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SURVEY OF 1951 WISCONSIN LEGISLATION

RICHARD P. BU ellesbach,* PAUL BINZAK** AND ROBERT F. BODEN***

(Editor's Note: Conspicuous by its absence from this article is any reference to one of the most important changes made by the 1951 Wisconsin Legislature—the new Corporation Code. This new law will be the subject of a separate article by Prof. Kenneth K. Luce of the Marquette University Law School, one of the authors of the law, to appear in the near future in the Marquette Law Review.)

The 1951 Wisconsin Legislature passed 735 new laws. This article presents an attempt to give the Wisconsin attorney a concise report of the most important of these new laws, noting and discussing the changes in statute law and the effect, if any, of such changes on Wisconsin case law. The laws discussed herein were chosen on the basis of their importance with respect to the magnitude of the changes wrought, effect on case or prior statute law and practical value to attorneys in the field. The discussions have been grouped into twelve sections: Creditors' Rights, Domestic Relations, Evidence, Insurance, Motor Vehicles, Practice and Procedure, Property, Taxation, Trusts, Wills and Probate, Workmen's Compensation and Wrongful Death. These sections are cross-referenced wherever possible for the convenience of the reader. As herein used, and unless indicated otherwise, all references to "section" are to the Wisconsin Statutes and to "chapter" are to the 1951 Wisconsin Session Laws. It is hoped that this work, which is to be henceforward a biennial feature of the Marquette Law Review, will be of value to Wisconsin attorneys. Comments, criticisms and suggestions for improving the survey of 1953 legislation are always welcome.

CREDITORS' RIGHTS

Executions on Old Judgments, or by Person other than Judgment Creditor. Chapter 638 amends section 272.04(1) of the Statutes, relating to the issuance of executions. The old law provided that execution may issue upon a proper judgment within 5 years after the rendition thereof, that when an execution was so issued and returned unsatisfied in whole or part other executions might issue at any time.

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The new law provides that when there has been such an unsatisfied execution issued within the 5 years, other executions may issue at any time "upon application of the judgment creditor." The old law further provided that if no execution was issued within the 5 years, execution could issue only upon leave of the court or judge when the sum still due was made known "by the affidavit of the owner, his agent or attorney." The new law amends this provision as follows:

"But if no execution was issued within said 5 years, or, if application be made by one other than the judgment creditor, execution shall issue only upon leave of the court, in its discretion, upon prior notice to the judgment debtor, served as a summons is served in a court of record. Application shall be by the petition of the judgment creditor, or, of the assignee, setting forth that such judgment, or a portion thereof, remains unpaid, and that the petitioner is the bona fide owner thereof, for value..."

The new law continues the prohibition of the old against execution or proceedings on judgments more than 20 years old. These amendments are obviously designed to curb and control the evils arising from the practices of certain persons in buying and selling and issuing executions on old judgments. The new law invests the court with discretion to grant or deny execution upon a hearing after notice to the debtor in all cases where no execution was issued within the first 5 years after the rendition of the judgment regardless of who the applicant is, and also in cases where such execution was so issued and returned unsatisfied, but the present applicant is not the original judgment creditor. Where in the latter case the applicant is the judgment creditor no change is made.

Exemption of Wages from Execution. Chapter 563 repeals and recreates section 272.18(15), relating to exemption of wages from execution. The new law, aside from being arranged in a more easily understood manner, works a general revision of the section with regard to the amounts of a debtor's income which are exempt from execution, the effect of which is to raise the "ceilings" and "floors" above and below which the basic 60% exemption is not applicable. The new statute also clarifies to some extent the question of eligibility as a debtor's dependent under the law by the use of more precise phrasing in defining the same.

Homestead Exemption, Denial Because Acquired in Fraud of Creditors. Chapter 497 has amended section 272.18(30), relative to limitations on exemptions from execution. Under the old law, the court might deny an exemption granted by section 272.18 where it found that the debtor "procured, concealed or transferred assets with the intention of defrauding his creditors." The new law extends this power of the
court to deny exemptions beyond those granted by section 272.18 to include all exemptions granted by chapter 272. The only exemption contained in the chapter in addition to those in section 272.18 is the homestead exemption, contained in section 272.20. The problem which arises then is whether this amendment changes in any respect the law relating to loss of a homestead exemption by the fraud of the debtor in procuring the homestead.

Prior to 1947, the question of a debtor’s purchase with non-exempt assets of exempt assets as being in fraud of creditors was regulated by the common law. In 1947 the Legislature amended section 272.18(30)\(^2\) by providing for the court’s denial of exemptions granted by that section under the fraudulent conditions as set forth above. There has been no Supreme Court construction of this amendment. Prior to this enactment the law seems clear. It was early held\(^2\) that an insolvent debtor who sells property which is subject to levy on execution, and with the proceeds immediately purchases exempt personal property, will be presumed to have done so with intent to defraud his creditors; but that the property so purchased does not for that reason cease to be exempt, the only possible remedy of the creditor being an attack on the sale of the non-exempt property.\(^3\) Thus it is seen that the 1947 amendment worked a substantial change in the law with regard to personal property exemptions (the exemptions granted by section 272.18). The very reason attributed by the Court for the decision that the exemption is not lost by the fraudulent acquisition of the exempt property was the lack of a legislative declaration that exemptions of personalty might be defeated because such personalty was acquired in fraud of creditors.\(^4\) That declaration was made in 1947.

That amendment has now been extended to the homestead exemption. The denial of a homestead exemption because the homestead was acquired by exchange of or purchase with non-exempt assets was also regulated by the common law until the present 1951 amendment. There is a complete dearth of recent Wisconsin cases on this subject. The older cases\(^5\) are not quite clear as to whether or not the acquisition of a homestead with non-exempt assets with an intent to thereby defraud creditors will render the homestead so acquired non-exempt.\(^6\) It is clear that no presumption of fraud will arise from the mere purchase and that fraud in such cases is a question of fact to be proved, presumably

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1 Wis. Laws, 1947, ch. 598.
2 Comstock v. Bechtel, 63 Wis. 656, 24 N.W. 465 (1885).
3 As to this approach see infra, note 6.
4 Supra, note 2.
5 Palmer v. Hawes, 80 Wis. 474, 50 N.W. 341 (1891); Kapernick v. Louk, 90 Wis. 232, 62 N.W. 1057 (1895).
6 The precise nature of the problem must be kept in mind. The creditor is attempting to attach or levy execution on a homestead, not to set aside the purchase thereof for fraud. That he may do the latter if he proves the fraud
by "clear and convincing" evidence. But the Court does not say in so many words what the effect of such proof would be. In the cases cited,7 the plaintiffs were unable to show fraud and the Court apparently was willing to rest its decision on that ground, holding that the mere acquisition of a homestead by such means was not sufficient to show fraud and did not raise a presumption thereof. However, the United States District Court for the Eastern District of Wisconsin seemed convinced that these decisions clearly set out the rule that "the insolvent debtor commits no fraud upon his creditors by taking non-exempt property and investing it in a homestead, although his purpose may have been to withhold such property from his creditors."8 It is not inconceivable that such an interpretation of the Wisconsin cases might be valid, especially in view of the spirit of protecting debtors through a liberal interpretation of the exemption laws which is manifest throughout the cases. Assuming the Federal court's interpretation of the Wisconsin cases to be the state of the law, as well it may be, it readily appears that the 1951 amendment to section 272.18(30) works as big and revolutionary a change with respect to homesteads as did the amendment of 1947 with regard to other exemptions.

For other homestead provisions see Cross-References, end this section.

Factor's Lien on Merchandise and Proceeds Thereof. Chapter 486 creates section 241.145 of the Statutes, providing for a factor's lien upon merchandise of a borrower without the factor's possession of the property with a power to sell it. The law defines a factor as: "Any person, firm, bank or corporation, their successors or assigns, engaged in whole or in part in the business of lending or advancing money on the security of merchandise whether or not they are employed to sell such merchandise." The act grants the factor a lien upon the entering of a written agreement with the buyer on any personal property intended for sale before or after or in the process of manufacture (except motor vehicles) covered by such agreements or by supplemental statements thereafter delivered by the borrower to the factor. The lien also extends to accounts receivable and other proceeds of merchandise. The factor need not have possession to exert his lien. The factors lien will also cover goods not in existence or not owned by the borrower at the time the lien is created. The lien so acquired may apparently be of indefinite duration. Loans may be made against

7 Supra, note 5.
8 In re Wood, 147 F. 877 (D.C., E.D. Wis., 1906).
merchandise for one year after filing of notice of the creation of the lien. This notice must be signed by both the factor and the borrower, contain certain information enumerated in the statute, and be filed with the register of deeds of the county where the merchandise is or will be situated. Purchasers of the merchandise from the borrower in the ordinary course of business take the property free and clear of the lien regardless of their knowledge of it, as do assignees in the regular course of business of conditional sales contracts or chattel mortgages given by purchasers from the borrower. A factor's lien, properly filed, is from that time effective upon and attached to the merchandise mentioned in the written agreement or supplemental statements as against all claims of unsecured and subsequent secured creditors of the borrower, except subsequent liens for processing, warehousing or shipping the property preparatory to sale. Actual possession by the factor gives him the lien without filing the notice.

The above is merely a recitation of the salient features of the new law. The entire text of it should be read for complete details. The purpose of the law apparently is to provide a simplified method whereby a lender may acquire a lien upon merchandise without taking possession of the borrower's stock-in-trade, raw materials or materials in the process of manufacture, or whereby he may acquire a lien on property acquired by the borrower after execution of the instrument, in situations where such merchandise may be the only security the borrower can offer. The law removes many of the difficulties previously inherent in a borrower's financing through encumbering his inventory. It provides a means of avoiding a pledge and its problem of possession in the pledgee, and the Wisconsin rule against chattel mortgages on after acquired property. It negates problems as to whether a purchaser from a chattel mortgagor is bound by the mortgage, for the statute provides that purchaser from the borrower in the ordinary course of business takes free and clear of the factor's lien regardless of notice and the lien attaches to the proceeds. It is to be noted, however, that a factor's lien does not take priority over subsequent liens incurred by the buyer in readying the merchandise for sale, a disadvantage when compared with the chattel mortgage.

The new statute bears little resemblance to the common law of factors and fàctors' liens. At common law a party could not acquire a lien as a factor unless he had possession of the property, along with management, control and a power to sell in his own name. In that

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9 Seymour v. Colburn, 43 Wis. 67 (1877); Geilfuss v. Corrigan, 95 Wis. 651, 70 N.W. 306, 37 L.R.A. 166 (1897).
10 Mietus, Chattel Mortgages on After Acquired Property, 23 Marq. L. Rev. 80 (1939), and cases cited therein.
11 Edgerton v. Michels, 66 Wis. 124, 26 N.W. 748 (1886); Kellogg v. Costello, 93 Wis. 232, 67 N.W. 24 (1896); Beardsley v. Schmidt, 120 Wis. 405, 98 N.W. 235 (1904).
respect a common law factor differs from a broker who ordinarily does not have possession or a right to sell in his own name.\textsuperscript{12} Thus it is apparent that the new law works a change of great magnitude in the field of security devices.\textsuperscript{13} Without question the factor's lien, extended as it has been by the statute, will be most heartily welcomed in Wisconsin.

\textit{Cross Reference:}
\begin{itemize}
  \item Property, Homestead, Descent as Affected by Value Limitation.
\end{itemize}

\textbf{DOMESTIC RELATIONS}

Reciprocal Enforcement of Support of Dependents. Section 49.135 entitled Uniform Reciprocal Enforcement of Support Act has been created by chapter 23 of the Session Laws. This law attempts to improve and extend by reciprocal legislation, the enforcement of duties of support through both the criminal and civil law. Wisconsin's provisions prior to the enactment of the law are found in section 351.30, and are primarily concerned with the criminal prosecution although some of the provisions of section 351.30\textsuperscript{1} appear to be quasi-civil proceedings. The present uniform act may be generally divided into three categories. The first part of the act consists of general provisions, i.e., the purpose,\textsuperscript{2} definitions,\textsuperscript{3} the effect of the remedies provided for,\textsuperscript{4} and the extent of the duties of support.\textsuperscript{5} The second category may be referred to as the civil enforcement provisions. The duties of support enforceable are those now existing in the several states,\textsuperscript{6} and in Wisconsin, these duties are set out in section 351.30 (1), Wis. Stats. Perhaps the greatest single contribution of the new act provides that any state may bring an action to reimburse itself for support previously given to a person to whom the defendant owed the duty of support.\textsuperscript{7} The act also provides for a procedure to be used against a person who owes the duty of support.\textsuperscript{8} The third category may be termed the criminal provisions which relieves the extradition process from the narrow requirements of Chapt. 364 of the Statutes.\textsuperscript{9} The act also provides for relief from extradition if the support orders of

\textsuperscript{12} Delafield v. Smith, 101 Wis. 664, 78 N.W. 425 (1899).
\textsuperscript{13} For an excellent discussion of the Pennsylvania Factor's Lien Law, similar or identical to the new Wisconsin statute, see note, 96 PA. L. Rev. 430 (1948).
\textsuperscript{1} Wis. Stats. (1949), 351.30 (3) and (4).
\textsuperscript{2} Subsection 1.
\textsuperscript{3} Subsection 2.
\textsuperscript{4} Subsection 3.
\textsuperscript{5} Subsection 4.
\textsuperscript{6} Subsection 5.
\textsuperscript{7} Subsection 6.
\textsuperscript{8} Subsection 7-14.
\textsuperscript{9} Subsection 16. See in this connection Recent Decision Note, infra p. 201, this issue.
\textsuperscript{10} Subsection 16.
the state are compiled with. The present uniform act will not be of any great value to Wisconsin, except in cases in which the person owing the duty of support as well as the person entitled to the support both remain in Wisconsin. The full force and effectiveness of the law will be felt when at least a number of states adopt similar provisions. At the present time, Wisconsin is the only state which has adopted this uniform law.

Legitimation of Children. Section 245.36 has been amended by chapter 471 and now provides one exception to the rule that illegitimate children become legitimated by a lawful marriage of such child's mother and father. Under the new amendment, if the parental rights of the mother were terminated before such marriage, the child shall remain illegitimate.

Consent of the Father of an Illegitimate Child in Adoptions. Section 322.04 (1) has been amended by chapter 324. Under the former statute, the consent of the father of an illegitimate child was not required in any case. A situation which this statute did not provide for would be a case where the natural father and mother of an illegitimate child would lawfully intermarry. Such marriage then would have the effect of legitimating the child and, if adoption proceedings were in progress, and the mother's rights terminated, might also require the consent of the father. This would be an effective manner in which to end any adoption proceedings. The 1951 amendment solves the problem by expressly providing that the consent of the father of an illegitimate child is not necessary where the father and mother have intermarried after the mother's parental rights have been terminated. If such marriage takes place before the termination of the mother's parental rights, the father's consent would, presumably, have to be obtained.

Annulment of Adoptions. Section 322.09(2) has been repealed by chapter 264. The repealed subsection placed a limitation on the conclusiveness of adoption after two years, i.e., if the adopted person developed a mental disease or venereal disease before he is 14 years of age, which disease existed prior to adoption and of which the parents by adoption were unaware, they could have petitioned for annulment of the adoption and if the facts brought the case under this section, the adoption was necessarily revoked. It would appear that under the present section, 322.09, as it now stands, the adoption becomes final after two years, without limitations.

Cross Reference:
Practice and Procedure, Service of Summons and Complaint in Divorce and Annulment Actions.

Wis. Stats. (1949), sec. 322.04(1).
Photographic Copies of Business Records as Evidence. Sec. 327.29 has been repealed and recreated by chapter 284. The new law provides that the originals of records kept in the ordinary course of business may be reduced to microfilm and when this is done, the originals may be destroyed. The microfilm and any enlargements or reproductions are admissible in evidence the same as the original record. It would appear that the rules of evidence applicable to original documents will prevail. Thus, the fact of existence of the microfilm will be a preliminary requirement to the admission of the enlargement, and testimony in court to the effect that the original microfilm is in existence, plus identification of the enlargement will be sufficient for admissibility. If the original microfilm is lost or destroyed and a justifiable excuse for its absence is made, the enlargement should be admissible, this being a mere expression of the best evidence rule applicable to secondary evidence. A second deviation from the old statute, apart from the right to destroy original documents, is this: Whereas, under the old statute the introduction of microfilm could affect the weight of such evidence, under the present statute the fact that the microfilm is introduced will affect neither the admissibility nor the weight to be given such microfilm.

The present uniform law, if adopted in other states would be of great value to the lawyer whose client is engaged in interstate transactions. In the absence of such a law, the businessman cannot destroy the bulky original records.

Search Warrants. Sec. 363.03(2) has been created by chapter 603 and provides that search warrants may be directed to the employees of the commissioner of taxation or the attorney general for gambling devices and intoxicating liquors illegally possessed. Several questions regarding the constitutionality of the present act were presented to the attorney general before passage of this law by the legislature. The attorney general is of the opinion that a magistrate may issue a search warrant to search a place which is outside his criminal territorial jurisdiction and direct that return be made to a court having jurisdiction of the crime. The attorney general is also of the opinion that others besides peace officers can execute search warrants. The question here involved

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1 For a discussion of the prior section, see 1947 Wis. L. Rev. 96, 101.
2 Wis. Stats. (1949), sec. 327.29.
3 Wis. Stats. (1951), sec. 327.29.
4 Georgia, South Dakota, Virginia, and Washington have already adopted this uniform law.
5 In People v. Wells, 380 Ill. 347, 44 N.E. (2d) 32 (1942), the court held that in the absence of legislative authority in Illinois, facsimiles of checks do not come within the best evidence rule.
the attorney general who is not in any sense a peace officer. At common law a justice of the peace could direct the warrant to anyone and this common law has not been changed by statute. Under this ruling the search warrant may properly be directed to the attorney general.

Cross Reference:
WORKMEN’S COMPENSATION, Testimony of Out-of-State Doctors Admissible.

INSURANCE

General

Medical Payment Insurance. Chapter 269 of the 1951 Wisconsin Session Laws made several changes in chapter 201 of the Wisconsin Statutes relating to insurance corporations in general. Medical payment insurance was authorized by a new special section, 201.04 (18). This type of insurance was previously allowed under sections 201.04 (5) and 201.04 (15), which deal primarily with liability and automobile insurance. These last two sections were accordingly amended by deleting all reference to medical payment insurance. It is expressly stated that the provisions of 204.31, relating to standard accident and health policies, are not to apply to medical payment insurance when such insurance is issued as supplemental to certain other types of insurance, provided “such expense arises out of a hazard directly related to such other insurance.”

One Company May Issue Various Types of Insurance. Section 201.05(2) was amended to allow a single company to be formed to handle various types of insurance. While similar provisions existed under the old law, the new statute appears to be more liberal in this respect. Under the new law, one company may now be formed for any or all of the purposes specified in section 201.04. The only qualification is in relation to life insurance, section 201.04 (3): “... Any company formed for the purpose of transacting the kind of insurance specified in subsection (3) and one or more of the kinds of insurance specified in any other subsection of section 201.04, except subsection (4), shall maintain separate reserves in trust as respects all insurance of the kind specified in subsection (3).”

6 40 A.G. 126 (1951).
7 Meek v. Pierce, 19 Wis. 300 (1865).
1 Wis. Stats. (1951), sec. 201.05 is referred to by the new statute as providing a list of cases where medical payment insurance can be so issued.
Licensing to Write Other Types of Insurance. Section 201.05 (2m), relating to the licensing of various insurers to write other types of insurance, was amended by incorporating into it reference to the new medical payments insurance provision. One other amendment to this section allows Mutual Companies, with the approval of the commissioner, to write any insurance mentioned in sections 201.04 (11), 4 (12), 5 (14), 6 (17) and (18) without increasing the surplus required for the kind or kinds of insurance already being written. Formerly this exception to increasing the necessary surplus applied only to subsections (11) and (12).

Necessity of Separate Premium Charge. Section 201.05(3) was amended to increase the types of insurance which can be written in the same policy with or without a separate premium charge. Likewise the new law increased the types of insurance which can be written in the same policy with separate premium charges.

Crop Insurance. Section 201.05(4), requiring a separate policy for insurance against damage to crops resulting from hail, was repealed. Sections 201.05(5), 201.11(1) and 204.38(1) were amended to include the necessary references to the new medical payments provision.

ACCIDENT AND SICKNESS INSURANCE

Form of Policy. Chapter 614 of the 1951 Session Laws rewrote the statutes relating to accident and sickness insurance policy forms. Section 204.29(2) was repealed; sections 204.31 (1) to (10) were

2 Wis. Stats. (1951), sec. 201.04 (4) relates to Disability Insurance.
3 Wis. Stats. (1951), sec. 201.04 (11) relates to Plate Glass Insurance.
4 Wis. Stats. (1951), sec. 201.04 (12) relates to Burglary Insurance.
5 Wis. Stats. (1951), sec. 201.04 (14) relates to Live Stock Insurance.
6 Wis. Stats. (1951), sec. 201.04 (17) relates to Other Casualty Insurance.
7 Wis. Stats. (1951), sec. 201.04 (18) relates to the new Medical Payment Insurance.
8 Supra, note 3.
9 Supra, note 4.
10 Under the old law, Fire and Sprinkler Leakage Insurance; Fidelity and Burglary Insurance; and Disability and Liability Insurance could be written in one policy. In addition to these, the new statute includes: Liability and Live Stock Insurance; Liability and Automobile Insurance; Liability, Automobile and Medical Payment Insurance; Liability and Medical Payment Insurance; Steam Boiler and Medical Payment Insurance; Burglary and Medical Payment Insurance; Elevator and Medical Payment Insurance; and Automobile, Other Casualty Insurance and Medical Payment Insurance.
11 Formerly any of the following could be written together in one policy if there was a separate premium charge: Liability Insurance; Steam Boiler Insurance; Burglary Insurance; Plate Glass Insurance; Sprinkler Leakage Insurance; Elevator Insurance; Live Stock Insurance; Automobile Insurance and Other Casualty Insurance. The new statute adds to this list: Fire Insurance and Marine Insurance.
12 This section required that the time allowed for serving a notice of injury be printed "clearly and conspicuously upon the face of every accident or casualty insurance policy or certificate." In view of the subsequent "Required Clauses" this provision has become obsolete.
repealed and recreated; sections 204.31 (11), (12) and (13) (c) and (d) were repealed; sections 204.31 (13)(a) and 204.31(14) were renumbered; section 204.31 (13)(b) was renumbered and amended; and section 204.33 was created.

The general provisions of the new law, relating to the form of a policy, are similar to those required under the old law. It is now provided in one section that a single policy may insure more than one person, if such additional persons are members of the insured's family. The new law also provides, in rather general terms, that the "over-all appearance of the policy give no undue prominence to any portion of the text. . .". No reference to charter or by-law can be made part of the insurance contract, unless the particular matter referred to is printed in full in the policy.

Required Provisions. The new law also provides for certain "Required Provisions" similar to those denominated "Standard Provisions" under the old law. The policy, together with endorsements and attached papers, must constitute the entire contract, with no change possible except upon approval of an executive officer of the insurer. One new required clause inserted by the 1951 Legislature provides that "After 3 years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability . . . commencing after the expiration of such 3 year period." It is specifically provided, however, that "the foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial 3 year period," nor shall it limit the application of other sections relating to misstatements of age, occupation, and other insurance. A loss or claim arising after the 3 year period, cannot be questioned on the basis that a disease or physical condition not excluded from coverage had existed prior to the effective date of the insurance.

The new law further requires that a minimum grace period be allowed for the payment of premiums, during which time the policy is to remain in full force and effect. In the case of a lapsed policy, a

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13 The old law quite tersely stated that "No such policy shall be issued . . . which insures more than one person." Family Insurance, however, was then permitted in section 204.31 (13) (c). This last provision has been repealed since Family Insurance is now allowed in section 204.31 (2).

14 The only exception to this provision is "the incorporation of, or reference to, a statement of rates or classification of risks, or short-rate table filed with the commissioner."

15 The minimum grace period is seven days if premiums are paid weekly; ten days if they are paid monthly; and thirty-one days if they are paid in any other manner.
special provision has been added to cover the question of reinstating such a policy.¹⁶

The new law, as did the old, provides for giving notice of claim within 20 days after the occurrence or commencement of any loss covered by the policy, "or as soon thereafter as is reasonably possible."¹⁷ In the case of policies providing loss-of-time benefits which may be payable for at least two years, the new law provides that the insurer may, at his option, require that notice of continuance of disability be given every six months. The duty of the insurer to furnish claim forms upon receipt of a notice of claim, is the same as under the old law.¹⁸ Both the 1949 statute and the 1951 statute provide that proof of loss must be furnished within ninety days, although the 1951 statute allows a reasonable time, but not in excess of one year from the time proof is otherwise required, if it was not reasonably possible to furnish proof within the required time. Claims are to be paid immediately upon proof of loss. Where the policy provides for periodic payments, such payments must be made at least monthly. Under the old law, such periodic payments had to be made at least every sixty days.

Payment of claims for loss of life are to be paid to the designated beneficiary. If there be no such designated beneficiary, then payment is to be made to the estate of the insured. Any accrued indemnities unpaid at the insured's death may, at the option of the insurer, be paid either to such beneficiary or to the estate. All other indemnities are payable to the insured. With the exception of the unpaid accrued indemnities provision, the above clauses are basically the same as the 1949 law. Two new option provisions for the payment of indemnities are allowed under section 204.31 (3) (a) 9b. One provides for the payment of up to $1,000 to any of the insured's blood or marital rela-

¹⁶ Acceptance of the over-due premium by an agent authorized to accept premiums, without requiring an application for reinstatement, will reinstate the policy. Over-due premiums may be accepted on condition that an application for reinstatement be submitted. The policy is reinstated upon approval of the application by the insurer, or on the forty-fifth day after conditional receipt of the premium unless the insurer has notified the insured that the application will not be accepted. "The reinstated policy shall cover only loss resulting from such accidental injury as may be sustained after the date of reinstatement and loss due to such sickness as may begin more than 10 days after such date." In all other respects the rights of the parties are to be the same as before the default, subject to express conditions contained in the reinstatement agreement. The premium accepted can be applied for the period during which payment had lapsed but cannot extend back more than 60 days prior to the date of reinstatement.

¹⁷ Wis. Stats. (1949), sec. 204.31 (3) (5) provided that if the notice was not given within twenty days, the claim would not be invalidated, if it could be shown "not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

¹⁸ If the forms are not furnished within 15 days after the giving of notice of claim, the claimant shall be deemed to have complied with the requirements of his policy if he submits, within the time allowed by his policy, written proof covering the occurrence, character and extent of loss for which claim is made.
tives, or to a beneficiary who is deemed by the insurer to be equitably entitled thereto, when any indemnity is payable to the estate of the insured or to one incompetent of giving a valid release. Another option provision allows the insurer, "subject to any written direction of the insured in the application or otherwise," and "unless the insured requests otherwise in writing not later than the time of filing proofs of such loss," to pay medical and doctor bills directly to the parties entitled to such payment. Under the new law, the period for bringing action on a policy has been extended from two to three years from the time written proof of loss is required to be furnished.

Other Provisions. Other provisions which can be inserted into a policy, and which are apparently optional, provide for cases involving a change of occupation, misstatement of age, and other insurance with the same insurer, or with other insurers. The new law also establishes a formula for determining proportionate liability under a loss-of-time policy where the aggregate benefits payable to the insured exceed his average monthly earnings at the time of disability, or for the period two years immediately preceding the disability, whichever is greater. A certain minimum liability, however, is fixed by the statute.

19 The statute provides that none of the provisions respecting the matters set forth under 204.31 (b), "Other Provisions," shall be included in a policy "unless such provisions are in the words in which the same appear in this paragraph; provided, however, that the insurer may at his option use in lieu of such provision a corresponding provision of different wording approved by the commissioner which is not less favorable in any respect to the insured or the beneficiary." If the insured is injured after having undertaken a more hazardous occupation, the insurer's liability is limited to the amount of insurance which the premiums paid would have purchased at the rates for the more hazardous occupation. When the change is to a less hazardous occupation, there is a provision for a reduction of premium and a return of the excess pro-rata unearned premium. Both of these alternatives were covered in a similar manner by the 1949 law.

21 If the age of the insured has been misstated, all amounts payable under the policy shall be such as the premium paid would have purchased at the correct age. This is a new provision added by the 1951 legislature.

22 In the case of two or more policies with the same insurer, a maximum amount of payable indemnity can be fixed, the excess being void and all premiums paid for such excess returnable to the insured. This situation was covered in a similar manner by the 1949 law.

23 In case the same claim is covered by a different company, without notice to the insurer, the insurer's liability shall be only for a fixed proportion of the loss. Again, this situation was covered by a similar provision of the 1949 law. The new law, however, makes a distinction between expense incurred insurance and other benefit insurance, and in each case, sets up a formula for determining proportionate liability.

24 "... but this shall now operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of $200 or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time."
Cancellation privileges are defined in more detail under the revised law. The insurer may still retain his right to cancel, but must give the insured at least 5 days written notice. After the policy has been continued beyond its original term, cancellation may be effective immediately upon the insured’s receipt of the notice of cancellation. Unearned premiums, of course, must be returned as soon as possible. The insurer will not be liable for any loss sustained as a result of being engaged in an illegal occupation, or under the influence of intoxicants or narcotics, unless administered on the advice of a physician.

Third Party Ownership. Third party ownership of an insurance policy is specifically approved under the new law. Policies issued by foreign insurers and delivered to a person in this state must be as favorable to the insured or beneficiary as it would be if issued under the Wisconsin Act or under the law of the state where the insurer is incorporated.

False Statements in Application. In applying for insurance, the new law provides that any false statements made in the application will not bar the right to recovery unless such false statements “materially affected either the acceptance of the risk or the hazard assumed by the insurer.” Nor shall the insured be bound by any statement made in an application unless such application is “attached to or endorsed on the policy when issued as a part thereof.”

Penalty Provisions. While the new law retains the $100.00 penalty for each violation of this Act, it also extends the penalty provision to cover violations of all orders of the Commissioner. As in the case of the 1949 law, the Commissioner may suspend or revoke an insurer’s or agent’s license for any wilful violation.

Effective Date. The effective date of this act is January 1, 1952. However, “a policy, rider or endorsement, which could have been lawfully used or delivered or issued for delivery to any person in this state immediately before the effective date of this section may be used or delivered or issued for delivery to any such person during 5 years after the effective date of this act without being subject to the provisions of section 204.31.”

Group Accident and Health Insurance. Section 204.31(13) (a) and (b), relating to group accident and health insurance, were renumbered 204.32, and then 204.31 (13) (b) was amended to include specifically those provisions of recreated 204.31 which may be applicable

25 The cancellation section is still part of the “Other Provisions” section, 204.31 (b), supra, note 19.
26 With the enactment of this new and revised penalty provision, the old penalty section, 204.31 (11), was repealed.
to group accident and health insurance relative to notice of proof of loss, or the time for paying benefits, or the time within which suit may be brought under the policy.

Direct Payment. Section 204.33 was created by the 1951 Legislature. This provision is similar to old section 204.31 (3)(11), and provides that any disability policy which includes benefits payable on account of hospital, medical or surgical services may also provide for direct payment to the hospital, physician or other institution or person furnishing the services covered by the policy. It is specifically provided that the “last paragraph in section 204.31 (3) (a) 9b27 shall not apply to any policy written in accordance with section 204.31 and which provides for direct payment as permitted in this section.”

As can be seen from the foregoing, many of the provisions of the new law were substantially included under the old law. The general confusion of the old law, however, and the overlapping or incomplete development of many of the provisions, necessitated a general revamping of the entire section. It would seem that the present statute goes far in establishing a sound, uniform policy for health and accident insurance.

FIRE INSURANCE

Section 203.06 (2) (d) was amended by chapter 410 of the 1951 Session Laws by deleting the reference made to automatic sprinkling systems. Under the old law, such a system was necessary if a rider or indorsement was to be added to the standard fire insurance policy insuring property used for mercantile purposes.

Section 203.01 was amended by chapter 452. This section provides a standard fire insurance policy form. The actual changes appear to be minor, and would be of interest only to those actually engaged in writing fire insurance. Sections 203.06 (1), (2) (a) (5), and (3) were also amended in such a manner as to affect form only.28

The 1951 Legislature created section 203.06(6) which provides that the standard policy is not mandatory for motor vehicle insurance, marine insurance, or for inland marine insurance as defined in section 203.32. Chapter 452 of the Session Laws, covering the above matter relative to the form of a fire insurance policy, became effective July 12, 1951, but it is expressly provided that existing policy forms may be used for a period of one year thereafter.

Chapter 573 of the 1951 Session Laws repealed and recreated section 203.28, taking the two-hundred and eleven word sentence of the

27 Supra, page 132.
28 Section 203.06 (2) (a) (5) was amended to provide that where damage under $100 is done to mortgaged real estate, the full amount of insurance is to be paid solely to the mortgagor. Formerly the mortgagor was paid if the damage was under $50.
old law, and breaking it down into more readable categories. A few minor changes were made regarding the other risks which may be insured by a fire insurance company, but both the old and the new law contain the general provision that a fire insurance company may insure "... any other hazard which may lawfully be the subject of insurance except hazards which may be insured against under section 201.04 (7), 29 (8), 30 and (9)." 31 The new law allows a fire insurance company to insure against the explosion of steam boilers whereas the old law specifically forbade such insurance.

MOTOR VEHICLES

Passing on Curves and Hills. Section 85.16 (5) has been amended by chapter 74 of the Session Laws. The new section makes it unlawful to operate on the left side of the road on any hill or curve where the driver's view is obstructed for such a distance as to create a hazard in the event another vehicle might approach from the opposite direction. Formerly the distance was limited to 1000 feet. Where formerly the legislature has declared a standard necessary for the protection of certain interests, which was effectual in removing the act from an inquiry as to the element of foreseeability, the present law appears to place the act within the realm of the element of foreseeability. The question, then, is the latter cases is—should the defendant, as a reasonably prudent person, have anticipated that the act would probably cause damage to another.1

Distance Between Vehicles. Section 85.32 (2) has been amended by chapter 87 and now provides that the operator of a truck shall not follow another truck within 500 feet except when passing. The effect of this amendment is to distinguish between slow moving vehicles and trucks. In the case of Meyer v. Neidhofer & Co., 2 the court held that where one truck followed another at a distance of 12 feet the question as to the negligence of the second driver was one for the jury. Under the present law, it is possible for a driver of a truck closely following another truck, i.e., within a distance of 500 feet, to the negligent as a matter of law. Here, then, the act is removed from an inquiry as to the element of foreseeability.

Reporting of Motor Vehicle Accidents. Section 85.141 (6) (a) has been amended by chapter 365. The sum of apparent property damage

29 Wis. Stats. (1951), sec. 201.04 (7) relates to Fidelity Insurance.
30 Wis. Stats. (1951), sec. 201.04 (8) relates to Title Insurance.
31 Wis. Stats. (1951), sec. 201.04 (9) relates to Credit Insurance.
1 Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).
2 213 Wis. 389, 251 N.W. 237 (1933).
has been raised from $50.00 to $100.00. In place of the ten day period within which a driver must report an accident, the amendment has substituted "immediately." In order to comply with this provision, it would appear that the reporter must meet the reasonable time test.

Dimming Headlights on Motor Vehicles. Section 85.06 (16) has been repealed and recreated by chapter 420, and now provides that a driver, during hours of darkness, shall dim his lights when at a distance of not less than 500 feet of an oncoming vehicle or vehicle preceding him. A driver is also required to use headlights which will reveal a person or vehicle at a distance of at least 100 feet ahead. A driver then is guilty of negligence as a matter of law if this section is not complied with. The question of foreseeability then is removed from the purview of the jury and the question remaining is whether or not the driver's negligence was the proximate cause of the accident.

Motor Vehicle Safety Responsibility Law. Sections 85.09 (7) (b) and 85.09 (10) (c) have been amended by Chapter 658. Under the old law, apparently some doubt existed as to whether a person, against whom a cross complaint was filed, was entitled to a refund of his deposit under Sec. 85.09 (10) (c). The attorney general was of the opinion that such a depositor was entitled to such a refund because no action had been instituted within the one year period to which he was a party. Under the new amendment, a depositor's security will not be returned for 13 months which will allow sufficient time for a cross complaint to be filed.

PRACTICE AND PROCEDURE

Service of Process on Non-Resident Motorists. Chapter 521 amends section 85.05(3), 85.09(5) (c) and 194.10, relating to service of process upon non-residents using the highways of Wisconsin in actions for damages arising out of such use. Section 85.05(3) has been amended with respect to the procedure of such service. Under the old law a resident plaintiff served the commissioner of the motor vehicle department and himself mailed a notice of service, a copy of the summons and complaint and an affidavit of compliance to the non-resident defendant at his last known address within 10 days after service on the commissioner. Under the new law, the plaintiff merely serves the commissioner with an original summons and complaint and suffi-

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3 Wis. Stats. (1949).
5 The situation herein discussed may arise in this wise: A, B, and C are involved in a three way collision. Each deposits security. A starts an action against B on the last day of the year following the accident. Within the 20 days B has to answer, B interpleads C. Is C entitled to a refund?
cient copies for all defendants and the commissioner then forwards the copies to the defendants by registered mail to the address given in the papers so served. However it is to be noted that the burden of finding the last known address of the defendant remains upon the plaintiff, and he or his attorney must certify in the papers served upon the commissioner that the address given therein is the last known address of the non-resident to be served. Similar changes are made in the procedure of service set out in section 85.09(5)(c), relative to service on insurance or surety companies not authorized to do business in Wisconsin insuring or bonding non-resident motor vehicles under the Safety Responsibility Law, and in section 194.10, relative to service upon non-resident motor carriers. The changes in these service statutes "streamline," as it were, the procedure of service, and avoid the trap for the unwary in the old law resulting from the Supreme Court decision that no jurisdiction over the non-resident is acquired by mailing the notice, copies and affidavit to him before the commissioner has received the summons and complaint, service not being completed until that time and no proper notice or affidavit be possible prior thereto.

Service of Summons and Complaint in Divorce and Annulment Actions. Chapter 419 of the Session Laws amends sections 247.05 and 247.06, regarding service of summons and complaint in divorce and annulment actions. The old law provided for service in both types of actions "by publication as provided in the statutes or by personal service on the defendant within this state." The new law adds a 3rd method: "in the manner provided in section 262.12." Section 262.12 provides for service by publication or personal service without the state upon a non-resident defendant in divorce and annulment actions, so that the net result of the amendment is to recognize as valid in section 247.05 and 247.06 not only the service by publication allowed in section 262.12, but also the alternate method allowed by the latter section, namely personal service without the state. Thus it would appear that the new law merely corrects an inadvertance in sections 247.05 and 247.06, section 262.12 always having provided for such service.

Service of Summons and Complaint in Unlawful Detainer Actions. Chapter 273 of the Session Laws amends sections 291.05 and 291.06(1) of the Statutes, providing for service of summons and com-

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1 Since the burden of ascertaining the defendant's last known address is still on the plaintiff, the amount of diligence required in ascertaining such address to comply with due process should remain unaffected by the amendment. The Wisconsin Court held, in Sorenson v. Stowers, 251 Wis. 398, 29 N.W. (2d) 512 (1947), that, in the absence of actual knowledge of a later address, the plaintiff is not bound to go further in his search than the address given by defendant in the accident report.

2 State ex rel. Stevens v. Grimm, 192 Wis. 601, 213 N.W. 475 (1927).
plaint in unlawful detainer actions. A defendant must now be summoned to appear not less than 6 nor more than 15 days after issuance of the summons, where formerly the period was 3 to 10 days (section 291.05); and the sheriff or constable concerned must now serve the summons and complaint at least 6 days before the return date thereof, where formerly it was 3 days (section 291.06(1)).

Verdicts, Five-sixths of the Jury. Section 270.25 (1) of the Statutes, relating to five-sixths jury verdicts, was amended by Chapter 36 of the Session Laws to provide that “if more than one question must be answered to arrive at a verdict on the same cause of action, the same five-sixths of the jurors must agree on all such questions.” This appears to be merely a legislative recognition of the Supreme Court construction placed upon old section 270.25(1) in *Scipior v. Shea* and other cases cited therein.

Court Commissioners, Powers and Duties. Chapter 251 renumbers and revises section 252.15 of the Statutes, relating to the powers and duties of court commissioners. The amendment effects a general reorganization of the section, subdividing the cumbersome passage that was section 252.15(1) into 10 subsections and combining the rules relating to the special powers and duties of commisioners in Milwaukee County into a new section 252.152. The amendment is merely one of reorganization of the statute and does not grant any new or take away any existing powers of court commissioners.

Discharge of Lis Pendens. An amendment to section 281.03 (3), contained in chapter 106, provides that a lis pendens may now be discharged “upon the conditions and in the manner provided . . . by section 270.87 for satisfying a judgment.” This is an addition to the old law and provides an alternate method for discharging a lis pendens, where formerly it could be done only in the manner provided in section 266.22 for discharging an attachment.

Motions Before Trial in Criminal Cases. Chapter 674 amends section 355.09(4), relating to motions before trial in criminal cases. The old law provided for such motions to be made “before the plea is entered, unless the court permits it to be made within a reasonable time thereafter.” The new law provides: “The motion shall be made at least 10 days before the trial of the action, unless the court permits it to be made within a reasonable time thereafter. In all cases where a plea is entered less than 10 days before trial the motion may be made at the time the plea is entered.”

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3 252 Wis. 185, 31 N.W. (2d) 199 (1948).
Changes in State Judicial Structure. Chapter 257 of the 1951 Session Laws amended section 252.01 of the Statutes by creating and adding thereto, a new judicial circuit, the Twenty-second. It also amended section 252.06 by adding thereto, and setting forth therein, the terms of court for the new Twenty-second Circuit comprising the county of Waukesha and by taking Waukesha county out of the Thirteenth Circuit. Similarly, Chapter 402 amends Section 252.01 by creating and adding thereto a new judicial circuit, the Twenty-first; and amends Section 252.06 by adding thereto and setting forth therein the terms of court for the new Twenty-first circuit comprising the county of Racine, and by taking Racine County out of the First Circuit. The following chapters amended Section 252.06 of the Statutes by changing the terms of court for the judicial circuits indicated after the chapter numbers: Chapter 200, Eighth Circuit; Chapter 255, Seventh Circuit; Chapter 630, Thirteenth Circuit.

Jurisdictional changes were made in the following named courts: County Court of Columbia County, Chapter 16; Municipal Court of Ashland County, Chapter 18; Municipal court of Neenah-Menasha, Chapter 22; County Court of Kewaunee County, Chapter 26; County Court of St.Croix County, Chapter 254; County Court of Bayfield County, Chapters 494 and 594; County Court of Trempeleau County, chapter 585. Chapter 300, 1951 Session Laws, confers additional jurisdiction and powers on, and imposes additional duties on the County Court of Eau Claire County and establishes as branches thereof, the following: County Court, Circuit Court Branch; and County Court, Justice Court Branch.

Chapters 125 through 197, and Chapters 383, 384, 620 and 621 revise and re-enact as revised, laws relating to municipal and inferior courts of a number of cities and counties to read as printed in the compilation of the Wisconsin Annotations, 1950 (pages 1620-1918). The laws will be referred to by the new chapter numbers.

Chapter 290 repeals Section 324.01 (1), 324.02 and 324.03 of the Statutes relating to appeals from the county courts; renumbers Sections 324.01 (2) and (3) and makes amendments thereto. This chapter

4 Chapters 257 and 402 also prescribe the election of judges to preside over the new judicial circuits, and provide that the counties affected shall remain with their present circuits until the first Monday in May, 1952.


6 The section now reads: "Section 324.01, Appeals from County Court. Any person aggrieved by any order or judgment of the county court may appeal
also amends Section 253.02, Wisconsin Statutes, relating to election of, and qualifications for, county judges. The changes made by Chapter 290 are to become effective with the terms of court beginning on the first Monday in January, 1956.

Chapter 501 enacts amendments relating to prosecution for violations of ordinances and by-laws of the city of Oshkosh and the county of Winnebago.

Chapter 63 amends section 17m, Chapter 218, laws of 1899 (along with amendments thereto), relating to new trials in the district courts of Milwaukee County.

Chapter 733 amends Chapter 177, laws of 1951, section 10, relating to change of venue for the Municipal court of Racine County.

Chapter 48 amends section 13, 1, Chapter 549, laws of 1909, relating to salaries of Milwaukee County Civil Court judges.

Changes in the power of the judge of the Municipal Court of Brown County to grant continuances and adjournments, and in the selection of jurors and salaries for jury commissioners were made by Chapter 58.

Miscellaneous Provisions as to Fees and Costs. Chapter 716 amends section 252.17 relative to fees of court commissioners and reporters and section 366.08 relative to stenographer fees at coroners' inquests. The amendment to section 251.23(1), contained in chapter 69, provides for an increase in the cost of printing cases and briefs in the Supreme Court from $1 to $2 per page. Also reflecting the inflationary trend was the amendment, by chapter 17, of section 325.05(1), increasing witness fees from $2.50 to $5 per day for witnesses attending before any court, officer, board or committee, excepting justice courts, arbitrators, and, generally speaking, local boards, in which case the fee remains at $2 per day. Chapters 218 and 312, amending section 59.57 and relating to the fees the Register of Deeds may charge for recording instruments, provides for a general increase in those fees.

Cross Reference:
WILLS AND PROBATE, Ancillary Administration of Estates.
WILLS AND PROBATE, Probate of Foreign Wills.
WILLS AND PROBATE, Time for Filing Claims

PROPERTY

Homestead, Descent as Affected by Value Limitation. Section 23m of Chapter 727 has amended section 237.02(2) of the Statutes, relating to descent of a homestead upon intestacy of the owner in therefrom to the supreme court, and the provisions of chapter 274 shall apply. But, no appeal may be taken on any claim unless the part thereof in dispute amounts to at least $20. . . ."
severalty when such owner leaves a widow or widower and issue. The subsection provided, and still provides, that in such case the widow or widower take a life estate in the homestead, subject to being divested by remarriage, with remainder to the issue of the decedent.¹

The new law adds this proviso: “the limitation as to value of the homestead in section 272.20 shall not apply to a widow and the heirs of her husband during widowhood.” The limitation referred to is the $5000 limitation on the homestead exemption from execution contained in section 272.20. It would seem that this amendment clearly removes the $5000 limit of that section engrafted by court construction upon what may descend as a homestead. An old case (the only decided case on the subject) held that the $5000 limitation on exemption of a homestead also applies to what may descend as such, and that one entitled by the statutes of descent (section 237.02) to a homestead right upon intestacy has such right only to the extent of $5000.²

There is some question of a conflict between this decision and the present statutes. Section 370.01(46) defines a “homestead” in terms of size and use only. Section 370.01(47) defines an “exempt homestead” as a “homestead” as limited by section 272.20 as to value. It would thus seem that there is a distinction between a “homestead” and an “exempt homestead.” Insofar as the descent statute, section 237.02, is concerned with the descent of “homesteads” it would appear that the statute in prescribing what may descend, is not limited to “exempt homesteads.” But that it is so limited is apparently the precise holding of the Supreme Court in the case referred to. It would seem, however, that the new law quite clearly removes this judicial limitation, if it be valid today under sections 370.01(46) and (47), in cases where the owner is survived by a widow and issue, but only for the duration of the widowhood. It does not apply to a situation where the wife dies first, leaving a widower and issue. Where before the Wisconsin Court apparently felt constrained to define a homestead, for purposes of descent, in terms of all restrictions placed upon it by the statute with regard to size, use³ and value, it would now appear, in the limited case at least of a widow and issue taking under section 237.02(2), that a homestead for descent purposes is not to be defined with reference to the value limitation of section 272.20, but only with reference to the use and size limitations of section 370.01(46).

A further question arises, however. Did the Legislature intend by the amendment to the statute of descent to remove the $5000 limitation on exemption in the case of a widow and issue during widowhood and allow them to claim as exempt from execution the whole of a

¹Lands of Christianson: Miller v. Hart, 161 Wis. 611, 155 N.W. 115 (1915).
²Lands of Sydow, 161 Wis. 325, 154 N.W. 371 (1915).
³Wis. Stats. (1949), Sec. 370.01 (46) and (47).
homestead qualifying as such under the limitations as to size and use, without regard to value? An attempted answer to this question would at this time be mere speculation. Whether or not the Court will include in determining what amounts to an exempt homestead under 272.20 the qualification now present in section 237.02(2) in the same manner as it included in determining what descends as a homestead under the latter section the value limitation of the former, would seem to depend upon the importance which it will attach to the distinction made in sections 370.01(46) and (47) between a "homestead" and an "exempt homestead." If at this time that distinction has rendered invalid the inclusion of the value limitation in determining what may descend, it seems only natural that the statute of descent, concerned only with "homesteads" and not "exempt homesteads," should not be used to qualify, limit or expand the exemption statute, concerned with "exempt homesteads."

For other homestead provisions see Cross References, end this section.

Reservations and Exceptions, Implied Dedication. Section 80.01(5) of the Statutes has been created by chapter 520. This section provides that a reservation or exception in a deed, mortgage or land contract of certain lands for street or alley purposes or a projected extension thereof shall constitute a dedication for such purposes to the public body having jurisdiction over the street or alley, unless the language of the reservation or exception plainly indicates an intent to create a private way. The new section also provides that to be effective as a dedication the deed, mortgage or land contract must be executed and recorded. Such a dedication may be accepted by resolution of the governing body having jurisdiction over the street or alley. In the absence of any time limit required for such acceptance (and the new statute prescribes none), a reasonable time must be allowed. An early Wisconsin case held that there are two methods of converting a private way to a public highway: 1) By express grant to, and acceptance by, the public; and 2) By user and working for ten years. The present section of the statutes appears to be a third method, i.e., dedication by implication. This method, as set up by the new statute, abrogates the general rule that in order to constitute a valid dedication there must be an intention on the part of the owner to devote his property to public use whether the dedication is claimed by acts resulting in an estoppel or by conveyances of record. The general rule amounted to a presumption against dedication which had

4 26 C.J.S. 96.
5 State ex rel. Lightfoot v. McCabe, 74 Wis. 481, 43 N.W. 322 (1889).
6 26 C.J.S. 61; cf. State ex rel. Lightfoot v. McCabe, supra note 5; Tupper v. Huson, 46 Wis. 646, 1 N.W. 332 (1879).
to be met by evidence of an *animus dedicandi*. The presumption in the present statute is in favor of a dedication unless the language of the reservation or exception shows a clear intent to create a private way.

**Mortgages to Department of Veterans Affairs under Veterans’ Housing Law.** Section 45.352 (5) of the Statutes has been amended by chapter 278 and now provides, in addition to the language comprising the subsection, that the mortgage securing the note for the loan made by the Department of Veterans Affairs to a veteran under section 45.352 is to have priority over all liens upon the mortgaged premises, buildings and improvements on such premises, which are filed after the recording of such mortgage. However, tax and special assessment liens are excluded. The effect of this amendment taken into consideration with the other language of the subsection will result in the following line of priorities: 1) a first mortgage, recorded; 2) tax and special assessment liens; 3) the recorded mortgage securing the veteran’s loan; 4) all other liens. However, if a lien were filed prior to the mortgage provided for in this section, such lien would then be prior. This last would probably never occur in view of the provision of section 45.352(5) which allows such loan secured by a mortgage to be subject to only one prior mortgage, otherwise the premises must be free and clear of all incumbrances whatever.

Section 235.70 has also been amended by chapter 278 and now includes the Wisconsin Department of Veterans Affairs, acting under section 45.352, as a mortgagee which shall be protected against liens filed subsequent to the recording of the mortgage. This section was formerly limited to federal savings and loan associations.

**Statute of Limitations, Defective Real Estate Titles.** A new statute of limitations is contained in Chapter 321, creating section 330.18(7) of the statutes and providing as follows:

“(a) No action or proceeding affecting the title to or possession of any real estate which is founded on a defect in jurisdiction over a person named as a party defendant in a judgment entered in a court of record of this state shall be commenced after 10 years from the filing of such judgment with the clerk of the said court, provided that during such time a lis pendens or such judgment or a certified copy thereof, naming such person as a party defendant, has been of record in the office of the register of deeds of the country in which such real estate is located, unless within 10 years after the date of the filing of such judgment with the said clerk there is filed in the office of such register of deeds some instrument or notice giving the name of the person claiming to have been affected thereby, describing such defect, and the real estate affected. Any such instrument or notice filed after the expiration of such 10 years,
be likewise effective, except as to the rights of a purchaser, without notice and for value, of such real estate or interest therein which may have arisen prior to such filing. Such instrument or notice may be discharged in the same manner as a lis pendens.

“(b) Paragraph (a) shall have no application to judgments in estates of decedents.”

It would appear that this section was enacted as a corollary to section 330.15, the 30 year statute on actions concerning real estate. While the 30 year statute is general in its terms with regard to title defects within its purview, this new 10 year statute is specifically limited to title defects arising from invalid service in actions affecting such title or the possession of such lands, i.e., quiet title, ejectment and unlawful detainer actions (the latter only where brought in a court of record). There is no indication that title defects so caused were not within the broad language of section 330.15 so as to make this new section a necessity for that reason. Rather it seems that the Legislature felt 30 years too long a time of limitation with respect to these specific defects. It is to be noted that the section applies only to defects arising from lack of jurisdiction over a defendant named in a judgment entered in a court of record. Title defects arising from invalid service in justice court unlawful detainers, or from complete lack of joinder in any court, or from invalid service on unnamed defendants are presumably not within the new law.

Cross Reference:

Creditors’ Rights, Homestead Exemption, Denial Because Acquired in Fraud of Creditors.

Creditors’ Rights, Factor’s Lien on Merchandise and Proceeds Thereof.

Practice and Procedure, Service of Summons and Complaint in Unlawful Detainer Actions.

Taxation, Tax Sales.


Wills and Probate, Escheats and Unclaimed Legacies and Shares.

Wills and Probate, Effect of Conveyances by Executors and Administrators.

Wills and Probate, Statute of Limitations on Actions to Set Aside Probate Decrees for Insufficient Service.
TAXATION

INCOME TAX

Inventories. Chapter 198 of the Session Laws amended section 71.10 (7), by providing a penalty provision for failure to comply with the statute. The statute itself requires that where income tax returns are based upon, or involve, inventories, the persons, firms or corporations involved must file certain information relative to those inventories. Under the new amendment, failure to file such information "shall be deemed a failure to file a return and subject such person to the penalties provided in section 71.11 (40), and in addition such person shall be denied any right of abatement by the board of review on account of the assessment of such personal property unless such person, firm or corporation shall make such return to such board of review together with a statement of the reasons for failure to make and file the return in the manner and form required by this section." Under this new provision, the department of taxation should have little difficulty in obtaining inventory information on time.

Amortization of Defense Facilities. Chapter 709 of the Session Laws created sections 71.04 (2a) and 71.05(2a), to allow corporations and individuals to amortize defense facilities and deduct such amortization from their gross income. Beginning after December 31, 1949, and in lieu of the present allowance for depreciation, amortization deductions of any emergency facility provided in section 216 of the Revenue Act of 1950¹ will be allowed by the State of Wisconsin. To qualify for these deductions, however, certain conditions, enumerated in the statute, must be satisfied, and it is expressly provided that the deductions cannot extend beyond the period allowed by the Federal Law. After the last of these emergency amortization deductions has been taken, the taxpayer "shall" deduct a reasonable allowance for depreciation at the ordinary rates on those depreciable emergency facilities that are continued in use in the business. Subsequently, the total amount of depreciation which will be allowed will be limited to the unamortized-balance of such facilities. The obvious purpose of this amendment, of course, was to allow Wisconsin taxpayers, deductions similar to those now allowed under the Federal Tax Law.

Deductions. Chapter 720 of the Session Laws made a number of changes in the Income Tax Act, Chapter 71 of the Wisconsin Statutes. Section 71.04 (1), which provides for deductions by corporations from gross income, was amended to include wages, salaries, commissions and bonuses of employees and of officers to whom a compensation of at least $800.00 was paid during the assessment year. Under the old statute, only the wages of employees and the salaries of officers

were covered. The amount of compensation which had to be paid during the year was formerly $700. Actually, deductions for bonuses paid to employees were covered by section 71.04(2), although the qualifying phrase, "if reasonable in amount" was not included in the latter section. Salaries and commissions could probably be classified as "ordinary and necessary" expenses, although the new amendment leaves no doubt as to their deductibility. Section 71.04(2) was also amended to include specifically rent paid during the year in the operation of the business as an "ordinary and necessary" business expense.

Section 71.05(1), covering non-corporate deductions, was amended by adding the phrase "if reasonable in amount" to the deduction allowance for wages and other compensation paid. Section 71.05(2) was amended to provide that if deductions are claimed for rent, a list of lessors must be furnished. A similar provision requires corporations to file like reports.

**Tax Liability of Persons Moving Into or Out of Wisconsin During a Taxable Year.** Section 71.07 (6) was repealed and recreated. This section relates to the income tax liability of a person who moves into or out of the State during a taxable year. Formerly the amount of income taxed in Wisconsin, was based simply on the per cent of the year that the taxpayer was a resident of Wisconsin.² Under the new law, there is tax liability only for the amount of income actually earned while a resident of Wisconsin (or accrued if on the accrual basis.)³ Past interpretation by the Wisconsin Supreme Court, however, leaves some doubt as to the exact effect of this new amendment. In *McCarty v. Wisconsin Tax Commission*⁴ the income involved was readily separable into that earned as a resident of Wisconsin, and that not earned as a resident of Wisconsin. The court, however, following the mandate of the statute, applied the "proportionate time of residency" test. But then in *Greene v. Wisconsin Tax Commission*⁵ it was held that where a taxpayer moves into the State during a taxable year, and when his income can be clearly separated into that received before and after he became a resident of Wisconsin, he is not taxable on income earned and received while a non-resident of Wisconsin.

² For example, if the taxpayer lived in Wisconsin three months of the year, he would be taxed on 25% of his income.
³ Theoretically this new formula removes the inequities which would arise if an individual having earned $10,000 in State X from January to June, moved to Wisconsin on July 1, and earned only $5,000 for the remaining six months. Under the old law, he would be liable in Wisconsin for the taxes on $7,500. Assuming State X taxed the income actually earned in that state, the taxpayer would be paying taxes on $17,500 when his income amounted to only $15,000.
⁴ 215 Wis. 645, 255 N.W. 913 (1934).
⁵ 221 Wis. 531, 266 N.W. 270 (1936).
Section 71.09(2) of the 1929 Statutes, which at the time provided for the apportionment of income according to the time of residence, was held only to apply when the income earned and received while a non-resident could not be reasonably ascertained. The McCarty case, supra, was not specifically over-ruled, the court remarking that "that case dealt with the application of the formula to the particular facts and circumstances of that case, and no question seems to have been raised as to the right to apply it; the dispute being rather as to how it should be applied." Since Greene v. Wisconsin Tax Commission, supra, still appears to be the law, the new amendment, in one sense, merely makes statutory, that which was formerly held by judicial determination. The problem which now presents itself is this: when it cannot be accurately determined how much income was earned as a resident of Wisconsin, what formula will be applied? If the court in the Greene case, supra, could apply the "amount of actual income" test in the face of the old statute, could it, and should it, in a case where the amount of actual income earned in Wisconsin is not clearly ascertainable apply the old "proportionate time of residency" test under the provisions of the new amendment? Or will the court, under the new law, be forced to determine the actual amount of income earned as a resident of Wisconsin, difficult as that job might be, before there can be any tax assessed? It would almost seem, that the old law, with the judicial determination which had been placed upon it, offered a more practical solution to the problem at hand. Or at least the Legislature in adopting the "actual amount of income" test, could have indicated what procedure is to be followed when that actual amount of income is not easily ascertainable.

**Who Must File a Return.** Section 71.10 (2), which determines who must file a return, was amended to include a married person and his or her spouse, if their combined income exceeds $1600. Formerly the statute simply provided that a married person did not have to file unless he alone had received $1600. A new provision was added by the 1951 Legislature which provides simply that every person, other than a corporation, who has gross receipts of $4000.00 or more, must file a return. The $800.00 requirement for a single person was not changed. It is further provided that an individual, having a married status only part of the income year shall report such income within the time provided when he has gross receipts of $4000.00 or more, or the tax on his net income exceeds the personal exemption to which he is entitled under 71.09(6). For the purpose of this subsection, "gross receipts" is defined as in section 71.09(2m)(c).

**Method of Accounting.** Section 71.11 (8) was repealed and recreated. This section now provides that income shall be computed in accordance with the method of accounting used in keeping the
books of the taxpayer. If such method, however, does not clearly reflect the income, the computation will be made on the basis, which, in the opinion of the department of taxation, shall clearly reflect such income. This new provision copies almost verbatim the provision in the United States Internal Revenue Code.\(^6\)

**Delinquent Taxes.** Section 71.13 (1), relative to delinquent taxes, now provides that in case an initial payment is not made as required by section 71.10(9)(a) or (b), the *entire* unpaid balance shall be considered as delinquent from the due date of the initial payment. While this penalty provision might have been impliedly included under the old statute, the new provision leaves little room for doubt.

**Returns of an Administrator or Executor; Corporate and Partnership Returns.** Section 71.08 (4)(d) was created to cover income tax returns filed by an administrator or executor of a deceased ward, while section 71.08(7), which describes the duty of a guardian to file a return for his ward, was repealed and recreated. Section 71.10(1) was amended to eliminate from corporate returns the necessity of an oath or affirmation. Under the new provision, returns may be submitted over a signature only. Section 71.10(3)(a), relating to partnership returns, was amended in a similar manner.

**Miscellaneous.** Chapter 394 of the Session Laws abolished the tax exempt Wisconsin dividend, and also the three per cent privilege dividend tax imposed by section 71.16(1). Chapter 685 granted certain extensions and exemptions to members of the United States Armed Forces. Chapter 600 created section 71.035 relative to the tax liability on certain corporate stock and property exchanges and distributions made in obedience to orders of the Securities and Exchange Commissions.\(^7\)

**Gift and Inheritance Tax**

**Powers of Appointment.** Chapter 510 of the Session Laws made several important changes in the law which taxes a power of appointment. Section 72.01 (5), which provided that the exercise of a power of appointment was deemed a transfer under sections 72.01 to 72.24, in the same manner as if the person exercising the power owned absolutely the property involved, and had devised or bequeathed it by will, was amended to define what is meant by a power

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\(^7\)Chapter 600 also created 71.03 (4) covering the taxable gain realized on certain corporate liquidations. Under the statute, however, the plan of liquidation must be adopted in 1951, and the transfer of all the property under the liquidation must take place within one calendar month in 1951. It would thus seem that by the time the new statute book is printed, section 71.03 (4) will have become past history.
of appointment. In the wording of the statute itself, it is "any power to appoint exerciseable by any person either alone or in conjunction with any other person, except a power to appoint within a class which excludes the donee of the power and is restricted to the husband, wife, lineal issue, the wife or widow of a son and the husband of the daughter of the creator of the power; provided that such power was created on or after October 21, 1942, or if created prior to October 21, 1942, was subsequently modified or limited by release or otherwise to the type of restricted power described herein; and provided further that this paragraph shall not include any power to appoint, whether exercised or not, under which another power to appoint may be created." Under the old law, whenever the donee of a power of appointment exercised that power in his will or when a corporation exercised any power of appointment) the tax imposed was based on a testamentary disposition of the fee. (If the power was not exercised, the recipients of the property were taxed as if they had received a fee under a will.) The new amendment, by its definition of a power of appointment, will exclude from this tax provision, certain powers of appointment which can be exercised only within a restricted class, that is, only in favor of the husband, wife, lineal issue, the wife or widow of a son and the husband of the daughter of the donor or creator of the power.

Section 72.15(8m) was repealed and recreated, incorporating therein the above definition of a power of appointment. Formerly the inheritance tax imposed on the recipient of a life estate (or an estate for years) with a power of appointment was payable by the life tenant as a transfer of absolute ownership. The same remains true under the new law, except that where the power granted comes within the exceptions created in the new definition of a power of appointment, then the remainder interest subject to the power "shall be taxed in the estate of the donor of the power as if the power had been exercised in favor of the person in the restricted class in such a manner as will result in the imposition of the largest amount of tax." The statute further provides, that "upon the exercise or release of such power by the donee of the power, either upon his death or during his lifetime, the tax in the estate of the donor shall be redetermined to accord with the ultimate evolution of the property. Any excess tax determined to have been paid shall, upon application to the department of taxation, be refunded forthwith and without interest to the residual beneficiaries of the estate of the donor of the

8 Lineal issue is defined in the new statute to include an adopted child and a mutually acknowledged child as defined in section 72.02 (1).
9 This was the date of the famous 1942 amendments to the United States Internal Revenue Code, affecting all powers of appointment under estate and gift tax law.
power, or to their respective heirs and assigns.” Prescinding for a moment from the actual tax consequences of this amendment, the procedure involved will be as follows: “A” upon his death, gives to “B” a life estate in Blackacre, with a power of appointment exercisable only in favor of either the wife or the children of “A.” This restricted power of appointment, while it will still subject “B” to an inheritance tax on his life estate, will throw the tax upon the remainder interest back into the estate of “A.” The amount of this tax is computed on the assumption that “B” will eventually exercise his power in favor of one of the children, since such a computation will produce a larger tax than if the wife received the remainder. This procedure is necessary under the statute, which requires that the tax will be determined in such a manner as will result in “the imposition of the largest amount of tax.” Assume, however, that when “B” does in fact exercise his power of appointment, he designates “A’s” widow as the recipient. At this point, the tax (which was originally paid out of “A’s” estate) will be redetermined, and the smaller tax payable on the wife’s interest, computed. Upon application to the department of taxation, the difference between the larger tax which has already been paid, and the smaller tax which is all that is actually owed, will be refunded, “to the residual beneficiaries of the estate of the donor of the power, or to their respective heirs and assigns,” the parties who indirectly paid the higher tax when such tax was originally deducted from the donor’s estate.

Section 72.75 (3), which formerly imposed a gift tax on any release or exercise of a power of appointment in the same manner as if the person exercising the power owned absolutely the property involved, was amended to exclude from its operation, those powers of appointment, exercisable within a class which “excludes the donee of the power and is restricted to the husband, wife and lineal issue” of the creator of the power, provided that such power was created on or after October 21, 1942, or if created prior to October 21, 1942, was modified or limited in compliance with section 452 (c) of the

10 Under the new definition of a power of appointment, of course, this restricted class could also include sons-in-law, daughters-in-law and “lineal issue.”
11 Who will be liable for this tax may present some difficulties. In Estate of Allen, 243 Wis. 44, 9 N.W. (2d) 102 (1943), it was held, in construing Wis. STATs. (1941), sec. 72.15 (5), that the inheritance tax due on a life estate was deducted from the corpus and not from the life estate. In 1947 sec. 72.15 (8m) was passed, and now in 1951 amended. That section provides that “a transfer of an estate for life... accompanied by a power of appointment shall be taxed to the life tenant as a transfer of absolute ownership.” In 1948 Wis. L. REV. 121, it was assumed that even under sec. 72.15 (8m), the interpretation of Estate of Allen, supra, would apply, and the tax would be deducted from the corpus. This interpretation is probably correct since the purpose of sec. 72.15 (8m) was to clarify the method of computing the tax, and not necessarily who was to pay it.
12 Supra, note 8.
13 Supra, note 9.
United States Revenue Act of 1942, as subsequently amended, and provided further that this subsection (a) shall not include any power to appoint, whether exercised or not, under which another power to appoint may be created." Also excluded from the original operation of 72.75 (2) is a "power to appoint among the donees described in section 72.79." Under this new amendment, therefore, a power of appointment, when exercised or released, will not be taxed if the power can be exercised only in favor of the husband, wife or lineal issue of the creator of the power, or in favor of those institutions enumerated in section 72.79. The power will be taxed, however, regardless of the beneficiary, when it is a power under which another power to appoint may be created.

The foregoing amendments were obviously passed to enable Wisconsin taxpayers to obtain some of the tax benefits presently allowed by the Federal government through the use of a limited power of appointment. Taking the standard unlimited power of appointment, A, to B for life with power to appoint the remainderman, the inheritance and estate tax consequences under both Wisconsin and Federal law, have been, and still are, basically the same, keeping in mind, of course, that under the Wisconsin law the recipient pays the tax while under the Federal law, it is the decedent's estate which must pay. In Wisconsin, B will pay a tax on the basis of having received absolute ownership, and then when the exercises his power of appointment, his recipient will pay a tax on the same basis. In Federal practice, A's estate will be liable for a tax on the fee, while B's estate will be subject to the same liability.

Because Federal law taxes the deceased, B's recipient will pay nothing; because Wisconsin law taxes the recipient, A, the original donor, will pay nothing. Thus basically the State and Federal laws are the same under general powers of appointment; both will impose two complete transfer taxes.

Under a limited power of appointment, A to B for life with power to appoint either A's wife or A's son as remainderman, the following estate and inheritance tax consequences would result. The Federal law would tax A's estate because he holds the fee; B's estate would not be taxed, however, because of the exclusions under Section 811 (f) of the Internal Revenue Code. In Wisconsin, before the

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14 Section 1000 (c) of the United States Internal Revenue Code, 26 U.S.C.A. §1000.
15 These include certain charitable, educational etc. organizations.
16 Wis. Stats. (1951) sec. 72.15 (8m).
17 Wis. Stats. (1951), sec. 72.01 (5).
18 Section 811 (f), United States Internal Revenue Code, 26 U.S.C.A. §811.
19 The restricted classes which come within the definition of a limited power of appointment, vary under State and Federal law. In the field of estate or in-
new amendments were passed, both B and the remainderman would be subject to a full inheritance tax, just as under an unlimited power of appointment.\textsuperscript{20} The new amendment provides, however, that B will be liable only for the taxes on his life estate,\textsuperscript{21} and the estate of A will pay the taxes on the remainder interest.\textsuperscript{22} Thus under the new amendment, Wisconsin law will follow the lead of the Federal law, and tax a limited power of appointment only once. While the restricted powers allowed by the State of Wisconsin are not as broad as those allowed by the Federal Government,\textsuperscript{23} at least Wisconsin taxpayers will be able to enjoy some of the advantages of a limited power of appointment.

Similarly the new amendment allows greater use of limited powers of appointment in the field of gift taxes. The old Wisconsin law taxed as a gift any exercise of a power of appointment,\textsuperscript{24} while the Federal law of 1942\textsuperscript{25} exempted powers of appointment if they were limited to a restricted class. The new amendment to section 72.75 (3), however, now offers to Wisconsin taxpayers, tax advantages similar to those offered by the Federal Government.\textsuperscript{26} Under the 1942 Federal amendments, the exceptions to a power of appointment

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<tr>
<th>Under Federal Law, 1942</th>
<th>Under Wisconsin Law, 1951</th>
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<td>The spouse of the creator of the power.</td>
<td>The spouse of the creator of the power.</td>
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<td>The spouse of the decedent.</td>
<td>The lineal issue of the creator of the power.</td>
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<td>The descendents (other than the decedent) of the creators of the power or his spouse.</td>
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<td>The spouses of the descendents of the decedent.</td>
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<td>Certain charitable, educational etc. organizations.</td>
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<td>(But see infra, note 29.)</td>
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\textsuperscript{20} Supra, notes 16 and 17.
\textsuperscript{21} Supra, note 11.
\textsuperscript{22} Wis. Stats. (1951), sec. 72.15 (8m). The purpose of the amendment to this section was obviously to clarify the law relating to the taxability of a life estate coupled with a power of appointment. Considerable confusion had existed prior to the enactment of the original section, 72.15 (8m) in 1947 as to the manner in which such a transfer should be taxed. The 1947 statute clarified this question by simply taxing the life tenant as if he had been the recipient of a fee simple estate. (For a discussion of this particular problem in Wisconsin, and the cases which gave rise to the 1947 Law, see 1948 Wis. L. Rev. 121.) The new 1951 amendment eliminates this harsh treatment of the life tenant, and indirectly places at least part of the tax upon the remainderman.
\textsuperscript{23} Supra, note 19.
\textsuperscript{24} Wis. Stats. (1949), sec. 72.75 (3).
\textsuperscript{25} Supra, note 14.
\textsuperscript{26} As pointed out in note 16, the restricted classes which come within the definition of a limited power of appointment, vary under State and Federal law. In the
ment, in both the gift and estate field, were almost identical.27 Under the new Wisconsin amendments, however, that is not true.28 Thus if A gives property to B for life, with power to appoint either A’s son or A’s son-in-law, as the remainderman, and B desires to release his life estate and exercise his power of appointment by way of a gift, he can, under Federal law, appoint either of the above named remaindermen without incurring any tax liability. The new Wisconsin law, however, would impose a gift tax upon B, if he should exercise his power of appointment in favor of A’s son-in-law, but it would not impose such a tax if he should exercise his power in favor of A’s son. The reason for this is simply that sons-in-law are not within the exempt category under the new gift statute, section 72.75 (3). However, if B were to wait until his death before exercising his power of appointment, he could name either A’s son or A’s son-in-law, and there would be no new tax liability under section 72.01 (5), because that section includes within the exempt class, both sons and sons-in-law.

General approval must be given to this attempt to give to Wisconsin taxpayers some of the benefits enjoyed under Federal law. It would almost seem that the Wisconsin law is modeled to some degree after the Federal law. But unfortunately, the Federal law was also changed in 1951.29 This change, however, should not be too substantial as far as our particular problem here is concerned. As was remarked by the Senate Finance Committee Report, the purpose of

| gift tax field, a power of appointment restricted to one or more of the following categories will not be taxed: | Under Wisconsin Law, 1951 |
| The spouse of the creator of the power. | The lineal issue of the creator of the power. |
| The spouse of the donee of the power. | |
| The descendents of the creator of the power or his spouse. | |
| The descendents of the donee of the power or his spouse. | |
| The spouses of such descendents of the creator of the power or his spouse. | |
| The spouses of such descendents of the donee of the power or his spouse. | |
| Certain charitable, educational etc. organizations. | Certain charitable, educational, etc. organizations. |

27 Compare the Federal provisions in notes 19 and 26, supra.
28 Compare the state provisions in notes 19 and 26, supra.
29 A General Power of Appointment, under the new Federal Amendment, is defined as meaning, “a power which is exerciseable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate . . . .” The specific exceptions enumerated above in notes 19 and 26 have been dropped. P.L. 58, 82nd Congress (1951).
the new Federal Law governing powers of appointment is not to increase the revenue, but "to make the law simple and definite enough to be understood and applied by the average lawyer." Thus the new Wisconsin amendments granting tax benefits to certain powers of appointment will not be rendered "inoperative" by a new and substantial Federal tax.

Certain Transfers to Out-of-State Institutions Exempted. Chapter 483 created two new sections, 72.04 (1)(m) and 72.79 (3), exempting from inheritance and gift taxes, certain transfers to out-of-state institutions. It is specifically provided, however, that to qualify for these exemptions the state containing the institution to which the transfer is made, must allow its citizens to make similar tax-free transfers to comparable Wisconsin institutions.

Judicial Determination of Inheritance Tax. Section 72.15 (2)(b), which provided that certain judicial determinations prior to January 1, 1947, declaring that no inheritance tax was due, would be conclusive as to property then before the court even though there had been no notice given to the public administrator or department of taxation, was amended by Chapter 326 of the Session Laws to include also judicial determinations which stated that the tax had been determined and paid. It seems clear that the purpose of this statute was to prevent old inheritance tax claims from arising many years later, and that the new amendment merely protects one class of cases which had not been protected under the original statute.

Chapter 53 of the 1951 Session Laws amended section 72.176 of the Wisconsin Inheritance Tax Statute, by adding a provision which enables the court, upon petition for a certificate of descent or for a certificate terminating a joint tenancy or life estate, to determine, without notice to or waiver by the department of taxation, but after notice has been given to the public administrator, or waived by him in writing, that no inheritance tax is due or payable on the transfer, where such fact appears "clearly evident to the court." Presumably section 72.176 was originally enacted to expedite certain probate matters. Under the old law, notice to the department of taxation was always necessary, but as can be seen from the foregoing amendment, that requirement is no longer an absolute necessity.

**Tax Sales**

Chapter 342 of the Session Laws amended the law relative to tax sales and a subsequent quiet title action by the purchaser or his successor to forever bar the former owner from asserting any right.

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30 In general, these institutions are charitable, educational etc. For a complete enumeration, see sections 72.04 (1)(m) and 72.79 (3) of the 1951 Statutes.
title, interest, or claim in such property. Sections 75.50 and 75.51 were strengthened so as to enable a plaintiff to bring such an action against unknown defendants, and foreclose such defendants from ever asserting a claim against the property, even though such defendants are later discovered to be minors or insane persons. Under the old law, certain judgments against unknown defendants who were later found to be minors or insane, could be set aside.

Section 72.521 (3) (b), referring to the commencement of an action by the county to foreclose a tax lien, was amended to provide that the filing with the clerk of the circuit court of a list of tax liens shall constitute, "notwithstanding any other provision of law," the commencement of an action by the county against each parcel of real estate therein described. As provided under the old law, such filing shall have the same force and effect as the filing and recording in the office of the register of deeds of a separate and individual notice of the pendency of such action as to each parcel described in such list. Section 75.521 (3) (c) was amended to provide that a copy of the petition to foreclose a tax lien shall also be sent to the State of Wisconsin, in addition to being sent to the last known owner, mortgagees of record, and municipalities having a claim or interest in the land. Section 75.521 (6) providing for public notice in an action to foreclose tax liens, was amended to enable the county treasurer to publish notice of such an action in any county paper, rather than in the paper having the largest county circulation.

Section 75.521 (14a) was amended to reduce from six years to two years the period of time within which an aggrieved party may commence an action against the county to recover damages resulting from an unjust foreclosure. It is further provided that any amount recovered by a plaintiff in such an action shall be reduced "by the total amount due, as of the date of entry of judgment, for all current taxes and upon all tax sales certificates held by the county on such date that the court shall find were valid."

31 See Wis. Stats. (1951), sec. 75.39.
32 To provide for the foregoing changes made in Chapter 75 of the Wisconsin Statutes, section 274.01 (1) was amended to provide that the six month time limit for appeals to the Supreme Court, shall begin to run from the date of entry of judgment in all cases under 75.39 to 75.50, even though a minor or insane person may be involved. Usually insanity or minority will toll the six months statute. The 1951 Legislature, however, has made it clear that land titles will not be kept under a continuous threat of attack by an unknown minor or insane person. The sections of these amendments referring to minors and insane persons will take effect January 1, 1952. After this date, the statutes involved will be retroactive to include the rights of any minors or incompetents accruing either prior to or subsequent to January 1, 1952.
33 This phrase was undoubtedly inserted to distinguish clearly between the tax lien foreclosure and other types of civil actions.
34 Where fraud is involved, however, the statute remains at six years.
TRUSTS

Registration of Securities Held in Name of Nominee. Chapter 315 amended section 223.05(2) of the Statutes, relating to registration of securities held by a fiduciary in the name of a nominee. The old law allowed registration of securities with the corporation in the name of a nominee by trust company banks, state banks or national banks authorized to exercise trust powers in Wisconsin acting as executor, administrator, guardian or testamentary trustee. The new law extends such privilege to such banks acting as “trustee of any inter vivos trust, unless prohibited by the terms of the trust instrument.” The old law also provided “that any bank, individual or individuals acting as executor, administrator, guardian or testamentary trustee” could “request any bank or trust company bank incorporated under the laws of Wisconsin or any national bank located in this state to cause any stock or other securities deposited with such bank or trust company bank by such individual or individuals as fiduciary or fiduciaries to be registered and held in the name of a nominee or nominees of such bank or trust company bank.” The new law also extends this privilege to banks and individuals acting as trustees of inter vivos trusts, unless prohibited by the terms of the trust instrument. Aside from the fact that this practice is now open to inter vivos trustees, it would appear that the chief point to be noted in connection with the new law is that settlors desiring to prevent such practice by their trustees may easily do so by inclusion of a prohibition in the trust agreement, an election not available to the settler under the old statute. The problem of interpretation which the new law creates, however, is this: Does the phrase “unless prohibited by the terms of the trust instrument” refer only to inter vivos trusts included in the new law? Or does it embrace both testamentary and inter vivos trusts? In both instances where the phrase is used it follows immediately upon the mention of inter vivos trusts and clearly refers thereto, but there appears no reason, aside from the fact that the phrase was enacted with the inter vivos clause, why it cannot also refer to the testamentary trust provision immediately preceding the inter vivos clause in the series of fiduciaries or fiduciary relationships to which the practice is open. The language in this regard appears highly ambiguous, and a determination of legislative intent must await court construction.

Investment of Trust Funds. Chapter 404 amended section 320.01 (17), relating to investment of trust funds. That section provided that, in the absence of provisions pertaining to investment in the instrument under which they act, fiduciaries may invest 35% of the excess over $15,000 of trust or guardianship funds in investments authorized by section 201.25(1)(ff) and (fg). Section 201.25(1)(ff)
provides for investment in “bonds or other evidences of indebtedness and stocks of any solvent corporation.” under certain specified conditions. The new law, by way of addition of a new sentence to section 320.01(17), provides that for the purpose of section 320.01 (17) the word “corporation” as used in section 201.25(1)(ff) “shall be construed to include investment companies which are common law trusts as well as those which are corporations,” thus widening the area of trust fund investment beyond that of the strictly corporate form of business.

Securities Eligible for Investment by Fiduciaries. Chapter 579 amended section 320.01(14), relating to securities eligible for investment by fiduciaries in the absence of express authorization otherwise in the instrument under which they act. The old statute allowed investment in “single premium endowment insurance policies and single premium annuities of life insurance companies authorized to do business in Wisconsin.” The new law adds that “with the approval of the court” the fiduciary “may retain and pay premiums on annuities, endowment policies, life insurance policies and accident and health policies benefiting the beneficiary of the trust or the ward or their dependents.”

WILLS AND PROBATE

Performance of Land Contract Made by the Decedent. Section 316.35 has been amended by chapter 54. Whereas the old section provided for only one mode of conveying land which a decedent had contracted to convey, viz., only under a court decree made after a hearing of which interested parties had notice, the new amendment allows an alternative method: If there are no objections, the court may direct the execution of the deed in accordance with the land contract without hearing or notice to interested parties. This raises the question as to whether the persons who might otherwise object will have notice of the fact that decedent had contracted to convey during his lifetime. It would seem proper that persons who will receive a smaller share of the estate if the contract is executed, should be given notice of the court’s intention to order performance of the contract unless objections are made. It would also seem that any objections made by such persons would necessitate a hearing on the validity of the contract. In view of the notice requirements in the first section of this statute, the question may be raised: whether the court’s decree, made without notice to interested parties, would be valid and binding on such interested parties?
Personal Estate Allowance for Widows. Section 313.15 (1) has been amended by chapter 71, raising the value of personal property which a widow may select from $200.00 to $400.00.

Ancillary Administration of Estates. Section 324.31 has been created by chapter 252 under the title Uniform Ancillary Administration of Estates Act. The act is procedural in nature and will be effectual only when the ancillary administration is initiated. If the Wisconsin court determines that the decedent was domiciled in another jurisdiction the act applies, even though there is no administration in the domiciliary state. But if the Wisconsin court decides that the person was domiciled in the local state, i.e., Wisconsin, this act will have no application. This would be true notwithstanding that a court of another jurisdiction had decided that the decedent was domiciled in such other jurisdiction. The effect of this act is to assimilate the various statutory regulations concerning ancillary administration into a compact section.

The basic purpose running through the act is to regard the domiciliary administration as the primary one. This is carried out by providing for the eligibility of a foreign representative and a preference that the foreign domiciliary representative serve as the local representative; by providing for denial of ancillary letters when unnecessary; and by providing for a substitution of the foreign for the local representative. While the act clarifies and simplifies the law of ancillary administration, it does not represent a radical departure from the existing case and statutory law. An example of this applicable to the Wisconsin situation may be found in that section of the act relating to payment of claims in case of the insolvency of the estate. This section appears to be a reaffirmation of the principles found in Estate of Hanreddy. An exception to the statement that the act is not a radical departure from existing law may be found in the provision relating to

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1 In re Will of Heyman, 190 Wis. 97, 208 N.W. 913 (1926).
2 Wis. Stats. (1949), Sec. 287.16, relating to foreign executors; Sec. 311.01, relating to administration of intestate estates; Sec. 316.30-32, relating to sale of lands by foreign executor; Sec. 223.12 (2), relating to a foreign corporation as executor.
3 The act here provides that a foreign corporation need not qualify under any other law of Wisconsin in order that such foreign corporation may act as an executor or administrator so long as an administration bond is given (under subsection 4) and an irrevocable power of attorney is granted to the clerk of the court naming him as agent for service (under subsection 5).
4 Subsection 2.
5 Subsection 3.
6 Subsection 6.
7 1949 Handbook of the National Conference of Commissioners on Uniform State Laws, p. 326.
8 Subsection 11.
9 176 Wis. 570, 186 N.W. 744 (1922). The court stated, inter alia, "It then becomes the duty of the court itself, administering the assets, to subordinate the demands of the local creditors to be paid in full or to the exhaustion of the assets to the broader rights of the creditors as a whole to share on equal footing in the assets as a whole."
the effect of adjudications for or against a representative. It is true that part of subsection 8 is merely declarative of the existing law. For example, when an administrator in one jurisdiction sues on a claim belonging to the decedent and obtains judgment, the claim is merged in the judgment and no other administrator may recover upon the claim or the judgment. But under present case law, judgments rendered for or against the administrator in suits brought against him, and judgments rendered against the administrator in suits brought by him, are not res judicata as to suits brought for or against the administrator in another jurisdiction even if the same person is the representative in both jurisdictions. The purpose then of subsection 8 is to establish privity between the local and foreign representatives with regard to judgments obtained for or against representatives of the same estate. If this is accomplished it will prevent the relitigation of the same claims based on the theory that the estate and the representative are distinct entities.

As far as it can be discerned, Wisconsin is the first state to adopt this ancillary administration act and hence there has been no judicial interpretation of any section of the law. It should be noted that the full force and effect of this act will not materialize until other states adopt similar provisions.

Probate of Foreign Wills. Section 310.08 has been repealed and section 310.07 has been repealed and recreated by chapter 253. Formerly these two sections dealt with the effect of the probating of foreign wills in the domiciliary state of the deceased non-resident and the original probate of a non-resident's will who died leaving real estate in Wisconsin. The new uniform act does not to any great extent change the substantive law of Wisconsin. Rather it incorporates the general ideas where stated with definite procedural steps which will effectuate the intent of the substantive law. One possible effect of the new act may be the solution of the problem of whether section 310.08 was restricted to cases in which the deceased non-resident left real

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10 Subsection 8 provides: "A prior adjudication rendered in any jurisdiction for or against any representative of the estate shall be as conclusive as to the local and foreign representative as if he were a party to the adjudication unless it resulted from fraud or collusion of the party representative to the prejudice of the estate. This subsection shall not apply to adjudications in another jurisdiction admitting or refusing to admit a will to probate."

11 Restatement, Conflict of Laws, section 505 (1934).

12 Supra, note 11, section 506.

13 Ingersoll v. Coram, 211 U.S. 335, 29 S.Ct. 92, 53 L. Ed. 208 (1908); Brown v. Fletcher's Estate 210 U.S. 82, 28 S.Ct. 702, 52 L. Ed. 966 (1908); Estate of Hanreddy supra, note 9 ("A judgment against an administrator in one jurisdiction is not binding in the other.")

14 WIS. STATS. (1949), sec. 310.07.

15 WIS. STATS. (1949), sec. 310.08.
estate in Wisconsin. The Wisconsin court in Estate of Joyce\textsuperscript{16} held that Wisconsin had jurisdiction in the original probate of a will where the will disposed of real estate and personal property located in Wisconsin and the county courts had the power to administer as to both the real and personal property. No case was decided where the non-resident decedent left only personal property in Wisconsin. In view of the court's reference to the Restatement of the Conflict of Laws\textsuperscript{17} and to section 253.03 of the statutes relating to the jurisdiction of the county court\textsuperscript{18} the problem would have been an interesting one if presented. Under the present act, the court is not faced with the problem in view of the fact that there is no distinction with reference to real and personal property either with regard to choice of law, or effect, or probate.\textsuperscript{19} To carry through this unitary idea section 253.035 has been created by chapter 699 and has enlarged the jurisdiction of the county court so that it now includes the administration of estates of non-resident persons who at the time of death had an interest in real or personal property within the state.

Compromises in the County Court. Section 318.31 relating to compromises in the county court has been created by chapter 367. Up to the present time Wisconsin has had no statute concerning compromises. In scope, the new act appears to be quite broad and if interpreted liberally may lead to a substantial change in the present Wisconsin case law regarding compromises and settlements of will contests. Perhaps the three most distinguishing features of the act are: First, the act allows an adjustment by compromise of any controversy arising between claimants to the estate;\textsuperscript{20} Second, the compromise may extend to persons claiming real estate or personalty under a will and persons claiming the estate under the statutes regulating the descent and distribution of intestate property;\textsuperscript{21} Third, any agreement of compromise which the court finds reasonable in its effects upon the interests of persons subject to guardianship, or unknown persons or the future contingent interests of persons not yet in being, is binding upon such persons.\textsuperscript{22} For the purposes of the

\textsuperscript{16} 238 Wis. 370, 298 N.W. 579 (1941).
\textsuperscript{17} Sec. 469. "The will of a deceased person can be admitted to probate in a competent court of any state in which the administrator could have been appointed had the decedent died intestate." Sec. 467. "An administrator is appointed to administer the estate of a decedent . . . (b) where there are assets of the decedent at the time of the death of the decedent or at the time of the appointment of the administrator . . . ."
\textsuperscript{18} This statute provides for the extension of jurisdiction of the county court to the probate of wills . . . "of all who die without the state having any estate within the county to be administered."
\textsuperscript{19} Supra, note 7. at page 344.
\textsuperscript{20} Wis. Stats. (1951), sec. 318.31 (1).
\textsuperscript{21} Wis. Stats. (1951), sec. 318.31 (2).
\textsuperscript{22} Wis. Stats. (1951), sec. 318.31 (3).
following discussion, the features will be treated in the order listed.

The first feature does not distinguish as to the type of controversy which may be compromised or settled and the use of the word any may permit an interpretation of legislative intent consonant with the idea that all types should properly be included. This would include: Group 1, situations involving disagreements among devisees and legatees over the validity or construction of the will; Group 2, cases in which a contest of a will has begun; Group 3, cases involving agreements to refrain from contesting a will; and Group 4, cases involving a settlement of an intestate estate. Cases under group 1 and 2 may be classified together for the purpose of qualifying under the general rule that parties, disagreed as to the construction of a will, may settle or compromise their differences and that such settlements entered into in good faith contravene no public policy. However, a contrary rule has heretofore prevailed in Wisconsin. In Taylor v. Hoyt the court held an agreement by the objectors of a will to withdraw the objections in consideration of payments made to them after the estate was settled was void as against public policy. That decision appeared to lean heavily on an earlier Wisconsin decision based on the doctrine that proceedings to probate a will are proceedings in rem which public interest demands should be pursued to a final adjudication, regardless of the wishes of the interested parties. Under a liberal interpretation of the present section it appears that Wisconsin’s position as to public policy supporting the will may give way to the position that the greater public policy supports the contract entered into by the heirs. As to those cases arising under group 3 the majority rule is that a bona fide agreement by one interested in the estate of a testator to refrain from contesting a will is valid. It is not void as against public policy since it serves to prevent litigation; and the forbearance to sue, being a detriment to the promisee, is a sufficient consideration to support the promise. Again Wisconsin’s position is to the contrary. But here again, the broad language of the new section may place Wisconsin in the category of those states following the majority rule. When the case involves the settlement of

23 Re La Croix, 244 Mich. 148, 221 N.W. 165 (1928), writ of certiorari denied in 279 U.S. 857, 49 S.Ct. 352, 73 L. Ed. 998 (1929). See also cases collected in 81 A.L.R. 1187.
24 207 Wis. 520, 242 N.W. 141 (1932).
25 Dardis’ Will, 135 Wis. 457, 115 N.W. 332 (1908).
26 After the will has been probated, the beneficiaries of a trust fund under a will can enter into an agreement which will constitute a present transfer of their interest to a third party. Estate of North, 242 Wis. 72, 7 N.W. (2d) 705 (1943).
27 Wis. Stats. (1951), sec. 318.31.
29 i.e., contracts to refrain from contesting the will.
30 55 A.L.R. 812 and cases collected therein.
31 Will of Rice, 150 Wis. 401, 137 N.W. 778 (1912).
an intestate's estate as in group 4, Wisconsin does follow the majority rule and has held that a contract among the heirs as to the division of property of an intestate is valid and will be enforced by the probate court which can assign the estate in accordance with such contracts.\textsuperscript{32} Here, public policy in the form of carrying out a testator's intent, which was the basis of decisions in groups 1, 2, 3, does not exist. The second feature presented, \textit{i.e.}, a compromise may extend to controversies arising between devisees and legatees and heirs of intestate property, would closely align itself with the feature regarding the type of controversy, discussed above. If compromises or contracts are allowed in cases where property is devised or bequeathed by will and where property passes by virtue of the statute of descent and distribution, then it should make little difference if a compromise is effected between these two classes provided that the heirs of intestate property have a justiciable basis for attacking the will.\textsuperscript{33}

Upon the third feature of the statute, \textit{i.e.}, an agreement of compromise found by the court to be reasonable is binding upon persons subject to guardianship, the courts are not in accord. It has been stated as the general rule that the guardian ad litem of an infant cannot bind him by any admissions affecting the infant's substantial rights.\textsuperscript{34} There are some cases, however, which have held that the court has power to sanction compromises on the settlement of estates in which the property rights of infants are concerned.\textsuperscript{35} In a Michigan case\textsuperscript{36} the court while mentioning the general rule qualified it by stating that when the terms of the compromise are examined by the court and approved, it is legal and binding on all parties. There is some language by the Wisconsin court in \textit{Will of McNaughton}\textsuperscript{37} which leads to the belief that Wisconsin might follow the Michigan view.

The effect of section 318.31 might well be to shift the Wisconsin policy from the consideration of the intent of the testator to the broader view that public policy supports the contract or compromise with its ensuing practical benefit of discouraging litigation and to definitely accept the view that a minor may be bound if his rights are properly safeguarded by the court.

\textsuperscript{32} Estate of Richardson, 223 Wis. 447, 271 N.W. 56 (1937).
\textsuperscript{33} Harris v. Harris, 211 Ala. 144, 99 So. 913 (1924).
\textsuperscript{34} 14 R.C.L. 291, sec. 58.
\textsuperscript{36} \textit{Ibid.}
\textsuperscript{37} 138 Wis. 179, 120 N.W. 288 (1909). "Those who by reason of infancy cannot appear for themselves must be represented by guardians ad litem in order to be bound \ldots." For cases showing the reluctance of courts to bind an infant, \textit{cf.} 33 A.L.R. 109 \textit{et sequiter}. 
Time for Filing Claims. Section 313.01 (1) has been amended by chapter 639. Under the old section, after the court had set the time limit for the filing of claims a creditor could apply for an extension of time if he did so within 60 days after the expiration date. This meant that a final account of the estate could not be made at least 60 days after the date for filing had expired in view of the Wisconsin court’s holding in Estate of Benesch that good cause need not be shown but only a showing satisfactory to the court is needed to receive the extension. The court also held that a satisfactory showing is in the broad discretion of the court. An even more impelling reason was the court’s conclusion that orders for granting the extension of time to file were not appealable. Under the present law the creditor must apply for an extension prior to the approval of the final account. It is uncumbent on the creditor, whether he has actual notice or not, to file his claim within the original time set by the court or risk the fact of his claim being barred if a final account has been approved. The administrator may take advantage of the change by seeking approval of the final account immediately after the time set by the court for the filing of such claims has expired. Under the new law, the desirability of speedily settling estates appears to be paramount to the dilatory actions of creditors.

Escheats and Unclaimed Legacies and Shares. Section 318.03 (1) has been renumbered 238.136; section 318.03(2) has been renumbered 238.135; section 318.03(3) has been repealed and a new section, 318.03, has been created by chapter 699 of the Session Laws. The new law appears to be a restatement of the old section 318.03(3) with an added provision regarding foreign legatees and heirs. The practical result of this new section is this: any intestate property not claimed by the heirs shall escheat to the state except that if one of the heirs is a foreign heir, his share shall not escheat but shall descend as intestate property. A recent interpretation of the old section 318.03(3) may be found in Estate of Rade. In that case that the only heirs resided in Bulgaria. The state of Wisconsin contended if the foreign heirs did not claim within the statutory time limit, the

38206 Wis. 582, 240 N.W. 127 (1932).
39 Ibid.
40 Wis. Stats. (1949).
41 Wis. Stats. (1949).
42 Wis. Stats. (1951), sec. 318.03(1). “If any intestate property is not claimed by the heir within 120 days after entry of final judgment (or within the time designated in such judgment) it shall be converted into money and paid to the state school fund. (2) If notice is given to a foreign legatee or heir in the manner provided in sections 310.05 and 324.18 and such person is not heard from within 120 days after entry of final judgment (or within a longer time designated in such judgment) the property which such foreign legatee or heir would take shall not escheat, but shall descend as intestate property.”
43 259 Wis. 169, — N.W. (2d) —— (1950).
property escheated to the state. Under this theory the estate becomes the property of the heir only when it is claimed by the heir, as provided by statute. The court, however, took the position that an heir does have an interest before claim is made and this interest may be reached by garnishment or other action. The decision is also effective as an interpretation of the newly created statute.\(^4\) Whereas under the old law, if the foreign heir did not claim, his share would escheat to the state (there being no distinction between foreign or resident heirs),\(^5\) under the present exception\(^6\) such share would descend as intestate property and would be apportioned among the known claiming heirs.

The question does arise, however, whether under this new section the words "any intestate property" relates to real estate as well as personality.\(^7\) It is a general rule of law that the title to real estate descends to the heirs immediately upon the death of the owner intestate. If this is true, is it possible for a known heir to be stripped of his title by mere failure to claim within 120 days? It may be said in opposition that section 318.03(4) provides for recovery by an heir of the money held by the state within 7 years.\(^8\) This does not, however, alter the fact that a person's title has been displaced. In support of such result is the general policy in favor of the alienability of land. The question remains, however, as to whether the 120 day time limit set by the statute is a sufficient amount of time where title to real estate is at stake. These problems tend to support a construction of the statute confining it to personal property.

Effect of Conveyances by Executors and Administrators. Section 316.235 has been created by chapter 705, and is intended to clarify the status of the title after a conveyance of decedent's land. Under the law existing previous to this amendment, if a decedent died seized of mortgaged real estate or if the real estate was encumbered by a lien, and such property was sold pursuant to chapter 316,\(^9\) such property passed to the purchaser subject to the mortgage or lien existing thereon.\(^5\) The question remained: whether a purchaser, of land owned by the decedent free and clear of all mortgages, liens and encumbrances at the time of decedent's death, took such land free and

\(^{44}\) Wis. Stats. (1951), sec. 318.03.
\(^{45}\) In Estate of Rade, supra, note 43, this result did not occur because the court found that the Alien Property Custodian became vested with the interest of the foreign heirs.
\(^{46}\) Wis. Stats. (1951), sec. 318.03 (2).
\(^{47}\) The Rade case involved only personalty.
\(^{48}\) This time limit is in accord with the Wisconsin rule raising a presumption of death after an absence of 7 years. Kietzmann v. Northwestern Mut. Life Ins. Co., 245 Wis. 165, 13 N.W. (2d) 536 (1944).
\(^{49}\) Wis. Stats. (1949).
\(^{50}\) Wis. Stats. (1949), sec. 316.24.
clear of any claims of creditors of the decedent or of decedent’s estate. The new section\textsuperscript{51} makes it clear that such land, unencumbered at the time of the decedent’s death, will pass free and clear of any claims of creditors of the decedent or his estate. The effect of the statute, then, is that the executor or administrator may issue a warrant deed to the purchaser. Any claims of creditors, however, are transferred to the proceeds of the sale. The present section protects both the purchaser and the creditor in such transactions.

**Statute of Limitations on Actions to Set Aside Probate Decrees for Insufficient Service.** Chapter 295 creates section 330.52 of the Statutes, providing as follows:

“No action or proceeding to set aside any judgment, order or decree entered before the effective date of this section by any county court after notice of the application for such judgment, order or decree has been given in accordance with the requirements of the then existing applicable statutes, shall be commenced after one year from the effective date of this section, based solely on the ground of failure to give other or additional notice of the application therefore; and no such judgment, order or decree shall be subject to direct or collateral attack in any action or proceeding based solely on such ground, after one year from the effective date of this section.” (The effective date was June 9, 1951.)

This statute attempts to cure the rather unstable position of many probate and related matters attendant upon the decision of the United States Supreme Court in 1950\textsuperscript{52} that where interested parties and their addresses were known, mere notice by publication was insufficient and amounted to a denial of due process.

**Cross References:**

PROPERTY, Homestead, Descent as Affected by Value Limitation.  
TAXATION, Income Tax-Returns of Administrator or Executor.  
TAXATION, Inheritance Tax.  
WRONGFUL DEATH, Increase in Damages for Wrongful Death.

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**WORKMEN’S COMPENSATION**

The Wisconsin Workmen’s Compensation Act, Chapter 102 of the Wisconsin Statutes, was changed and modified by Chapter 382 of the 1951 Session Laws. While many of the changes are perhaps not too significant, nevertheless most of the new provisions have been in-

\textsuperscript{51} Wis. Stats. (1951); sec. 316.235.  
cluded in this article because of the general importance of Workmen's Compensation.

**Maximum Weekly Wage Basis Increase.** Section 102.11 (1) increases the maximum weekly wage basis for compensation from $46.50 to $52.86. In the maximum case, this results in an increase in weekly compensation from $32.55 to $37.00, or over thirteen per cent.¹

**Time to File Claims Extended.** Section 102.12 was amended to extend the time within which a claim may be filed. Under the old law, the right to compensation was barred if there had been no payment of compensation and no claim filed with two years of the date of injury or death. This time could be extended if, within the two year period, the employer knew, or should have known, that the employe would probably sustain disability. Under the new law, the time can be extended if the employer knew, or should have known, "that the employe had sustained the injury on which claim is based." There is, of course, a clear distinction between "injury" and "disability." The statute is now extended to cover those cases where an employe is injured (and the employer knows or should know of the injury), but where the actual disability does not develop until after the two year period has elapsed. In all cases, however, there is still a general six year statute of limitations,² regardless of the employer's actual or imputed knowledge.

**Testimony of Out-of-State Doctors Admissible.** Section 102.13 (1) was extended to permit expressly the use of the testimony of out-of-state doctors in compensation cases. Formerly, because of sections 147.14 (1) and 147.14 (2),³ there was some doubt as to the admissibility of this evidence.

**Hearings Outside of Wisconsin and Before Other State Commissions.** Section 102.17 (1) (a) was amended to provide for hearings outside of Wisconsin and for hearings before other State Commissions. Under the old law, hearings could be held at such places "as the Commission shall designate." In the past, for the convenience of parties and witnesses, hearings have been held outside of Wisconsin, but at times there were objections to this procedure on the ground

¹ Under this new increase, the death benefits allowed under section 102.46 are increased from $9300 to $10,572. In the case of injuries covered under section 102.52, the increase will depend on the nature of the injury involved. For example, where formerly an arm at the shoulder provided for a maximum of $16,275, the new law will allow a maximum of $18,500.

² Wis. Stats. (1949), sec. 102.17 (4).

³ These statutes provide generally for the requirements necessary for the practice of medicine in Wisconsin. Sec. 147.14 (2) indicates that anyone not properly licensed in Wisconsin cannot "testify in a professional capacity as a medical or osteopathic physician or practitioner of any other form or system of treating the afflicted, or as an insanity expert."
that the Commission was without power so to act. Under the new law, however, the old practice is specifically approved, and the Wisconsin Commission may now hold hearings in another state. A further provision provides for hearings before Sister-state Commissions. The testimony taken is to be reported to the Commission, and become a part of the record in the case. "Any evidence so taken shall be subject to rebuttal upon final hearing before the Commission." Again, the second provision simply approves of the practice of reciprocity which has been used for some time between the commissions of the various states.

Reports of Out-of-State Doctors Shall Constitute Prima Facie Evidence. Section 102.17 (1)(as) was amended and now provides that reports of out-of-state physicians and surgeons to whom the claimant has been sent by the employer or insurer shall constitute prima facie evidence as to matters contained in such reports, provided that the doctor whose report is presented consents to subject himself to cross-examination. Only the claimant can use these medical reports, after which the burden is on the employer to overthrow the prima facie case thus established. Under the old law, the reports of Wisconsin doctors alone could be used in this manner. There would seem to be no reason, however, why a claimant should not be able to use the report of an out-of-state doctor to whom he has been sent by his employer, as freely as he can use the report of a Wisconsin doctor. Since the new law expressly provides for cross-examination of the out-of-state doctor, the danger of the employer being unable to subpoena such out-of-state doctor for the very purpose of cross-examination is destroyed. Another provision of this section provides for the receipt into evidence of the records of any hospital or sanatorium in Wisconsin, provided that the record is established "by certificate, affidavit, or testimony of the supervising officer or other person having charge of such records, or of a physician or surgeon, to be such record of the patient in question, and made in the regular course of examination or treatment of such patient." Such record then constitutes prima facie evidence as to the matter contained therein, insofar as it may otherwise be competent or relevant. The purpose of this amendment seems to be to provide for the introduction of hospital records without calling every party who may have been involved in making the record.

Time to File Claims Extended for Minors, Insane Persons, and Members of the Armed Forces. Section 102.17 (6) is a new provision of the Workmen's Compensation Act and provides for an extension of time within which a claimant may proceed under this act, when such claimant is under twenty-one, insane, or in the armed
forces. Since these three classes were not expressly covered in the old act, the present section was enacted to give them the necessary protection.

Method of Correcting Error Made by the Commission. Section 102.18 (5) was recreated to provide in more detail for the correction of error when a case is decided on the basis of an accidental injury, when actually an occupational disease is involved. In such a case the Commission has three years within which it can set aside its erroneous order. This can be done with or without a hearing, upon the Commission's own motion, or upon application duly made. "Thereafter, and after opportunity for hearing, the commission may, if in fact the employe is suffering from disease arising out of employment, make new findings and award, or it may reinstate the previous findings, order, or award."

Review of Cases Involving Occupational Diseases. Section 102.18 (6) was created to allow for the review of a case involving an occupational disease. The commission can now review its findings and orders as new facts present themselves. Since it is often difficult to predict accurately the exact treatment which will be necessary or the disability which will result from a particular disease, this review provision is probably desirable. It is specifically stated however, that the general six year statute of limitations is still to apply.

Third Party Actions. Section 102.29 (1) was amended to eliminate from third party actions reimbursement by the employer or the insurance carrier for certain increased compensation payments. Under this new provision there can be no reimbursement for payments of additional compensation made under the provisions of 102.22, 102.57 and 102.60. By holding the employer or insurance carrier alone responsible for these payments, and denying to them any right of reimbursement from a third party, there is created an additional sanction for the enforcement of the provisions and regulations involved.

Section 102.29 (5) was created to give additional time to an employe to file suit against a third party, where the insurance carrier of

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4 For persons under the age of 21, the time within which application must be filed or action begun under this act, is extended to one year after reaching the age of 21, if such time would ordinarily expire at an earlier date. If a person is insane or in the armed forces during any part of the last year of the normal period of limitation, such period of limitation is extended two years after the date that it would otherwise expire. "The provision heretofore with respect to persons on active duty in the armed forces of the United States shall apply only where no applicable federal statute is in effect."

5 Supra, note 2.

6 These provisions are penalty provisions allowing for additional compensation because of delayed payments, the violation of a safety order, or improper employment of a minor.
the employer and the casualty insurer of the third party are the same or are subject to a common control. In such cases, where the insurance carrier fails to commence the third party action or file the statutory notice of claim, the two year notice of injury statute cannot be pleaded as a bar in an action begun by the employe against the third party after the two year period has expired, but before six years from the date of injury. The recovery, however, is limited to the insured liability of the third party. If the action is commenced by the employe after the two year period, the insurance carrier forfeits all right to participate in the action as a complainant or to recover any of the payments made under Workmen's Compensation. The foregoing does not apply if the insurance carrier has complied with Section 102.29 (4). This new provision, of course, was quite clearly designed for the protection of the employe. While the insurance carrier is foreclosed from participating in a third party action if it has done nothing for the two year period, the employe still retains his right to bring such an action.

Employer Must Rehire Injured Employe. Section 102.35 (2) was amended to require an employer to rehire, under penalty, an employe injured in the course of employment. This merely supplements the old law, which provides for a like penalty when an employer discriminates or threatens to discriminate against an employe who has made a claim under Workmen's compensation.

Refusal to Submit to Medical Treatment. Section 102.42 (7) was amended to provide in more precise terms under what conditions a refusal to submit to medical treatment shall constitute a bar to the recovery of compensation. In the case of tuberculosis, when the commission finds it necessary, the claimant shall submit to hospital or sanatorium treatment, or his right to compensation accruing during the period of neglect or refusal, shall be barred. Under the old law, compensation in a tuberculosis case was denied only insofar as the disability was "aggravated, caused or continued" by the refusal to submit to the necessary medical treatment. The new provision, however, will bar all compensation during the period of refusal or neglect, "irrespective of whether disability was aggravated, caused or continued thereby." The new law also makes it clear that in cases other than tuberculosis a refusal to submit to medical as well as surgical treatment, shall result in the loss of compensation to the extent that

8 When the insurance carrier of the employer and the 3rd party are the same or are subject to a common control, this section places the duty upon the insurance carrier of the employer of notifying the parties in interest and the Industrial Commission of such fact. If this notification statute is satisfied, the employe will not be entitled to the benefits provided by section 102.29 (5).
the refusal of such treatment augments the disability. Under the old law, only surgical treatment (not medical treatment) was explicitly covered by statute.\(^9\)

**Method of Computing Age Deductions for Compensation Payable.** Section 102.44 (3) (a) and (b) and Section 102.53 (2) were amended to make uniform the age deductions applicable to schedule (members) and non-schedule (head and torso) permanent disabilities. Under the old law, age reductions for non-schedule disabilities began at the age of thirty-one, and were reduced from the maximum one thousand weeks, at the rate of eighteen weeks for each successive year, until a minimum limit of two hundred and eighty weeks was reached.\(^10\)

In the case of schedule injuries, the former law provided for a two per cent reduction for each year over fifty years from the maximum number of weeks allowed in the schedule.\(^11\) Theoretically this could reach to almost zero. Under the new provisions, age reductions for both schedule and non-schedule permanent injuries begin at the age of fifty and reduce at the rate of two and one-half per cent for each successive year thereafter, with no reduction in excess of fifty per cent. In the case of non-schedule disabilities the maximum number of weeks is still one thousand, with reductions beginning from that point. Under the new law, the fifty per cent maximum reduction will be reached at the age of seventy, after which the number of weeks will remain the same.

**Burial Expenses.** Section 102.47 was amended to provide for burial expenses, in a case of permanent *total* disability, where death results from causes other than the injury. Under the old law burial expenses were payable under such circumstances where there was permanent *partial* disability,\(^12\) but there was no provision to cover such expenses in the case of permanent *total* disability. There seems to be no reason to discriminate between the two classes, and this amendment was obviously passed to correct the discrepancy. The amendment makes it clear, however, that the burial expense allowance shall be included in the items subject to the limitation in 102.46,\(^13\) and shall

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\(^9\) The new law, as did the old law, specifically allows Christian Science treatment in lieu of other medical or hospital care.

\(^10\) Wis. Stats. (1949), sec. 102.44 (3) (a) and (b).

\(^11\) Wis. Stats. (1949), sec. 102.53 (2).

\(^12\) Wis. Stats. (1949), sec. 102.47 (2).

\(^13\) Section 102.46, by way of limitations, provides, that the death benefit "... when added to the disability indemnity paid and due at the time of death, shall not exceed seventy per cent of weekly wages for the number of weeks set out in paragraphs (a) and (b) of subsection (3) of section 102.44, based on the age of the deceased at the time of his injury." The burial expenses now allowed under section 102.47 (1) are included in the items subject to this limitation, and are not in addition thereto. A similar provision governs the burial expenses payable under section 102.47 (2).
not be in addition thereto as in the case of death caused by the injury. As in the case of permanent partial disability, the burial expenses allowed by the new amendment shall take precedence over any death benefits or amounts payable to dependents.

**Death Benefits.** Section 102.48 (1) was amended to increase the death benefits for unestranged parents from $1500.00 to $2000.00. This amount is paid to all unestranged parents not totally dependent on the deceased.

**Benefits to Dependent Children.** Section 102.49 (1) was amended to raise the age limit for benefits to dependent children from fifteen years of age to eighteen years of age. Formerly the amount for each child under one year of age was an amount equal to the average annual income of the deceased. For each additional year of the child's age, this amount was reduced by one-fifteenth. Under the new law, the child under one year of age receives an amount equal to one and one-fifth of the decedent's annual wage, with reductions at the rate of one-eighteenth for each additional year of the child's age. Thus under the new law a child at the age of eighteen will receive the same benefit as a child of fifteen did under the old law.

Section 102.49 (5) was amended to raise the maximum amount payable to the state fund in the case of a decedent leaving no one wholly dependent on him for support, from $2500 to $3000. This fund is maintained for payments to children under Section 102.49 (1).

**Dependents.** Section 102.51 (1) was amended to protect certain children where the parents are separated but where no divorce has been decreed. Under the statute a child below the age of eighteen, living with a deceased parent, is conclusively presumed to be wholly dependent upon such parent, there being no surviving dependent parent. Formerly it was provided that in the case of divorce, with an obligation to support upon one of the parents, such support would constitute a "living with" for the purpose of the preceding presumption, making the child dependent upon such parent. The new law deletes all reference to divorce, and simply provides that the presumption of dependency shall exist where one of the parents is charged with maintenance or support, or makes voluntary payments for such purposes. Thus the child is protected by statute while a divorce is pending or where the parents live apart without divorce or where, for any reason, the child may not, in fact, be living with his parents, but where he receives his support from them.

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14 Section 102.50 allows a maximum of $300 for funeral expenses where death was caused by the injury. This amount is in addition to the regular death benefits provided for in section 102.46.
15 Supra, note 11.
Pre-existing Disability. Section 102.59 (1) was amended to define more accurately the degree of permanent partial disability which will qualify under section 102.59. Under the old law, if an employe had fifteen per cent or more of permanent total disability at the time of the second injury, and as a result of such second injury, sustained a similar disability of fifteen per cent or more of permanent total disability, such employe was entitled to certain additional payments from the state fund. To avoid the problem of what constitutes fifteen per cent, the new law provides that where an employe, has, at the time of the second injury, permanent disability, "which if it had resulted from such injury would have entitled him to indemnity for one hundred and fifty weeks less two and one-half per cent thereof for each year of age above fifty years with no reduction in excess of fifty per cent," and where the second injury is of the same nature as the first, i.e., entitling him to one hundred and fifty weeks less two and one-half per cent thereof for each year over fifty years with no reduction in excess of fifty per cent, then such employe is entitled to additional state aid as provided in section 102.59. There is the further new provision that "such additional compensation shall accrue from the end of the period for which compensation for permanent disability resulting from such injury is payable by the employer, and shall be subject to the provisions of section 102.32 (6) and (7)."16

Penalties. Section 102.62 was amended to provide for the collection of certain penalties, provided for by sections 102.57 and 102.60,17 in the event that the employer goes bankrupt, makes an assignment for the benefit of creditors, dissolves, or loses its corporate charter. Usually payment is made by the insurer only after judgment is entered against the employer and execution returned unsatisfied. Under the new amendment, however, in the cases listed, the insurer can be held liable without judgment or execution against the employer. It is to be noted, however, that the employer remains primarily liable, so that the insurer still has his remedy against such employer.

The above provisions of the Workmen's Compensation Law take effect as of July 1, 1951.

WRONGFUL DEATH

Increase in Damages for Wrongful Death. Chapter 634 amends section 331.04(4), relating to damages for wrongful death. The amendment raises the amount recoverable for pecuniary injury from

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16 These sections provide for payment in gross or for lump sum payments, depending upon the particular circumstances involved.
17 Section 102.57 provides for certain penalties for the violation of safety provisions, and section 102.60 penalizes the improper employment of minors.
$12,500 to $15,000. The limit for additional damages for loss of society and companionship which may be awarded to spouse or parents of deceased remains at $2500. The old law provided that where a decedent left a widow with more than two dependant children under 15 years of age, the maximum limit recoverable by the widow for pecuniary loss could be increased $1000 on account of each such child in excess of two up to a total increase of $5000. The new law provides that "where a decedent leaves dependent children under 15 years of age, the . . . maximum limit for pecuniary loss recoverable shall be increased $1500 on account of each child, but not exceeding a total increase of $7500." Thus, in addition to raising the sums, the new law does away with the requirement that the decedent leave more than two children before the increase may be had, and allows an increase for each child instead of for each child in excess of two. Under the new law the total possible liability of a defendant in a wrongful death action is $25,000, while under the old law it was $20,000.

Cross Reference:
Practice and Procedure, Service of Process on Non-Resident Motorists.