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CHAPTER 78.

ACTIONS BY OR AGAINST EXECUTORS, ADMINISTRATORS, LEGATEES, HEIRS, &c.

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SEC. 1. A cause of action arising out of an injury to the person, dies with the person of either party, except as provided in section three.

A cause of action for injury to person does not survive.

SEC. 2. 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; therefore, the executors or administrators, may maintain the action against the party against whom the cause of action accrued, or after his death, against his representatives.

Other causes of action do survive.

SEC. 3. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former, may maintain an action against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission; but the action must be commenced within two years after the act or omission, by which the death was caused; the damages thereon cannot exceed five thousand dollars, and the amount recovered, is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions, as the personal property of the deceased person.

When death ensues and injury.

SEC. 4. In an action against several executors or administrators, they are all considered as one person, representing their testator or intestate, and judgment may be taken, and execution issued against all who are named as defendants in the summons, although it be served only on part of them, in the same manner as if served on all, except as provided in the next section.

Representatives of deceased regarded as one person.

SEC. 5. When a judgment is taken against an administrator or executor, upon failure to answer, it is not to be deemed evidence of assets

Assets not presumed on failure to answer.

in his hands, unless it appear that the complaint alleged assets, and was personally served on him.

Statute of limitation in case of death.

SEC. 6. The time which shall have elapsed between the death of a person, and the granting of letters testamentary, and of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters are not to be deemed any part of the time limited for the commencement of actions by executors or administrators.

Executor of executor not to sue as such.

SEC. 7. An executor of an executor, has no authority as such to commence or maintain an action or proceeding, relating to the property of the testator of the first executor, or to take any charge or control thereof.

Real property of deceased not affected by judgment against executors.

SEC. 8. 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.

Effects of inventory as evidence.

SEC. 9. In an action against executors or administrators, in which the fact of their having administered the estate of their testators or intestate, or any part thereof, comes in issue, and the inventory of the property of the deceased, filed by them, is given in evidence, the same may be repelled by evidence :

1. That any property has been omitted in such inventory, or was not returned therein at its full value :

2. That such property has perished, or been lost without the fault of such executors or administrators, or that it has been fairly sold by them at private or public sale, at a less price than the value so returned, or that, since the return of the inventory, such property has deteriorated or increased in value ; in such action the defendants cannot be charged for any things in action specified in their inventory, unless it appears that they have been collected, or might, with due diligence, have been collected.

Executor in his own name not liable.

SEC. 10. 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 person, for the value of all property so taken or received, and for all damages caused by his acts, to the estate of the deceased.

Next of kin who have received distribution liable for debts.

SEC. 11. 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, severally.

Each liable for the whole amount received.

SEC. 12. 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 must 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 their being other relatives to whom assets have also been delivered.

Next of kin may compel contribution.

SEC. 13. 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 against any of them separately, for a just and equal contribution, and may recover of each defendant, such amount as shall be in the same proportion to the whole sum collected of the plaintiff, as the value of the assets delivered to such defendant, bore to the value of all the assets delivered to all the relations of the deceased.

Legatees when liable for debts.

SEC. 14. 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 only one of the legatees. In such action the plaintiff cannot recover unless he shows :

1. That no assets were delivered by the executor or administrator, of the deceased, to his heirs or next of kin; or,
2. That the value of such assets, has been recovered by some other creditor; or,
3. 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, must 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.

SEC. 15. If an action be brought against several next of kin jointly, or against several legatees jointly for assets delivered to them, and a recovery be had against them, the costs of such action must be apportioned among the several defendants, in proportion to the amount of the debt, or damages, recovered against each of them.

Costs in actions against next of kin and legatees.

SEC. 16. In case a judgment against several next of kin, of a testator or against several legatees, the payment on satisfaction of the amount recovered, against any one of the defendants discharges such defendant and exonerates him, and his property, from the judgment.

Recovery exonerates from further liability.

SEC. 17. 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 real any property, or inherited by, or devised to them; if such action be against the heirs, all the heirs who may be liable must be made parties to the action.

Heirs and devisees liable for debts.

SEC. 18. But the heirs are not liable for the debt, unless it appear that the personal assets of the deceased were not sufficient to discharge it, or that after due proceedings before the probate court, the creditor has been 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 shall have been collected, as mentioned in the last section, the heirs of such deceased person, are liable for the residue.

In what cases heirs liable and to what extent.

SEC. 19. 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.

When debts expressly charged by will.

SEC. 20. In cases, where the next of kin, legatees, heirs, and devisees are liable for the debts of their ancestors, as herein provided, they must give preference in the payment of the same, and are liable there for, in the following order :

Preference of debts

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

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

3. Recognizances, bonds, sealed instruments, notes, bills, unliquidated demands, and accounts.

SEC. 21. 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.

No preference between debts of same class.

SEC. 22. The next of kin, legatees, heirs, and devisees, may show that there are debts of a prior class, unsatisfied; or that there are un-

Defence that there are debts of a prior class.

paid debts of the same class, with that on which the action is brought; and if it appear, that the value of 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 must be rendered in their favor.

Judgment for excess only over prior debts.

SEC. 23. 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, exceed the amount of debts which are entitled to a preference over the debt for which the action is brought, judgment must be rendered against them only for such a sum as shall be a just proportion to the other debts of the same class, with that on which the action is brought.

Payment of prior debt to be allowed.

SEC. 24. If a debt of a class prior to that on which the action is brought, or of the same class, shall have been paid by any next of kin legatees, heirs, or devisees, they may prove such payment, and the amount of the debt so paid must 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.

Real property inherited covered by the judgment.

SEC. 25. If it appear that the real property so descended was not aliened by the lien at the time of the commencement of the action, or if the heir confess the claim, and show what real property has descended to him, the court must 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 descended, to any judgment obtained against such heir personally, for a debt on demand in his own right.

When heirs or devisees personally liable.

SEC. 26. When it appears in the action, that before the commencement thereof, the heir has claimed 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.

Contribution among heirs or legatees.

SEC. 27. In actions brought against several heirs jointly, or several devisees jointly, the amount which the plaintiff recovers must 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.

Devisees and heirs not liable when there are assets.

SEC. 28. Devisees made liable, by the foregoing provisions of this chapter, to the creditor of their testator, are not so liable, unless it appear that his personal assets, and the real property of the testator descended to his heirs, were insufficient to discharge the debt; or unless it appear 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.

Liable for deficiency only.

SEC. 29. 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.

When debts have been expressly charged.

SEC. 30. 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.

SEC. 31. 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 action and proceedings against devisees, and they must in like manner be jointly sued.

Devisees subject to action same as heirs.

SEC. 32. 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 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.

Child how after making will provided for.

SEC. 33. 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.

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CHAPTER 79.

ACTIONS ON OFFICIAL SECURITIES, AND FOR FINES AND FORFEITURES.

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SEC. 1. The official bonds, or other security of a public officer, to the territory, or the United States, whether with or without securities, is to be construed as security to the territory, and also to all persons

Official bonds to the territory how construed.