

MASON'S MINNESOTA STATUTES

1927

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STATUTE COMPILATION COMMISSION FOR THE PUBLICATION OF
THE GENERAL STATUTES OF 1923

EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STAT-
UTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT
THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED
BY THE SUBSEQUENT LEGISLATION OF 1925
AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES
1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE
LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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receiver could not recover possession by resorting to unlawful detainer proceedings. 157-485, 196+661.

9654. Receiver to file account for approval—At the termination of the receivership for any cause the receiver shall file his account in said court. On the approval and confirmation of such account the receiver shall dispose of the funds in his hands in accordance with the order of court, and shall thereupon be entitled

to a discharge by order of court, freeing and releasing him from all further liability on account of such receivership. ('15 c. 305 § 5)

9655. Not to limit certain rights and remedies—The provisions of this act shall in no manner detract from or limit the rights and remedies of the mortgagor or mortgagee respectively now or hereafter provided by law. ('15 c. 305 § 6).

CHAPTER 84

ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES AND HEIRS

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9656. What causes of action survive—A cause of action arising out of an injury to the person dies with the person of either party, except as provided in § 9657. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter. (4502) [8174]

1. Held to survive—Mechanic's lien (14-145, 113); right of ward to an estate (33-220, 22+383); liability for nuisance (38-179, 36+451); liability for personal injury after verdict (55-134, 56+588); cause of action for fraud in exchange of property (66-66, 68+771); liability of stockholder in corporation (80-432, 83+377); liability on bond for maintenance of parents (85-73, 88+418). Liability of liquor licensee on his bond is for breach of contract and survives against his estate (121-450, 141+793). 131-368, 155+396; 133-128, 156+8. For fraud or deceit (139-227, 166+177). 150-479, 185+658. Workmen's Compensation Act (152-198, 188+265). Injunction restraining injury to property (155-225, 193+177).

Cause of action for injury to property survived. 161-406, 201+614.

2. Held not to survive—Cause of action for death by wrongful act (28-5, 5+875; 32-125, 19+656; 97 Fed. 140, 38 C. C. A. 79); for libel, slander, malicious prosecution and the like (69-30, 71+826); for injury to person (79-377, 82+669); for negligence (92-42, 99+357). A cause of action for malicious attachment held an injury to property, and not to person, so as to pass to trustee in bankruptcy (105-491, 117+926). Claim for damages for destruction of personalty by fire is assignable (117-434, 136+275).

9657. Action for death by wrongful act—When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed seven thousand five hundred dollars, and shall be for the exclusive benefit of the surviving spouse and next of kin,

to be distributed to them in the same proportion as personal property of persons dying intestate; but funeral expenses, and any demand for the support of the decedent, duly allowed by the probate court, shall first be deducted and paid. Provided, that if an action for such injury shall have been commenced by such decedent, and not finally determined during his life, it may be continued by his personal representative for the benefit of the same persons and for recovery of the same damages as herein provided, and the court on motion may make an order, allowing such continuance, and directing pleadings to be made and issues framed conformably to the practice in action begun under this section. (R. L. § 4503, amended '11 c. 281 § 1) [8175]

1. Right statutory—32-125, 19+656; 92-184, 99+620.

2. Construction and application of statute—The word "wrongful" is not used in the sense of wilful or malicious. An action will lie under the statute for the same kind of act or omission causing death for which the deceased might have maintained an action if the resulting injury had fallen short of death (12-530, 435). Where, after verdict, in action for personal injuries, plaintiff dies, this section does not apply (104-1, 115+949). Administrator of one whose death was due to wrongful act of a municipality may maintain action against it for damages consequent thereon (113-55, 129+158, 775). 124-196, 144+942. Joinder of actions, concurrent negligence (124-531, 144+474).

Sec. 4291 Gen. St. 1923 does not destroy the right of action enforceable, under the death statute (section 9657, Gen. St. 1923), by the personal representative of a deceased employee whose employer has paid compensation pursuant to the Workmen's Compensation Act. 165-390, 206+714.

3. Who may sue—No one is authorized to sue under the statute except the administrator or executor of the deceased (8-97, 72, 28-5, 8+875; 32-125, 19+656; 81-493, 84+342). Special administrator may (108-129, 121+606. See 120-122, 139+300). 125-358, 147+278.

4. Non-residents—A non-resident alien who is next of kin may have the benefit of the statute (89-41, 93+1057; 163 Fed. 827, 91 C. C. A. 390).

5. Who is next of kin—A husband held not next of kin of his wife within former statute. Next of kin means the nearest blood relation (70-514, 73+400).

5a. Railroad employees.

Death of railroad employee. 159-417, 199+101.

Section 8175, G. S. 1913, limiting the amount recoverable in actions for injuries causing death, does not apply to actions under the state Railway Employers' Liability Act. 160-1, 199+887.

6. Jurisdiction—Actions under foreign statute—Action for death of non-resident resulting from injury received in this state (44-5, 46+79). Action for injury received on river constituting boundary between Wisconsin and Minnesota (30-126, 14+575). Action for injury received in another state when statute of such state gives cause of action (69-476, 72+694). Not necessary that statute in this state should be the same as that of the state in which the accident occurred (31-11, 16+413; 69-476, 72+694; 78-43, 80+776; 92-184, 99+620). Right of action, given by statute of North Dakota enforced (102-448, 113+1017; 103-525, 114+1133. See 103-156, 114+953). 124-196, 144+942; 140-494, 168+590.

7. Notice to municipality unnecessary—87-237, 91+843.

See, also, 40-406, 42+88; 87-237, 91+843; 111-253, 126+253; 113-55, 129+158, 775; 33 L. R. A. (N. S.) 339.

S. Complaint—Must state that deceased left a widow or next of kin (28-371, 10+208; 59-130, 60+1008; 81-493, 84+342). Complaint alleging that deceased left certain next of kin, but not relation of such person, or no widow, good against demurrer (106-241, 118+1018). Not necessary to allege that widow or next of kin had pecuniary interest in deceased (30-461, 16+364; 31-283, 17+622). A general allegation of damages is sufficient (30-461, 16+364; 31-283, 17+622). Existence and amount of claims for support of deceased during last illness and for funeral expenses must be alleged (59-130, 60+1008). If action under foreign statute such statute must be fully pleaded and proved (69-476, 72+694; 103-156, 114+953); and must allege existence of beneficiaries thereunder (114-118, 130+70). 126-133, 147+964; 133-392, 165+237; 155-220, 193+127.

O. Defences—Contributory negligence a defence (63-248, 65+447; 76-189, 78+1041, 79+530). Contributory negligence of parent of minor a defence (98-296, 108+517). Instinct of self-preservation (114-244, 130+994; 115-443, 132+752; 117-152, 134+313). That deceased was violating Sunday law no defence (30-126, 14+575). Authority of administrator may be questioned (35-193, 28+219; 44-5, 46+79). 129-206, 152+137; 136-304, 161+716.

10. Former release, settlement or recovery—A release to the person injured is a bar to a subsequent action by his personal representatives (59-130, 60+1008). Personal representatives of deceased may compromise and settle claim without consent of next of kin or probate court (81-493, 84+342). Right of action given creates one single, indivisible cause of action; and recovery against, or settlement with, one of wrongdoers, is bar to subsequent action against others whose wrongful conduct may have contributed to cause death (115-37, 131+796). Release fraudulently made by administrator, adverse party participating in fraud, not bar to action by succeeding administrator (101-449, 112+538. See, also, 104-322, 116+590; 101-396, 112+534; 102-21, 112+885). An agreement not to sue an employer for death of an employe, unless there can be no recovery from a third person, and unless consideration paid is returned employer, is a covenant not to sue, and not a release, and decedent's representative may enforce liability against the third person without deducting the consideration from the verdict (103-369, 122+499). Settlement with one of next of kin no defence. Defendant may have amount applied pro tanto in satisfaction of judgment (110-184, 124+971. See, also, 113-450, 129+852). Where damages to a wife, resulting from defendant's fault, have in no part been caused by her wrong, two causes of action may accrue—one to her, for the direct injuries to her person; the other to her husband, for the consequential injuries to him. That such injuries have resulted in her death, and recovery has been had under the statute by the administrator, is no bar to the action by the husband (103-290, 115+651, 946).

11. Limitation of actions—Period intervening death and appointment of personal representative not excluded in computing time (30-386, 15+676). Statute of foreign state applied (92-184, 99+620). Statute held not applicable (22-476). Neither city charter nor R. L. § 768 refer to or include actions under this section (111-253, 126+826). 124-196, 144+942; 152-198, 188+265; 154-182, 191+607; 134-78, 158+908.

12. Abatement by death—A cause of action under the statute abates with the death of the tort-feasor (26-500, 5+376).

13. Substitution of personal representative—92-42, 99+357; 123-166, 143+25; 129-279, 152+413; 145-274, 177+130; 150-530, 184+1025.

14. Funeral expenses—59-130, 60+1008; 76-269, 79+95.

15. Liability of recovery for debts of decedent—51-241, 53+463; 59-130, 60+1008.

16. Damages—The damages awarded must be solely by way of compensation for pecuniary loss. Punitive damages are not allowed. No compensation can be awarded for wounded feelings, for the loss of the companionship and comfort of the deceased or for his pain and suffering. The true test is, what, in view of all the facts in evidence, was the probable pecuniary interest of the beneficiaries, in the continuance of the life of the deceased? The proper estimate may be arrived at by taking into account the calling of the deceased and the income derived therefrom, his health, age, probable duration of life, talents, habits of industry, success in life in the past and the amount of aid in money or services which he was accustomed to furnish the beneficiaries. If the deceased was the head of a family the value of his services to the family cannot be limited in a pecuniary sense to the amount of his daily wages earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well and the jury must judge of the circumstances in each case (28-103, 9+575; 28-371, 10+208; 30-126, 14+575; 32-518, 21+711; 35-84, 27+305; 36-6, 29+340; 36-413, 31+856; 37-485, 35+273; 41-206, 42+932; 43-289, 45+440; 43-454, 45+864; 44-5, 46+79; 47-161, 49+694; 47-543, 50+690; 76-269, 79+95; 87-

280, 91+1106; 96-469, 105+494; 133 Fed. 867, 71 C. C. A. 619. See 96-460, 105+494; 103-98, 114+365; 103-345, 114+948; 111-105, 126+534; 113-450, 129+852; 113-501, 129+1048; 117-513, 136+302). Where relation such that beneficiary would have been entitled of right to support from decedent, law presumes life to be of some value (102-501, 114+259).

127-381, 149+660; 128-332, 150+1088; 131-166, 154+957; 133-42, 157+904; 134-113, 158+913; 134-452, 159+1077; 135-38, 159+1087.

10a. Disposition of proceeds.

The statute regulates and directs the proportion in which such money shall be distributed, to wit, "in the same proportion as personal property of persons dying intestate." The element of dependency is not involved in this statute; the element of pecuniary loss is. 162-291, 202+732.

Money received by a representative of an estate, does not belong to the estate, but to those named in the statute. 162-291, 202+732.

The probate court has no jurisdiction over such money; the district court has. 162-291, 202+732.

The widow cannot select therefrom her statutory \$500. 162-291, 202+732.

10b. Negligence.

Negligence of telephone company in leaving wire through wall on disconnecting phone, over which lightning traveled. 156-60, 194+313.

10c. Pleading.

A demurrer to the amended pleading, based upon the ground that a new cause of action was then stated which was barred by the two-year limitation, was properly overruled. 166-1, 206+945.

10d. Presumptions.

In an action to recover for a death, where there are no eyewitnesses, the presumption is that the decedent was in the exercise of due care for his own safety. 165-223, 206+436.

In a death case, where there is no evidence of contributory negligence, the presumption of due care must control. 167-250, 208+995.

One who loses his life in an accident is presumed to have exercised due care for his own safety. 211+580.

17. Evidence—Sufficient to sustain finding that defendant's negligence was proximate cause of death (108-100, 121+392; 114-309, 131+319). That patient dies immediately after operation not of itself evidence of negligence of operating surgeon (100-276, 111+264). Insufficient to establish that death was caused by injuries in railroad accident; it being conceded that decedent died of peritonitis within five days after childbirth and five months after accident (102-399, 113+1016). As to the presumption that one who was killed while crossing railway track looked and listened (96-504, 105+555). Contributions of minor may be shown. Financial condition of next of kin immaterial (109-481, 124+235, 372).

122-363, 142+716; 123-279, 143+722; 123-308, 143+789; 124-65, 144+434; 125-137, 145+804; 125-362, 147+279; 126-144, 148+108; 127-172, 149+24; 127-515, 150+176; 128-10, 150+169; 128-95, 159+379; 129-78, 151+541; 129-82, 151+539; 130-222, 153+529; 152-391, 188+1009.

It was error to exclude proof that, shortly prior to the accident complained of, decedent was convicted of driving an automobile while intoxicated, sentenced to the workhouse for the term of 90 days, that he was put on probation, and that the probation was thereafter set aside, and a commitment issued. 167-232, 208+308.

17a. Instructions.

Action to recover for death by wrongful act; held that there was no prejudicial error in the charge to the jury as given, nor in refusing to charge as requested by plaintiff, nor in a failure to charge in certain respects. 164-76, 204+921.

18. Jurisdiction over fund, for distribution—Under Const. art. 6 § 7 the statute giving cause of action to administrator in trust for beneficiaries does not give probate court power to administer trust, and its approval of settlement by administrator and release was without jurisdiction (104-322, 116+590). Probate court has no jurisdiction to distribute funds recovered. Distribution rests with district court (106-484, 119+217). Where settlement is made, district court has jurisdiction of distribution (114-364, 131+381. See, also, 110-184, 124+971). 153-509, 190+986.

9658. Default judgment—Judgment not lien upon real estate—Whenever a judgment is taken against an executor or administrator upon failure to answer, it shall not be deemed evidence of assets in his hands, unless the complaint alleged assets and was personally served on him. No judgment against any executor or administrator shall bind or in any way affect

the real property which belonged to the decedent, nor shall the same be liable upon execution issued upon such judgment. (4504) [8176]

9659. Executor de son tort, to whom liable—No person shall be liable to an action, as executor of his own wrong, for having taken, received, or interfered with the property of a deceased person, but shall be responsible to the executor, or general or special administrator, of such decedent, for the value of all property so taken or received, and for all damages caused by his acts to the estate. (4505) [8177]

29-418, 13+197; 32-81, 19+391.

9660. Action by foreign executor, etc.—Any foreign executor or administrator may commence and prosecute an action in this state, in his representative capacity, in the same manner and under the same restrictions as in case of a resident: Provided, that before commencing such action he shall file an authenticated copy of his appointment as executor or administrator with the probate court of the county in which such action is to be commenced. (4506) [8178]

Failure to file waived unless objection made by answer or demurrer (94-502, 103+500). Failure to file before suit not cured by subsequent filing (23-304. See 16-509, 460). May receive payment without filing (76-216, 78+1111). Cited (20-234, 212; 35-191, 28+238; 60-73, 61+1020). 140-496, 168+590.

9661. Next of kin—Liability for debts—Contribution—The next of kin of a deceased person are liable to an action by a creditor of the estate, to recover the distributive shares received by them out of such estate, or so much thereof as shall be necessary to satisfy his debt, which action may be against all or against any one or more of them. The plaintiff may recover the value of all assets received by all the defendants, if necessary to satisfy his demand, and his recovery shall be apportioned among the defendants in proportion to the value of the assets received by each, without deduction on account of there being other relatives who have received assets. But any one against whom such recovery has been had may maintain an action for contribution against all or any other relatives of the decedent to whom assets have been paid, and may recover of each defendant such proportionate share of the amount paid by plaintiff as the value of assets received by each bears to the value of all the assets distributed to all the relatives. (4507) [8179]

61-361, 63+1069; 61-520, 526, 63+1072; 66-209, 68+974; 70-519, 73+416; 73-170, 75+1041; 75-138, 77+788; 87-189, 91+485; 90-172, 95+1110; 196+656.

Such being the case, neither the heirs nor the administrator can be held liable in this action. 158-14, 196+655.

The finding that none of the proceeds of the lot ever came to the estate of the deceased or into the hands of his heirs or administrator is fully sustained. 158-14, 196+655.

9662. Legatees—When liable—Legatees are liable to an action by a creditor of the testator to recover the value of legacies received by them. Such action may be brought against all or any one or more of the legatees. The plaintiff cannot recover unless he shows:

1. That no assets were delivered by the executor or administrator to the heirs or next of kin; or

2. That the value of the assets so delivered has been recovered by another creditor; or

3. That such assets are not sufficient to satisfy the demands of the plaintiff, in which case he can recover only the deficiency.

The whole amount which the plaintiff can recover shall be apportioned among all the legatees, in proportion to the amount of their legacies respectively, and his proportion only can be recovered of each legatee. (4508) [8180]

87-189, 91+485; 90-172, 95+1110.

9663. Costs—Judgment, when discharged—If an action be brought against several next of kin jointly, or several legatees jointly, for assets delivered to them, and a recovery be had against them, the costs shall be apportioned among the several defendants in proportion to the amount of the damages recovered against each. In either case, the payment or satisfaction of the judgment recovered against any one of the defendants shall discharge him and his property from such judgment. (4509) [8181]

73-170, 75+1041; 90-172, 95+1110.

9664. Heirs and devisees—When liable—Heirs and devisees are liable to an action by a creditor of a deceased person to recover a debt, to the extent of the value of any real property inherited by or devised to them. If such action be against the heirs, all heirs who are liable shall be made parties thereto. But the heirs shall not be liable for the debt unless it shall appear that the personal assets were not sufficient to discharge it, or that, after due proceedings before the probate court, the creditor is unable to collect the debt from the personal representatives of the decedent, or from his next of kin or legatee; and if the personal assets were sufficient to pay a part of the debt, or in case a part thereof has been collected as hereinbefore mentioned, the heirs of such deceased person are liable for the residue. But nothing in this section shall affect the liability of heirs for a debt of their ancestors, where, by his will, such debt was expressly charged exclusively on the real property descended to such heirs, or directed to be paid out of the real property so descended, before resorting to the personal property. (4510) [8182]

20-313, 271; 47-382, 50+367; 87-189, 91+485; 90-172, 95+1110; 136-222, 161+413; 196+656.

158-14, 196+655, note under § 9661.

9665. Apportionment of liability—Contribution—Whenever the heirs, devisees, or legatees have received real or personal estate, and are liable by law for any debts, such liability shall be in proportion to the estate they have respectively received, and a creditor may recover his claim against a part or all of them to the amount of such liability. If, by the testator's will, any part of his estate, or any devisees or legatees, are made exclusively liable for the debt, the devisees or legatees shall contribute among themselves accordingly. (4511) [8183]

20-313, 271; 75-138, 77+788; 86-214, 90+395; 87-189, 91+485.

9666. New parties—Issues—Apportionment—If all the persons liable for the payment of any such debt shall not be included as defendants, the action shall not thereby be dismissed or barred; but the court may order any other parties brought in, and allow such amendments as may be necessary, on such terms as it may prescribe. If more than one person is liable, and the creditor shall bring action against all or any of them, and those liable shall dispute the debt, or the amount claimed, the court may order an issue to be framed, and direct the amount to be ascertained by a jury, and shall determine how much each is liable to pay. (4512) [8184]

20-313, 271.

9667. Estate of deceased heirs, etc., when liable—If any of the heirs, devisees, or legatees die without having paid his just share of the debts, his estate shall be liable therefor as for his own debt, to the extent to which he would have been liable if living. (4513) [8185]

9668. Contribution among heirs—When any heir, devisee, or legatee pays more than his share of such debt, the other persons liable shall be holden and compelled to contribute their just proportion of the same. (4514) [8186]

9669. Priority among debts—Whenever the next of kin, legatees, heirs, and devisees are liable for the debts of their ancestor, or testator, they shall give preference in the payment of the same, and be liable therefor, in the following order:

1. Debts entitled to a preference under the laws of the United States.

2. Judgments against the ancestor or testator, according to the priority thereof respectively.

3. Debts due to other creditors. (4515) [8187]

9670. No preference between debts of same class—No preference shall be given by any next of kin, legatee, heir, or devisee to one debt over another of the same class, except one specified in § 9669 subd. 2; nor shall a debt due and payable be entitled to a preference over one not due; nor shall the commencement of an action against any next of kin, legatee, heir, or devisee, for the recovery of a debt, entitle it to preference over others of the same class. (4516) [8188]

9671. Defences—Other debts outstanding or paid—The next of kin, legatees, heirs, and devisees may show, in their defence, that there are unsatisfied debts of a prior class, or others of the same class as the debt in action; and if it shall appear that the value of the personal property delivered, or of the real estate descended or devised, to them does not exceed the debts of a prior class, judgment shall be rendered in their favor. If the value of such property exceeds the amount of debts which are entitled to preference over the debt in action, judgment shall be rendered against them only for such a sum as bears a just proportion to the other debts of the same class. If a debt of a class prior to the one in action, or of the same class, is paid by any next of kin, legatees, heirs, or devisees, they may prove such payment, and the amount thereof shall be treated, in ascertaining the amount to be recovered, as if it were unpaid. (4517) [8189]

9672. Real property descended—Lien of judgment—If it appears that the real property so descended was not alienated by the heir at the time of the commencement of the action, the court shall order that plaintiff's debt, or the proportion thereof which he is entitled to recover, be levied upon such real estate, and not otherwise; and every judgment rendered in such action has preference as a lien on such real estate, to

any judgment obtained against such heir for a debt of his own. (4518) [8190]

9673. Personal liability—Alienation before suit—If it appears in the action that before the commencement thereof the heir has alienated the real property descended to him or any part thereof, he shall be personally liable for the value of that alienated; and judgment may be rendered therefor, and execution awarded, as in actions for his own debts. But no real property alienated in good faith by an heir, before action commenced against him, shall be liable to execution or in any manner affected by a judgment against him. (4519) [8191]

9674. Heirs and devisees—Limit of recovery—In actions brought against several heirs or several devisees jointly, the amount of plaintiff's recovery shall be apportioned among all the heirs of the ancestor, or all the devisees of the testator, in proportion to the value of the real property descended or devised, and such proportion only can be recovered of each. (4520) [8192]

9675. Devisees, when liable—Limitations—Devisees made liable to creditors of their testator by the provisions of this chapter shall not be held liable unless it shall appear that his personal assets and the real property descended to his heirs were insufficient to discharge the debt, or that after due proceedings before the probate court the creditor has been unable to recover the debt or any part thereof from the personal representative of the testator, or his next of kin, legatees, or heirs. In either of said cases the amount of the deficiency of the personal assets, and of the real property descended to satisfy the debt of the plaintiff, and the amount which he may have failed to recover from the personal representative, next of kin, legatees, and heirs of the testator, may be recovered of the devisees, to the extent of the real property devised to them respectively. But nothing in this section shall affect the liability of the devisees for a debt of their testator which was charged by will exclusively upon the real property devised, or made payable exclusively by such devisees, or out of the real property devised before resorting to the personal property or to any other real property descended or devised. (4521) [8193]

9676. Devisees—Application of chapter—The provisions of this chapter with regard to heirs, and to proceedings by and against them, and to judgments and executions against them, are applicable to actions and proceedings against devisees, and they must in like manner be jointly sued. (4522) [8194]

1940 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1940)
(Superseding Mason's 1931, 1934, 1936 and 1938
Supplements)

Containing the text of the acts of the 1929, 1931, 1933, 1935, 1937 and 1939 General Sessions,
and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and
amendatory, and notes showing repeals, together with annotations from the
various courts, state and federal, and the opinions of the Attorney
General, construing the constitution, statutes, charters
and court rules of Minnesota together with digest
of all common law decisions.



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weeks prior to the date to which said sale shall be postponed. (Act Mar. 2, 1933, c. 44, §1; Mar. 16, 1933, c. 90, §1.)

Laws 1933, c. 44, is constitutional. *State v. Moeller*, 189M412, 249NW330. See Dun. Dig. 207 to 209, 1628.

Duties of register of deeds as prescribed by Mason's Minn. St., sec. 2217, are in no way affected by this law. Op. Atty. Gen., Apr. 3, 1933.

Governor's executive order to officers to desist from foreclosing mortgages expired by limitation on Apr. 30, 1933. Op. Atty. Gen., May 2, 1933.

9655-2. Posting of notices.—In all cases where any sheriff has heretofore and subsequent to February 23, 1923, postponed any such mortgage foreclosure sale, the said sheriff may again postpone the sale, provided, however, that the date to which said sale is finally postponed shall be subsequent to April 30, 1933, and shall not be more than ninety days from the date upon which said sale was originally advertised to be held, and provided further, that the said sheriff shall post a notice of such final postponement at one of the entrance doors of the court house or county jail of the county where the sale was originally advertised to be held, at least three weeks prior to the date to which the said sale shall be finally postponed. (Act Mar. 2, 1933, c. 44, §2; Mar. 16, 1933, c. 90, §2.)

9655-3. Acts legalized.—Any postponement heretofore made by any sheriff of any such mortgage foreclosure sale, without the publication of a notice of postponement in a newspaper, is hereby validated and is hereby declared to be legal and binding in all respects. (Act Mar. 2, 1933, c. 44, §3; Mar. 16, 1933, c. 90, §3.)

Adjournment of mortgage foreclosure sale by sheriff on Feb. 27, 1933, was validated by curative provision of act of Mar. 2, 1933. Laws 1933, c. 44. *State v. Moeller*, 189M412, 249NW330.

9655-4. Provisions separable.—If any section or part of this act shall be declared unconstitutional or invalid for any reason, the remainder of this act shall not be affected thereby. (Act Mar. 2, 1933, c. 44, §4; Mar. 16, 1933, c. 90, §4.)

9655-5. Powers and duties of trustees in certain cases.—Whenever a mortgage made or assigned to a trustee or trust deed on any real property or any real and personal property located in this State has been heretofore or shall hereafter be foreclosed and bid in on such foreclosure by a trustee for the holders of the bonds or notes secured by such mortgage or trust deed, or for the holders of certificates or other evidences of equitable interest, in such mortgage or trust deed, or whenever a mortgagor after the mortgage has been executed and delivered, but not before nor as a part of the mortgage transaction, conveys directly to the mortgage trustee, thereby eliminating his title, the said trustee may at any time petition the district court of the county in which such property or any portion thereof is situated for instructions in the administration of the trust. Upon the filing of such petition the court shall make an order fixing

a time and place for hearing thereof, unless hearing has been waived in writing by the beneficiaries of such trust. Notice of such hearing shall be given by publishing a copy of such order one time in a legal newspaper of such county at least twenty days before the date of such hearing, and by mailing a copy thereof to each known party in interest then in being whose address is known, at his last known address, at least ten days before the date of such hearing or in such other manner as the court shall order, and if such court shall deem further notice necessary it shall be given in such manner as may be specified in such order. Upon such hearing the court shall make such order as it deems appropriate, including an order to sell, mortgage, or lease such property or any part thereof in such manner and upon such terms as the court may prescribe. In the case of a sale, the court in its discretion may authorize the trustee to sell at private sale or may direct the sheriff of said county to offer such property for sale at public auction and sell the same to the highest bidder therefor for cash. Any sale of such property made at public auction shall be reported to the court for confirmation and confirmed by the court before the same shall become effective and valid. Notice of hearing on such confirmation shall be given to all parties in interest who have appeared in said proceedings. Upon such confirmation, the sheriff shall make, execute and deliver, subject to such terms and conditions as the court in its order of confirmation may impose, a good and sufficient instrument or instruments of conveyance, assignment and transfer. No confirmation of a private sale, mortgage or lease shall be required. The order of confirmation in the case of a sale at public auction, and the order authorizing a private sale, mortgage or lease, shall be final and conclusive as to all matters thereby determined, and shall be binding in rem upon the trust estate and upon the interests of all beneficiaries, vested or contingent, except that appeal to the Supreme Court may be taken from such order by any party in interest within thirty days from the entry thereof, by filing notice of appeal with the clerk of district court, who shall mail a copy of such notice to each adverse party who has appeared of record. (Mar. 25, 1937, c. 108, §1.)

9655-6. Limitation of Act.—Nothing in this act contained shall be deemed to limit or abridge the power or jurisdiction of the district court over trusts and trustees, or to limit the authority conferred upon any trustee by any mortgage, trust deed, or other instrument. (Mar. 25, 1937, c. 108, §2.)

9655-7. Proceedings legalized.—All actions and proceedings heretofore brought or commenced in which the procedure prescribed by this act has been followed are hereby legalized and validated and any orders made therein shall have the same force and effect as if made hereunder. (Mar. 25, 1937, c. 108, §3.)

CHAPTER 84

Actions by or against Personal Representatives and Heirs

9656. What causes of action survive.

1. Held to survive.

Rights under Wisconsin Statutes 1927, §287.01 may be enforced in Minnesota. *Chubbuck v. H.*, 182M225, 234NW314. See Dun. Dig. 14, 1530.

A right of action accruing to a party under a foreign statute will, as a matter of comity, be enforced in the courts of this state when jurisdiction can be had and justice done between the parties, if such statute be not contrary to the public policy of this state. *Chubbuck v. H.*, 182M225, 234NW314. See Dun. Dig. 14, 1530.

Action under Wisconsin Survival Statute, *Chubbuck v. M.*, 182M225, 234NW868.

A husband's cause of action for medical expenses and nursing incurred in attempting to cure his wife of the injuries negligently inflicted survives the death of the

wife and the death of the wrongdoer. *Fowle v. F.*, 184M82, 237NW846. See Dun. Dig. 14.

2. Held not to survive.

Rights of parent to support under deed to child are personal and do not survive. *Gamble v. M.*, 187M640, 246NW368; *Mallick v. M.*, 189M121, 248NW723. See Dun. Dig. 2677.

Action and cause of action for malicious prosecution and false arrest ended as to a certain defendant with his death. *Hoffer v. F.*, 204M612, 244NW873. See Dun. Dig. 14.

3. Cause of action arising in another state.

Jurisdiction of estate of deceased tort-feasor may be acquired by service on personal representative as in case of surviving liability for torts committed here. *Kertson v. J.*, 185M591, 242NW329. See Dun. Dig. 3669.

9657. Action for death by wrongful act.—When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed \$10,000.00, and shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them in the same proportion as personal property of persons dying intestate; but funeral expenses, and any demand for the support of the decedent, duly allowed by the probate court, shall first be deducted and paid. Provided, that if an action for such injury shall have been commenced by such decedent, and not finally determined during his life, it may be continued by his personal representative for the benefit of the same persons and for recovery of the same damages as herein provided, and the court on motion may make an order, allowing such continuance, and directing pleadings to be made and issues framed conformably to the practice in action begun under this section. (R. L. '05, §4503; '11, c. 281, §1; G. S. '13, §8175; Apr. 29, 1935, c. 325, §1.) Sec. 2 of Act Apr. 29, 1935, cited, provides that the act shall be in force from and after July 1, 1935.

2. Construction and application of statute.

The next of kin of a deceased person are persons interested in the outcome of an action to recover damages for causing the death of such deceased person. *Dougherty v. G.*, 184M436, 239NW153. See Dun. Dig. 10316.

It is doubtful that an implied warranty that food sold is fit for purpose intended would constitute a basis for an action for wrongful death. *Doherty v. S.*, 227Wis661, 278 NW437.

Mason's Minn. St. 1927, §3789, creates a tort liability in favor of a person injured by eating of unwholesome, poisonous, or deleterious food sold to him, independently of any showing of culpability or negligence, and recovery may be had for death of one from unwholesome food without proof of negligence. *Id.*

Inasmuch as a personal representative, in conduct of an action for wrongful death, acts for district court and not at all for probate court or estate of deceased, he is not acting in his capacity as executor or administrator, and therefore is not relieved by §9692, from necessity of furnishing an appeal bond or undertaking, of depositing cash in lieu thereof imposed by §9499. *Sworski v. C.*, 203M545, 282NW276. See Dun. Dig. 325a.

In order to recover it is necessary that cause be such that deceased, had he lived, might have pursued such an action. *Sworski v. C.*, 204M474, 283NW778. See Dun. Dig. 2600.

Right to recover for death arising out of prenatal injury. 20MinnLawRev321.

Recovery for wrongful deaths for breach of implied warranty. 23MinnLawRev92.

3. Who may sue.

Though wife cannot maintain an action against her husband for a tort committed by him against person of wife, action by administrator of a child is not an action by wife against husband, and administrator may recover for death of child, though wife of defendant is sole beneficiary. *Albrecht v. P.*, 192M557, 257NW377. See Dun. Dig. 2608, 4288.

Action for wrongful death under Federal Employers' Liability Act must be brought by personal representatives, and none of beneficiaries may maintain an action. *Noesen v. M.*, 204M233, 283NW246. See Dun. Dig. 2602b.

Where tavern keeper unlawfully sold intoxicating liquors to a minor, resulting in his intoxication and death, cause of action, if any, accrued to parents of minor, and not to special administrator of minor under death act. *Sworski v. C.*, 204M474, 283NW778. See Dun. Dig. 2607.

County furnishing burial pursuant to §3176 may not sue to recover burial expenses under §9657, nor file petition for appointment of a special administrator for that purpose. *Op. Atty. Gen.* (339c-1), June 22, 1929.

Status of adopted children under wrongful death statutes. 23MinnLawRev33.

5. Who is next of kin.

An adopted child has rights of a natural child as next of kin for whose benefit an action for wrongful death may be brought. *McKeown v. A.*, 202M595, 279NW402. See Dun. Dig. 2608.

9. Defences.

That one defendant in action for death of guest in automobile was son of decedent and would benefit by recovery did not prevent recovery by personal representative for benefit of other beneficiaries, though representation or apportionment because of negligence might be made. *Anderson v. A.*, 188M602, 248NW35. See Dun. Dig. 2616.

11. Limitation of actions.

Action for death against city must be commenced within one year from the occurrence of the loss or injury. 178M489, 227NW653.

14. Funeral expenses.

Representative of decedent's estate may recover from the wrongdoer the necessary funeral, hospital and medical expenses incurred in that behalf, provided same be reasonable, even if decedent left an adequate estate to pay such items. *Prescott v. S.*, 197M325, 267NW251. See Dun. Dig. 2612.

16. Damages.

\$2,564. held not excessive for death of child. 179M528, 229NW784.

Where the action is brought to recover for death by wrongful act, and the defense is contributory negligence by one or more of the next of kin or beneficiaries, the proper practice is to require the jury to assess the value of the loss of the life to all the next of kin and by special verdict determine who, if any, of the next of kin was guilty of contributory negligence. *Harrington v. A.*, 183M74, 235NW534. See Dun. Dig. 2616(7).

Measure of damages for wrongful death is money value to surviving spouse, if any, and next of kin, of continuance of decedent's life, measured by money value of what evidence shows decedent probably, or with reasonable certainty, would have contributed to them in money, property, or services, during remainder of his life. *Wiester v. K.*, 183M341, 247NW237. See Dun. Dig. 2617.

Verdict for \$7,500 was not excessive for death of woman 52 years of age leaving 10 children. *Anderson v. A.*, 188M602, 248NW35. See Dun. Dig. 2617.

Verdict for \$5,057.86 held not excessive for death of child. *Christensen v. P.*, 189M548, 250NW363. See Dun. Dig. 2597, 2617.

Verdict for \$7,500 reduced to \$6,750 for death of blacksmith, held not excessive. *Harris v. R.*, 189M599, 250NW 577. See Dun. Dig. 2597.

Verdict for \$2,800 to a woman 58 years of age for death of a daughter earning \$95 a month who contributed substantial sum to her mother for family expenses, held not excessive. *Albrecht v. P.*, 192M557, 257NW377. See Dun. Dig. 2617.

Verdict for \$7,500 for death of roofing contractor regularly contributing \$250 each month for maintaining household held not excessive. *Gross v. G.*, 194M23, 253 NW557. See Dun. Dig. 2617.

A verdict for \$3,500 for death of seven year old child held not excessive. *Dickey v. H.*, 195M292, 262NW869. See Dun. Dig. 2617.

\$6,000 not excessive for death of 49-year-old daughter. *Hartel v. W.*, 196M465, 265NW282. See Dun. Dig. 2617.

In determining damages for death of a parent, consideration should be given to elements of loss which arise from deprivation of counsel, guidance and aid given to family. *Hoppe v. P.*, 196M538, 265NW338. See Dun. Dig. 2617.

Verdict for \$7,500 was not excessive for death of man 48 years old receiving public relief and leaving a wife and three children. *Id.*

Argument rejected that, because earnings of an able-bodied man have been much reduced by adverse general economic conditions, there must be a corresponding reduction of recovery by his dependents for his wrongful death. *Id.*

Verdicts for \$5,000 and \$2,500 respectively for death of elderly retired wealthy parents held excessive. *Prescott v. S.*, 197M325, 267NW251. See Dun. Dig. 2617, 2618 (40).

In action by husband for wrongful death of wife, testimony as to second marriage and services of second wife is inadmissible and incompetent for any purpose whatsoever, especially where there are small children. *Lorberbaum v. C.*, 198M289, 269NW646. See Dun. Dig. 2619.

Evidence held to sustain a verdict of \$7,500 for wrongful death of man, 27 years of age, earning \$80 a month, who turned practically his entire income over to his parents, with whom he lived and for whose benefit action is brought. *Koski v. M.*, 201M549, 277NW229. See Dun. Dig. 2617.

Fact that maximum amount was allowed in a death action was not of itself important in determining whether verdict was excessive. *Paine v. G.*, 202M462, 279NW257. See Dun. Dig. 2617.

Loss of wages earned for support of family is not only matter to be considered in determining pecuniary loss for death. *Id.* See Dun. Dig. 2617.

Verdict for \$10,000 for death of manager of a creamery with expectancy of 15 years held not excessive. *Id.* See Dun. Dig. 2617.

Damages in wrongful death action are measured by pecuniary interest of beneficiaries in continuance of life of deceased, and calling of deceased, his income therefrom, his health, age, probable duration of life, amount of aid in money or services which he was accustomed to furnish beneficiaries are factors to be considered. *McKeown v. A.*, 202M595, 279NW402. See Dun. Dig. 2617.

A verdict for \$10,000 for the wrongful death of a physician and surgeon with an expectancy of over 17 years and a well-established practice from which he earned between \$5,000 and \$6,000 per year, from which he contributed between \$40 and \$60 a month to each of his

two dependents, held not excessive. *Id.* See Dun, Dig. 2617.

Verdict for \$7,500, reduced to \$6,250 was not excessive for death of a 15 year old boy. *Ekdahl v. M.*, 203M374, 281NW517. See Dun, Dig. 2617.

Verdict of \$6,000 was not excessive for death of man 39 years of age leaving wife and six children. *Farwell v. S.*, 203M392, 281NW526. See Dun, Dig. 2617.

Damages for wrongful death under Federal Employers' Liability Act are limited to probable amount of pecuniary aid each dependent would have received from employee had he continued in life. *Noesen v. M.*, 204M233, 283NW246. See Dun, Dig. 2617a.

Recovery for conscious pain and suffering under Federal Employers' Liability Act is not measured by dependency of widow of child upon employee for support. *Id.* See Dun, Dig. 2617a.

Verdict of \$7,500 for death of wife and mother was not excessive. *Doherty v. S.*, 227Wis661, 278NW437.

16a. Disposition of proceeds.

It cannot be said that children of parent not engaged in any gainful occupation, but who has means or income by which he contributes to them, will suffer no pecuniary loss by his death, though they will inherit his property. *Wiestler v. K.*, 188M341, 247NW237. See Dun, Dig. 2617.

The recovery in an action for death by wrongful act is not for benefit of estate but for benefit of surviving spouse and next of kin. *Luck v. M.*, 191M503, 254NW609. See Dun, Dig. 2608, 2609.

Trial judge has plenary power in respect to distribution of damages for death and may not permit negligent father to share. *Id.* See Dun, Dig. 2610.

Where father individually and as special administrator brought action for death of infant son, and a settlement was made, mother is entitled to half, after deducting medical, funeral expenses and attorney's fees and other disbursements, though she suffered no pecuniary loss by reason of death, having deserted the family years before. *Murphy v. D.*, 200M345, 274NW515. See Dun, Dig. 2617.

16b. Negligence of defendant or beneficiary.

Negligence of defendant held not the proximate cause of death. 171M486, 214NW763.

A husband's cause of action for medical expenses and nursing incurred in attempting to cure his wife of the injuries negligently inflicted survives the death of the wife and the death of the wrongdoer. *Fowle v. F.*, 184M82, 237NW846. See Dun, Dig. 14.

Where defendants did not ask for a reduction of death verdict or apportionment because of negligence of one beneficiary, no complaint could be made after a general verdict had been found favorable to administratrix. *Luck v. M.*, 191M503, 254NW609. See Dun, Dig. 2617.

Contributory negligence on part of mother of a child seven years old, which was killed by an automobile on a public highway, held question of fact for jury. *Dickey v. H.*, 195M292, 262NW369. See Dun, Dig. 2616.

In action for death of wife in a collision at highway intersection, contributory negligence of plaintiff held for jury. *Duncanson v. J.*, 195M347, 263NW92. See Dun, Dig. 2616.

Where in action for wrongful death, representative of estate of deceased would be sole beneficiary of any recovery, his contributory negligence bars recovery against defendant whose negligence caused death. *Jenson v. G.*, 195M556, 263NW624. See Dun, Dig. 2616(6).

Contributory negligence of deceased driver of car in nighttime in colliding with truck which had just pulled car out of ditch, blocking highway, held for jury. *Szyperski v. S.*, 198M154, 269NW401. See Dun, Dig. 2620.

16d. Presumptions.

Circumstantial evidence is sufficient to rebut presumption of due care on part of a deceased. *Faber v. H.*, 194M321, 260NW500. See Dun, Dig. 2616, 7032.

Driver killed in automobile collision is presumed to have exercised due care. *Vogel v. N.*, 196M509, 265NW350. See Dun, Dig. 2616(12).

It is incorrect to say that presumption of due care on part of decedent does not apply where there are eye witnesses to accident, and although the presumption is only an inference which law permits from appropriate facts, and since burden of proof upon issue of contributory negligence is upon defendants, the effect of the presumption or inference is governed by the state of the record at the time of submitting case to jury. *Anderson v. K.*, 196M578, 265NW321. See Dun, Dig. 2616, 3431, 7032.

A very strong presumption arises that deceased exercised due care to save himself from personal injury or death, and the question is always one of fact for jury unless undisputed evidence so conclusively and unmistakably rebuts presumption that honest and fair-minded men could not reasonably draw different conclusions therefrom. *Szyperski v. S.*, 198M154, 269NW401. See Dun, Dig. 2616.

Driver of car killed in accident is presumed to have exercised due care. *Laiti v. M.*, 199M167, 271NW481. See Dun, Dig. 2616.

Where driver of automobile was killed in a collision at a street intersection, with a street-car, presumption of due care of plaintiff's decedent is conclusively overcome by evidence which discloses that as a matter of law his negligence contributed to cause his death. *Geldert v. B.*, 200M332, 274NW245. See Dun, Dig. 2616(12).

Presumption that deceased was in exercise of due care, being disputable, may be overcome by any adequate evidence. *Hack v. J.*, 201M9, 275NW381. See Dun, Dig. 7032(99).

Where deceased truck driver stopped truck ten feet from curb and at an angle with timbers extending out of the back towards center of highway and was on pavement near to or in front of cab at time defendant's car struck timbers, without any explanation of stoppage, contributory negligence of truck driver was question for jury. *Id.*

In action for death of person falling into basement stairway in absence of eye witnesses plaintiff was entitled to presumption of due care on part of deceased. *Paine v. G.*, 202M462, 279NW257. See Dun, Dig. 2616.

There is a presumption that a person killed was in exercise of ordinary care at time of accident, but this presumption must yield to proof that due care was not exercised. *Ekdahl v. M.*, 203M374, 281NW517. See Dun, Dig. 2616.

Presumption that deceased was in exercise of due care did not exist where established facts annul it. *Luce v. G.*, 203M470, 281NW812. See Dun, Dig. 2616(12).

Elements of compensation for the death of a minor child. 16MinnLawRev409.

17. Evidence.

Evidence of financial condition of next of kin, held admissible. 179M528, 229NW784.

Person killed in an accident in the absence of eyewitnesses is presumed to have exercised due care. *Dougherty v. G.*, 184M436, 239NW153. See Dun, Dig. 2616(12).

It was not error to refuse to receive in evidence the general inventory filed in probate court in decedent's estate, as bearing upon the amount of damages resulting from his death. *Quinn v. Z.*, 184M589, 239NW902. See Dun, Dig. 2619.

In action to recover for death by wrongful act, directed verdict for defendant is proper, where evidence of causal connection between defendant's wrongful act and death is merely conjectural and speculative. *Peterson v. L.*, 186M101, 242NW549. See Dun, Dig. 2620.

In an action for wrongful death of wife, evidence of plaintiff's use of intoxicants, coupled with testimony indicating that wife, because thereof, was contemplating a separation and possible divorce, is relevant. *Peterson v. P.*, 186M583, 244NW68. See Dun, Dig. 2617.

Evidence held to sustain finding that death from lobar pneumonia 52 days after automobile accident was caused by it. *Anderson v. A.*, 188M602, 248NW35. See Dun, Dig. 2620, 6999.

In a death action wherein it appeared mother of decedent was sole beneficiary, mortality tables were admissible to show life expectancy of the mother, even if not admissible to show life expectancy of decedent, who was in ill health. *Albrecht v. P.*, 192M557, 257NW377. See Dun, Dig. 3353.

Mortality tables were admissible in evidence in action for death though evidence indicated that decedent had a weak heart. *Id.*

Evidence that plaintiff collected money on insurance carried on life of decedent and that she received at his death personal and real property from his estate, although not to be considered in arriving at amount of damages for his wrongful death, was admissible in refutation of testimony of plaintiff that she had no money with which to redeem certain real property of her husband sold under foreclosure. *Wright v. E.*, 193M509, 259NW75. See Dun, Dig. 2570b, 7193, 7202.

Presumption that a deceased person exercised due care for his own safety yields to credible undisputed testimony, and does not remain to create an issue of fact against such evidence. *Faber v. H.*, 194M321, 260NW500. See Dun, Dig. 2616, 7032.

In action against druggist evidence held to sustain finding that mineral oil contaminated with formalin or formaldehyde in deleterious quantity was sold to plaintiff for family use and that it caused death of his child. *Berry v. D.*, 195M366, 263NW115. See Dun, Dig. 2620.

In action for death of one caught upon door handle of moving automobile, evidence held not to support a verdict for plaintiff. *Markgraf v. M.*, 197M571, 267NW515. See Dun, Dig. 2620.

Evidence held not to support a finding that lobar pneumonia, from which plaintiff's intestate died, was caused by collision, occurring over five weeks prior to pneumonia, connection as proximate cause lacking as a matter of law. *Honer v. N.*, 198M55, 268NW852. See Dun, Dig. 2620.

In action by husband for wrongful death of wife, testimony as to second marriage and services of second wife is inadmissible and incompetent for any purpose whatsoever, especially where there are small children. *Lorberbaum v. C.*, 198M289, 269NW646. See Dun, Dig. 2619.

In action for death, it must be presumed, until evidence shows otherwise, that deceased exercised due care for his own safety. *Theisen v. M.*, 200M515, 274NW617. See Dun, Dig. 2616(12).

In action against village for death of one installing sign on pole constituting part of village distribution system, contributory negligence held for jury in that deceased was not experienced in working with electricity and there was no showing that he knew of possibility of a disruptive or "brush" discharge from nearby high tension line. *Id.*

Plaintiff had affirmative on issue of proximate cause, and burden of proof rested upon him. *Paine v. G.*, 202M 462, 279NW257. See Dun. Dig. 2616.

Admission of mortality tables in evidence was not error, although deceased was not in normal health at time he was killed. *Id.* See Dun. Dig. 3353.

Circumstantial evidence was sufficient to sustain finding that missing rail was proximate cause of death of person using sidewalk and falling into pit. *Id.* See Dun. Dig. 2620.

Showing cash value of deceased's life, based upon his capacity, earnings, and life expectancy, in connection with argument as to pecuniary damage which beneficiaries of action sustained by his death, was proper. *McKeown v. A.*, 202M595, 279NW402. See Dun. Dig. 2619.

17a. Instructions.

Electric company was not harmed by charge on presumption of due care by a deceased. *Ekdahl v. M.*, 203M 374, 281NW517. See Dun. Dig. 424.

9660. Actions by foreign executor, etc.

A foreign executor or administrator is not authorized to maintain an action based upon possessory rights in real estate of decedent. *Bowen v. W.*, 203M289, 281NW 256. See Dun. Dig. 3678.

Effect of statutory right to sue on right to possession of realty by foreign administrator. 23MinnLawRev373.

9661. Next of kin—Liability for debts.

Gilbertson v. M., (CCA8), 32F(2d)665.

Moneys and credits which were omitted in assessment of any year or years during life of deceased owner may be assessed and taxed for such year or years after estate has been distributed and personal representative discharged, and heirs and legatees are liable on property passing to them, and personal representative is liable personally if he had knowledge of such omission during administration of estate, and personal representative is further personally liable if moneys and credits tax is not paid for years covered by administration. *Op. Atty. Gen.* (614f), Jan. 7, 1935.

CHAPTER 85

Official and Other Bonds—Fines and Forfeitures

9677. Bonds, etc.

In counties having 55,000 to 70,000 population and 35 to 45 townships premiums on bonds of officers and deputies shall be paid by the county. *Laws 1939, c. 205.*

City officials should furnish new bond at beginning of each term of office, and a renewal certificate of bonding company is insufficient. *Op. Atty. Gen.*, Jan. 24, 1933.

Reelected township officials are required to furnish new bonds instead of renewal certificates. *Op. Atty. Gen.*, June 5, 1933.

A rider to a bond should be executed and properly acknowledged as provided by this section. *Op. Atty. Gen.* (645b-2), Aug. 20, 1934.

Provision in bond covering state employees that renewal thereof may be by certification or endorsement thereon is not renewed by instrument purporting to be a schedule continuous list. *Op. Atty. Gen.* (45G), Nov. 1, 1934.

Surety on official bond may not cancel bond during term of office without consent of all parties concerned, and consent may not lawfully be given by governing body until a satisfactory new bond is furnished. *Op. Atty. Gen.* (469b-5), Feb. 21, 1936.

Where one of joint sureties on bond of city treasurer dies, claim for full amount of defalcation should be filed against his estate, and city may not compromise claim or divide it as between sureties, estate of decedent being financially able to pay in full. *Op. Atty. Gen.* (59a-12), July 22, 1936.

Bonds should cover entire term of official, and annual continuation certificates should not be approved. *Op. Atty. Gen.* (59a-8), July 8, 1937.

Executive secretary of county welfare may not be required to execute a fidelity bond, but it would not be unlawful for board of control to pass a resolution providing that it is desirable that such secretary give a fidelity bond to be filed as other bonds and paid for by county, and a bond so voluntarily given would be enforceable. *Op. Atty. Gen.* (104a-2), Aug. 25, 1937.

There is no authority for the execution by secretary of state or any other state officer of a certificate of cancellation and release of a corporate surety on an official bond. *Op. Atty. Gen.* (45G), March 4, 1939.

Duty of approving generally fidelity and surety bond of state officers is upon commissioner of administration, but state officers need not be bonded except in cases where law so provides. *Op. Atty. Gen.* (640), June 24, 1939.

Commissioner of administration has authority to determine what employees are to be bonded and amount thereof. *Id.*

9677-1. State may take fidelity insurance.—The comptroller from time to time shall make surveys of each department or other agency of the state government to determine the employees in such department or agency whose fidelity should be assured by individual bond or fidelity insurance policy, and the amount of such bond or insurance necessary for each such employe, and shall submit a list thereof to the commission of administration and finance for its action thereon. The commission may approve in whole or in part and shall certify its action thereon to the directing head of each such department or agency, who shall require each of the employes so listed to give bond to the state in the amount indicated in such certificate. The commission in such certificate may direct that, in lieu of individual bonds so required,

the directing head of any such department or agency shall procure and keep in effect a schedule or position insurance policy, in such aggregate amount as the commission shall direct, insuring the fidelity of such department employes in the respective amounts so required, upon a form to be prescribed by the comptroller. Such policy may cover also the subordinate officers of such department required by law to give bond to the state, and in the amount which the Commission shall require. The surety upon the bonds of all state officers and state employees required under any law of the state shall be a corporation authorized to act as sole surety upon such official bonds, and all such bonds shall be approved by the attorney general as to form and generally by the comptroller, who shall keep an appropriate record of such approval and cause such bond or policy to be filed in the office of the secretary of state. (*Laws 1929, c. 263, §1; Apr. 20, 1931, c. 233, §1.*)

Legislature intended by §5327 to fix amount of fidelity assurance of deputy and twelve examiners, leaving amount of bond for assistant and second assistant examiners to determination of administration. *Op. Atty. Gen.* (980a-8), May 5, 1937.

Banking division of department of commerce created pursuant to *Laws 1909, c. 201*, as amended by *Laws 1925, c. 426, art. 8*, is a department of state government within meaning of §9677-1, and legislature contemplated administration of amount of fidelity bond for those for whom legislature has not fixed amount. *Id.*

Official bonds of secretary of department of health should be referred to commission of administration and finance for approval, and continuation certificates should not be approved, such bonds should be cumulative. *Op. Atty. Gen.* (45a), May 7, 1937.

Law does not permit commission of administration and finance to write a blanket fidelity insurance policy to cover employees in more than one department, but each department head shall procure and keep in effect such a policy, and commissioner of banks, commissioner of insurance and commissioner of securities are each directing heads of a department within such rule. *Op. Atty. Gen.* (980a-8), May 10, 1937.

Attorney-in-fact who executed insurance policy need not acknowledge his signature before a notary. *Op. Atty. Gen.* (45G), March 10, 1939.

Commission of administration and finance has same duty to perform with reference to bonds given by employees of unemployment compensation division it has with reference to bonds given by employees of other departments, except that penalties and positions to be bonded are not designated by it, such bonds to be filed with secretary of state as in other cases, but unemployment commission is to designate employees to be bonded, and amount thereof. *Op. Atty. Gen.* (885), April 13, 1939.

Commissioner of administration may provide by rule or regulation that two or more companies may join in writing of a single bond, be jointly and severally liable thereon. *Op. Atty. Gen.* (640), July 6, 1939.

Authority and responsibility of commissioner of administration with reference to requiring and procuring fidelity bonds or insurance for elective officers of state or appointive principal officers thereof, subordinate officers of the state, employees of the state, and directors of department of social security, determined and stated. *Id.*