

1944 Supplement
To
Mason's Minnesota Statutes, 1927
and
Mason's 1940 Supplement

Containing the text of the acts of the 1941 and 1943 Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with Law Review Articles and digest of all common law decisions.

Edited by
the
Publisher's
Editorial Staff

MINNESOTA STATE LAW LIBRARY

MASON PUBLISHING CO.
SAINT PAUL 1, MINNESOTA

1944

~~PROPERTY OF
MAHONIN LAW LIBRARY
ASSOCIATION~~

9633-35. Proceeding after expiration of time of redemption.—Upon the expiration of the time for redemption as may be hereunder extended, the certificate of sale shall operate as a conveyance to the purchaser or his assignee of all the right, title, and interest of the mortgagor or owner in and to the premises described therein at the date of such lien without any other conveyance or formality whatsoever. (Act Apr. 13, 1943, c. 431, §5.)

9633-36. Not to affect rights of junior lienors.—Nothing herein contained shall be construed to extend the time for redeeming by junior lienors under Mason's Minnesota Statutes of 1927, Section 9627 and said junior lienors who have filed during the year of redemption, notice of intention to redeem under Mason's Minnesota Statutes of 1927, Section 9627, and have complied therewith, shall have the right to redeem within said five day periods respectively in accordance with their priority upon payment of the amounts required to redeem in each case and upon making said redemption the person last redeeming shall be exactly in the same position with the same and no greater rights and privileges, with exception as to the amount due necessary to redeem by the original mortgagor, his assigns or his or her personal representative, as the first holder and owner of the sheriff's certificate of sale and the mortgagor or the present owner of said premises or his or her personal representative shall have the same right to redeem during the extended period of redemption as provided in this act from such foreclosure sale, from the last of said persons redeeming as junior lienors, by paying the total amount then and there due as he or she would have had to redeem from the first owner and holder of said sheriff's certificate under said foreclosure sale, but in no event shall said right to redeem extend beyond June 1, 1945. (Act Apr. 13, 1943, c. 431, §6.)

BY ACTION

9634. By what rules governed.

13. Issues which may be litigated.
In suit to foreclose trust deed, in which suit trustees acting under authority expressly conferred upon them by such trust deed selected a court of equity and demanded equitable relief of having amount of secured debt established and legal remedy of judgment for deficiency, not only the validity of the trust deed was an issue but also the validity of the bonds and the consideration therefor as well as question of fraud inhering in them. *Phoenix Finance Corp. v. I.*, (CCA8), 115F(2d)1, 139ALR1490. Rev'd on other grounds 314US118, 62SCR139. See 313US538, 61 SCR833, 314US582, 62SCR294, 316US641, 62SCR940. See Dun. Dig. 5173, 6438.

9634-1. State of Minnesota may be made defendant in certain cases.—In all cases not otherwise provided for, the consent of the State of Minnesota is given to be named a party in any suit which is now pending or which may hereafter be brought in any State Court having jurisdiction of the subject matter,

to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the State of Minnesota may have or claim on the real estate or personal property involved, provided, that this shall not be deemed to supersede any express provision of law relating to actions to which the state may be made a party, nor to relieve any person from complying with any requirement of such laws. (Act Mar. 15, 1943, c. 134, §1.)
[582.13]

9636. Judgment—Transcript to sheriff.

1. The judgment generally.
Where personal liability for debt in a lien foreclosure action is found against two defendants jointly and severally and judgment is entered against only one of them, latter may not complain since he may seek contribution from other defendant for his proportionate share of any sum he has paid on judgment. *Smude v. Amidon*, 214M266, 7NW(2d)776. See Dun. Dig. 1920, 6442.

Lien claimants, parties to a foreclosure action, before finally submitting their cause to the court, may waive their lien rights and limit recovery sought to personal judgments against a defendant personally liable for the debt. *Id.* See Dun. Dig. 6442.

Judgment need not specifically provide for a deficiency judgment in order to authorize later entry of a personal judgment against a defendant found personally liable, for the balance due after the foreclosure sale. *Id.* See Dun. Dig. 6442.

In actions to foreclose mechanics' liens or mortgages, ordinarily personal judgment may not be entered against a defendant found personally liable for the debt until lien rights covered by judgment have first been exhausted by foreclosure sale. *Id.* See Dun. Dig. 6442.

3. Modification of judgment.

In foreclosure actions, court retains jurisdiction after entry of judgment and after time to appeal therefrom has expired for purpose of supervising and controlling the foreclosure sale, and in exercise of such control may permit a lien claimant to waive completely worthless lien rights included in such judgment and order entry of personal judgment against a defendant personally liable for the debt without first requiring a foreclosure sale. *Smude v. Amidon*, 214M266, 7NW(2d) 776. See Dun. Dig. 6443.

In ordinary action, after time for appeal expires, court cannot modify a judgment except for clerical error or misprision, or except as prescribed in statute, but there is a distinction in mortgages and mechanics' lien foreclosure action. *Id.*

6. Distribution of proceeds of sale.

A determination in a prior action that plaintiffs, as holders of the third mortgage, were entitled to have rents due under the renewal of a lease executed during the period of redemption from the foreclosure of the second mortgage applied to reduce amount due under the first mortgage, is res judicata in a subsequent action between the same parties. *Gandrud v. Hansen*, 215M474, 10NW(2d)372. See Dun. Dig. 5205.

9642. Satisfaction of judgment—Execution for deficiency.

Judgment need not specifically provide for a deficiency judgment in order to authorize later entry of a personal judgment against a defendant found personally liable, for the balance due after the foreclosure sale. *Smude v. Amidon*, 214M266, 7NW(2d)776. See Dun. Dig. 6442.

CHAPTER 84

Actions by or against Personal Representatives and Heirs.

9656. What causes of actions survive.—A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in Section 9657. It also dies with the person against whom it exists, except a cause of action arising out of bodily injuries or death caused by the negligence of a decedent survives against his personal representatives. 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. (As amended Act Apr. 25, 1941, c. 440, §1.)

½. In general.
Prior to amendment by Laws 1941, Ch. 440, §1, an action to recover loss of earnings and medical, hospital, and nursing expenses resulting from personal injuries caused by negligence of wrongdoer who was instantly killed by act of negligence was based on a cause of action for "injury to the person" which died with person of tortfeasor. *Eklund v. Evans*, 211M164, 300NW617. See Dun. Dig. 14.

Amendment by Laws 1941, Ch. 440, §1, abolishes rule against survivorship as to causes of action for negligence arising out of injuries to the person where tortfeasor dies, but rule where person wronged dies has been continued as before. *Id.*

1. Held to survive.

Cause of action against partnership having accrued, it did not abate with death of partner negligently driving partnership truck. *Kangas v. W.*, 207M315, 291NW 292. See Dun. Dig. 14.

A cause of action for injury to one's property or estate was one for some wrong directly affecting specific property. *Eklund v. Evans*, 211M164, 300NW617. See Dun. Dig. 14.

2. Held not to survive.

Statute prior to its amendment in 1941 adopted and affirmed common-law rule that a cause of action arising out of injury to person dies with person of either party. *Eklund v. Evans*, 211M164, 300NW617. See Dun. Dig. 14.

3. Cause of action arising in another state.

Survivability of a cause of action relates to right and is governed by law of place where act occurred upon which right or liability rests, and law of Iowa that a cause of action for death against deceased tort-feasor survives governs in an action for death in the state of Minnesota, and the right of action based on the Iowa survival statute may be enforced in Minnesota as a matter of comity, although such state does not have a similar statute. *Daniel's Estate*, 208M420, 294NW465. See Dun. Dig. 1543.

9657. Action for death by wrongful act.—When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed \$10,000.00, and shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them in the same proportion as personal property of persons dying intestate; but funeral expenses, and any demand for the support of the decedent other than old age assistance, duly allowed by the probate court, shall first be deducted and paid. Provided, that if an action for such injury shall have been commenced by such decedent, and not finally determined during his life, it may be continued by his personal representative for the benefit of the same persons and for recovery of the same damages as herein provided, and the court on motion may make an order, allowing such continuance, and directing pleadings to be made and issues framed conformably to the practice in action begun under this section. (As amended Act Apr. 20, 1943, c. 538, §1.)

1. Right statutory.

No action for wrongful death existed at common law. *Joel v. P.*, 206M580, 289NW524. See Dun. Dig. 2600.

There did not exist at common law a right of recovery for death by wrongful act, nor were there any enactments in the United States creating this right until after the passage of Lord Campbell's Act by the British Parliament in 1846, and this section is in derogation of the common law and is considered to have established and created a new right of action. *Cashman v. Hedberg*, 215M463, 10NW(2d)388. See Dun. Dig. 2600, 2601.

2. Construction and application of statute.

An action by administrator for death should not have been dismissed because surviving spouse was not in fact the wife of decedent, where there was a surviving sister, even though no testimony was offered as to her loss from her brother's death, statute obligating brother and sister to support each other, and plaintiff being entitled to recover funeral expenses in addition to any damages to next of kin. *Rogers v. Cordingley*, 212M546, 4NW(2d) 627. See Dun. Dig. 2608.

The distinctions between a proceeding under the compensation law and an action for wrongful death is that in the latter there must be tort or negligence as a foundation for recovery, whereas under the compensation act fault or negligence on the part of the employer is not involved. Under the latter the measure of damages is the monetary loss, within statutory limits, to the widow and next of kin of the deceased; under the former, compensation is based on the wage of the decedent at the time of his death, and a definite proportion of such wage is awarded, to the dependent under the terms of the act. *Fehland v. City of St. Paul*, 215M94, 9NW(2d)349. See Dun. Dig. 2601.

The underlying purpose of both the Workmen's Compensation Act and the death by wrongful act statute is to provide something in the way of relief or compensation to those who have been injured by the untimely death of one to whom they were accustomed to look for sustenance and support, and both provide for rights and remedies unknown to the common law and are purely of statutory origin. *Id.*

3. Who may sue.

Special administrator held entitled to maintain action for wrongful death under statute authorizing administrator to maintain such action. *Wilson v. P.*, 10SE(2d) (Ga)407.

5. Who is next of kin.

Section 9657 is not amended or supplemented by §4272-5(2) so as to affect rights of next of kin, who are not dependents. *Joel v. P.*, 206M580, 289NW524. See Dun. Dig. 2608.

Interpretation of "children," "next of kin," and "parents" under wrongful death statutes. 27MinnLawRev 315.

6. Jurisdiction—Actions under foreign statute.

Suit for death of a seaman under Jones Act, Mason's U.S.C.A., 46:688, cannot be removed to federal court. *Fiolat v. M.*, (DC-Minn), 31FSupp219.

Survivability of a cause of action relates to right and is governed by law of place where act occurred upon which right or liability rests, and law of Iowa that a cause of action for death against deceased tort-feasor survives governs in an action for death in the state of Minnesota, and the right of action based on the Iowa survival statute may be enforced in Minnesota as a matter of comity, although such state does not have a similar statute. *Daniel's Estate*, 208M420, 294NW465. See Dun. Dig. 14.

Where an action is brought by a legal representative who has sole right to sue, his citizenship as a party is determined by his citizenship as an individual and not by that of beneficiaries of the action. *Id.* See Dun. Dig. 2614.

An action for wrongful death against a nonresident motorist is transitory and is triable in any county designated by plaintiff. *Claseman v. Feeney*, 211M266, 300NW 818. See Dun. Dig. 10109.

Original jurisdiction to determine heirship or who may be entitled to take as beneficiaries under a will lies wholly with probate court. Determination of surviving spouse and next of kin for distribution of recovery under death by wrongful act statute lies wholly with the district court. Determination of who are "dependent persons or legal heirs" entitled to accrued compensation due to decedent prior to death lies exclusively with the industrial commission under the Workmen's Compensation Act. *Fehland v. City of St. Paul*, 215M94, 9NW(2d)349. See Dun. Dig. 2603.

8. Complaint.

An allegation that funeral expenses in a certain sum were "incurred" means that the personal representative by act of some person authorized in law to bind him became liable to pay decedent's funeral expenses out of his estate, as affecting sufficiency of complaint in action for wrongful death. *Schmitt v. Emery*, 215M288, 9NW (2d)777. See Dun. Dig. 2615.

10. Former release, settlement or recovery.

Dependents of deceased WPA worker, fatally injured in line of duty, who accept compensation for his death pursuant to federal statute, are not precluded from bringing action against a third party whose negligence caused death. *Wagner v. City of Duluth*, 211M252, 300NW820. See Dun. Dig. 2611.

A judgment in a former action by plaintiff in her individual capacity to recover for personal injuries based upon the same facts and issues as those in the later action brought by her as administratrix of her deceased husband against the defendant for wrongful death is not res judicata as to those facts and issues in the later action, where the recovery would be for not only the benefit of the plaintiff, but also for the payment of decedent's funeral expenses. *Schmitt v. Emery*, 215M288, 9NW(2d)777. See Dun. Dig. 2616.

Settlement with and release of negligent motorist causing wrongful death did not prevent subsequent suit and recovery of penalty from a liquor dealer and his surety, right of action under death statute and liability created under liquor license statute being wholly unrelated in scope and purpose. *Phillips v. Aretz*, 215M325, 10NW(2d)226. See Dun. Dig. 2611.

11. Limitation of actions.

Limitation period provided by this section is a condition precedent to right of action for wrongful death, to be strictly complied with, and is not extended by Mason's Stat. §9203, Minn. Stat. 1941, §541.16. *Cashman v. Hedberg*, 215M463, 10NW(2d)388. See Dun. Dig. 2614.

14. Funeral expenses.

An action by administrator for death should not have been dismissed because surviving spouse was not in fact the wife of decedent, where there was a surviving sister, even though no testimony was offered as to her loss from her brother's death, statute obligating brother and sister to support each other, and plaintiff being entitled to recover funeral expenses in addition to any damages to next of kin. *Rogers v. Cordingley*, 212M546, 4NW(2d) 627. See Dun. Dig. 2608.

Statute imposes upon probate court duty to determine reasonable funeral expenses to be first deducted out of recovery collected for wrongful death, and one advancing money to mother of decedent, who later became administratrix, for payment of funeral expenses has a valid claim against the administratrix and the estate for reimbursement, as against contention that money was advanced to mother as a personal loan before any administrator was appointed. *Kirschstein's Estate*, 213M1, 4NW (2d)633. See Dun. Dig. 2610.

Claimant of funeral expenses is a beneficiary preferred over other beneficiaries. *Schmitt v. Emery*, 215M288, 9NW (2d)777. See Dun. Dig. 2612.

16. Damages.

Verdict for \$6575 for death of a 48 year old owner of a pool hall who supported his family of wife and 6 children well was not excessive. *Ost v. U.*, 207M500, 292 NW207. See Dun. Dig. 2617.

Verdict for \$7500 held not excessive for death of clerk 67 years of age. *Symons v. G.*, 208M240, 293NW303. See Dun. Oig. 2617.

Verdict of \$8,078.80, reduced to \$6,000, held not excessive for death of young person. *Ressmeyer v. Jones*, 210M423, 298NW709. See Dun. Dig. 2617.

Verdict for \$7,621.50, reduced to \$6,500, held not excessive for death of young person. *Id.*

Recovery for wrongful death should be the present worth of expected contributions, determination of which need not necessarily be based on legal rate of interest or probable expectancy, and there is no requirement that computation be made according to any doctrine of annuities or any other mathematical measurement. *Thoirs v. Pounsford*, 210M462, 299NW16. See Dun. Dig. 2617.

In addition to decedent's expectancy, each case involves a consideration of such variables as decedent's character, health, habits, talents, prospects, earnings, contributions to his dependents, and many others which affect amount of recovery and concerning which there is permissible difference of opinion among juries. *Id.*

Recovery is permitted as compensation for deprivation of reasonable expectation of pecuniary benefits that would have resulted to beneficiary from continued life of deceased. *Id.*

Verdict of \$10,000 for death of a woman annuitant, 67 years old at time of her death, who contributed approximately \$66.66 a month to two sisters, held not excessive. *Id.*

Fact that decedent was under no legal obligation to support her two maiden sisters who lived with her was no reason for denying recovery of damages for her death, since expectancy of pecuniary benefits may arise from disposition of decedent to contribute. *Id.*

Ordinarily computation of present worth of expected contribution should be based on rate of interest available on safe investments and not upon legal rate of interest. *Id.*

That amount of recovery for death is maximum allowed under statute is not important in considering whether verdict is excessive. *Id.*

Duration of expected contributions from one suffering wrongful death is not necessarily period shown in mortality tables, since they do not conclusively establish life expectancy of a particular person. *Id.* See Dun. Dig. 2619.

Verdict for \$9,000 was not excessive for death of a carpenter and farmer 49 years of age, leaving a wife of 35 in poor health and three children, ages 16, 14, and 11. *Duff v. Bemidji Motor Service Co.*, 210M456, 299NW196. See Dun. Dig. 2617.

Verdict of \$7,500 reduced to \$6,840 was not excessive, absent anything indicating passion or prejudice, for death of a man 52 years old with annual income of \$2,000, leaving a daughter 19 years of age living at family home, and a daughter of 22 years of age, married and living on a nearby farm, to whom decedent had extended substantial and fatherly aid. *Ristow v. Von Berg*, 211M150, 300NW444. See Dun. Dig. 2617.

Verdict for \$1,250, increased by court to \$1,650 for death of a single man 29 years old, leaving as next of kin a father 66 years of age and mother 53 years, was not so inadequate as to show passion or prejudice influenced jury. *Gamble v. Smith*, 211M457, 1NW(2d)411. See Dun. Dig. 2617.

Right to support under poor statute considered. *Id.* In determining damages for wrongful death much must be left to probabilities or reasonable possibilities as to how long would the life of deceased have continued had not defendant's wrongful act cut it short, and how long will the life of the beneficiary last. *Bergstrom v. Frank*, 213M9, 4NW(2d)620. See Dun. Dig. 2617.

Verdict for \$5,000 was not excessive for death of 48-year-old, devoted mother, in good health, leaving two children 22 and 23 years of age respectively. *Id.*

The pecuniary loss to beneficiaries resulting from death of one by wrongful act measures the recovery. *Id.*

Verdict for \$2,500 was not excessive for death of a 20-year-old sister. *Id.*

In comparing verdict for wrongful death with verdicts in former days, purchasing power of dollar now and then must be considered on question of excessiveness. *Id.*

Measure of damages for wrongful death is properly determinable according to circumstances at the time of wrongful death, and fact that widow has since remarried so that she now has another source of support for herself and her children does not divest her of her right to damages. *Murphy v. Barlow Realty Co.*, 214M64, 7NW(2d)684. See Dun. Dig. 2617.

Verdict for \$10,000 was not excessive for death of a man 32 years old who was married and had two small children. *Id.*

As against contention that there was a lack of substantial evidence of pecuniary benefit to beneficiaries, testimony of widow that she was 37 years old and that her deceased husband was 40, that he left surviving him a 15-year-old daughter, that family lived together and were dependent upon him, and that at time of his death he was earning \$45.46 per week and testimony

of deceased's employer that he was an honest, industrious, and sober man, supported a verdict of \$9,541. *Webber v. McCarthy*, 214M76, 7NW(2d)681. See Dun. Dig. 2617.

A verdict for the death of a minor child is not subject to reduction or apportionment because the liability is based on the negligence of the father's employee, the father being one of the beneficiaries of the verdict. *Turenne v. Smith*, 215M64, 9NW(2d)409. See Dun. Dig. 2616, 5834c, 5844, 7041. See 27MinnLawRev579.

A verdict of \$7,628 for the death of a boy of 14 years of age was not excessive. *Id.* See Dun. Dig. 2617.

Verdict of \$5,500 held not excessive for death of child five years and ten months old, where it appeared that special damages amounted to \$1,609.65 and that decedent had already reached the age where he was helpful to both of his parents at the time of his death. *Deach v. St. Paul City Ry. Co.*, 215M171, 9NW(2d)735. See Dun. Dig. 2617.

16a. Disposition of proceeds.

No part of the recovery goes to the decedent's estate, and it is no part of it, since recovery is for the exclusive benefit of the surviving spouse and next of kin, and the widow may not even select her statutory allowance out of the amount so recovered under the statute of descent. *Fehland v. City of St. Paul*, 215M94, 9NW(2d)349. See Dun. Dig. 2609.

The element of dependency is not involved, but the element of pecuniary loss is. *Id.* See Dun. Dig. 2610.

Distribution is made under the jurisdiction and direction of the district court in which the recovery is had, and the probate court has no jurisdiction. *Id.* See Dun. Dig. 2610.

Action is not for the exclusive benefit of the surviving spouse and next of kin, but for the exclusive benefit, first, of those having demands for funeral expenses and for the support of the decedent as preferred beneficiaries, and second, for the surviving spouse and next of kin. *Schmitt v. Emery*, 215M288, 9NW(2d)777. See Dun. Dig. 2608, 2610, 2612.

Claims for old age assistance against funds recovered under statute relating to death by wrongful act. *Op. Atty. Gen.* (521g), Jan. 12, 1943.

16b. Negligence.

In case involving electrocution of employee by defendant's uninsulated electric wire, where recovery is sought by employer's insurer, as subrogee, for payments made to employee's dependents, questions of negligence, assumption of risk, and contributory negligence of both employee and employer were for jury. *Standard Acc. Ins. Co. v. M.*, 207M24, 239NW782. See Dun. Dig. 2620.

In action for death, a workman putting out flares was guilty of contributory negligence as a matter of law in attempting after dark to pass across a pavement open for traffic in front of approaching car traveling with lights turned on, at a speed of not to exceed 30 miles an hour. *Hoelmer v. S.*, 207M140, 290NW225. See Dun. Dig. 4171.

In action for wrongful death in automobile collision, there could be no recovery from driver of other car if death was due solely to negligence of servant of deceased driving his car, but such servant would be liable. *Rogers v. Cordingley*, 212M546, 4NW(2d)627. See Dun. Dig. 2606, 2620.

Negligence to be actionable must be a, but not the sole, cause of death or injury complained of. *Harris v. Wood*, 214M492, 8NW(2d)818. See Dun. Dig. 2620.

In action for death of motorcycle driver who collided with truck emerging suddenly from a private driveway where view was obstructed by trees and parked cars, submission of the emergency rule to the jury was warranted. *Merritt v. Stuve*, 215M44, 9NW(2d)329. See Dun. Dig. 2620, 4164g.

Evidence held not to show contributory negligence of parents in sending a five year old boy on an errand across a streetcar track. *Deach v. St. Paul City Ry. Co.*, 215M171, 9NW(2d)735. See Dun. Dig. 2616, 7041, 9026.

16c. Pleading.

In a death action in federal court local substantive law governs but federal court is not bound by the state rule that pleadings are to be construed most strongly against the pleader, the rule now being the reverse of what it was before the Erie Railroad Co. decision and before the Conformity Act was superseded by the Rules of Civil Procedure. *Hannah v. Gulf Power Co.*, (CCA5), 128F(2d)930. See Dun. Dig. 3748b.

16d. Presumptions.

In death action against power company involving electrocution and wherein defendant had burden of proof on issue of contributory negligence, it is difficult to understand how presumption of due care in favor of a decedent would operate in favor of plaintiff. *Peterson v. M.*, 206M268, 238NW588. See Dun. Dig. 2616.

Presumption of due care by a decedent cannot aid plaintiff on issue of contributory negligence, since burden of proof on that issue is upon defendant irrespective of any "presumption" of due care. *Ralston v. T.*, 207M485, 292NW24. See Dun. Dig. 2616.

Presumption that deceased at moment of fatal injury was in exercise of due care should not be given to the jury in a civil case. *Duff v. Bemidji Motor Service Co.*, 210M456, 299NW196. See Dun. Dig. 2616.

A pedestrian struck and killed while walking on wrong lane of a divided highway, with rather than against traffic, is prima facie guilty of negligence. *Wojtowicz v. Belden*, 211M461, 1NW(2d)409.

Presumption of due care of a pedestrian struck while standing close to edge of shoulder between two cars involved in a collision does not vanish in absence of evidence showing conduct of deceased when defendant's car approached at high speed in the night time and swung to the left when defective brakes prevented his stopping before passing through a lane of cars resulting from an accident. *Lee v. Zaske*, 213M 244, 6NW(2d)793. See Dun. Dig. 2616.

Evidence that a workman, who was electrocuted by taking hold of a metal brace and an uninsulated spot on a connection with high-voltage wires, while engaged in the performance of his work on the steeply sloping roof of a lean-to shed, was seen walking on the roof toward the crossarm brace and afterwards was seen holding onto the connection at the uninsulated spot and the metal brace, with his body doubled up, but did not show what the workman did when he got in close proximity to the brace, did not displace the presumption that decedent exercised due care for his own safety. *Schroepfer v. City of Sleepy Eye*, 215M525, 10NW(2d)398. See Dun. Dig. 2616.

17. Evidence.

In action for wrongful death, whether deceased died as a result of the accident or from excessive use of hard liquor held for jury. *Ost v. U.*, 207M500, 292NW207. See Dun. Dig. 2620.

Whether deceased employee was acting within scope of his authority in cleaning floor of oil room or was merely cleaning his coat with carbon tetrachloride, when fumes caused his death, held for jury. *Symons v. G.*, 208M240, 293NW303. See Dun. Dig. 5858.

Whether employee was guilty of contributory negligence in using carbon tetrachloride to clean floors, resulting in his death, held for jury. *Symons v. G.*, 208M240, 293NW303. See Dun. Dig. 2616.

In action for death of passenger in defendant's car based upon excessive speed, failure to keep a proper lookout, negligently driving upon shoulder of road, and failure to reduce speed on return to pavement, evidence held to support verdict for defendant. *Dahlstrom v. H.*, 209M72, 295NW508. See Dun. Dig. 2620.

Contributory negligence of driver of automobile killed at township highway crossing by car coming from his right held for jury. *Ristov v. Von Berg*, 211M150, 300NW 444. See Dun. Dig. 2616.

In action for wrongful death, testimony of only living witness to head-on collision need not be accepted as true where jury could not only find inconsistencies in his testimony, but there were circumstances of physical facts impeaching verity of witness's story. *Malmgren v. Foldesi*, 212M354, 3NW(2d)669. See Dun. Dig. 10344a.

In action for wrongful death in automobile collision, where sole evidence for plaintiff consisted of certain statements made by defendant's employee at scene of collision and his admissions later to a witness in presence of plaintiff's attorney, both of whom were investigating the accident, weight to be attached to such admissions was for jury, though contrary to testimony of such employee on the trial. *Litman v. Peper*, 214M 127, 7NW(2d)334. See Dun. Dig. 2616.

A certificate of death, being only prima facie evidence of the cause of death, may be contradicted and explained. *Harris v. Wood*, 214M492, 8NW(2d)818. See Dun. Dig. 2620.

17a. Instructions.

An instruction that presumption of due care on part of a deceased is comparable to that of right conduct, every person is presumed to do what is right, but this presumption of due care on part of deceased may be overcome by ordinary proof by the greater weight of the evidence that due care was not exercised by deceased, was technically incorrect in that jury might understand that presumption is equivalent of evidence which defendant must meet and overcome, instead of charging that presumption vanishes when there is evidence of care deceased did take or omitted to take to avoid death. *Lang v. C.*, 208M487, 295NW57. See Dun. Dig. 2616.

Instruction that one attempting to rescue a person imperilled by negligence of another should recover unless his act was "clearly" one of rashness or recklessness was erroneous, but was without prejudice where it appeared from instructions as a whole that contributory negligence need be shown only by a fair preponderance of the evidence. *Duff v. Bemidji Motor Service Co.*, 210M456, 299 NW196. See Dun. Dig. 2616.

18. Jurisdiction over fund for distribution.

Amount recovered for one's death is no part of his estate, and probate court has no jurisdiction to control action in which recovery is had or to direct the distribution of fund after it is recovered. *Daniel's Estate*, 208M 420, 294NW465. See Dun. Dig. 2603.

9664. Heirs and devisees—When liable.

An action may now be maintained in district court against representatives and heirs of a deceased person to enforce a lien or charge for work and materials furnished for improvement of homestead at request of deceased, without presenting claim therefor to probate court for allowance, it appearing that deceased left no property other than homestead. *Anderson v. J.*, 208M152, 293NW131. See Dun. Dig. 3592a.

CHAPTER 85

Official and Other Bonds—Fines and Forfeitures

9677. Bonds, etc.—Sureties, qualifications.

Statutory bonds must be construed in light of the statute creating obligations intended to be secured. *Graybar Electric Co. v. S.*, 208M478, 294NW654. See Dun. Dig. 10566.

County may not purchase and pay for a public official fidelity bond issued by reciprocal company organized under either laws of Iowa or of Minnesota. *Op. Atty. Gen.* (249a-4), May 11, 1942.

A bond "during his continuance in office" remained in effect while appointee was holding over after expiration of term, but if there should be an appointment for a new term it would be advisable to obtain a new bond. *Op. Atty. Gen.* (401b-19), Aug. 4, 1942, Aug. 10, 1942.

9677-1. State may take fidelity insurance.—The public examiner from time to time shall make surveys of each department or other agency of the state government to determine the employes in such department or agency whose fidelity should be assured by individual bond or fidelity insurance policy, and the amount of such bond or insurance necessary for each such employe, and shall submit a list thereof to the commissioner of administration for his action thereon. The commissioner may approve in whole or in part and shall certify his action thereon to the directing head of each such department or agency, who shall require each of the employes so listed to give bond to the state in the amount indicated in such certificate. The commissioner in such certificate may direct that, in lieu of individual bonds so required, the directing head of any such department or agency shall procure and keep in effect a schedule or position insurance policy, in such aggregate amount as the commissioner shall direct, insuring the fidelity of such department employes in the respective amounts so

required, upon a form to be prescribed by the public examiner. Such policy may cover also the subordinate officers of such department required by law to give bond to the state, and in the amount which the commissioner shall require. The surety upon the bonds of all state officers and state employes required under any law of the state shall be a corporation authorized to act as sole surety upon such official bonds, and all such bonds shall be approved by the attorney general as to form and generally by the public examiner, who shall keep an appropriate record of such approval and cause such bond or policy to be filed in the office of the secretary of state. (As amended Apr. 23, 1943, c. 588, §1.)

Bonds must be approved as to form and execution by attorney general and generally by commissioner of administration, and need not be approved by department head, unless required by statute under which particular bond is given. *Op. Atty. Gen.*, (640) Oct. 5, 1939.

Surety companies need not file deviations from regular rates which they intend to charge on bonds covering state employes. *Op. Atty. Gen.*, (640), Oct. 30, 1949.

A state appraiser is a subordinate officer of the state department, which may require fidelity insurance in place of an official bond, but a fidelity policy must be conditioned as is a statutory bond. *Op. Atty. Gen.*, (640), Nov. 1, 1939.

Employees of state treasurer do not come within general rule laid down for writing of blanket bond, since state treasurer is personally accountable for all funds deposited with him, and selection of surety should be subject to his approval. *Op. Atty. Gen.*, (454), Jan. 29, 1940.

A mutual company may issue and department of administration may purchase a non-assessable fidelity bond which satisfies requirements of statutes and is licensed by commissioner of insurance and has a sufficient guaranty fund. *Op. Atty. Gen.*, (980a-4), Jan. 31, 1940.