CHAPTER 324.

APPEALS AND MISCELLANEOUS PROVISIONS.

324.01 Appeals from county court; guardian ad litem. (1) In counties having a population of fifteen thousand or less any executor, administrator, guardian, trustee or any person aggrieved by any order or judgment of the county court may appeal therefrom to the circuit court for the same county by filing a notice thereof with said county court within sixty days from the date of the act appealed from.

(2) In counties having a population of over fifteen thousand any executor, administrator, guardian, trustee or any person aggrieved by any order or judgment of the county court may appeal therefrom to the supreme court, and the provisions of chapter 274 shall apply.

(3) But there is no appeal from the action of any county court on any claim unless the part thereof in dispute amounts to at least $20. The appeal of any minor from an order of adoption may be taken by any person on his behalf. In an appeal from an order of adoption, if the child is a minor, the state department of public welfare is a party and shall be served with notice of appeal. In all other cases the appeal of any minor or incompetent person may be taken and prosecuted by his general guardian or by a guardian ad litem. [*1933 c. 190 s. 82; 1943 c. 93*]

Cross Reference: Time allowed for appeal to supreme court, see 324.04.

Revisor's Note, 1933: "Cases not otherwise provided for" is perplexing. What cases are they? Maybe those named in 324.17. The law of adoption is not confined to minors, 322.01 (2), but "child" in the adoption clause in (3) probably means "minor;" see last sentence. The method of appeal is in 324.02 to 324.04. (Bill No. 123 S, s. 82)

Whether an administrator has the right to appeal from an order of distribution, is an open question. Estate of Bailey, 205 W 648, 238 NW 845.

A special administrator may appeal under (2). Estate of McLean, 219 W 222, 262 NW 707.

A "decision" of the county court on the only claim against the estate of a decedent, which found the amount due therefor, and which concluded with a provision that "judgment may be entered for the amount" constituted merely findings of fact and an order for judgment, and was not an order which prevented a judgment from which an appeal might be taken, hence was not an appealable order within 274.33. Estate of Maurer, 234 W 601, 291 NW 764.

Only a person who is aggrieved by an order can appeal therefrom. Estate of Crocker, 236 W 579, 295 NW 717.

Where a brother brought proceedings to have the proceeds of a policy on the life of the decedent, which had been paid to the administrator as part of the estate, declared to be the individual property of the plaintiff and his brothers, one of whom was the administrator, a judgment that the proceeds of the policy belonged to the decedent's estate, was in favor of the administrator, and the brother who was administrator could not appeal therefrom as administrator. Estate of Bryngelson, 237 W 7, 296 NW 63.

Where the county court, in administration proceedings in which a legatee appeared, entered an order authorizing the administrator to accept a debtor's offer of a certain sum in settlement of his mortgage indebtedness to the estate, and the administrator complied with the order and satisfied the mortgage before any appeal was taken and without any stay of proceedings having been requested or made, the only question open to consideration was whether the administrator had acted in good faith in complying with the order, and hence, no proceedings having been had with respect to the question of good faith, the legatee's appeal from the order is dismissed since a review thereof would be ineffectual. Estate of Turnock, 238 W 438, 300 NW 155.

The fact that they offered no evidence on the hearing did not preclude distributees of an estate from appealing from the judgment. Estate of Pardee, 240 W 19, 1 NW (2d) 803.

Although 324.01 (2) provides that an appeal may be taken to the supreme court from "any" order or judgment of the county court, it does not give the right of appeal from orders not appealable under the provisions of 274.33. The widow of a testator and a guardian ad litem for minor children could not appeal from an order requiring an accounting by the executors in relation to the estate as of a certain date, where the order was granted at their request for an accounting. Will of Krause, 240 W 68, 2 NW (2d) 732.

Where a creditor's claim against a testator's estate was allowed, and the widow had elected to take by law rather than under the will and the amount of property to

which her percentage was to be applied would be reduced by the claim if finally allowed, and the shares of the residuary legatees were thereby subject to diminution, both the widow and the residuary legatees were "parties aggrieved" so as to be entitled, under 274.10 and 324.01, to appeal from the judgment allowing such claim; although had the claim been disallowed, neither she nor they would have been "adverse parties" in the sense that notice of appeal must be served upon them. [Will of Krause, 240 W 72, distinguished.] Estate of Krause, 240 W 502, 3 NW (2d) 696.

Administrators with the will annexed were entitled to have a construction of the will reviewed because of doubt whether a brother of the testator was to be considered deceased at the time of the death of the testator or whether he was to be considered an "absent" legatee whose share should be handled under 318.03 (2). Estate of Satow, 240 W 622, 4 NW (2d) 147.

Under the provision in 324.01 (1) that "any executor, administrator, guardian, trustee or any person aggrieved by any order or judgment of the county court may appeal therefrom," an executor has the right to appeal individually if individually aggrieved, and he has the right to appeal in his representative capacity in the discharge of his duties as executor, as where the will is refused probate, or a claim against the estate is allowed, or there is a construction of the will, or a ruling affecting the distribution of the estate, adverse to the executor's views thereon. [Estate of Crocker, 236 W 579, so far as to the contrary, overruled] Will of Hughes, 241 W 257, 5 NW (2d) 791.

A judgment allowing the final account of an administratrix and adjudging that the residue in her hands consisted of a claim against O., and that such claim was assigned to the heirs of the decedent, and that the administratrix was indebted to the estate in a sum consisting in part of the claim against O., did not adjudge that O., was liable for the claim nor otherwise make him a "person aggrieved" by the judgment such as to entitle him to appeal to the supreme court. Estate of Stephens, 246 W 471, 17 NW (2d) 574.

A determination of the county court admitting a will to probate is a judgment, not an order. Will of Wehr, 247 W 98, 18 NW (2d) 709.

324.02 Bond on appeal to circuit court. In appeals to the circuit court the appellant, other than an executor, administrator, guardian, trustee or alleged incompetent person, shall, before his appeal shall be effectual, file with the county court a bond in such sum and with such surety as the judge thereof shall approve, to the effect that he will diligently prosecute his appeal to effect and pay all damages and costs which may be awarded against him on such appeal; but no bond shall be required of nor costs awarded against any child, or person acting in behalf of a child, on an appeal from an order of adoption. [*1933 c. 190 s. 83*]

324.03 Notice of appeal to circuit court; transmission of papers; trial. (1) The appellant shall give notice of the appeal to the adverse party, in such manner as the county court shall direct within ten days after taking the same, and the county judge shall, within twenty days after the appeal is perfected, file in the circuit court the record and proceedings appealed from, together with the notice of appeal and bond and proof of service of notice of appeal on the adverse party.

(2) When such record, notice of appeal, bond and proof of service are filed in the circuit court the appeal may be brought to trial and tried in the same manner as actions originally brought there; and such court may direct an issue to be made up between the parties. [*1933 c. 190 s. 84*]

324.04 Review by supreme court. (1) The time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any order or judgment of the county court is limited to sixty days from the date of the entry thereof, except as provided in section 324.05.

(2) On appeals from county courts to the supreme court no bond shall be required or costs awarded against any child or person acting in behalf of the child on an appeal from an order of adoption; and no bond shall be required of any executor, administrator, guardian, trustee or alleged insane or incompetent person.

(3) A bill of exceptions may be settled, served and filed in the manner and under the restrictions required in the circuit court.

(4) In all matters not otherwise provided for in this chapter relating to appeals from county courts to the supreme court, and jury trials in county courts, the law and rules of practice relating to circuit courts shall govern. [*1933 c. 190 s. 85, 99*]

Cross Reference: When bond not required, see 274.16.

Note: Upon appeals which fall within this section, the bond therein mentioned is sufficient. Compliance with 274.15 is unnecessary. Every distributee of deceased's estate is an adverse party entitled to service of notice of appeal from the final order of distribution. In re Sveen's Estate, 202 W 573, 232 NW 549.

An appeal from county court not taken within the time limited by this section must be dismissed where there is no order of the county court permitting the appeal. An appeal from an order of the county court transfers to the supreme court only such portions of the proceeding as are germane to the order appealed from. But the transmission to the supreme court of a case on appeal from the final judgment brings up the entire record and transfers jurisdiction from the county court. Thereafter the county court cannot allow appeal by others unless the record is returned to the county court. Estate of Bailey, 205 W 648, 238 NW 845.

An appeal does not lie from findings of fact, conclusions of law, or decision in a controversy over heirship, but only from the final judgment assigning the estate. Estate of Lewis, 207 W 155, 240 NW 818.

Statute authorizing appeal from decree in organization of sewer district and statute relating to appeals from county court to supreme court afford complete remedy for correcting errors in such adjudication. Golden v. Green Bay Metropolitan Sewerage Dist., 210 W 193, 246 NW 505.

Judgments and decrees of county court of Milwaukee county directing proceeds of estates, wherein there were no heirs, to be distributed to orphan asylums, held res

judicata as to state, notwithstanding statute under which court acted was subsequently declared unconstitutional, where judgments and decrees were not appealed from. In re Trustees of Milwaukee County Orphans' Board, 218 W 518, 261 NW 676.

The time for appeal from the county court to the supreme court is determined by 324.04 and not by 274.04. In re Bowler's Will, 228 W 527, 280 NW 684.

Under a statute requiring appeal from an order to be taken within sixty days from entry thereof, where the order was entered October 26, the appeal bond was dated December 20, surety did not justify until January 20, the bond was not filed until January 24, and appellants made no showing that sureties could not have justified the proper time or that failure to file the appeal bond in time resulted from mistake or accident, the appeal was dismissed. In re Stanley's Will, 228 W 530, 280 NW 685.

Heirs who otherwise would have been entitled to share in the amount of a surcharge upon the executor's account waived their rights by joining as appellants and asking that the account of the executor be approved. In re Roebken's Will, 230 W 215, 283 NW 815.

274.11 (1) is rendered applicable to appeals from the county court to the supreme court by 324.04 (4). Estate of Pitcher, 240 W 356, 2 NW (2d) 729.

See note to 274.11, citing Will of Steindorff, 242 W 89, 7 NW (2d), 597.

324.05 Extension of time for appeal; retrial. If any person aggrieved by any act of the county court shall, from any cause without fault on his part, omit to take his appeal within the time allowed, the court may, upon his petition and notice to the adverse party, and upon such terms and within such time as it shall deem reasonable, but not later than one year after the act complained of, allow an appeal, if justice appears to require it, with the same effect as though done seasonably; or the court may reopen the case and grant a retrial, but the order therefor must be made within one year after the act complained of. [*1933 c. 190 s. 86*]

Revisor's Note, 1933: Section 324.05, makes possible an appeal more than a year after the order or judgment complained of; even the order extending the time for appeal may be made after a year has run. That was not likely intended. See Estate of Meek, 199 W 602, 227 NW 270. (Bill No. 123 S, s. 86)

The trial court's decision upon a petition to extend the time for appeal will not be reversed in the absence of abuse of discretion. In this case there was no such abuse. In re Schilling's Will, 205 W 279, 237 NW 130; Estate of Hilgermann, 208 W 520, 243 NW 753.

Where attempt to appeal within proper time failed because of errors of law of attorneys without fault of appellant, it was permissible to relieve him from default. Will of Loewenbach, 210 W 253, 246 NW 332.

A county court has power to reopen proceedings for the administration of an estate and grant a new trial, but the granting of a new trial is made discretionary. But a petitioner under this section cannot ask for a new trial on the ground of error, and, upon a denial of his petition by the county court, sustain his right to a new trial merely by demonstrating that there was error in the proceedings. There must be present some factor apart from the merits to warrant the granting of a new trial. Estate of Walczak, 216 W 465, 257 NW 589.

Error of fact or law in judgment approving accounts of administrator or executor does not render such judgment void or subject to collateral attack, but must be redressed only by appeal or retrial under statute. "Fraud" such as will authorize setting aside probate order or judgment may consist of suppression or misrepresentation of facts, the offering for probate of the will of known incompetent, or misrepresentation to interested persons to induce them not to contest will and thus deprive court of benefit of their testimony. Estate of Penney, 225 W 455, 274 NW 247.

Where an appeal from a judgment denying a motion to surcharge an executor was not timely taken, an appeal from a subsequent judgment allowing the executor's final account, which was timely taken but involved the same issues, was frivolous and the judgment must be affirmed. In re Dammann's Estate, 230 W 160, 283 NW 363.

The fact that the plaintiff did not exercise diligence in taking an appeal from the judgment in county court did not, as a matter of law, require a denial of the plaintiff's motion to reopen the case and grant a new trial, since what might constitute want of diligence in taking an appeal might conceivably not constitute want of diligence in moving for a new trial. In re Blahnik's Estate, 231 W 101, 285 NW 421.

The county court rendered its decision on October 28, made its findings of fact and conclusions of law and an order on November 4, but dated them October 28. However, the findings, conclusions of law and order were not actually signed or filed until December 21. The notice of appeal was filed on December 29. The appeal was within the time allowed by the statutes, the time not commencing to run until the order was signed and filed. Estate of Campbell, 232 W 227, 286 NW 60.

A new trial in the interest of justice may be granted by a trial court on its own motion. Estate of Noe, 241 W 173, 5 NW (2d) 726.

In reopening an order determining inheritance taxes, and granting a rehearing, on a petition filed almost 6 months after the order was entered, but filed about 2 months after the petitioner had full knowledge of the essential facts, the county court did not abuse its discretion, where the court could reasonably conclude, from the petition and the record, that justice appeared to require the reopening of the case. Estate of Allen 243 W 44, 9 NW (2d) 102.

A petition for extension of the time to appeal from a judgment of the county court was properly denied, where there was no showing that the petitioner's omission to appeal within the time allowed therefor was without fault on his part. Estate of Stephens, 246 W 471, 17 NW (2d) 574.

324.06 Proceedings stayed. After notice of appeal to the circuit court is filed in the county court all further proceedings in pursuance of the act appealed from shall cease until the appeal shall be determined. [*1933 c. 190 s. 87*]

Revisor's Note, 1933: Section 324.06 is limited to appeals to the circuit. Appeals direct to the supreme court from county courts follow the procedure on appeals from the circuit. (Bill No. 123 S, s. 87)

Statute does not make stay of proceedings dependent upon filing of undertaking to cover consequential damages. On appeal from judgment probating will, court properly fixed undertaking at two hundred and fifty dollars. Will of Loewenbach, 210 W 253, 246 NW 332.

324.07 Judgment on appeal to circuit court. The circuit court may reverse or affirm in whole or in part the act of the county court appealed from, and may render a

proper judgment or make such order therein as the county court ought to have made, and may remit the case for further proceeding in pursuance of the opinion of the circuit court, or may make any order, or take any action therein, to enforce its own judgment, as it may deem best. If the case is appealed to the supreme court it may remit the same to the county court, when no further proceedings are required in the circuit court. [*1933 c. 190 s. 88*]

Revisor's Note, 1933: Subsection (2) is out of place and is not needed. Sections 274.34 to 274.37 are general practice rules; appeals are allowed by 274.09; and 324.01 is amended to declare chapter 274 applicable. (Bill No. 123 S, s. 88)

324.08 Dismissal of appeal. If the appellant fails to prosecute his appeal to the circuit court with reasonable diligence the court, on motion, shall dismiss the appeal or affirm the judgment or order appealed from, as such court shall deem just. [*1933 c. 190 s. 89*]

324.09, 324.10 [*Repealed by 1933 c. 190*]

324.11 Costs, when allowed; judgment for. Costs may be allowed in all appealable contested matters in county court, excepting in jury trials, to the prevailing party, to be paid by the losing party or out of the estate as justice may require; and when costs are allowed they shall be taxed by the judge at the rates allowed in circuit court and upon like notice; but the attorney fees shall not exceed twenty-five dollars, and shall be allowed only when an attorney appears for the prevailing party. When costs are allowed, the court shall render judgment therefor, stating in whose favor and against whom the same is rendered and the amount thereof; and a list of the items making such amount shall be filed with the papers in the case. [*1933 c. 190 s. 92*]

Note: The allowance of ten per cent attorney's fees was proper under a provision in the notes for the payment of all costs and expenses, including ten per cent attorney's fees, paid or incurred in collecting the notes; the contractual obligation incurred by the maker being controlling. Estate of McAskill, 216 W 276, 257 NW 177.

With reference to the question of allowance of executor fees and attorney fees out of the estate in a proceeding to construe a will, it cannot be said that an executor has no duty in good faith to present to the courts his views as to the facts and the law to the end that the true intentions of the testator may be found and given effect. Will of Asby, 232 W 481, 287 NW 734.

324.12 Costs in will contests. Costs shall not be awarded to an unsuccessful contestant of a will unless he is a special guardian appointed by the county or circuit judge, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent. [*1933 c. 190 s. 93*]

324.13 Attorney's fees, will contests. (1) In a contest upon the probate of any will, or in relation to any trust created therein, or for the allowance of any account required of an executor or trustee, the court may, if the contest is necessary or meritorious, allow to the proponent of such will and to the successful contestant in such proceedings a reasonable attorney's fee to be paid out of the estate of the decedent; and the court may allow to the proponent if successful on his appeal or to such contestant if finally successful on appeal a reasonable attorney's fee for services on such appeal to be paid out of said estate.

(2) A guardian ad litem for a necessary party to a proceeding to probate a will, or in a proceeding to construe a will, or in a proceeding in the settlement of an estate, may be allowed compensation and his necessary expenditures, to be fixed by the court, and paid out of the estate or property in controversy. [*1933 c. 190 s. 94; 1945 c. 345*]

Note: Where complaining beneficiaries in a proceeding against the trustee, although unsuccessful in their contention that each was entitled to cash for the full amount of the share of the trust estate which he claimed, were successful to the extent that each was held obliged to accept but a one-eighth interest in unliquidated mortgage investments instead of the one-seventh interest credited to him by the trustee, the county court erred in making allowances to the trustee for attorney fees to be retained out of the shares of such beneficiaries. Will of Manegold, 234 W 525, 291 NW 753.

324.14 Security and judgment for costs. In all cases mentioned in section 324.11 the county court may require the claimant or contestant to give a bond in such sum and with such surety as shall be approved by the court, to the effect that he will pay all costs that may be awarded by such court in such proceeding against him. A judgment for costs shall be against the claimant or contestant and the surety. [*1933 c. 190 s. 95*]

324.15 Judgment, how enforced; execution; lien. (1) All money judgments in favor of an estate shall have the same force and effect as judgments in the circuit court, and may be enforced by execution. The pertinent provisions of chapter 272, relating to executions, shall apply to such executions except as otherwise provided in this section.

(2) Any such judgment for more than ten dollars may be docketed in the circuit court as circuit court judgments are docketed, upon filing therein a certified transcript of such judgment. Such judgment when so docketed shall be a lien upon the real estate of the debtor in the same manner and for the same length of time as judgments rendered and docketed in the circuit court. When execution shall issue from the county court upon

such judgment, in case the same has been docketed as aforesaid, it shall recite the time of docketing. [*1933 c. 190 s. 96*]

324.16 Writs of error. Writs of error to obtain a review by the supreme court of proceedings of the county court, in counties having a population of over fifteen thousand, shall be allowed, and taken in accordance with the provisions of chapter 274, relating to writs of error. [*1933 c. 190 s. 97*]

324.17 Jury trials, practice. (1) This section applies only to counties which have over fifteen thousand population. Jury trials may be had in county court in all appealable cases in which a jury trial may be had of similar issues in circuit courts.

(2) In all cases provided in subsection (1), any person having the right of appeal from the determination of the court, may file with the court, within ten days after notice that the matter is to be contested, a written demand for a jury trial, and deposit ten dollars with the county treasurer, take his receipt therefor and file it with the court. If such issue is transferred for trial to the circuit court, as provided in this section, the judge of the county court may order said deposit refunded to the depositor, and the county treasurer upon presentation of such order shall refund said amount.

(3) Upon filing such demand and receipt, the court may order an issue to be framed by the parties within a fixed time, and the matter shall be placed upon the calendar for the next jury term of the court. The county court may transfer the matter or cause, and the record thereof, to the circuit court of such county for trial.

(4) Three jury terms of the county court shall be held each year (if there are jury cases ready for trial at such times), commencing respectively on the second Tuesday in January, April and October.

(5) Jurors and trial juries shall be drawn in the manner provided by sections 255.03 to 255.09, except as otherwise provided herein, and trials by jury shall be in the manner provided by sections 270.15 to 270.31; but in county courts having civil jurisdiction jurors and juries may be drawn in probate matters and jury terms had in the manner and according to the regulations required in civil cases in such courts.

(6) Not more than ten days prior to each jury term the clerk shall prepare, in the order of their date of issue, a list of cases in which a trial by jury shall have been demanded, and such list shall constitute the jury calendar for such term of the county court. Unless the court shall otherwise order, every case on such calendar which shall not be disposed of at said term shall stand continued to the next jury term, and be placed on the jury calendar for such term. If the party who demanded the jury trial shall ask to have such action continued for the term, after the commencement of the term at which such action is for trial, such continuance shall be granted only upon payment of ten dollars motion fees unless such party shall waive a jury trial in such proceeding. In case a continuance in any action upon the jury calendar is asked by any other party, the court may grant such continuance and require payment of ten dollars motion fees in its discretion.

(7) In all jury cases costs shall be allowed as a matter of course to the prevailing party, the items and taxation of which shall be as in circuit court.

(8) Any party to the controversy may within ten days after notice that a jury trial has been demanded, have the matter transferred to the circuit court of the county for trial. Upon the filing of such demand for transfer, the judge of the county court shall immediately cause the record and proceedings in the matter to be certified to the circuit court, and the same shall there be tried and determined as a circuit court action. And in case the matter is one where the county court has the right to fix the fees or compensation of the attorneys, executors, administrators or guardians, the circuit court may determine such fees or compensation. The circuit court may render such judgment as may be proper, or make such order therein as the county court ought to have made and may remit the case to the county court for further proceedings, or make any order or take any action therein to enforce its own judgment as the circuit court may deem best. The county court, after such cause is remitted, shall proceed therein in accordance with the determination of the circuit court. [*1933 c. 190 s. 98*]

Revisor's Note, 1933: The amendment gives any party to a jury issue the right to have it tried in circuit court. The statute now denies that right to the one who demanded a jury in county court. The county court may, in every case, transfer a jury issue to the circuit court. (Bill No. 123 S, s. 98)

Under (8) the fixing of fees by the circuit court is discretionary rather than mandatory. Kessler v. Olen, 228 W 662, 280 NW 352.

A claim based upon an oral agreement which, if enforceable, entitled the claimant to the entire estate of a decedent presented an issue for a jury and the claimant upon demand was entitled to a jury trial. Kessler v. Olen, 228 W 662, 280 NW 352.

Under 324.17 (8), where a claim against the estate of a decedent was transferred from the county court to the circuit court for trial and the circuit court rendered judgment on the claim and the record was not yet remanded to the county court, the matter was one pending in the circuit court and an appeal from such judgment was an appeal from the circuit court, not the county court, so that the time for taking the appeal was not governed by the 60 days' limitation in 324.04, but was governed by the 6 months' limitation in 274.01. Will of Krause, 240 W 72, 2 NW (2d) 733.

324.18 [*Renumbered section 324.04 sub. (4) by 1933 c. 190 s. 99*]

324.18 Notice in county court; mode of service; proof of service. (1) MODE OF SERVICE. When notice is required to be given in compliance with the provisions of this section, the notice shall be given either by service thereof upon all persons interested (whether within or without the state) at least ten days before the hearing or proceeding in the manner in which a circuit court summons is required to be served, other than by publication; or by publication of the notice as provided by section 324.20. When service is by publication the court may order a copy of the notice mailed to every interested person whose post-office address is known or can with due diligence be ascertained, at least twenty days before the hearing or proceeding. The court may order both service by publication and personal service or service by mail on designated persons.

(2) WAIVER OF NOTICE. Persons who are sui juris may in writing waive the service of notice upon them and consent to the hearing of any matter without notice.

(3) EFFECT OF APPEARANCE. A general appearance by a competent adult person is equivalent to timely personal service of notice upon him.

(4) WHO MAY SERVE NOTICE. The notice may be served by any person not a party.

(5) PROOF OF SERVICE. Proof of the service of the notice shall be as follows:

(a) By the affidavit of the person who made the service, or if by the sheriff, by his certificate, showing the place and the time of the service, and that he knew the person served to be the person for whom the notice was intended and that he delivered to and left with him a copy; if the person was not personally served such affidavit or certificate shall say when, where and with whom the copy was left.

(b) By the written admission of the person served if he be competent and an adult. The subscription of his name to such admission shall be presumptive evidence of its genuineness.

(c) In case of publication, by the affidavit of the publisher or printer or his foreman or principal clerk showing the notice and specifying the date of the first and of the last publication; and the affidavit of the person who mailed the notice showing when and to whom he mailed it. [*Supreme Court Order, effective Jan. 1, 1940*]

324.19 Notice, when fixed by court order. When notice of any proceedings in county court is required by law or deemed necessary by the court and the manner of giving the same shall not be directed by any law the court shall order notice to be given to all persons interested in such manner and for such length of time as it shall deem reasonable. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: When a guardian ad litem is appointed and files his consent to act, his appearance in the proceedings thereafter is an appearance for and on behalf of his ward. In re West's Estate, 231 W 377, 284 NW 565.

324.20 Publication of notices. (1) All county court notices required to be given by publication shall be printed once a week for three successive weeks (unless a different length of publication is expressly required by law) in such newspaper, published in the county, as the court shall by order direct; such notices shall be printed in the English language, but may be published in a newspaper printed in any other language, if in the opinion of the court, it shall be more likely to give notice to the interested persons. If no newspaper is published in such county, the publication shall be in such newspaper published in this state as the court shall order; notices published under section 316.18 shall be in a newspaper published in the county where the land is situated, and if there be none so published, then in such newspaper as the court shall direct. No county judge or register in probate shall order the publication of any such notice in any newspaper controlled by him or in which he has any pecuniary interest, if there be any other newspaper published in his county.

(2) Any county judge, register in probate or other officer of any court, who shall neglect or refuse to carry out or violate any provisions of this section, shall forfeit not less than fifty dollars for each such neglect, refusal or violation. [*1931 c. 79 s. 33; Supreme Court Order, effective Jan. 1, 1934*]

Cross Reference: Orders signed by register in probate, see 253.27.

324.21 Records, how amended. Any county court may amend, correct and perfect its record of any matter transacted therein in such manner as may be necessary to make the same conform to the truth.

324.22 Correction of court records; notice of hearing. (1) Upon verified application to a county court by any person interested, praying that its records be amended, corrected or perfected, as specified in the application, the court shall order a hearing thereon and notice of the hearing shall be given as provided in section 324.18.

(2) If the error in the court record is obvious or is purely clerical, the court may hear the application and correct the error without notice, or upon such notice as the court

may direct. [*Stats. 1931 s. 324.23 sub. (2); Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1938; Supreme Court Order, effective Jan. 1, 1940*]

324.23 Hearing; amendment, effect. If on such hearing the court shall find its record incorrect, incomplete or imperfect it shall make it conform to the truth. Such amended, corrected and perfected record shall be as valid and binding as though correctly made and entered at the proper time. [*Supreme Court Order, effective Jan. 1, 1934*]

324.24 Hearings set for term; calendar, how disposed of. (1) All matters in county court requiring notice of hearing shall be made returnable and set for hearing at a term of court. All such matters by brief titles shall be entered in a book called the court calendar.

(2) Uncontested matters shall be first disposed of in their order on such calendar, followed by the disposition of contested matters in like manner, unless the court shall otherwise direct. [*Supreme Court Order, effective Jan. 1, 1934*]

324.25 Citation. An order to account or to appear in the county court shall state explicitly what the party cited is required to do, and shall be served in the manner provided for service of summons in circuit court. [*Court Rule XII; Supreme Court Order, effective Jan. 1, 1934*]

Note: The competency of a person nominated as the executor of a will must be determined as of the time when the appointment is made, and the competency must be determined by consideration of the provisions of 310.12, requiring the issuance of letters testamentary to such nominee if he is "legally competent," and not by consideration of the provisions of 324.35, relating entirely to the removal, and the causes for removal, of an executor. Estate of Svacina, 239 W 436, 1 NW (2d) 780.

324.26 Forms of notices. In all matters and proceedings in any county court wherein such court shall order notice to be given to parties interested therein of the time and place of the hearing thereof, by publication or otherwise, it shall not be necessary to publish in full or to serve a complete copy of such order; but a notice containing a brief statement of the matter to be heard, sufficient to fairly inform those interested of the nature of the proposed proceeding and the estate involved, with the residence or late residence of the owner of such estate, and stating the time and place of such hearing shall be sufficient, and any number of different matters may be included in the same notice, and such notice may be substantially as follows:

STATE OF WISCONSIN, }
County Court for .... County. } In Probate.

Notice is hereby given that at the .... term of the county court to be held in and for said county at the courthouse in the (city, village or town) of ...., in said county, on the first Tuesday of ...., A. D. 19.., the following matters will be heard and considered:

The application of A. B. for the appointment of an administrator of the estate of C. D., late of the (city, village or town) of ...., in said county, deceased.

The application of A. B. to admit to probate the last will and testament of C. D., late of the (city, village or town) of ...., in said county, deceased.

The application of A. B. for the appointment of a guardian of the person and estate of C. D., an insane person of the (city, village or town) of ...., in said county.

The application of A. B., administrator of the estate of C. D., late of the (city, village or town) of ...., in said county, deceased, to sell a piece of real estate belonging to such estate, described as follows (here describe particularly), in said county.

By order of the court. E. F., Judge.

Dated.

324.27 County court fees. Fees in the county court shall be allowed:

(1) To appraisers, an amount to be fixed by the court in its discretion;

(2) To commissioners to make partitions, or to assign dower or homestead against deceased persons, three dollars per day;

(3) In all cases, travel, four cents per mile each way;

(4) To jurors, interpreters and witnesses the same fees as provided in circuit court;

(5) In cases not provided for, a reasonable compensation shall be allowed by the court.

324.28 [*Repealed by Supreme Court Order, effective Jan. 1, 1934*]

324.29 Appearances, how made. (1) IN PERSON OR BY ATTORNEY. Every person not under disability may appear in any proceeding in county court or before any county judge and conduct or defend the same in person or by attorney and not otherwise. Every person under disability shall appear and conduct or defend by his guardian ad litem, who shall be an attorney, or by his general guardian who may appear by attorney. The county judge shall make an entry in his minutes of every appearance stating when, how and by whom it was made, and shall not proceed further in the cause, matter or proceeding until such entry is made.

(2) GUARDIANS AD LITEM. When it shall be necessary to appoint a guardian ad litem

for any person under disability, the court may appoint such guardian at the time of making the order for hearing the matter, and require notice thereof and of such hearing to be served upon such guardian; or such guardian may be appointed on the day of the hearing, and before any proceedings are had. The guardian ad litem shall continue to act throughout the proceeding in relation to the same estate or matter, until its final settlement or conclusion, unless otherwise ordered. In the discretion of the court, the appointment may be revoked and another guardian ad litem appointed.

(3) ATTORNEYS. No attorney shall appear, or be appointed as guardian ad litem, for different persons in the same matter or proceedings, whose interests and rights in relation to such matter or proceeding shall be conflicting. The attorney who shall first appear for any party shall be recognized as his attorney throughout the matter or proceeding, unless another is substituted with his consent in writing, or for good cause shown upon application to the court, and after notice to such attorney, if residing in the state and his residence is known, and by order of the county court.

(4) PERSONS IN MILITARY SERVICE. At the time of making the order for the hearing of any matter in county court, the moving party shall make and file an affidavit setting forth the facts showing whether or not any of the parties interested in such matter are actively engaged in the military service of the United States. Whenever it shall appear by such affidavit or otherwise that any person in the active military service of the United States is interested in any proceeding pending in county court and is not represented by an attorney the judge shall appoint an attorney to represent such person and protect his interest and no further proceedings shall be had until such appointment has been made. An attorney appointed by the court to represent any person in the military service in any proceeding in the probate of an estate may be allowed compensation and his necessary expenditures to be fixed by the court, and paid out of the estate. [*Court Rules III, IV; Supreme Court Order, effective Jan. 1, 1934; 1945 c. 319*]

Note: When a guardian ad litem is duly appointed and files his consent to act, his appearance in the proceedings thereafter is an appearance for his ward. In this case the guardian ad litem for minors had actual notice of the hearing on the petition for allowance of trustees' account. He signed a written waiver for formal notice and consented that a hearing be had on the same day. We think that equivalent to a formal notice of the hearing to the guardian ad litem. Of course the guardian ad litem should not enter upon a hearing without sufficient time to examine accounts involved and to study legal questions which may have a bearing upon the interest of his wards. However, a guardian ad litem's failure to take such precautions does not affect the court's jurisdiction. In re West's Estate, 231, W 377, 284 NW 565.

"It having been stated on the hearing before us that the testator left no heirs, query was made by the court whether Mr. Meyer had any standing as guardian ad litem or otherwise to appear in this court or to file objections to the probate of the will in the court below. The objection had not been made by appellants and the point had not been raised in the court below. After some verbal wanderings by counsel and wonderings by the court the matter was left with the understanding that counsel would file supplemental briefs limited to the particular question. Such briefs have been filed. We find nothing in these briefs directly to the question stated. The authorities cited all refer to situations in which there were in fact incompetent heirs living. It seems to us, a priori, that no one has any right to appear in court for unknown incompetent heirs unless there are living heirs whose names are unknown for him to appear for, or to file objections to granting relief asked for unless he is interested in the matter involved himself or is representing some living person who has an interest in it. It also appears to us that when it is represented to a county court by proponents of a will filing it for probate, or by a person filing a petition for administration, that the decedent has no heirs, the state under the escheat statutes is the only legal entity having any interest in the matter, except executor proponents and the beneficiaries of the will and the decedent's creditors. Proper notice having been given to them as was done here how may anyone else as matter of right appear in the proceedings or object to the granting of the relief granted? But however this be, it is not necessary to determine that question now and we shall not assume to decide it." Will of Knoepfle, 243 W 572, 11 NW (2d) 127.

324.30 Papers; filing; withdrawal. All papers in any matter shall be fairly and legibly written on substantial paper and have indorsed thereon the title of the proceeding in which they are filed, and the character of the paper; and if not so written and indorsed, the judge may refuse to receive and file the same. He shall indorse all papers with the dates of their delivery to him. No paper filed in any matter shall be withdrawn without leave of the court or judge, and when a paper is withdrawn a copy thereof, attested by the judge, shall, if required, be left in its place. [*Court Rule I; Supreme Court Order, effective Jan. 1, 1934*]

324.31 to 324.34 [*Renumbered section 253.33 by 1933 c. 190 s. 100*]

324.35 Removal of executor, administrator, guardian, trustee. If an executor, administrator, guardian or trustee shall reside out of this state, or shall neglect to render his account within the time provided by law or the order of the court, or shall neglect to settle the estate according to law, or to perform any judgment or order of the court, or shall abscond, or become insane or otherwise incapable or unsuitable to discharge the trust, the county court may remove such executor, administrator, guardian or trustee and appoint a successor therefor; but no such order shall be made until the person affected has been notified, as provided by sections 310.21 or 324.19, to show cause at a specified

time why he should not be removed. [*Stats. 1931 s. 310.22; Supreme Court Order, effective Jan. 1, 1934*]

Note: The control of county courts and courts of equitable jurisdiction in the matter of custody of children, when incidental to guardianship proceedings, was not disturbed by the enactment of the children's code. The guardian of the person of a minor has power to control the ward, and to justify interference with the guardian's control by the courts there must be positive misbehavior, want of integrity, or negligence affecting the ward's welfare. The circuit court properly transferred a habeas corpus proceeding against a guardian to the county court which had assumed jurisdiction of the guardianship matter. In re Bagley's Guardianship: James v. Roberts, 203 W 89, 233 NW 563.

At a hearing on the petition of an executor for instructions, an oral motion by devisees for his removal as executor, even though based on facts stated in his petition for instructions, could not serve as a substitute for the procedure for removal of an executor, including notice to show cause, as provided for in 324.19 and 324.35; and the county court could not acquire jurisdiction to remove him without compliance with the statutory procedure. 324.18 (3) has no application here. Will of Erpenbach, 245 W 518, 15 NW (2d) 795.

324.351 Accounts; failure of fiduciaries to file. If any executor, administrator, guardian or trustee shall fail to file his account as required by law or ordered by the court, the court may, upon its own motion or upon the petition of any party interested, issue a citation directed to the sheriff ordering and directing the executor, administrator, guardian or trustee to show cause before the court why he should not immediately make and file his reports or accounts. Should any executor, administrator, guardian or trustee fail, neglect, or refuse to make and file any report or account after having been cited by the court so to do, or if he fails to appear in court as directed by a citation issued under direction and by authority of the court, the court may, upon its own motion or upon the petition of any interested party, issue a warrant directed to the sheriff ordering that the executor, administrator, guardian or trustee be brought before the court to show cause why he should not be punished for contempt for such failure, refusal, or neglect. If the court finds that such failure, refusal or neglect is wilful or inexcusable, the executor, administrator, guardian or trustee may be punished for contempt by a fine not to exceed $50 or by imprisonment not to exceed 10 days, or both. [*1945 c. 536*]

324.36 Delayed service of notice. (1) In case the county court fails, because of insufficient notice, to acquire jurisdiction of the subject matter or of a person who is a necessary party in any proceeding, the court may at any time order service of the proper notice and may require the person to show cause why he should not be bound by the action already taken in the proceeding as though he had been seasonably notified. This provision for delayed notice applies to minors and incompetents. The notice may be served in the regular manner or as the court directs.

(2) Such person may appear and defend and the procedure shall be the same as to him and he shall have the same remedies and relief he would have been entitled to had he been seasonably served with notice. The court may amend any order or judgment to make it conform to the changed conditions resulting from the delayed notice and proceedings thereon. [*Supreme Court Order, effective July 1, 1943*]

Comment of Advisory Committee: There is need of a rule whereby the invalidity of probate proceedings due to a lack of service of notice may be validated. 324.36 is intended to provide a method. The serious consequences which may result from failure of acquiring jurisdiction of an interested minor are discussed in O'Dell v. Rogers, 44 W 136, 173. Failure to obtain jurisdiction of a necessary party may be due to a total lack of service of notice or to a futile attempt to serve him. For validating this type of invalidity in civil proceedings in courts of record we have sections 269.03, 269.12 and 278.09, and perhaps other provisions. [Re Order effective July 1, 1943]