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CHAPTER 84

ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES
AND HEIRS

4502. 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 § 4503. 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. (5912)

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).

2. Held not to survive—Cause of action for death by wrongful act (28-5, 5+875; 32-125, 19+656; 97 Fed. 140); 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).

4503. 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 must be commenced within two years after the act or omission. The damages therein cannot exceed five thousand 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 actions begun under this section. (5913; '97 c. 261)

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

2. Construction 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, 438).

3. Who may sue—No one is authorized to sue under the statute except the administrator or executor of the deceased (28-5, 8+875; 32-125, 19+656; 8-97, 72; 81-493, 84+342).

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

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

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).

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

8. Complaint—Must state that deceased left a widow or next of kin (28-371, 10+208; 59-130, 60+1008; 81-493, 84+342). Not necessary to allege that widow or next of kin had pecuniary interest in deceased (31-283, 17+622; 30-461, 16+364). 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).

9. Defences—Contributory negligence a defence (63-248, 65+447; 76-189, 78+1041,

4502
105-M - 491
117-NW 926

4503
111-NW 264

4503
100-M - 278
101-M - 450
102-M - 21
103-M - 297
104-M - 2
104-M - 326
112-NW 885
115-NW 954
118-NW 1018

79+530). 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).

10. **Releases**—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).

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).

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.

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 (44-5, 46+79; 36-418, 31+856; 47-161, 49+694; 43-289, 45+440; 28-103, 9+575; 37-485, 35+273; 30-126, 14+575; 43-454, 45+864; 32-518, 21+711; 36-6, 29+340; 47-543, 50+690; 28-371, 10+208; 35-84, 27+305; 76-269, 79+95; 41-206, 42+932; 87-280, 91+1106; 105+494; 138 Fed. 867).

4504. 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. (5914, 5915)

4505. 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. (5916)

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

4506. 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. (5917)

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 (60-73, 61+1020; 20-234; 212; 36-191, 28+238).

4507. 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. (5918-5920)

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

4508. 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. (5921)

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

4509. 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. (5922, 5923)

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

4510. 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. (5924-5926)

20-313, 271; 47-382, 50+367; 87-189, 91+485; 90-172, 95+1110.

4511. 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. (5927, 5928)

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

4512. 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. (5929, 5930)

20-313, 271.

4513. 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. (5931)

4514. 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. (5932)

4515. 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. (5933)

4516. 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 § 4515 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. (5934)

4517. 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. (5935-5937)

4518. 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. (5938)

4519. 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 aliened 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. (5939)

4520. 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. (5940)

4521. 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. (5491-5493)

4522. 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. (5944)

CHAPTER 85

OFFICIAL AND OTHER BONDS—FINES AND FORFEITURES

4523. Bonds, etc.—Sureties, qualifications—Same when otherwise specially provided by statute, every bond, recognizance, or undertaking required or permitted to be made, given, tendered, or filed for the security or protection of the state, or of any person, corporation, municipality, or department thereof, or any other organization whatever, and conditioned for the doing or not doing of anything in such instrument of security specified, shall be signed by two or more sureties, who shall be residents and freeholders of the state, and shall justify as provided in § 4524. Every bond or recognizance shall also be signed by the principal, and every bond shall be acknowledged by the principal and sureties. (5947)

4524. Modes of justification—The justification of sureties, mentioned in § 4523, shall be by affidavit, annexed to the bond or other security, wherein each surety shall state under oath that he is worth double the amount for which he justifies above his debts and other liabilities and exclusive of his property exempt from execution. Where in the cases provided by law exception is taken to sureties, they shall be examined by the judge or officer before whom they are required to attend for purposes of justification, in such manner as he shall deem proper. The examination shall be reduced to writing and filed in the cause, and, if the judge or officer deems the sureties sufficient, he shall indorse his approval upon the instrument, and return the same to the proper custodian thereof. (5281-5283)

4525. Surety companies—Whenever the bond or other instrument is required to be made with one surety, or with two or more sureties, it shall be sufficient if the same be executed, or the conditions thereof be guaranteed, solely by a corporation authorized by law so to do. But no such corporation shall be accepted or approved as a surety or guarantor unless it holds the