any such process shall be liable in damages to the party aggrieved in like manner and to the same extent as if he had not had any such process.

331.30 Nor on Saturday, when. Whenever an execution or other final process shall be issued against the property of any person who habitually observes the seventh day of the week, instead of the first, as a day of rest the officer to whom such process shall be directed shall not levy upon or sell any property of any such person on the seventh day of the week; provided, that said person shall deliver to such officer an affidavit in writing, setting forth the fact that he habitually keeps and observes the seventh day of the week instead of the first, as a day of rest, at any time before such levy or at least two days before such sale, as the case may be; and such sale may, at the time appointed therefor, be adjourned to any day within the life of the execution or such execution may be renewed as in other cases.

331.33 Limitation of surety's liability. Any person may limit the amount of his liability as a surety upon any bond or other obligation required by law or ordered by any court, judge, magistrate or public official for any purpose whatever. The amount of such limited liability may be recited in the body of the bond or stated in the justification of the surety thereto; and in any action brought upon such bond no judgment shall be recovered against such surety for any sum larger than the amount of his liability stated as aforesaid, together with his pro rata share of the costs of said action. And in any such action

a surety may deposit in court the amount of his liability, stated as aforesaid, whereupon he shall be discharged and released from any further liability under such bond.

331.34 Renewal of sureties upon becoming insufficient and effects thereof. If any bail bond, recognizance, undertaking or other bond or undertaking given in any civil or criminal action or proceeding, shall become at any time insufficient, the court or judge thereof, justice of the peace or any magistrate before whom such action or proceeding is pending, may, upon notice, require the plaintiff or defendant, as the case may be, to give a new bond, recognizance or undertaking. Every person becoming surety on any such new bond, recognizance or undertaking shall be liable from the time the original was given, the same as if he had been the original surety. If any person shall fail to comply with the order made in such case the adverse party shall be entitled to any order, judgment, remedy or process to which he would have been entitled had no bond, recognizance or undertaking been given at any time.

331.345 Justification of individual sureties. (1) This section shall apply to any bond or undertaking in an amount of more than $1,000 whereon individuals are offered as sureties, which is authorized or required by any provision of the statutes to be given or furnished in or in connection with any civil action or proceeding in any court of record in this state, in connection with which bond or undertaking real property is offered as security.

(2) Before any such bond or undertaking shall be approved, there shall be attached thereto and made a part of such bond or undertaking a statement under oath in duplicate by the surety that he is the sole owner of the property offered by him as security and containing the following additional information:

(a) The full name and address of the surety.

(b) That he is a resident of this state.

(c) An accurate description by lot and block number, if part of a recorded plat, or by metes and bounds of the real estate offered as security.

(d) A statement that none of the properties offered constitute the homestead of the surety.

(e) A statement of the total amount of the liens, unpaid taxes and other encumbrances against each property offered.

(f) A statement as to the assessed value of each property offered, its market value and the value of the equity over and above all incumbrances, liens and unpaid taxes.

(g) That the equity of the real property is equal to twice the penalty of the bond or undertaking.

This sworn statement shall be in addition to and notwithstanding other affidavits or statements of justification required or provided for elsewhere in the statutes in connection with such bonds and undertakings.

331.346 Bail, deposit in lieu of bond. When any bond or undertaking is authorized in any civil or criminal action or proceeding, the would-be obligor may, in lieu thereof and with like legal effect, deposit with the proper court or officer cash or certified bank checks or United States bonds in an amount at least equal to the required security; and the receiver thereof shall give a receipt therefor. Section 274.14 shall govern the procedure so far as applicable.

331.35 Expenses in actions against municipal officers. (1) Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it shall appear from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.

County traffic patrolman is an officer of the county within the meaning of this section, and the county board is authorized to pay reasonable expenses incurred by him in successful defense of criminal action brought against him by reason of acts done in the performance of his official duties. 16 Atty. Gen. 593 overruled. 43 Atty. Gen. 230.

331.36 Process against officer. No process against private property shall issue in an action or upon a judgment against a public corporation or an officer in his official capacity, when the liability, if any, is that of the corporation nor shall any person be liable as garnishee of such public corporation.

History: 1953 c. 540.

331.37 Abrogation of defenses. (1) In any action to recover damages for a personal injury sustained within this state by an employe while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

(a) That the employe either expressly or impliedly assumed the risk of the hazard complained of.

(b) When such employer has at the time of the injury in a common employment three or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

(c) When such employer has at the time of the injury in a common employment three or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of the injured employe, where such want of ordinary care was not wilful.

(2) Any employer who has elected to pay compensation as provided in chapter 102 shall not be subject to the provisions of this section.

(3) Paragraphs (a), (b) and (c) of subsection (1) shall not apply to farm labor.

(4) No contract, rule, or regulation, shall exempt the employer from any of the provisions of this section.

In respect to a cause of action based on common-law negligence, as distinguished from a cause based on violation of 167.12, a farm hand who was operating a corn-picking machine by means of a tractor which pulled the machine, and who knew that the loose and flopping chains of the machine were dangerous and that he was not required to go near them while in motion and that he could protect himself by stopping the mechanism, but who nevertheless attempted to pick up some ears of corn lying beneath the snouts of the machine, with the mechanism in motion, and was injured when the chains caught his sleeve, either assumed the risk or was contributorily negligent and, if the latter, his negligence was at least as great, as a matter of law, as the negligence of his employer in failing to provide safer chains. Frei v. Frei, 263 W 430, 57 NW (2d) 731.

331.375 Abrogation of defense that contract was champertous. No action, special proceeding, cross complaint or counterclaim in any court shall be dismissed on the ground that a party to the action is a party to a contract savoring of champerty or maintenance unless the contract is the basis of the claim pleaded.

History: 1953 c. 293.

331.38 Surety, how discharged. (1) Any surety or the personal representative of any surety upon the bond of any trustee, guardian, receiver, executor, or other fiduciary, may be discharged from liability as provided in this section. On five days' notice to the principal in such bond, application may be made to the court where it is filed, or which has jurisdiction of such fiduciary or to any judge of such court for a discharge from liability as surety, and that such principal be required to account.

(2) Notice of such application may be served personally within or without the state. If it shall satisfactorily appear to the court or the judge that personal service cannot be had with due diligence within the state, the notice may be served in such manner as the court or judge shall direct. Pending such application the principal may be restrained from acting, except to preserve the trust estate.

(3) If at the time appointed the principal shall fail to file a new bond satisfactory to the court or judge, an order shall be made requiring the principal to file a new bond within five days. When such new bond shall be filed, the court or judge shall make an order requiring the principal to account for all his acts to and including the date of the order, and to file such account within a time fixed not exceeding twenty days; and shall discharge the surety making such application from liability for any act or default of the principal subsequent to the date of such order.

(4) If the principal shall fail to file a new bond within the time specified, an order shall be made removing him from office, and requiring him to file his account within twenty days. If he shall fail to file his account as required, the surety may make and file such account; and upon settlement thereof and upon the trust fund or estate being found or made good and paid over or properly secured, credit shall be given for all commissions, costs, disbursements and allowances to which the principal would be entitled were he accounting.

(5) The procedure for hearing, settling and allowing such account shall be according to the practice prescribed by chapter 317 in the matter of account of executors and administrators. Upon the trust fund or estate being found or made good and paid over or properly secured, such surety shall be discharged from all liability. Upon demand by the principal, the discharged surety shall return the unearned part of the premium paid for the canceled bond.

(6) Any such fiduciary may institute and conduct proceedings for the discharge of his surety and for the filing of a new bond; and the procedure shall in all respects conform

substantially to the practice prescribed by this section in cases where the proceeding is instituted by a surety, and with like effect.

331.39 Juror's oath. (1) In every case and in all courts the jurors selected to try the issues in the action or proceeding, civil or criminal, shall be sworn; and the oath may be administered in substantially the following form: Do you and each of you swear (or affirm) that you will well and truly try the issue joined between ...., plaintiff, and ...., defendant, and, unless discharged by the court, a true verdict give, according to law and the evidence given in court, so help you God.

(2) The juror's assent to the oath may be manifested by the uplifted hand.

331.40 Oath of officer in charge of jury. When the issues have been submitted to the jury the jurors shall be under the charge of a proper officer until they agree upon a verdict or are discharged by the court; the officer shall be sworn for that purpose and the following oath may be administered to him: You do swear that, unless otherwise ordered by the court, you will, to the utmost of your ability, keep all jurors sworn on this trial together in some private and convenient place, without drink except water, that you will not suffer any person to speak to them or speak to them yourself, except it be to ask whether they have agreed on their verdict, until they have agreed on their verdict or are discharged by the court, and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God.

331.41 Employe's cash bonds to be held in trust; duty of employer; penalty. (1) Where any person, firm or corporation requests any employe to furnish a cash bond, the cash constituting such bond shall not be mingled with the moneys or assets of such person, firm or corporation demanding the same, but shall be deposited by such person, firm or corporation in any bank, trust company or any savings and loan association doing business in this state whose deposits or shares are insured by a federal agency to the extent of $10,000, as a separate trust fund, and it shall be unlawful for any person, firm or corporation to mingle such cash received as a bond with the moneys or assets of any such person, firm or corporation, or to use the same. No employer shall deposit more than $10,000 with any one depository. The bank book, certificate of deposit or other evidence thereof shall be in the name of the employer in trust for the named employe, and shall not be withdrawn except after an accounting had between the employer and employe, said accounting to be had within 10 days from the time relationship is discontinued or the bond is sought to be appropriated by the employer. All interest or dividends earned by such sum deposited shall accrue to and belong to the employe and shall be turned over to said employe as soon as paid out by the depository. Such deposit shall at no time and in no event be subject to withdrawal except upon the signature of both the employer and employe or upon a judgment or order of a court of record.

(2) In the event of the failure of any person, firm or corporation, such moneys on deposit shall constitute a trust fund for the benefit of the persons who furnished such bonds and shall not become the property of the assignee, receiver or trustee of such insolvent person, firm or corporation.

(3) In case of the death of such employe before such cash bond is withdrawn in the manner provided in subsection (1) of this section such accounting and withdrawal may be effected not less than five days after such death and before the filing of a petition for letters testamentary or of administration in the matter of the decedent's estate, by the employer with the decedent's surviving spouse; and if there be no surviving spouse with his children; and if he shall leave no children, his father or mother; and if he shall leave no father or mother, his brother or sister, in the same manner and with like effect as if such accounting and withdrawal were accomplished by and between the employer and employe as provided in subsection (1) of this section. The amount of such cash bond, together with principal and interest, to which the deceased employe would have been entitled had he lived, shall, as soon as paid out by the depository, be turned over to such relative of the deceased employe effecting such accounting and withdrawal with the employer, and such turning over shall be a discharge and release of the employer to the amount of such payment. If no such relatives survive, the employer may apply such cash bond, or so much thereof as may be necessary, to paying creditors of the decedent in the order of preference prescribed in section 313.16 for satisfaction of debts by executors and administrators and the making of payment in such manner shall be a discharge and release of the employer to the amount of such payment.

(4) Any person who shall violate any provision of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine equal to the amount of the bond or by imprisonment in the county jail for not less than ten days nor more than 60 days, or by both such fine and imprisonment.

History: 1953 c. 613.

331.42 Deposit of undistributed money and property by administrators and others. (1) In case in any proceeding in any court of record it is (a) determined that moneys or other personal property in the custody of or under the control of any administrator, executor, trustee, receiver or other officer of the court, belongs to a natural person if he is alive, or to an artificial person if it is in existence and entitled to receive, otherwise to some other person, and the court or judge making such determination finds that there is not sufficient evidence showing that the natural person first entitled to take is alive, or that the artificial person is in existence and entitled to receive, or (b) in case such money or other personal property, including any legacy or share of intestate property cannot be delivered to the legatee or heir or person entitled thereto because of the fact that such person is a member of the military or naval forces of the United States or any of its allies or is engaged in any of the armed forces abroad or with the American Red Cross society or other body or other similar business, then in either or any of such cases, the court or judge may direct that the officer having custody or control of such money or other personal property, deposit the same in any trust company, or any state or national bank within the state of Wisconsin authorized to exercise trust powers, or with the public administrator, taking its or his receipt therefor, and the said receipt shall, to the extent of the deposit so made, constitute a complete discharge of the said officer in any accounting by him made in said proceeding.

(2) In case such deposit is directed to be made, the court shall require the trust company or bank in which said deposit is ordered to be made, or the public administrator, as a condition of the receipt thereof, to accept and handle, manage and invest the same as trust funds to the same extent as if it or he had received the same as a testamentary trust, unless the court shall expressly otherwise direct, except that the reports shall be made to the court of its or his appointment.

(3) No distribution of the moneys or personal property so deposited shall be made by the depository as such trustee or otherwise without an order of the court on notice as prescribed by section 324.18, and the jurisdiction of the court in the proceeding will be continued to determine, at any time at the instance of any party interested, the ownership of said funds, and to order their distribution.