

REVISED LAWS OF MINNESOTA 94

SUPPLEMENT 1909

CONTAINING

THE AMENDMENTS TO THE REVISED LAWS,
AND OTHER LAWS OF A GENERAL AND
PERMANENT NATURE, ENACTED
BY THE LEGISLATURE IN
1905, 1907, AND 1909

WITH HISTORICAL AND EXPLANATORY NOTES TO PRIOR STATUTES
AND FULL AND COMPLETE NOTES OF ALL
APPLICABLE DECISIONS

COMPILED AND ANNOTATED BY
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CHAPTER 83.

FORECLOSURE OF MORTGAGES.

BY ADVERTISEMENT.

4457. Limitation.

See sections [4074—] 1, [4074—] 2.

Foreclosure in general.—A covenant of warranty in a deed of conveyance, and a covenant against incumbrances, excepting mortgages to a certain amount, estops the grantor from afterwards acquiring and enforcing the mortgage lien against the premises. But a conveyance by a subsequent grantee, subject to mortgages, operates as an estoppel against the former estoppel, and the mortgage becomes enforceable in the hands of the original grantor or his assignee, and, the mortgage providing for foreclosure by advertisement, the character of the remedy is not changed from such foreclosure to an action in equity. *Tappan v. Huntington*, 97 Minn. 31, 106 N. W. 98.

4458. Requisites for foreclosure.

Historical.—G. S. 1894, § 6029, subd. 3, was amended by "An act to amend sections six thousand twenty-nine and six thousand thirty-three of the General Statutes of eighteen hundred ninety-four, as amended by chapter eighty-seven of the General Laws of Minnesota for nineteen hundred three, and relating to the foreclosure of mortgages," (Laws 1905, c. 136) approved April 11, 1905, to read as follows: "Third. That the mortgage containing such power of sale had been duly recorded, and if assigned, that all assignments thereof have been recorded; provided, that, if the mortgage is upon registered land, it shall be sufficient if the mortgage, and all assignments thereof, have been duly registered." G. S. 1894, §§ 6029, 6033, were Laws 1878, c. 53, §§ 2, 6 (as amended by Laws 1883, c. 24, § 1). Said acts, and Laws 1903, c. 87, were repealed by R. L. §§ 5531, 5535, 5546; the provisions of said amended sections being incorporated in R. L. §§ 4458, 4460. For the construction of Laws 1905, c. 136, see R. L. § 5504.

Assignee of mortgage.—One claiming to be assignee must have a recorded legal assignment before he can foreclose by advertisement. An instrument purporting to be an assignment, in which no assignee is named, but a blank space left for his name, is, until the blank is legally filled, a nullity. If, however, the name of the assignee is afterwards inserted by authority of the mortgagee, express or implied from circumstances, and then recorded, it is a valid assignment. *Cassery v. Morrow*, 101 Minn. 16, 111 N. W. 654.

[4458—]1. **Failure to record assignment—Curative.**—Every foreclosure of mortgage by advertisement heretofore made where foreclosed by an assignee and where the assignment had not been recorded prior to the commencement of the foreclosure proceedings, but recorded thereafter, such foreclosure, if otherwise regular, shall be and hereby is declared to be valid and effectual for all purposes as if such assignment had been duly and properly recorded in the office of the register of deeds of the proper county prior to the commencement of such foreclosure proceedings. ('09 c. 274 § 1)

Historical.—"An act to legalize the foreclosure of mortgages by advertisement where such foreclosure is made by an assignee prior to the recording of the assignment of such mortgage." Approved April 20, 1909.

[4458—]2. **Same—Pending actions.**—This act shall not affect any action at law or in equity now pending. ('09 c. 274 § 2)

[4458—]3. **Defective assignments—Curative.**—In all cases where an assignment of real estate mortgage has been defectively executed by reason of the failure of witnesses to the signature of one or more of the persons executing the same, or the failure of one or more persons executing the assignment to acknowledge the execution thereof, or both of said defects, and the thus defective assignment has been recorded in the office of the register of deeds of the county where the mortgage was recorded and where

the land affected thereby is situate, all such assignments and the record thereof, and any foreclosure by the assignee of the mortgage thus assigned, when otherwise legally foreclosed, is hereby legalized and confirmed and made valid; and all such records may nevertheless be read in evidence in any court within this state and shall be received as prima facie evidence of the contents of the original instruments of which they purport to be records; and all such records shall in all respects have the same force and effect as they would have if such original instruments at the time they were so recorded had been legally entitled to record and were legally recorded. Provided, however, that this act shall not affect any action or proceeding now pending in any court of this state. ('07 c. 86)

Historical.—"An act to legalize and validate the defective execution of assignments of mortgages, the recording of said assignments and the foreclosure of the mortgages assigned." Approved April 3, 1907.

4459. Notice of sale—Service on occupant.

Service on occupant.—Where the premises consist of separate farms, each of which is occupied by a different person, notice must be served on each. *Caslerly v. Morrow*, 101 Minn. 16, 111 N. W. 654.

4460. Requisites of notice.

Historical.—G. S. 1894, § 6033, subd. 2, was amended, by the act referred to in note under section 4458, to read as follows: "Second. The date of the mortgage, and when and where recorded, except where the mortgage is upon registered land, the notice shall state that fact, and when and where the mortgage is registered."

See note under section 4458.

[4460—]1. **Defective notice and service—Curative.**—Every mortgage foreclosure sale heretofore made under a power of sale in the usual form contained in any mortgage executed under the laws of the State of Minnesota, and recorded in the office of the proper register of deeds of real property within the limits of this state, is, together with the record of such sale, legalized, and made valid and effective to all intents and purposes, as against the following objections, namely:

First, where the hour of the record of said mortgage, or any assignment thereof in the office of the register of deeds is incorrectly stated in the notice of sale or any of the foreclosure papers, affidavits or instruments.

Second, where the date of the mortgage or any assignment thereof is incorrectly stated in the notice of sale or any foreclosure papers, affidavits or instruments.

Third, where the notice of sale was properly published and the service thereof was made upon the occupant by leaving a true copy thereof with a member of the family of said occupant of suitable age and discretion, who was a resident of said premises, but at the time of such service was not upon said premises. ('05 c. 209 § 1)

Historical.—"An act to legalize mortgage foreclosure sales heretofore made." Approved April 17, 1905.

[4460—]2. **Same—Pending actions.**—The provisions of this act shall not affect any action now pending in any court of this state. ('05 c. 209 § 2)

[4460—]3. **Defective notice and service—Curative.**—Every foreclosure of mortgage by advertisement made heretofore, to-wit: on and between the 25th day of January, 1904, and March 16th, 1904, where the notice of sale recites that the sale will take place at the front door of the court house in a certain town and the court house had previously been located in said town, but prior to such foreclosure proceedings that part of said town in which said court house had been located had been duly incorporated into a village and such court house during all of said foreclosure proceedings was

in said village; and where in mortgage foreclosure proceedings the mortgagee foreclosing such mortgage was the sole occupant of the premises foreclosed and no notice of foreclosure sale was served on such occupant, such mortgage foreclosures, if otherwise valid, shall be and hereby are declared to be valid and sufficient for all purposes and shall not be affected in any manner by reason of the irregularities aforesaid. ('09 c. 352 § 1)

Historical.—"An act to legalize the foreclosure of mortgages in which the notice of sale erroneously states that the place of sale is in a certain township instead of a certain village; and where in mortgage foreclosure proceedings the party foreclosing is the occupant and notice of sale has been served on such occupant." Approved April 21, 1909.

[4460—]4. **Same—Pending actions.**—This act shall not affect any action at law or action in equity now pending. ('09 c. 352 § 2)

[4460—]5. **Where notice claims amount not due, etc.—Curative.**—Every mortgage foreclosure sale heretofore made under a power of sale in the usual form contained in any mortgage executed under the laws of the state of Minnesota on real property within the limits of this state, and recorded in the office of the proper register of deeds, is, together with the sale, and the record of such sale, legalized and made valid and effectual to all intents and purposes as against the following objection, namely, where the amount claimed in the foreclosure sale notice includes the amount of a note or notes not then due and which stipulate for a greater rate of interest after maturity than before maturity, and the total amount of said note or notes are as a matter of fact collected at the foreclosure sale and retained by the mortgagee together with the interest stipulated for before maturity without objection at any time during the period of redemption by the mortgagor; provided, that at the time of the foreclosure sale notice there has been a default in the payment of one or more of the notes accompanying the mortgage. ('09 c. 293 § 1)

Historical.—"An act to legalize and validate the foreclosure of mortgages on real estate by advertisement where the amount claimed in the foreclosure sale notice exceeds the amount due." Approved April 20, 1909.

[4460—]6. **Same—Action to set aside, when.**—No action shall be maintained in this state to set aside a mortgage foreclosure sale and the record of the same, wherein the objections mentioned in the first section hereof, after the period of redemption from the foreclosure sale has expired. ('09 c. 293 § 2)

[4460—]7. **Same—Pending actions.**—The provisions of this act shall not affect any action or proceeding now pending in any court of this state. ('09 c. 293 § 3)

[4461—]1. **Power acknowledged before attorney—Curative.**—Every foreclosure of mortgage by advertisement heretofore made where the power of attorney to foreclose the same, provided for by chapter 262 of the General Laws of Minnesota for the year 1897, has been acknowledged before a notary public who is the same person named as the attorney authorized to make such foreclosure, and which attorney has signed as witness to the signature of the person who executed such power of attorney, if otherwise regular, shall be and is hereby declared to be as valid and effectual for all purposes, as if such power of attorney had been duly and properly executed. ('05 c. 317 § 1)

Historical.—"An act to legalize the foreclosure of mortgages by advertisement where the power of attorney to foreclose the same has been acknowledged and witnessed by the person authorized to make the foreclosure." Approved April 19, 1905.

[4461—]2. **Same—Pending actions.**—The provisions of this act shall not affect any action pending in any court of the state. ('05 c. 317 § 2)

[4461—]3. **Failure to give or record power—Curative.**—Every foreclosure of mortgage by advertisement heretofore made where the power of attorney to foreclose the same provided for by chapter two hundred and sixty-two of the General Laws of the State of Minnesota for the year 1897 has not been executed or given, provided such foreclosure was authorized by the owner of said mortgage, or where such power of attorney has been executed and given, but not recorded or filed for record in the office of the register of deeds where the foreclosure is had until after the sale under such mortgage has been completed, such mortgage foreclosure if otherwise regular shall be and hereby is declared to be valid and sufficient for all purposes and shall not be affected in any manner by reason of the failure to have such power of attorney recorded. ('05 c. 67 § 1)

Historical.—"An act to legalize the foreclosure of mortgages by advertisement, where the power of attorney to foreclose the same has not been executed, or where the same has been executed but has not been recorded or filed for record until after the mortgage foreclosure sale." Approved March 23, 1905.

[4461—]4. **Same—Pending actions.**—This act shall not affect any action at law, or action in equity now pending. ('05 c. 67 § 2)

[4461—]5. **Failure to give or record power—Curative.**—In every foreclosure of mortgage by advertisement heretofore made, where the power of attorney provided by chapter 262, General Laws 1897, and by section 4461, Revised Laws 1905, has not been executed, but such foreclosure was authorized by the owner of such mortgage, and a written instrument of satisfaction, signed and acknowledged by the person foreclosing such mortgage, ratifying all acts done by the attorney conducting such foreclosure, shall be recorded before Sept. 1, 1907, in the office of the register of deeds of the county in which such foreclosure was held, or when such power of attorney has been executed, but not filed for record in the register of deeds office of the proper county until after such mortgage foreclosure sale has been completed, every such mortgage foreclosure, if otherwise regular, is hereby declared to be valid. ('07 c. 437 § 1)

Historical.—"An act to legalize the foreclosure of mortgages by advertisement, where such has been authorized by the owner, but no power of attorney to foreclose the same has been executed, and where an executed power of attorney has not been filed for record until after such foreclosure sale." Approved April 25, 1907.

[4461—]6. **Same—Pending actions.**—This act shall not affect any action at law, or action in equity now pending. ('07 c. 437 § 2)

[4461—]7. **Failure to give or record power—Curative.**—In every foreclosure of mortgage by advertisement heretofore made, where the power of attorney provided by chapter 262, General Laws 1897, and by section 4461, Revised Laws 1905, has not been executed, but such foreclosure was authorized by the owner of such mortgage, and a written instrument of ratification, signed and acknowledged by the person foreclosing such mortgage, ratifying all acts done by the attorney conducting such foreclosure, shall be recorded before Sept. 1, 1909, in the office of the register of deeds of the county in which such foreclosure was held, or when such power of attorney has been executed, but not filed for record in the office of the register of deeds of the proper county until after such mortgage foreclosure sale has been completed, every such mortgage foreclosure, if otherwise regular, is hereby declared to be valid. ('09 c. 273 § 1)

Historical.—"An act to legalize the foreclosure of mortgages by advertisement, where such has been authorized by the owner, but no power of attorney to foreclose the same has been executed, and where an executed power of attorney has not been filed for record until after such foreclosure sale." Approved April 20, 1909.

[4461—]8. **Same—Pending actions.**—This act shall not affect any action at law or action in equity now pending. ('09 c. 273 § 2)

[4461—]9. **Failure to give or record power—Curative.**—In every foreclosure of mortgage heretofore made, by advertisement, where the power of attorney to foreclose the same, provided for by section 4461 of the Revised Laws of Minnesota for 1905, has not been executed, or if executed, has not been filed for record or recorded prior to such foreclosure sale, such foreclosure sale, if otherwise regular, shall be, and hereby is, declared to be valid and sufficient for all purposes, and shall not be affected in any manner, by reason of the failure to have such power of attorney recorded, provided, such power of attorney has in fact been executed and recorded in the proper office prior to the passage of this act. ('09 c. 318 § 1)

Historical.—"An act to legalize the foreclosure of mortgages, where the power of attorney to foreclose the same, provided for by section 4461, Revised Laws of 1905, has not been executed, or, where executed, has not been recorded or filed for record until after the mortgage foreclosure sale." Approved April 21, 1909.

[4461—]10. **Pending actions.**—This act shall not affect any action at law or in equity now pending. ('09 c. 318 § 2)

4465. Foreclosure for installment.

Application of proceeds.—Failure to apply the proceeds as directed by the statute does not invalidate the foreclosure, nor by operation of law cancel the first note; the amount received not being sufficient to pay the entire debt. *Endreson v. Larson*, 101 Minn. 417, 112 N. W. 628, 118 Am. St. Rep. 631.

[4469—]1. **Failure to record—Curative.**—That no certificate heretofore executed under and by virtue of section eleven, chapter eighty-one, title one, Statutes of Minnesota, being section 6038 General Statutes of 1894, shall be deemed invalid by reason of the same not having been made, executed, proved or acknowledged and recorded within the twenty days mentioned in said section; and the record of all such certificates heretofore executed, proved or acknowledged and recorded after the expiration of the said twenty days is hereby legalized and made valid, and said record shall have the same force and effect as if said certificates had been executed, proved or acknowledged and recorded within the said twenty days; provided, that nothing herein contained shall be construed to apply to cases now pending which involve the legality or validity of any such certificate of sale. ('05 c. 289 § 1)

Historical.—"An act to legalize sheriffs' certificates, executed, proved or acknowledged and recorded after the expiration of twenty days." Approved April 19, 1905.

4476. Certificate as evidence.

G. S. 1894, § 6054, cited in *Schlag v. Gooding-Coxe Co.*, 98 Minn. 261, 108 N. W. 11.

4480. Redemption by mortgagor.

Redemption by wife.—Where plaintiff wife redeemed land of her husband from a mortgage, and they were afterwards divorced, and he conveyed his interest to defendant, the redemption annulled the sale, and defendant owned the land; but she was entitled to subrogation to an equitable lien for the amount paid. *Kopp v. Thele*, 104 Minn. 267, 116 N. W. 472, 17 L. R. A. (N. S.) 981.

Possession by person other than mortgagor—Notice.—The rule that possession is notice applies to one redeeming from foreclosure sale of land which, at the time of redemption, is in actual possession of a person other than the mortgagor. *Niles v. Cooper*, 98 Minn. 39, 107 N. W. 744, 13 L. R. A. (N. S.) 49.

4481. Redemption by creditor.—If no such redemption be made by the mortgagor, his personal representatives or assigns, the senior creditor having a lien, legal or equitable, upon the mortgaged premises, or some part thereof subsequent to the mortgage, may redeem within five days after the expiration of said twelve months;

and each subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lienholder, respectively, may redeem by paying the amount aforesaid and all liens prior to his own held by the person from whom redemption is made; provided, that no creditor shall be entitled to redeem unless within said twelve months he file for record notice of his intention to redeem with the register of deeds of the county or counties where the mortgage is recorded. (R. L. § 4481, as amended by Laws 1909, c. 243, § 1.)

Cited in *Kopp v. Thele*, 104 Minn. 267, 116 N. W. 472, 17 L. R. A. (N. S.) 981.

In general.—Where defendant foreclosed his mortgage and purchased the premises at the sale for an amount which left a surplus, and afterwards plaintiff issued execution on his judgment, which was a second lien, and purchased the premises at the execution sale for the amount of his judgment and costs, and execution was returned satisfied, and he never redeemed from the foreclosure sale, he was not entitled to recover the surplus from defendant. *McCaffery v. Burkhardt*, 104 Minn. 340, 116 N. W. 645.

Amount payable.—A junior creditor, in order to redeem, must pay the amount shown by the record to be due. The statute provides no method by which he may determine the validity of prior liens or the proper amount thereof. He must pay according to the record, and if the lien is fraudulent, or the amount padded, he must resort to other proceedings to recover any damages sustained by him thereby. *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512.

Order of redemption.—The priority of liens for purposes of redemption is determined by the time of record, without reference to the nature of the estates in the land, or any part thereof, owned by the mortgagors. *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512.

4482. Redemption, how made.

Cited in *Kopp v. Thele*, 104 Minn. 267, 116 N. W. 472, 17 L. R. A. (N. S.) 981.

Redemption in general.—The provisions which confer the right to redeem are remedial and should receive liberal construction. *Lightbody v. Lammers*, 98 Minn. 203, 108 N. W. 846.

Proof of right to redeem.—Proof of heirship of one entitled to redeem is sufficient without production of any document or record, where it does not appear that probate proceedings have been completed. *Lightbody v. Lammers*, 98 Minn. 203, 108 N. W. 846.

4483. Certificate of redemption—Record.

Cited in *Kopp v. Thele*, 104 Minn. 267, 116 N. W. 472, 17 L. R. A. (N. S.) 981.

Record.—A certificate of redemption, issued by the holder of the sheriff's certificate to the owner, which is not filed for record within the four days, is void as to a second redemption duly made through the sheriff, in good faith by a junior lienholder, even though the second redemption be made and the certificate thereof filed for record within the time limited for recording the first certificate. *Coffman v. Christenson*, 102 Minn. 460, 113 N. W. 1064.

4484. Effect of redemption.

Kopp v. Thele, 104 Minn. 267, 116 N. W. 472, 17 L. R. A. (N. S.) 981, cited in note under section 4480.

BY ACTION.

4486. By what rules governed.

Plea of tender.—Where it is sought by tender to discharge a mortgage of record, the tender must be of the exact amount due. *Kingsley v. Anderson*, 103 Minn. 510, 115 N. W. 642, 116 N. W. 112.

[4495—]1. **No report, order of confirmation or final decree prior to 1886—Curative.**—That in all cases of a foreclosure of a real estate mortgage by action, or of an attempted foreclosure of a real estate mortgage by action, prior to the year 1886, under a duly rendered judgment, order or decree of a court of competent jurisdiction, where an official certificate of sale has been made, executed, acknowledged and delivered by the proper officer to the proper party, and such certificate has been filed for record, and actually recorded in the office of the register of deeds of the county in which

the real estate so foreclosed upon, is situate, but in which action no report of sale nor order confirming the sale has been made or filed, nor any final decree made or entered therein, such foreclosure is hereby declared to be in all respects legal, valid and effective, as though such report of sale has been duly made, and an order had been duly made by the court confirming the same, and a final decree made and entered therein, and the certificate of sale in such action is hereby declared to operate as a conveyance to the purchaser at the sale, and to his assigns or successors in interest in the property sold, of all the right, title and interest of the mortgagor, his heirs or assigns in and to the premises described therein, which the mortgagor had at the date of the mortgage so foreclosed, from and after the expiration of one year from the date of said certificate where no redemption has been made from said sale, without any report of sale, or order confirming the same, or final decree or other act, proceeding or conveyance whatsoever; provided, that nothing herein contained shall be construed to apply to actions now pending, which involve the validity of any such sale. ('07 c. 125)

GENERAL PROVISIONS.

4499. Attorney's fees.

In general.—In an action to foreclose it is not necessary to prove the value of services of counsel, where the allowance is made at the conclusion of the trial. *Kingsley v. Anderson*, 103 Minn. 510, 115 N. W. 642, 116 N. W. 112.

4501. Foreclosure or execution sale.—Taxes, insurance and interest.—The purchaser at any sale, upon foreclosure of mortgage or execution or at any judicial sale during the year of redemption, may pay any taxes or assessments on which any penalty would otherwise accrue, and may pay the premium upon any policy of insurance procured in renewal of any expiring policy upon mortgage premises, and may in case any interest upon any prior or superior mortgage shall become due during such year of redemption pay the same, and in all such cases, the sums so paid, with interest, shall be part of the sum required to be paid to redeem from such sale. Such payments shall be proved by the affidavit of the purchaser, his agent or attorney, stating the items and describing the premises, which must be filed for record with the register of deeds, and a copy thereof shall be furnished to the sheriff at least ten days before expiration of the year of redemption. (R. L. § 4501, as amended by Laws 1909, c. 421, § 1.)

[4501—]1. Homestead included in mortgage—Separate sale.—In all proceedings to foreclose any mortgage upon real property in this state, if the whole or any part of the homestead of the mortgagor or of any one claiming under him, as such homestead is defined by the laws of this state, shall be included in the real estate described in such mortgage, the person claiming such homestead may, at any time prior to the foreclosure sale, serve or cause to be served upon the sheriff making such sale a notice of such claim which shall designate and describe with reasonable certainty the real estate so claimed and selected as such homestead, which selection shall include the site of the dwelling and its appurtenances, shall be compact in form and shall be so made as not unreasonably to affect the value of the remaining part, which notice together with the proof of service thereof shall be filed for record and recorded in the office of the register of deeds. Upon the service and filing of such notice it shall be the duty of the sheriff, at the time of the sale, to first offer for sale and sell that part of the mortgaged real estate, or so much thereof as is necessary, which is not included

in such selected homestead, and thereupon, if the proper purposes of such foreclosure require, he shall offer for sale and shall sell separately that part of the mortgaged real estate included in such selected homestead, provided that if such homestead claimant shall have prior to such foreclosure made a property homestead selection from his real estate he shall be bound thereby, and cannot change the same for the purposes of such foreclosure. ('07 c. 389)

Historical.—"An act to protect the rights of homestead claimants in proceedings to foreclose real estate mortgages and to provide that such homestead shall be offered for sale as a separate parcel only." Approved April 24, 1907.

CHAPTER 84.

ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES AND HEIRS.

4502. What causes of action survive.

Application in general.—A cause of action for malicious attachment held an injury to property, and not to the person, so as to pass to a trustee in bankruptcy. *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 105 Minn. 491, 117 N. W. 926.

4503. Action for death by wrongful act.

Application in general.—Where, after verdict, in an action for personal injuries, plaintiff dies, this section does not apply. *Clay v. Chicago, M. & St. P. R. Co.*, 104 Minn. 1, 115 N. W. 949.

This section includes among its beneficiaries a nonresident alien having the prescribed relationship. *Mahoning Ore & Steel Co. v. Blomfelt*, 163 Fed. 827, 91 C. C. A. 390.

See note under section 4064.

Action under foreign statute.—A right of action, given by a statute of North Dakota to the surviving spouse, children, or personal representative, in the order named, of a person killed by the wrongful act or neglect of another, to recover, without limit, such damages as are proportionate to the injury resulting from his death, for the benefit of his heirs in such shares as the trial judge shall fix, will be enforced in this state. *Powell v. Great Northern R. Co.*, 102 Minn. 448, 113 N. W. 1017; followed in *Matthey v. Great Northern R. Co.*, 103 Minn. 525, 114 N. W. 1133.

In an action here for wrongful killing in another state, plaintiff must plead the statute of that state, which creates the liability. *Stewart v. Great Northern Ry. Co.*, 103 Minn. 156, 114 N. W. 953, 123 Am. St. Rep. 318.

Personal representative.—A special administrator is a "personal representative" of decedent. *Jones v. Minnesota Transfer R. Co.*, 121 N. W. 606.

Defenses—Contributory negligence of parent.—In an action by a father as administrator to recover for the death of a minor child, the negligence of the father which contributed to the injury will bar a recovery. In determining whether due care was exercised, the jury may consider the place of the accident, the character of the community, the intelligence of the people, and the means and opportunities at command in connection with the other circumstances. *Mattson v. Minnesota & N. W. R. Co.*, 98 Minn. 296, 108 N. W. 517.

Release.—A release fraudulently made by the administrator, the adverse party participating in the fraud, is not a bar to an action by a succeeding administrator. *Aho v. Jesmore*, 101 Minn. 449, 112 N. W. 538, 10 L. R. A. (N. S.) 998.

An administrator made an alleged fraudulent settlement with defendant of the cause of action for death and delivered a release. The probate court made an order approving the settlement and release. The widow, for herself and children, commenced an action against such administrator and defendant, which was dismissed without a trial on the merits, to recover damages sustained by reason of such fraudulent release. The widow, as administratrix de bonis, afterwards brought action to recover damages for the death. Held that, if the release was fraudulent, neither it nor the commencement of the prior action by the widow is a bar to this action. *Aho v. Republic Iron & Steel Co.*, 104 Minn. 322, 116 N. W. 590.

See, also, *Johnson v. Minneapolis & St. L. R. Co.*, 101 Minn. 396, 112 N. W. 534; *Picciano v. Duluth, M. & N. R. Co.*, 102 Minn. 21, 112 N. W. 885.

— **Jurisdiction of probate court.**—Under Const. art. 6, § 7, the statute giving a cause of action for death to the administrator in trust for the bene-