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GENERAL STATUTES

OF THE
STATE OF MINNESOTA

As Amended by Subsequent Legislation, with which are Incorporated
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CHAPTER 77.

ACTIONS BY OR AGAINST EXECUTORS, ADMINISTRATORS, AND HEIRS.

§ 5912. 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 the next section. 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 the personal representatives of the latter.

(G. S. 1866, c. 77, § 1; G. S. 1878, c. 77, § 1.)

Action for pure personal tort does not survive the death of the tort-feasor. *Green v. Thompson*, 26 Minn. 500, 5 N. W. Rep. 376.

Under a statute providing for the survival of all causes of action other than those arising out of an injury to the person, held, that a cause of action against a telegraph company for a statutory penalty survives to the personal representatives of him in whom the right of action originally existed. *Western Union Tel. Co. v. Scircle*, (Ind.) 2 N. E. Rep. 604.

See *Jordan v. Secombe*, cited in note to § 4611; *Hegerich v. Keddie*, cited in note to § 5913; *Brackett v. Griswold*, (N. Y.) 9 N. E. Rep. 438; *Randall v. Telegraph Co.*, (Wis.) 11 N. W. Rep. 419; *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 125, 19 N. W. Rep. 656; *United States v. Spiel*, 8 Fed. Rep. 143; *McKeen v. Waldron*, 25 Minn. 466, 468.

Legal representatives of one who created a nuisance on his own land are not liable for continuing it after his death. *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. Rep. 451.

§ 5913. Action for death by wrongful act.

When death is caused by the wrongful act or omission of any party or corporation, the personal representative of the deceased may maintain an action, if he might have maintained an action, had he lived, for an injury caused by the same act or omission by which the death was caused. But the action shall be commenced within two years after the act or omission by which the death was caused. The damages therein cannot exceed five thousand dollars, and the amount received is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportion as the personal property of deceased persons; Provided, That any demand for the support of the deceased, and funeral expenses, duly allowed by the probate court, shall be first deducted and paid.

(G. S. 1866, c. 77, § 2; G. S. 1878, c. 77, § 2; as amended 1889, c. 109, § 1; 1891, c. 123, § 1.)

The wrongful act or omission referred to is not necessarily a willful or malicious one, but one for which the intestate might, had the injuries not resulted in death, have maintained an action. *McLean v. Burbank*, 12 Minn. 530, (Gil. 438.)

This section does not confer upon the United States district court jurisdiction of a libel *in rem* filed for a marine tort by the administrator of the injured person, as in case of death from such tort the action does not survive in admiralty. *Oleson v. The Ida Campbell*, 34 Fed. Rep. 432.

A similar statute held to apply to statutory liabilities imposed after its passage. *Merkle v. Township of Bennington*, (Mich.) 24 N. W. Rep. 776.

Statutes authorizing personal representatives to maintain an action, as provided in this section, are held not to provide merely for the devolution of an existing cause of action, but to create a new one. *Hegerich v. Keddie*, (N. Y.) 1 N. E. Rep. 737, and cases cited. And the action provided for by the statute abates with the death of the wrong-doer. *Id.*; *Green v. Thompson*, 26 Minn. 500, 5 N. W. Rep. 376.

A father cannot maintain an action for the negligent killing of his infant child. It must be brought under the statute by the executor or administrator. *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 125, 19 N. W. Rep. 656.

An action for damages, under this section, on account of the death of a person caused by the wrongful act or omission of another, must be brought by the executor or administrator of the decedent. *Nash v. Tousley*, 28 Minn. 3, 8 N. W. Rep. 875.

An action must be commenced within two years after the act or omission by which the death was caused. *Rugland v. Anderson*, 30 Minn. 386, 15 N. W. Rep. 676.

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This right of action is given for the benefit of the widow and next of kin, upon the theory that they have a pecuniary interest in the life of the deceased, and the object of the statute is to compensate them for their loss caused by his death; and, if there are neither widow nor next of kin, there can be no recovery, because there are no persons entitled to compensation under the statute. Therefore it is necessary, in such an action, that the complaint allege that deceased left surviving him a widow or next of kin. *Schwarz v. Judd*, 28 Minn. 371, 10 N. W. Rep. 208; *Stewart v. Railroad Co.*, (Ind.) 2 N. E. Rep. 208; *Burlington & M. R. R. Co. v. Crockett*, (Neb.) 24 N. W. Rep. 219.

An action may, under the statute, be maintained against a steam-boat by name, for wrongfully causing the death of a person. *Boutiller v. Steam-Boat Milwaukee*, 8 Minn. 97, (Gil. 72.) The administrator or executor is the proper plaintiff in such an action. *Id.* The complaint, where it states the names of the next of kin, and how they were related to the deceased, with an allegation of damage to them, is sufficient, so far as pleading the damages is concerned. *Barnum v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 461, 16 N. W. Rep. 364.

Damages are to be computed with reference to the reasonable expectation of pecuniary benefit from the continuance of the life of the deceased. *Scheffler v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 518, 21 N. W. Rep. 711. The probable duration of life is a proper element to be considered in estimating damages in an action under the statute before cited. *Id.* In an action under this section evidence of the amount of property deceased had acquired, his habits of industry, his ability to make money, and his success in business, is proper as a basis for the damages. *Shaber v. St. Paul, M. & M. Ry. Co.*, 23 Minn. 103, 9 N. W. Rep. 575.

Measure of damages, see *Morris v. Railroad Co.*, 26 Fed. Rep. 22; *Collins v. Davidson*, 19 Fed. Rep. 83, (action under the Minnesota statute); *Strutzel v. St. Paul City Ry. Co.*, 47 Minn. 543, 50 N. W. Rep. 690; *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161, 49 N. W. Rep. 694; *Hutchins v. St. Paul, M. & M. Ry. Co.*, 44 Minn. 5, 46 N. W. Rep. 79; *Deisen v. Chicago, St. P., M. & M. Ry. Co.*, 43 Minn. 454, 45 N. W. Rep. 864.

An administrator may be appointed to prosecute an action for death, though the deceased was not a resident of the state, and left no property therein. *Hutchins v. St. Paul, M. & M. Ry. Co.*, 44 Minn. 5, 46 N. W. Rep. 79.

An administrator appointed in Minnesota, where the action accrued, may sue in Missouri. *Wilson v. Tootle*, 55 Fed. Rep. 211.

The amount recovered is not subject to payment of all debts incurred by the deceased for the support of himself and family, but, at most, to such as were incurred in consequence of, or after, the injury. *State v. Probate Court of Dakota Co.*, 51 Minn. 241, 53 N. W. Rep. 463.

This section does not confer on the United States district court jurisdiction of a libel in rem. *Oleson v. The Ida Campbell*, 34 Fed. Rep. 432.

A release given for a valuable consideration to the person liable by those entitled to the benefit of the amount recoverable for death is a bar to a subsequent action by the personal representative of the deceased. Those having demands "for the support of the deceased and funeral expenses" are beneficiaries to the extent of their demands, but their existence and amount must be alleged in the complaint. *Sykora v. J. I. Case T. M. Co.* (decided Nov. 16, 1894) 60 N. W. Rep. 1003.

See *In re Hardy*, 35 Minn. 193, 28 N. W. Rep. 219; *Meese v. City of Fond du Lac*, (Wis.) 4 N. W. Rep. 406; *James v. Emmet Min. Co.*, (Mich.) 21 N. W. Rep. 361; *Phillips v. Railroad Co.*, (Wis.) 25 N. W. Rep. 544; *Blakeley v. Le Duc*, 22 Minn. 476.

§ 5914. Judgment by default against executor, etc., when evidence of assets.

When a judgment is taken against an administrator or executor, upon failure to answer, it is not to be deemed evidence of assets in his hands, unless it appears that the complaint alleged assets, and was personally served on him.

(G. S. 1866, c. 77, § 3; G. S. 1878, c. 77, § 3.)

§ 5915. Judgment against executors, etc., not a lien on real estate, etc.

The real property which belonged to a deceased person is not bound or in any way affected by a judgment against his executors or administrators, nor liable to be sold by virtue of an execution issued upon such judgment.

(G. S. 1866, c. 77, § 4; G. S. 1878, c. 77, § 4.)

§ 5916. Executor de son tort, to whom liable.

No person is liable to an action, as executor of his own wrong, for having taken, received or interfered with the property of a deceased person; but is responsible to the executor, as general or special administrator of such deceased per-

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son, for the value of all property so taken or received, and for all damages caused by his acts to the estate of the deceased.

(G. S. 1866, c. 77, § 5; G. S. 1878, c. 77, § 5.)

An administrator cannot maintain an action for trespass upon real property, committed after the death of an intestate, unless he has first asserted his right under the statute by taking possession of such real property. But if he takes possession, he may then maintain an action for a trespass committed thereon before he took possession, and after the death of his decedent. In such case his possession, as well as his letters of administration, relate back to the death of his intestate. *Noon v. Finnegan*, 29 Minn. 419, 13 N. W. Rep. 197. And see same case, 32 Minn. 81, 83, 19 N. W. Rep. 391.

§ 5917. **Actions by foreign executor, etc.—Condition precedent.**

Any administrator or executor, duly appointed in any other state or country, may commence and prosecute any action in any court of this state, in his capacity of executor or administrator, in like manner and under like restrictions as a resident may do: provided that before commencing any action, an authenticated copy of his appointment as such executor or administrator is filed in the probate court of the county in which such action is to be commenced.

(G. S. 1866, c. 77, § 6; G. S. 1878, c. 77, § 6.)

His failure to file his appointment before the commencement of an action cannot be cured (if proper objection is taken) by a filing after such commencement. *Fogle v. Schaeffer*, 23 Minn. 304.

See *Pott v. Pennington*, 16 Minn. 509, (Gil. 460, 461); *Brown v. Brown*, 35 Minn. 191, 23 N. W. Rep. 238.

§ 5918. **Next of kin liable for debts of deceased—To what extent.**

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 out of such estate, or so much thereof as may be necessary to satisfy his debt; the action may be against all the next of kin jointly, or against any one or more of them.

(G. S. 1866, c. 77, § 7; G. S. 1878, c. 77, § 7.)

§ 5919. **Same—In what amount—Apportionment.**

In such action, the plaintiff may recover the value of all the assets received by all the defendants in the action, if necessary to satisfy his demand; and the amount of the recovery shall be apportioned among the defendants, in proportion to the value of the assets received by each; and no allowance or deduction can be made from such amount, on account of there being other relatives to whom assets have also been delivered.

(G. S. 1866, c. 77, § 8; G. S. 1878, c. 77, § 8.)

§ 5920. **Same—Contribution among next of kin.**

Any one of the next of kin against whom a recovery is had, pursuant to the last section, may maintain an action against all the other relatives of the testator to whom any such assets have been paid, jointly, or any one or more of them, for a just and equal contribution, and may recover of each defendant such amount as bears the same proportion to the whole sum collected of the plaintiff, as the value of the assets delivered to such defendant bears to the value of all the assets delivered to all the relations of the deceased.

(G. S. 1866, c. 77, § 9; G. S. 1878, c. 77, § 9.)

§ 5921. **Legatees liable for debts of testator—To what extent.**

Legatees are liable to an action by a creditor of the testator, to recover the value of a legacy received by them. The action may be brought against all, or any one or more of the legatees. In such action, the plaintiff cannot recover unless he shows:

First. That no assets were delivered, by the executor or administrator of the deceased, to his heirs or next of kin; or,

Second. That the value of such assets has been recovered by some other creditor; or,

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Third. That such assets are not sufficient to satisfy the demands of the plaintiff; and in the last case he can recover only the deficiency.

The whole amount which the plaintiff can recover shall be apportioned among all the legatees of the testator, in proportion to the amount of their legacies respectively, and his proportion can only be recovered of each legatee. (G. S. 1866, c. 77, § 10; G. S. 1878, c. 77, § 10.)

§ 5922. Same—Costs, how apportioned.

If an action is brought against several next of kin jointly, or against several legatees jointly, for assets delivered to them, and a recovery had against them, the costs of such action shall be apportioned among the several defendants, in proportion to the amount of the damages recovered against each of them. (G. S. 1866, c. 77, § 11; G. S. 1878, c. 77, § 11.)

§ 5923. Same—Judgment, how discharged.

In case of a judgment against several next of kin of a testator, or against several legatees, the payment or satisfaction of the amount recovered against any one of the defendants, discharges such defendant, and exonerates him and his property from the judgment. (G. S. 1866, c. 77, § 12; G. S. 1878, c. 77, § 12.)

§ 5924. Heirs and devisees, to what extent liable for debts.

Heirs and devisees are liable to an action by a creditor of a deceased person, to recover the debt, to the extent of the value of any real property inherited by, or devised to them; if such action is against the heirs, all the heirs who are liable shall be made parties to the action. (G. S. 1866, c. 77, § 13; G. S. 1878, c. 77, § 13.)

The debts upon which actions are allowed by c. 53, Gen. St. 1866, are the same as those, the actions upon which are the subject of c. 77. *Bryant v. Livermore*, 20 Minn. 313, (Gil. 271.)

Where commissioners to audit claims against an estate are appointed and a claim proper to be passed on by them is presented to and disallowed by them, and no appeal taken, such claim cannot be enforced by action against real estate descended to the heirs, whatever irregularities there may have been in the appointment of, and in the action of, the commissioners, or subsequent to their report, and though the claimant was ignorant of the report till more than two years thereafter, and after the administrator was discharged. *Bryant v. Livermore*, 20 Minn. 313, (Gil. 271.)

The action against the heirs is barred, if the creditor neglects to present his claim for allowance in the probate proceedings. *Hill v. Nichols*, 47 Minn. 382, 50 N. W. Rep. 367.

§ 5925. Same—Heirs not liable, when.

But the heirs are not liable for the debt, unless it appears that the personal assets of the deceased 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 deceased, or from his next of kin, or legatee; if the personal assets were sufficient to pay a part of the debt, or in case a part thereof has been collected, as mentioned in the last section, the heirs of such deceased person are liable for the residue. (G. S. 1866, c. 77, § 14; G. S. 1878, c. 77, § 14.)

§ 5926. Same—Limitation of last section.

But the last section does not affect the liability of heirs for a debt of their ancestors, where such debt was by his will expressly charged exclusively on the real property descended to such heirs, or where such debt is by the will expressly directed to be paid out of the real property descended, before resorting to the personal property. (G. S. 1866, c. 77, § 15; G. S. 1878, c. 77, § 15.)

§ 5927. Same—Apportionment of liability.

When the heirs, devisees or legatees have received real or personal estate, and are liable for any debts under the provisions of law, they shall be liable in proportion to the estate they may have respectively received; and a creditor shall have a right to recover his claim against a part or all of such heirs, devisees or legatees, to the amount of the estate they have respect-

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ively received; but no action shall be maintained, unless commenced within one year from the time the claim is allowed or established.

(G. S. 1866, c. 77, § 16; G. S. 1878, c. 77, § 16.)

§ 5928. Same—Contribution among devisees and legatees.

If, by the will of the deceased, any part of his estate, or any devisees or legatees, shall be made exclusively liable for the debt, the devisees or legatees shall be liable to contribute among themselves [only] according to the will.

(G. S. 1866, c. 77, § 17; G. S. 1878, c. 77, § 17.)

§ 5929. Actions against heirs, etc.—New parties.

If all the persons liable for the payment of any such debt shall not be included in the action as defendants, the action shall not thereby be in any way dismissed or barred; but the court before which it is pending may order any other parties brought in, by any proper process, and may allow such amendments as may be necessary to make them defendants, on such terms as the court shall prescribe.

(G. S. 1866, c. 77, § 18; G. S. 1878, c. 77, § 18.)

§ 5930. Same—Issues between defendants—Apportionment.

If more than one person is liable as aforesaid, and the creditor brings an action against all or a part of the persons so liable, and the persons liable dispute the debt or the amount claimed, the district court may order an issue to be formed, and direct that the amount may be ascertained by a jury; and said court shall ascertain and determine how much each is liable to pay, and may award execution therefor.

(G. S. 1866, c. 77, § 19; G. S. 1878, c. 77, § 19.)

§ 5931. Estate of deceased heirs, etc., liable, when.

If any of the heirs, devisees or legatees dies 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.

(G. S. 1866, c. 77, § 20; G. S. 1878, c. 77, § 20.)

§ 5932. Contribution among heirs, etc.

When any of the heirs, devisees or legatees 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.

(G. S. 1866, c. 77, § 21; G. S. 1878, c. 77, § 21.)

§ 5933. Priority among debts.

In cases where the next of kin, legatees, heirs and devisees are liable for the debts of their ancestors, as herein provided, they shall give preference in the payment of the same, and are liable therefor, in the following order:

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

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

Third. Debts due to other creditors.

(G. S. 1866, c. 77, § 22; G. S. 1878, c. 77, § 22.)

§ 5934. No preference between debts of same class.

No preference can be given by any next of kin, legatee, heir or devisee, to one debt over another of the same class, except one specified in the second subdivision of the last section; nor is a debt, due and payable, entitled to a preference over a debt not due; nor does 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.

(G. S. 1866, c. 77, § 23; G. S. 1878, c. 77, § 23.)

§ 5935. Defences by heirs, next of kin.

The next of kin, legatees, heirs and devisees may show that there are debts of a prior class, unsatisfied; or that there are unpaid debts of the same class with that on which the action is brought; and if it appears that the value of

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the personal property delivered to them, 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.

(G. S. 1866, c. 77, § 24; G. S. 1878, c. 77, § 24.)

§ 5936. Judgment, in what amount rendered in certain cases.

If the personal property delivered to such next of kin or legatee, or if the real estate descended or devised to such heir and devisee, exceeds the amount of debts which are entitled to a preference over the debt for which the action is brought, judgment shall be rendered against them only for such a sum as bears a just proportion to the other debts of the same class with that on which the action is brought.

(G. S. 1866, c. 77, § 25; G. S. 1878, c. 77, § 25.)

§ 5937. Defence of payment of debt of prior class, etc.

If a debt of a class prior to that on which the action is brought, or of the same class, is paid by any next of kin, legatees, heirs or devisees, they may prove such payment; and the amount of the debt so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the last two sections.

(G. S. 1866, c. 77, § 26; G. S. 1878, c. 77, § 26.)

§ 5938. Real property descended, liable, when—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, or if the heir confesses the claims, and shows what real property has descended to him, the court shall order that the debt of the plaintiff, or the proportion thereof which he is entitled to recover, be levied of the real property so descended, and not otherwise; and every judgment rendered in such action has preference, as a lien on the real property so descended, to any judgment obtained against such heir personally, for a debt on demand in his own right.

(G. S. 1866, c. 77, § 27; G. S. 1878, c. 77, § 27.)

§ 5939. Heir personally liable, when—Alienation before suit brought.

When it appears in the action, that, before the commencement thereof, the heir has aliened the real property descended to him, or any part thereof, he shall be personally liable for the value of the property so aliened, and judgment may be rendered therefor, and execution awarded, as in actions for his own debts. But no real property aliened in good faith by an heir, before action commenced against him, is liable to execution, or in any manner affected by a judgment against him.

(G. S. 1866, c. 77, § 28; G. S. 1878, c. 77, § 28.)

§ 5940. Contribution among heirs and devisees.

In actions brought against several heirs jointly, or several devisees jointly, the amount which the plaintiff recovers shall be apportioned among all the heirs of the ancestor, or among 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 heir or legatee.

(G. S. 1866, c. 77, § 29; G. S. 1878, c. 77, § 29.)

§ 5941. Devisees not liable, when.

Devisees made liable, by the foregoing provisions of this chapter, to the creditor or their testator, are not so liable, unless it appears that his personal assets, and the real property of the testator descended to his heirs, were insufficient to discharge the debt; or unless it appears that, after due proceedings before the probate court, the creditor has been unable to recover the debt, or any part thereof, from the personal representatives of the testator, or from his next of kin or legatees, or from his heirs.

(G. S. 1866, c. 77, § 30; G. S. 1878, c. 77, § 30.)

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§ 5942. Same—Devises liable for deficiency.

In either of the cases specified in the last section, 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 such plaintiff may have failed to recover from the personal representatives of the testator, his next of kin, legatees and heirs, may be recovered of the devisees of such testator, to the extent of the real property devised to them respectively.

(G. S. 1866, c. 77, § 31; G. S. 1878, c. 77, § 31.)

§ 5943. Limitation of last two sections.

But the last two sections do not affect the liability of devisees for a debt of their testator, where such debt was, by his will, expressly charged exclusively upon the real property devised, or by the terms of the will made payable exclusively by such devisee, or made payable out of the real property devised, before resorting to the personal property, or to any other real property descended or devised.

(G. S. 1866, c. 77, § 32; G. S. 1878, c. 77, § 32.)

§ 5944. Actions against devisees—Former sections applicable.

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.

(G. S. 1866, c. 77, § 33; G. S. 1878, c. 77, § 33.)

§ 5945. Child born after making of will, how provided for.

In cases where, by the provisions of any statute, a child born after the making of a will is entitled to succeed to a portion of the testator's real and personal property, such child shall have the same rights and remedies to compel a distribution of the personal property, and a partition of the real property, as are provided for next of kin, and for heirs, and shall in all respects be liable in the same manner, and to the same extent, to the creditors of his ancestor, in respect to the personal property delivered to him, and the real property descended to him, as is herein prescribed in relation to the next of kin, and heirs; and such child may recover of the legatees and devisees who may have received or taken any real or personal property of the testator, the share or portion thereof to which he may be entitled.

(G. S. 1866, c. 77, § 34; G. S. 1878, c. 77, § 34.)

§ 5946. Last section applies to certain witnesses to wills.

The provisions of the last two sections, relative to a child born after the making of a will, apply equally to every person who, being a witness to a will, is entitled, by the provisions of any statute, to recover a portion of the real or personal property of the testator from the legatees and devisees named in such will.

(G. S. 1866, c. 77, § 35; G. S. 1878, c. 77, § 35.)