

CHAPTER 573

ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES AND HEIRS

573.01 SURVIVAL OF CAUSES.

HISTORY. R.S. 1851 c. 78 ss. 1, 2; P.S. 1858 c. 68 ss. 1, 2; G.S. 1866 c. 77 s. 1; G.S. 1878 c. 77 s. 1; G.S. 1894 s. 5912; R.L. 1905 s. 4502; G.S. 1913 s. 8174; G.S. 1923 s. 9656; M.S. 1927 s. 9656; 1941 c. 440.

1. Actions that survive

2. Actions held not to survive

1. Actions that survive

The following causes of action survive:

Mechanic's lien, *Tuttle v Howe*, 14 M 145 (113);

The right of a ward to his estate. *Jordan v Secombe*, 33 M 220, 22 NW 383;

Liability of heir for nuisance. *Stoggy v Dilworth*, 38 M 179, 36 NW 451;

Town of Warsaw v Bakken, 133 M 128, 156 NW 7, 157 NW 1089.

Liability for personal injury after verdict. *Cooper v St. P. City Ry.* 55 M 134, 56 NW 588;

Cause of action for fraud in exchange of property. *Billson v Linderberg*, 66 M 66, 68 NW 771;

Liability of stockholder in a corporation. *Willoughby v St. P. Germ. Ins. Co.* 80 M 432, 83 NW 377;

Liability on bond for maintenance of parents. *Portner v Wilfahrt*, 85 M 73, 88 NW 418.

The liability of a liquor licensee on his bond is for breach of contract and survives against his estate. *Koski v Pakkala*, 121 M 450, 141 NW 793.

A suit in equity, brought during the lifetime of the insured to cancel a certificate of membership in the respondent association, does not abate by reason of the death of the insured, nor does it abate because plaintiff now has an adequate remedy at law. *Nat'l Council v Weisler*, 131 M 365, 155 NW 396.

A cause of action for damages sustained by fraud or deceit is one for injury to property, not for injury to the person, survives the death of either party, and is assignable. *Guggisberg v Boettger*, 139 M 226, 166 NW 177; *Jandera v Lakefield Union*, 150 M 476, 185 NW 656.

The compensation act gives no new right of action, but recognizes and continues in force existing legal remedies, with the right of subrogation by the employer to the rights of the employee when he has paid the compensation therein provided for. *Fidelity & Casualty v St. Paul Gas Co.* 152 M 197, 188 NW 265.

An action for an injunction to restrain an injury to property survives the death of the plaintiff. *Erb v Western Display*, 155 M 226, 193 NW 177.

A cause of action for injury to plaintiff's property rights by the wrongful acts and conduct of defendant's decedent, survived. *Bell v Friedman*, 161 M 406, 201 NW 614.

A right of action accruing to a party under a foreign statute (Wisconsin) will as a matter of comity be enforced in the courts of this state when jurisdiction can be had and justice done between the parties. Under the Wisconsin statute there is, in actions ex delicto, a survival of liability upon death of the wrongdoer. *Chubbock v Halloway*, 182 M 225, 234 NW 314, 868; *Kerston v Johnson*, 185 M 591, 242 NW 329.

A husband's cause of action for medical expenses and nursing incurred in attempting to cure his wife of the injuries negligently inflicted survives the death

of the wife and the death of the wrongdoer. *Fowlie v First Mpls. Trust*, 184 M 84, 237 NW 846.

Johnson receiving personal injuries through negligence of Reymond, since deceased, was properly brought against Whitney, the administrator of Reymond. *Johnson v Whitney*, 217 M 469, 14 NW(2d) 765.

See as to enforcement of stockholders' liability. *Forrest v Jack*, 294 US 158.

Wrongful death and survival act; two causes of action or one. 2 MLR 295.

Enforcement in one state of right of action under statute of another state against administrator of deceased tortfeasor. 15 MLR 706.

Assignability of a cause of action for damages for fraud in the sale of property. 18 MLR 586.

Laws 1941, Chapter 440, relates to the survival of causes of action, by providing that a cause of action arising out of bodily injuries or death caused by the negligence of a deceased tortfeasor survives against his personal representatives. Formerly under Section 573.01 no cause of action arising out of an injury to the person survived as to either party, except after the manner of Lord Campbell's Act as provided by section 573.02, which exception still is expressly retained. The rule where the injured party dies remains unchanged.

2. Actions held not to survive

The right of action given by section 573.02 was wholly unknown to our law prior to the enactment of these provisions of the statute. Being a creature of the statute, it must be enforced as the statute enacts, and the action must be brought by the personal representative. *Nash v Tousley*, 28 M 6, 5 NW 875; *Scheffler v M. & St. L.* 32 M 125, 19 NW 656.

An action for malicious prosecution abates. *Bryant v Amer. Surety*, 69 M 30, 71 NW 826; *Hoffer v Fawcett*, 204 M 612, 284 NW 873.

If in tort, and an injury to the person of the original claimant, the action dies with the person of the deceased party. *Gilman v Maxwell*, 79 M 377, 82 NW 669.

The amendment to General Statutes 1894, Section 5913 (now 573.02), made by Laws 1897, Chapter 261, only authorizes the personal representative of a deceased party to be substituted as plaintiff in the original action brought by him, and convert it by an amendment of the pleadings into an action for the benefit of the widow and next of kin. *Anderson v Fielding*, 92 M 42, 99 NW 357.

Malicious attachment of corporate property is not a personal tort, but gives rise to a cause of action for injury to property, which passes to the trustee in bankruptcy of the corporation. *Hansen v Wyman*, 105 M 491, 117 NW 926.

A claim for damages for destruction of personalty by fire is assignable. *Babcock v Can. Northern*, 117 M 434, 136 NW 275.

In life support contract the obligation, if any, on the part of the grantees in a conveyance made by parents, as consideration for the contract, to live with and personally care for the parents, is of such a personal nature that as a matter of law its breach cannot be invoked after the parents' death, as a ground for setting aside the conveyance. *Malicki v Malicki*, 189 M 121, 248 NW 723.

A foreign corporation is liable in all actions against it which survive under section 573.01. *Pomeroy v Nat'l City*, 209 M 160, 296 NW 513.

An action to recover loss of earnings and medical, hospital, and nursing expenses resulting from personal injuries caused by the negligence of a wrongdoer who was instantly killed by the act of negligence is based on a cause of action for "injury to the person", which dies with the person of the tortfeasor. *Eklund v Evans*, 211 M 164, 300 NW 617.

While in the absence of a statutory provision actions on contracts survive, and actions on torts abate, on the death of the injured party, the real test of survival is not the form, but the substance, of the cause of action; and the true rule is that if the primary cause of the damages sought is the breach of contract and injuries to the person incidents of the breach, the action survives; but if the proximate cause of the damages is the personal injury, and the breach and damages therefrom are a mere incident to the injury, the action dies. *Webber v St. P. City Ry.* 97 F. 140.

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Abatement of an action under Sherman anti-trust act by death of defendant. 10 MLR 160.

Implied assumpsit as an alternative remedy in certain classes of torts. 11 MLR 533.

573.02 ACTION FOR DEATH BY WRONGFUL ACT.

HISTORY. R.S. 1851 c. 78 s. 3; P.S. 1858 c. 68 s. 3; G.S. 1866 c. 77 s. 2; G.S. 1878 c. 77 s. 2; 1889 c. 109 s. 1; 1891 c. 123 s. 1; G.S. 1894 s. 5913; 1897 c. 261; R.L. 1905 s. 4503; 1911 c. 281 s. 1; G.S. 1913 s. 8175; G.S. 1923 s. 9657; M.S. 1927 s. 9657; 1935 c. 325 s. 1; 1943 c. 538 s. 1.

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1. Generally

NOTE. Originally in most cases of death by wrongful act, the wrongdoer was executed, his property confiscated, leaving nothing to compensate the next of kin of the decedent. Minnesota adopted and as yet follows the common law rule that right of recovery in tort abates upon the death of the tortfeasor. In many states, however, tort causes of action and liabilities are as much a part of the estate of either plaintiff or defendant as contract debts.

The national conference of commissioners on uniform state laws, after several years' survey, at their conference in 1943 decided to proceed no further with consideration of uniform act relating to death by wrongful act, or of uniform act relating to survival of actions.

Action for pure personal tort does not survive the death of the tortfeasor. *Green v Thompson*, 26 M 500, 5 NW 376.

At common law a cause of action arising out of an injury to the person died with the death of either party. Section 573.02 creates a cause of action when death is caused by the wrongful act or omission of any party, and vests it in the personal representative. No one else can sue upon it. *Scheffler v M. & St. L.* 32 M 125, 19 NW 656; *Neganbauer v Gt. Northern*, 92 M 184, 99 NW 620.

A special law, limiting the time for commencing actions against the city of St. Paul for injuries caused by its negligence, is not applicable to actions under section 573.02. *Maylone v City of St. Paul*, 40 M 406, 42 NW 88; *Orth v Village of Belgrade*, 87 M 237, 91 NW 843; *Senecal v City of West St. Paul*, 111 M 253, 126 NW 826; *Keever v City of Mankato*, 113 M 55, 129 NW 158, 775.

Laws 1891, Chapter 123, does not make the amount recovered by an administrator or executor for wrongfully causing death of deceased subject to payment of all debts incurred by the deceased for the support of himself and family, but, at most, only to such as were incurred in consequence of, or at any rate after, the injury causing the death. *State ex rel v Probate Court*, 51 M 241, 53 NW 463; *Sykora v Case Co.* 59 M 130, 60 NW 1008.

Under the statute as amended by Laws 1891, Chapter 123, those having demands "for the support of the deceased and funeral expenses" are beneficiaries of the amount recoverable, to the extent of their demands; but, in order to recover

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on account of such claims, their existence and amount must be alleged in the complaint. *Sykora v Case*, 59 M 130, 60 NW 1008; *Sieber v Gt. Northern*, 76 M 269, 79 NW 95.

Representatives of decedent's estate may recover from the wrongdoer the necessary funeral, hospital, and medical expenses incurred in that behalf. This rule applies even if decedent left an ample estate. *Prescott v Swanson*, 197 M 338, 267 NW 251.

Under a Wisconsin statute there is, in actions ex delicto, a survival of liability upon the death of the wrongdoer, while Minnesota restates the common law rule that all actions ex delicto abate on death of either party. The doctrine of comity controls. *Chubbuck v Hallway*, 182 M 225, 234 NW 314, 868.

A guest enjoying the free hospitality of a home accepts such entertainment with the understanding he accommodate himself to conditions as they are. *Page v Murphy*, 194 M 607, 261 NW 443.

Wrongful death and survival statutes; two causes of action in one. 2 MLR 294.

Breach of covenant of lease. 2 MLR 303.

Abatement and revival; abatement of an action under Sherman anti-trust act by death of defendant. 10 MLR 160.

Lord Campbell's act. 17 MLR 363.

2. Construction

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. *McLean v Burbank*, 12 M 530 (438).

Under section 573.02, an administrator of a person whose death was due to the wrongful act of a municipality may maintain an action against it for damages consequent thereon. *Maylone v City of St. Paul*, 40 M 406, 42 NW 88; *Orth v Village of Belgrade*, 87 M 237, 91 NW 843; *Keever v City of Mankato*, 113 M 55, 129 NW 158, 775.

After a verdict, decision, or report of referee fixing the amount of damages for a wrong, such action does not abate by death of either party and section 573.02 does not apply. *Clay v Chgo. Milw.* 104 M 1, 115 NW 949.

An action for damages for a negligent act committed in another state is based upon the statute of the state in which the cause of action arose, and the time within which such action may be brought is governed by the laws of such state; but the time at which such action is deemed as commenced and all other matters pertaining to procedure are determined and governed exclusively by the law of the forum. *Bond v Pennsylvania Co.* 124 M 196, 144 NW 942.

Causes of action against more than one defendant, based upon concurrent negligence of all of them, where the facts are identical as to time, place, and result in causing decedent's death, may be united. *Petcoff v St. Paul City Ry.* 124 M 531, 144 NW 474.

Under the workman's compensation law the \$7,500 limitation is the total, and where the widow is entitled to compensation up to that amount, nothing remains for other dependents. *Miller v Bohn*, 192 M 242, 255 NW 835.

In a wrongful death case there must be a tort, and the measure of damages is the monetary loss to the heirs of decedent; and action can only be brought by the personal representative. Under workmen's compensation the compensation is based upon wages at the time of death, and a definite proportion of such wage is awarded. Such compensation is often awarded under circumstances not within the wrongful death statute. *Lewis v Connolly*, 196 M 114, 264 NW 581; *Joel v Dale*, 206 M 580, 289 NW 524.

The personal representative is an agency of the district court, and not at all under the control of the probate court, and is not relieved from furnishing a bond as he would be if acting in his capacity as executor or administrator. *Sworski v Colman*, 203 M 545, 282 NW 276.

The person killed, had he lived, could not have recovered damages against the liquor dealer under section 340.95. Consequently, his personal representative has no cause of action. *Sworski v Colman*, 204 M 474, 283 NW 778.

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Right to recover for death arising out of prenatal injury. 20 MLR 321.
Recovery for wrongful death for breach of implied warranty. 23 MLR 92.

3. Who may sue

No one is authorized to sue under the statute except the administrator or executor of the deceased. *Boutittler v Steamboat Milwaukee*, 8 M 97 (72); *Nash v Tousley*, 28 M 5, 8 NW 875; *Scheffler v M. & St. L.* 32 M 125, 19 NW 656; *Foot v Gt. Northern*, 81 M 493, 84 NW 301; *Noesen v Mpls. St. P.* 204 M 233, 283 NW 246.

Under General Statutes 1894, Section 5913, before amendment of this section, it was held that the husband is not the next of kin of the deceased wife. *Watson v St. P. City Ry.* 70 M 514, 73 NW 400.

Non-resident aliens who are next of kin are entitled to the benefits conferred by section 573.02. *Renlund v Commodore Mining Co.* 89 M 41, 93 NW 1057; *Mahoning Ore v Blomfeldt*, 163 F. 828.

A special administrator is a personal representative of the decedent, within the meaning of section 573.02, and may bring suit. *Jones v Minn. Transfer*, 108 M 129, 121 NW 606.

One whose claim is for funeral expenses of the deceased, though the only assets consist of a cause of action for the wrongful death of the decedent, is a creditor. A foreign consul, as such, has a proper status to intervene in and to become a party to proceedings upon an application to appoint an administrator of the estate of one of his deceased nationals dying in this state, and likewise may appeal from the order of court making the appointment. *Austro-Hungarian Consul v Westphal*, 120 M 124, 139 NW 300.

A complaint by an Illinois attorney against a Minneapolis attorney for half of fees earned in successfully prosecuting an action for the heirs at law of Young under this section, states a cause of action. *Comstock v Baldwin*, 125 M 357, 147 NW 278.

Note difference between federal employers liability act and Minnesota statute. *Wells-Dickey v Chgo. Burlington*, 159 M 417, 199 NW 101; *Lombard v Northern Pacific*, 160 M 1, 199 NW 887.

An action by the administrator of the estate of a decedent for damages for wrongful death, against the husband of the sole beneficiary, is not an action by the wife against her husband for a tort and does not come within the common law rule that the wife cannot bring action against her husband for a tort against her personally. *Albrecht v Potthoff*, 192 M 557, 257 NW 377.

At common law and unless intervenor can qualify under section 575.172, an illegitimate child has no right of inheritance from its father. *Reilly v Shapiro*, 196 M 377, 265 NW 284.

An adopted child has rights of a natural child. *McKeown v Argetsinger*, 202 M 602, 279 NW 402.

The policy which forbids one spouse to maintain a civil action against the other, forbids a wife from maintaining an action in this state for a personal injury while a passenger in her husband's car because of his negligent driving on a Wisconsin highway, although such action is there maintainable. *Kyle v Kyle*, 210 M 209, 297 NW 744.

Dependents of deceased WPA worker, fatally injured, who accept compensation under the federal statute, are not precluded from bringing action against a third party who was the cause of their decedent's death. *Wagner v City of Duluth*, 211 M 254, 300 NW 820.

Right of mother to recover for the death of an illegitimate child. 6 MLR 172.

Right of employer who has paid death claim to sue for wrongful death. 6 MLR 594.

Recovery where the sole beneficiary is the wife of the tortfeasor. 19 MLR 595.

Adopted children under wrongful death act. 23 MLR 83.

Effect of workmens compensation upon wrongful death act; splitting causes of action. 24 MLR 719.

Interpretation of "children", "next of kin", and "parents", under wrongful death statute; status of illegitimate child. 27 MLR 315.

4. Jurisdiction

The states of Wisconsin and Minnesota have concurrent jurisdiction upon the St. Croix river and its waters; and in case of death from an injury, the jurisdiction of a Minnesota court is not affected by the fact the accident occurred on the east or Wisconsin side of the center of the stream. *Opsahl v Judd*, 30 M 126, 14 NW 575.

The respective states of the union are foreign to each other, so far as taking notice of what the statutory laws of those states are; and such laws are matters of fact which must be pleaded as well as provided; and as to matter to which this section relates the substantive law of the foreign state, not being in conflict with the expressed public policy of this state, governs, even though it differs from the common-law rule, which we retain. Procedure is governed by the *lex fori*. *Herrick v M. & St. L.* 31 M 11, 16 NW 413; *Myers v Chgo. St. P.* 69 M 476, 72 NW 694; *Nicholas v Burlington*, 78 M 43, 80 NW 776.

Within the maximum limit fixed by law damages are assessed to cover the pecuniary loss, and not as a solatium. A case under this statute is clearly distinguishable from one where punitive damages are allowable. *Hutchins v St. P. Mpls.* 44 M 9, 46 NW 79.

Where by statute a right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right, and will control, no matter in what forum the action is brought. *Neganbauer v Gt. Northern*, 92 M 184, 99 NW 620.

The North Dakota statute enforced. *Powell v Gt. Northern*, 102 M 448, 113 NW 1017; *Matthey v Gt. Northern*, 103 M 525, 114 NW 1133, 115 NW 1134.

In an action brought in this state to recover damages for the wrongful killing of a person in another state, the plaintiff must plead the statute of that state which creates the liability and authorizes the action to be brought by him. Procedure is governed by the *lex fori*. *Stewart v Gt. Northern*, 103 M 156, 114 NW 953; *Bond v Pennsylvania Co.* 124 M 196, 144 NW 942.

In an action brought in this state by a citizen of Nebraska under the Nebraska death by wrongful act statute, the Nebraska court temporarily restrained plaintiff, its citizen, from prosecuting the action in the Minnesota courts until its hearing on an injunction. The Minnesota court wrongfully ordered a stay until after the hearing in Nebraska. Upon an application, the supreme court of Minnesota granted a peremptory writ directing the district court to proceed with the Minnesota action. *State ex rel v District Court*, 140 M 494, 168 NW 589.

An action under this section, when defendant is a non-resident, may be brought in any county in the state. *Closeman v Feeney*, 211 M 268, 300 NW 818.

5. Complaint

The complaint must state that deceased left a widow or next of kin. *Schwarz v Judd*, 28 M 371, 10 NW 208; *Sykora v Case*, 59 M 130, 60 NW 1008; *Foot v Gt. Northern*, 81 M 493, 84 NW 301.

A general allegation of damage is sufficient; and it is not necessary to allege that the widow or next of kin had a pecuniary interest in the deceased. *Barnum v Chgo. Milwaukee*, 30 M 461, 16 NW 364; *Johnson v St. P. & Duluth*, 31 M 283, 17 NW 622.

Existence and amount of claims for support of deceased during last illness and for funeral expenses must be alleged. *Sykora v Case*, 59 M 130, 60 NW 1008.

If the action is under a foreign statute such statute must be fully pleaded and proved. *Myers v Chgo. St. Paul*, 69 M 476, 72 NW 694; *Stewart v Gt. Northern*, 103 M 156, 114 NW 953.

"The complaint alleges that deceased left surviving him a certain person as his next of kin and heir at law. It does not state the relationship; nor negative the leaving of a widow. The allegation could be made better, but it is not so bad as to vitiate the pleading." *Lohti v Oliver Iron Co.* 106 M 242, 118 NW 1018.

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In the instant case the complaint does not allege the existence of any beneficiary, and consequently does not state a cause of action. *Vander Wegen v Gt. Northern*, 114 M 118, 130 NW 70.

"Defendant's contention, that it owed deceased no duty except to refrain from wilfully injuring the watchman after knowledge of his being in a place of danger, is untenable." The holding of the trial court was erroneous. *Sheehy v M. & St. L.* 126 M 133, 147 NW 964.

The complaint alleged negligence in the performance by a landlord of his contract with a tenant to keep leased premises heated, causing death of the tenant. Although the action is based on the contract and is an action on contract, the complaint states a cause of action to recover damages for tenant's death by the wrongful acts and omissions of defendants. *Keiper v Anderson*, 138 M 392, 165 NW 237.

In an action against the agent of the president under the transportation act of 1920, each railroad corporation is a separate entity, and must be named and served. The trial court properly denied a motion to amend. *Granquist v Payne*, 155 M 217, 193 NW 126.

Recovery upon either general statute or railway statute under one complaint. 10 MLR 418, 435.

Implied assumpsit as an alternative remedy in certain classes of torts. 11 MLR 533.

See rules of district court. Minn. Statutes 1941, p. 3983.

6. Defenses

The fact that injuries resulting in death occurred on a steamboat excursion operating in violation of the Sunday law, is no defense. *Opsahl v Judd*, 30 M 126, 14 NW 575.

If for any reason the appointment of an administrator is invalid, so that he is not an administrator, that fact can be taken advantage of in any suit which he may assume to bring in that character. *Hardy's Estate*, 35 M 193, 28 NW 219; *Hutchins v St. P. Mpls.* 44 M 5, 46 NW 79.

Contributory negligence is a defense. *Judson v Gt. Northern*, 63 M 248, 65 NW 447; *Nelson v St. Paul & Duluth*, 76 M 189, 78 NW 1041, 79 NW 530.

In an action by a parent to recover for the loss of the services of a minor child, the negligence of the parent which contributed to the injury will bar a recovery. *Mattson v Minn. & No. Wis.* 98 M 296, 108 NW 517.

Where person is killed by the negligence of another, a very strong presumption arises that he exercised due care to save himself from personal injury or death. The presumption is based upon the law of nature, the universal and instinctive instinct of self-preservation. *German v Gt. Northern*, 114 M 247, 130 NW 1021; *Gilbert v City of Tracy*, 115 M 443, 132 NW 752; *LaPray v Lavioris*, 117 M 152, 134 NW 313.

The doctrine of assumption of risk does not arise, and there is no evidence of contributory negligence. *Wheeler v Tyler*, 129 M 206, 152 NW 137.

The negligence of the husband driving the car in which the wife was riding, was not imputable to her. *Kokesh v Price*, 136 M 304, 161 NW 715.

That one of the defendants who was found negligent was decedent's son and a beneficiary does not prevent recovery by the personal representative, since recovery is for the benefit of all the beneficiaries. A reduction or apportionment because of the son's negligence, might be made. *Anderson v Anderson*, 188 M 602, 248 NW 35.

Where the defense of contributory negligence by one or more beneficiaries is raised, the jury should assess the full value of the loss of life to all, and by special verdict determine who, if any, of the next of kin are guilty of contributory negligence. *Peterson v Anderson*, 183 M 86, 235 NW 534.

Where a wrongdoer causes harm to another by negligent use of a car converted by him, liability cannot be fastened on the real owner, his consent being wholly absent. *Roerich v Holt*, 201 M 586, 277 NW 274.

The wrongdoer having died at the time of the accident, any right of action dies with the person of the tortfeasor. *Eklund v Evans*, 211 M 164, 300 NW 617.

The recovery in an action for wrongful death under section 573.02, being for the payment of decedent's funeral expenses as well as for the benefit of the surviving spouse and next of kin, a judgment in a former action by plaintiff in her individual capacity to recover for personal injuries based on the same facts and issues as those in a later action brought by her in her representative capacity against the defendants 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*, 215 M 288, 9 NW(2d) 777.

The liability created under the liquor license statute has for its basis the enforcement of the statutory penalty imposed, not damages for a tort done to plaintiff. *Philips v Aretz*, 215 M 327, 10 NW(2d) 226.

Statements of decedent in wrongful death action. 22 MLR 735.

7. Former release, settlement and recovery

A release given for a valuable consideration, to the person liable, by those entitled to the benefit of the amount recoverable for death caused by a wrongful act, is a bar to a subsequent action brought by the personal representative of the deceased. *Sykora v Case*, 59 M 130, 60 NW 1008.

The personal representative of the deceased person may compromise and settle the claim, arising under section 573.02, with the person liable, without the consent of the next of kin or the probate court. *Foot v Gt. Northern*, 81 M 493, 84 NW 342.

A father, mother, and minor son were injured, and suit brought by the father and mother. A settlement was made before trial. The writings were ambiguous, and evidence sustains the findings that the settlement made did not include the minor son. *Johnson v M. & St. L.* 101 M 396, 112 NW 534.

Where a release was made by an administrator, the adverse party participating in the fraud, the release is not a bar to an action to enforce the claim by a succeeding administrator. *Aho v Jesmore*, 101 M 449, 112 NW 538; *Aho v Repub. Iron & Steel*, 104 M 322, 116 NW 590.

Where the parent without advice of counsel or direction of the court made a settlement of the claim of a minor child, the court being informed of the nature and manner of the settlement, was justified in setting aside its former order and the stipulation for settlement, and reinstating the case on the calendar. *Pacciano v Duluth, Missabe*, 102 M 21, 112 NW 885.

Where injuries have resulted in the death of the wife, and an action has been brought under the statute by the administrator for the statutory beneficiaries, and a verdict recovered therein, this constitutes no bar to the action by the husband to recover damages inflicted on him by defendant's wrong. *Magean v Gt. Northern*, 103 M 290, 115 NW 651, 946.

An agreement not to sue an employer for death of an employee, unless there can be no recovery from a third person, and unless consideration paid is returned employer, is a covenant not to sue, and not a release, and decedent's representative may enforce liability against the third person without deducting the consideration from the verdict. *Musolf v Duluth Edison*, 108 M 368, 122 NW 499.

Settlement with one of next of kin is no defense, but defendant may have the amount paid applied pro tanto in satisfaction of the judgment. *McVeigh v Mpls. & Rainy River*, 110 M 184, 124 NW 971; 113 M 450, 129 NW 852.

The right of action for the wrongful death of a person creates one single, indivisible cause of action; and a recovery against, or settlement with, one of the wrongdoers, is a bar to a subsequent action against others whose wrongful conduct may have contributed to cause the death. *Almquist v Wilcox*, 115 M 37, 131 NW 796.

The general rule is that an injured party who has accepted satisfaction, from whatever source it may have come, cannot recover again for the same injury; but the liability created under the liquor license statute has for its basis the enforcement of the statutory penalty imposed upon the liquor dealer, not damages for a tort done to plaintiff. *Philips v Aretz*, 215 M 327, 10 NW(2d) 226.

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8. Limitation of actions

NOTE. The original act, Revised Statutes 1851, Chapter 78, Section 3, patterned after Lord Campbell's Act, 1846, set the limit of recovery in case of death at \$5,000. This was increased by Laws 1911, Chapter 281, to \$7,500; and by Laws 1935, Chapter 325, to \$10,000.

The two years' limitation does not apply in this case, which may be brought at any time within six years, being an action on contract. *Blakely v LeDuc*, 22 M 476.

An action for an injury causing death must be commenced within two years after the act or omission by which the death was caused; and the period intervening between death and the appointment of a personal representative is not excluded in computing time. *Rugland v Anderson*, 30 M 386, 15 NW 676.

Where by statute a right of action is given which did not exist at common law, and the statute giving the right also fixes the time within which such right may be enforced, the time so fixed becomes a limitation or condition upon the right, and will control, no matter in what forum the action is brought. *Neganbauer v Gt. Northern*, 92 M 184, 99 NW 620.

Following *Maylone v City of St. Paul*, 40 M 406, 42 NW 88, neither defendant's city charter nor Revised Laws 1905, Section 768 (repealed), limiting the time within which certain actions may be commenced against municipalities, refer to or include actions for death by wrongful act. *Senecal v City of West St. Paul*, 111 M 253, 126 NW 826.

An action for damages for a death resulting from a negligent act committed in another state is based upon the statute of the state in which the cause of action arose, and the time within which such action may be brought is governed by the statutes of such state. *Bond v Pennsylvania Co.* 124 M 196, 144 NW 942.

In determining whether a cause of action is barred by the statute of limitations, the day on which it accrued is excluded. *Haack v Coughlan*, 134 M 78, 158 NW 908.

The statute is tolled as to a particular cause of action when the complaint is drawn and the summons therein served, even though the complaint be demurrable. *Haack v Coughlan*, 134 M 78, 158 NW 908.

The time within which an employer who has paid the compensation provided for by the workmen's compensation act for the death of his employee, whose death is caused by the wrongful act of a third person, by which payment the employer becomes subrogated to the rights of the dependents of the deceased employee, may commence an action against such third person, is that prescribed by General Statutes 1913, Section 8175, (section 573.02). *Fidelity & Casualty v St. Paul Gas*, 152 M 197, 188 NW 265.

Laws 1915, Chapter 187, covers the entire field under which a steam railroad employer engaged in intrastate commerce shall be liable for injury to its employees likewise engaged, and the two years' limitation prescribed by that act applies to all actions to recover damages for such injuries. *Herr v Chgo. Milw.* 154 M 182, 191 NW 607.

More than two years after the death occurred plaintiff amended the complaint by eliminating the allegation that decedent was an employee of defendant. A demurrer to the amended pleading, based upon the ground that a new cause of action under section 573.02, was then stated which was barred by the two-year limitation contained in said section, was properly overruled. *Edelbrock v Mpls. St. P.* 166 M 1, 206 NW 945.

In an action against a municipality the action must be commenced within one year. *Kuhlman v City of Fergus Falls*, 178 M 491, 227 NW 653.

The limitation period provided by section 573.02, is a condition precedent to the right of action for wrongful death, to be strictly complied with, and is not extended by the tolling provisions of section 541.16. *Cashman v Hedberg*, 215 M 463, 10 NW(2d) 388.

✓ Action for wrongful death; statute of limitations. 3 MLR 430.

Advisability of removing disparities from Minnesota's wrongful death statutes. Limitation of action for wrongful death. 6 MLR 584.

9. Substitution of personal representatives

The proviso added by Laws 1897, Chapter 261, only authorizes the personal representative of a deceased party to be substituted as plaintiff in the original action brought by him, and convert it by an amendment of the pleadings, if the facts warrant it, into an action for the benefit of the widow and next of kin. *Anderson v Fielding*, 92 M 42, 99 NW 357.

The surety on an administrator's bond is liable thereon where the principal converts the proceeds of a settlement of a cause of action given by section 573.02; and an administrator de bonis non may maintain an action to enforce such liability. *Vukminovich v Nickolich*, 123 M 165, 143 NW 255.

Plaintiff's intestate was killed in Minnesota while in the employ of the defendant. He was domiciled in Missouri where a general administrator was appointed. Later plaintiff appointed special administrator in Minnesota and the intervenor as his attorney commenced suit under the death by wrongful act statute. The Missouri general administrator settled the case. Later plaintiff was appointed general administrator in Minnesota. Upon appeal the order of the probate court was reversed. The intervenor upon commencement of the action had a lien for his compensation. *Castigliano v Gt. Northern*, 129 M 279, 152 NW 413.

Where a verdict was returned in favor of the defendant and a motion for a new trial made, and not finally disposed of during his life, his personal representative may be substituted as plaintiff as a matter of course under section 573.02. *Wilson v Anderson*, 145 M 274, 177 NW 130.

10. 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. *Shaber v St. P. Mpls.* 28 M 103, 9 NW 575; *Schwarz v Judd*, 28 M 371, 10 NW 208; *Opsahl v Judd*, 30 M 126, 14 NW 575; *Scheffler v M. & St. L.* 32 M 518, 21 NW 711; *Robel v Chgo. Milw.* 35 M 84, 27 NW 305; *Clapp v M. & St. L.* 36 M 6, 29 NW 340; *Bolinger v St. P. & Dul.* 36 M 418, 31 NW 856; *Phelps v Win. & St. P.* 37 M 485, 35 NW 273; *Jacobson v St. P. & Dul.* 41 M 206, 42 NW 932; *O'Malley v St. P. Mpls.* 43 M 289, 45 NW 440; *Deisen v Chgo. St. P.* 43 M 454, 45 NW 864; *Hutchins v St. P. Mpls.* 44 M 5, 46 NW 79; *Gunderson v N. W. Elev.* 47 M 161, 49 NW 694; *Strutzel v St. P. City Ry.* 47 M 543, 50 NW 690; *Sieber v Gt. Northern*, 76 M 269, 79 NW 95; *Gray v St. P. City Ry.* 87 M 280, 91 NW 1106; *Bremer v Mpls. & St. P.* 96 M 469, 105 NW 494; *Holden v Gt. Northern*, 103 M 98, 114 NW 365; *Peterson v Mchts. Elev.* 111 M 105, 126 NW 534; *McVeigh v Mpls. & Rainy R.* 113 M 450, 129 NW 852; *Bodin v Dul. St. Ry.* 117 M 513, 136 NW 302; *Boos v M. & St. L.* 127 M 381, 149 NW 660; *Lundeen v Gt. Northern*, 128 M 332, 150 NW 1088; *Nash v M & St. L.* 131 M 166, 154 NW 957; *Falk v Chgo. & N. W.* 133 M 41, 157 NW 904; *Hillstrom v City of St. P.* 134 M 451, 159 NW 1076; *Zemmer v Gt. Northern*, 135 M 37, 159 NW 1087; *Swift v Johnson*, 138 F 867.

Verdicts held not excessive: *Luther v Dornack*, 179 M 528, 229 NW 784; *Anderson v Anderson*, 188 M 602, 248 NW 35; *Christensen v Pestorius*, 189 M 548, 250 NW 363; *Harris v Raymer*, 189 M 599, 250 NW 577; *Albrecht v Potthoff*, 192 M 557, 257 NW 377; *Gross v Gen'l Invest.* 194 M 23, 259 NW 557; *Dickey v Haes*, 195 M 292, 262 NW 869; *Hartel v Warren*, 196 M 465, 265 NW 282; *Hoppe v Peterson*, 196 M 538, 265 NW 338; *Prescott v Swanson*, 197 M 325, 267 NW 251; *Koski v Muccilli*, 201 M 549, 277 NW 229; *Paine v Gamble*, 202 M 462, 279 NW 257;

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McKeam v Argetsinger, 202 M 595, 279 NW 402; Ekdahl v Minn. Utilities, 203 M 374, 281 NW 517; Eystad v Stambaugh, 203 M 392, 281 NW 526; Thoires v Pounsford, 210 M 462, 299 NW 16.

The measure of damages is the money value to the surviving spouse, if any, and the next of kin, of the continuance of the decedent's life, measured by the money value of what he would have contributed to them in money, property, or services during the remainder of his life. Wiester v Kaufer, 188 M 344, 247 NW 237.

The husband's cause of action for medical expenses and nursing incurred in attempting to cure his wife of the injuries, survives the death of the wife and the death of the wrongdoer. Fowlie v First Mpls. Trust, 184 M 82, 237 NW 846.

Damage not excessive. Fluctuation of the money market considered. Kerzie v Rodine, 216 M 44, 11 NW(2d) 771; Bimberg v Northern Pacific, 217 M 187, 14 NW(2d) 410; Moeller v St. Paul City Railway, 218 M 353, 16 NW(2d) 289.

Remarriage of surviving spouse cannot be considered in mitigation of damages. 4 MLR 436.

11. Negligence

There was no reasonable ground to anticipate that leaving a piece of wire in the wall would result in injury or death; and no proof that the lightning reached and killed the deceased over the wire. Alling v N. W. Bell Co. 156 M 60, 194 NW 313.

The trial court was warranted in directing a verdict for defendant. Lind v Gt. Northern, 171 M 486, 214 NW 763.

Contributory negligence on the part of the mother of a child seven years old, which child was killed by an automobile on a public highway, was under the circumstances a question for the jury. Dickey v Haes, 195 M 292, 262 NW 869.

The question of contributory negligence was for the jury and not to the court. Duncanson v Jeffries, 195 M 347, 263 NW 92; Szyperski v Swift & Co. 198 M 154, 269 NW 401.

Where representative would be sole beneficiary, his contributory negligence bars recovery. Jenson v Glemaker, 195 M 556, 263 NW 624.

One suddenly confronted by a peril, through no fault of his own, who in the attempt to escape does not choose the safest way, should not be held negligent because of such choice, unless it was so hazardous that a prudent person would not have made it. Dahlstrom v Hurtig, 209 M 72, 295 NW 508.

12. Presumption

Where there are no eye witnesses, the presumption is that the decedent was in the exercise of due care for his own safety. Schendl v Chgo. Milw. 165 M 223, 206 NW 436; Paine v Gamble, 202 M 463, 279 NW 257.

Where there is no evidence of contributory negligence, the presumption of due care must control. Bengstorff v Winston Bros. 167 M 290, 208 NW 995; Vogel v Nash, 196 M 509, 265 NW 350.

Contributory negligence must be proved by a fair preponderance of evidence. One who loses his life in an accident is presumed to have exercised due care for his own safety. The presumption may be overcome by evidence and the question is for the jury. Aubin v Dul. St. Ry. 169 M 342, 211 NW 580; Anderson v Kelley, 196 M 578, 265 NW 821; Szyperski v Swift & Co. 198 M 160, 269 NW 401.

Where the relation is such that the beneficiary would have been entitled of right to support from decedent, law presumes life to be of some value to claimant. Youngquist v Mpls. St. Ry. 102 M 501, 114 NW 259.

The presumption that a deceased person exercised due care for his own safety yields to credible undisputed testimony, even though circumstantial, and does not remain to create an issue of fact. Faber v Herdliska, 194 M 321, 260 NW 500; Laiti v MacNaughton, 199 M 167, 271 NW 481; Ekdahl v Minn. Utilities, 203 M 374, 281 NW 517; Luce v Gt. Northern, 203 M 470, 281 NW 812.

The presumption of due care is entirely overcome by evidence that decedent's negligence contributed to his death. Gelbert v Boehland, 200 M 332, 274 NW 245, 275 NW 299.

The presumption that the deceased exercised due care, being disputable, may be overcome by any adequate evidence. *Hack v Johnson*, 201 M 9, 275 NW 381; *Oxborough v Murphy*, 194 M 335, 260 NW 305.

The court charged "there is a presumption of law that the decedent was in the exercise of due care". In an action for wrongful death, such instruction was not improper. *Bimberg v Northern Pacific*, 217 M 187, 14 NW(2d) 410.

Elements of compensation for the death of a minor child. 16 MLR 410.

13. Evidence

The presumption that one who was killed while crossing a railway track looked and listened before attempting to cross it is destroyed where the plaintiff introduces direct and affirmative evidence as to exactly what occurred, and where it also appears from the undisputed evidence that if the deceased had looked and listened before going upon the crossing he must have seen and heard the train approaching. *Carlson v Chgo. & N. W.* 96 M 504, 105 NW 555.

The fact that a patient dies immediately after an operation is not of itself evidence of negligence on the part of the operating surgeon. *Staloch v Holm*, 100 M 276, 111 NW 264.

Decedent died of peritonitis within five days of childbirth, and five months after a railroad accident. Plaintiff failed to prove the accident was the cause of the peritonitis which caused her death. *Magean v Gt. Northern*, 102 M 399, 113 NW 1016.

Evidence sufficient to sustain a finding that the negligence of defendant in directing decedent to fix a hot box on a freight car, and then starting the train without warning, was the cause of decedent's death. *Moores v Northern Pacific*, 108 M 100, 121 NW 392.

In an action for death resulting from dangerous machinery left unguarded, the location of the machinery, the sufficiency of the guards, and the necessity or liability of the operator coming in contact with it, are all substantial considerations to be submitted to the jury for determination. *Kerling v Van Dusen*, 109 M 481, 124 NW 235, 372.

A verdict that an injury due to the negligence of the defendant was the proximate cause of death of the person injured cannot rest upon mere conjecture. *Coultas v Hennepin Paper*, 114 M 312, 131 NW 319.

There was no assumption of risk or contributory negligence, and the negligence of the defendant caused the injury. *Murphy v Twin City Taxicab*, 122 M 363, 142 NW 716; *Nillson v Barnett*, 123 M 308, 143 NW 789; *Mitton v Cargill Elev.* 124 M 65, 144 NW 434; *Howell v Gt. Northern*, 125 M 137, 145 NW 804; *Hutchins v Sleepy Eye Co.* 125 M 362, 147 NW 279; *McCull v Cameron*, 126 M 144, 148 NW 108; *Rademacher v Pioneer Tractor*, 127 M 172, 149 NW 24; *Gronlund v Cudahy*, 127 M 575, 150 NW 176; *Velin v Lauer Bros.* 128 M 10, 150 NW 169; *Kimball v City of St. P.* 128 M 95, 150 NW 379; *Diehl v Walpert, Davis Co.* 129 M 77, 151 NW 541; *Fitzgerald v Armour Co.* 129 M 81, 151 NW 539; *Kludzinski v Gt. Northern*, 130 M 222, 153 NW 529; *Richardson v Weiss*, 152 M 391, 188 NW 1008.

The contributory negligence of the decedent was a question for the jury. *Green v Gt. Northern*, 123 M 279, 143 NW 722.

It was error to exclude evidence of decedent's habits, his record for non-support of family, and his having served a term in the workhouse. This goes to the question of the amount of damage to be awarded. *Holmberg v Murphy*, 167 M 232, 208 NW 808.

It is not safe to say that evidence of the pecuniary condition of the next of kin is always admissible or always inadmissible. It must be left to the discretion of the trial court. *Luther v Dornack*, 179 M 532, 229 NW 784.

It was error for the trial court to dismiss the case at the close of plaintiff's case. A person killed in an accident in the absence of witnesses is presumed to have exercised due care. *Daugherty v Garrick*, 184 M 436, 239 NW 153.

It was not reversible error to refuse to receive in evidence an inventory filed in the probate court in the estate of decedent. While competent, its materiality in this case was nil. *Quinn v Zimmer*, 184 M 595, 239 NW 902.

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Where the causal connection between defendant's wrongful act and decedent's death is merely conjectural and speculative, the court should direct a verdict for the defendant. *Peterson v Langsten*, 186 M 101, 242 NW 549.

In an action by a husband for wrongful death of the wife, evidence of his use of intoxicants, together with testimony indicating plans for divorce, is admissible and relevant to the question of her value to him had she lived. *Peterson v Pete Erickson Co.* 186 M 586, 244 NW 68.

Evidence sustains a finding that death of decedent from lobar pneumonia 52 days after the accident was caused by it. *Anderson v Anderson*, 188 M 602, 248 NW 35.

Mortality tables have probative value, and in this case are admissible for certain purposes. *Albrecht v Potthoff*, 192 M 565, 257 NW 377.

While the amount of insurance collected and the value of property inherited from decedent is not admissible for the purpose of fixing the amount of damages, it was admissible to controvert plaintiff's testimony that she had no money with which to redeem property under foreclosure. *Wright v Engelbert*, 193 M 509, 259 NW 75.

The jury's verdict is supported by evidence tending to prove that mineral oil containing harmful matter was sold to plaintiff for family use, and that it caused death of the child. *Berry v Daniels*, 195 M 366, 263 NW 115.

When plaintiff's intestate was killed when she was caught on the door handle of defendant's moving automobile, there is no evidence to support a verdict by the jury. *Markgraf v McMillan*, 197 M 571, 267 NW 515.

Where the decedent died of lobar pneumonia five weeks after the accident, the facts do not support a verdict for plaintiff. *Honer v Nicholson*, 198 M 55, 268 NW 852.

In an action by husband for death of wife, evidence that since her death he has remarried, and as to the value of her services is error. *Lorberbaum v Christopher*, 198 M 292, 269 NW 646.

In the absence of evidence showing otherwise, it is presumed that decedent exercised due care for his own safety. *Theisen v Minn. Power*, 200 M 521, 274 NW 617.

Proof on the fact issue of proximate cause being wholly circumstantial, the jury's finding for the affirmative on that issue must be sustained, the burden being upon the plaintiff. *Paine v Gamble*, 202 M 467, 279 NW 257.

No error in showing cash value of deceased's life, based upon his capacity, earnings, and life expectancy, and commenting thereon to the jury. *McKeown v Argetsinger*, 202 M 595, 279 NW 402.

In an action for death resulting from crossing collision in Minnesota, if, under the law of Minnesota, there was evidence which would justify a recovery by plaintiff upon any of the grounds of negligence alleged, trial court did not err in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict. *Roth v Swanson*, 145 F(2d) 263.

The defendant, in a wrongful death case, in a street car accident, has the burden of proving contributory negligence. *Moeller v St. Paul City Railway*, 218 M 353, 16 NW(2d) 289.

14. Distribution

The cause of action does not belong to the deceased in his lifetime, but only accrues on his death. The proceeds of the action are not a part of his estate. The statute gives the right of action to the personal representative as a matter of convenience. The probate court has no jurisdiction and the personal representative may make a valid settlement without probate court approval. *Aho v Republic Iron Co.* 104 M 326, 116 NW 590.

The recovery does not inure to the benefit of the estate of the deceased person, but solely to the benefit of his next of kin, and distribution thereof rests exclusively with the district court. *Moyer v Moyer*, 106 M 484, 119 NW 217.

Settlement with one of next of kin is no defense in an action by another, but defendant may apply to court to have the money paid applied pro tanto on

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the share of the one with whom settlement was made. *McVeigh v Mpls. & Rainy River*, 110 M 184, 124 NW 971.

An action need not be commenced in order to confer jurisdiction on the district court. The court has power and duty of distribution in case of an amicable settlement. *State ex rel v District Court*, 114 M 364, 131 NW 381.

Discharge of administrator by probate court does not affect his prosecution of the action in district court. *Turner v Mpls. St. Ry.* 153 M 509, 190 NW 986.

Money received by personal representative under this section does not belong to the estate, but to those named in the statute. The widow cannot select her statutory allowance. Jurisdiction of distribution is solely in district court. The distribution follows the same rule as the personal property of persons dying intestate. *Masek v Hedlund*, 162 M 291, 202 NW 732.

Recovery is based entirely on pecuniary loss caused by the death of decedent. The element of support or dependency is not material except to show loss. *Masek v Hedlund*, 162 M 291, 202 NW 732.

It is optional with the employer, when subrogated to the rights of the employee or his dependents, by application of the workmen's compensation act, to bring an action or continue one already commenced, but the action is not for his exclusive benefit, for the employee or his dependents have an interest in the amount recovered to the extent above stated. *McGuigan v Allen*, 165 M 390, 206 NW 714.

Even though decedent had retired and was following no earning occupation; and his next of kin would inherit his property, a recovery may still be had. *Wiester v Kaufer*, 188 M 342, 247 NW 237.

It is not to be assumed that the trial judge, who has plenary power in respect of the distribution of the funds, will permit the negligent father to share. *Luck v Mpls. St. Ry.* 191 M 517, 254 NW 609.

Even though the mother had deserted the family and in fact suffered no financial loss by death of child, after certain deductions she is entitled to an equal share of the residue with her husband. *Murphy v Duluth-Superior*, 200 M 345, 274 NW 515.

Funeral expenses ordered paid out of the amount recovered. *Kirschsten's Estate*, 213 M 4, 4 NW(2d) 633; *Schmitt v Emery*, 215 M 288, 9 NW(2d) 777.

Instalments of compensation accruing prior to the death of the workman but not paid before his death, do not become part of his estate, nor vest in his dependents, but are to be paid to such as the industrial commission shall order without probate proceedings. *Fehland v City of St. P.* 215 M 95, 9 NW(2d) 349.

Distribution under wrongful death statutes of judgment obtained under federal employers' liability act. 7 MLR 416.

Illegitimacy; interpretation of "children", "next of kin" and "parents" under wrong death statute. 27 MLR 315.

573.03 DEFAULT JUDGMENT; JUDGMENT NOT LIEN UPON REAL ESTATE.

HISTORY. R.S. 1851 c. 78 ss. 5, 8; P.S. 1858 c. 68 ss. 5, 8; G.S. 1866 c. 77 ss. 3, 4; G.S. 1878 c. 77 ss. 3, 4; G.S. 1894 s. 5914, 5915; R.L. 1905 s. 4504; G.S. 1913 s. 8176; G.S. 1923 s. 9658; M.S. 1927 s. 9658.

573.04 EXECUTOR DE SON TORT, TO WHOM LIABLE.

HISTORY. R.S. 1851 c. 78 s. 10; P.S. 1858 c. 68 s. 10; G.S. 1866 c. 77 s. 5; G.S. 1878 c. 77 s. 5; G.S. 1894 s. 5916; R.L. 1905 s. 4505; G.S. 1913 s. 8177; G.S. 1923 s. 9659; M.S. 1927 s. 9659.

An administrator cannot maintain an action for trespass upon real property committed after the death of an intestate unless he has first asserted his right under the statute by taking possession of such real property. If he takes possession he may then maintain an action for a trespass committed thereon before he took possession, and after the death of the decedent. Possession and letters date back to the death of his intestate. *Noon v Finnegan*, 29 M 418, 13 NW 197, 32 NW 81, 19 NW 391.

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573.05 ACTION BY FOREIGN EXECUTOR.

HISTORY. Feb. 27, 1858; P.S. 1858 c. 68 s. 34; G.S. 1866 c. 77 s. 6; G.S. 1878 c. 77 s. 6; G.S. 1894 s. 5917; R.L. 1905 s. 4506; G.S. 1913 s. 8178; G.S. 1923 s. 9660; M.S. 1927 s. 9660.

An executor in another state, the will not being proved nor letters issued in this state, although an authenticated copy of the letters and appointment in such other state be filed in the proper probate in this state, cannot maintain an action in this state for trespass upon real estate here. (Later modified.) *Pott v. Pennington*, 16 M 509 (460); *First National v Kidd*, 20 M 238 (211).

The failure of the foreign administrator to file as required by General Statutes 1866, Chapter 77, Section 6 (section 573.05), cannot be cured (if proper objection is taken), by filing after such commencement. *Fogle v Schaeffer*, 23 M 304.

A foreign administrator may be admitted to defend an action pending against his intestate at the time of his decease. *Brown v Brown*, 35 M 191, 28 NW 238.

Power of sale under a foreign will. *Babcock v Collins*, 60 M 73, 61 NW 1020.

A foreign executor, without complying with the statutes of this state, has authority to receive payment voluntarily made. *Dexter v Berge*, 76 M 216, 78 NW 1111.

Failure to file affects merely his capacity to sue in our courts, and is waived, unless objection is taken by answer or demurrer. *Pope v Waugh*, 94 M 502, 103 NW 500.

Action for wrongful death under Nebraska statute. Nebraska court temporarily restrained plaintiff, a resident of Nebraska, from prosecuting the action in Minnesota courts until a hearing of an application for an injunction. The Minnesota court on hearing ordered a stay. Upon application the supreme court issued a writ of mandamus compelling the district court of Hennepin county to proceed with the suit. *State ex rel v District Court*, 140 M 494, 168 NW 589.

A foreign executor or administrator is not authorized by section 573.05 to maintain an action based upon possessory rights in the real estate of the decedent. *Bowen v Willard*, 203 M 289, 281 NW 256.

Right of foreign administrator to sue on negotiable paper. 8 MLR 544.

Statutory right of foreign executors and administrators to sue; effect on right to possession of realty. 23 MLR 373.

573.06 NEXT OF KIN; LIABILITY FOR DEBTS; CONTRIBUTION.

HISTORY. R.S. 1851 c. 78 ss. 11 to 13; P.S. 1858 c. 68 ss. 11 to 13; G.S. 1866 c. 77 ss. 7 to 9; G.S. 1878 c. 77 ss. 7 to 9; G.S. 1894 ss. 5918 to 5920; R.L. 1905 s. 4507; G.S. 1913 s. 8179; G.S. 1923 s. 9661; M.S. 1927 s. 9661.

A contingent claim arising on contract against the estate of a decedent, which does not become absolute and capable of liquidation before the time limited for creditors to present their claims to the probate court for allowance, is not barred because not so presented; and the holder of such claim, after it becomes absolute, may maintain an action against the heirs, next of kin, legatees, or devisees to whom the residue of the estate has been distributed, to recover such claim to the extent of the estate received by them. *Hantzch v Massolt*, 61 M 361, 63 NW 1069; *Oswald v Pillsbury*, 61 M 520, 63 NW 1072; *Lake Phalen v Lindeke*, 66 M 209, 68 NW 974; *Dent v Mattison*, 70 M 519, 73 NW 416, 73 M 170, 75 NW 1041; *Markell v Ray*, 75 M 138, 77 NW 788.

No greater amount can be recovered than the legatees proportionate share of the debt. *Hunt v Grant*, 87 M 189, 91 NW 485.

If a contingent claim becomes absolute before final distribution, but after the time limited for filing claims, application should be made to the probate court for leave to present and file the same against the estate. *Hunt v Burns*, 90 M 172, 95 NW 1110.

The finding that none of the proceeds of the lot ever came to the estate of the deceased or into the hands of his heirs or administrator is fully sustained; and such being the case, neither the heirs nor the administrator can be held liable. *Klessig v Lea*, 158 M 14, 196 NW 655.

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The administrator, before his discharge, was not required by the Utah law to retain or pay into court any money or property in anticipation of the assessment, then but a possible future liability, and was not guilty of devastavit. *Forrest v Jack*, 294 US 164.

Liability for assessment against shareholder of national bank, a statutory liability, is not barred where the receiver of the bank did not know of shareholder's death until too late to file claim prior to closing of estate. *Gilbertson v McCarthy*, 32 F(2d) 667.

Where the decedent during his lifetime escaped taxation on money and credits, they may be assessed and taxed after the estate has been distributed and collected from the heirs and legatees. The personal representative is personally liable if he had knowledge of such omission during administration and is moreover personally liable if the money and credits tax is not paid for the years covered by administration. 1936 OAG 380, Jan. 7, 1935 (614f).

Contractual obligations affecting wills. 19 MLR 105.

Summary probate proceedings. 20 MLR 105.

573.07 LEGATEES; WHEN LIABLE.

HISTORY. R.S. 1851 c. 78 s. 14; P.S. 1858 c. 68 s. 14; G.S. 1866 c. 77 s. 10; G.S. 1878 c. 77 s. 10; G.S. 1894 s. 5921; R.L. 1905 s. 4508; G.S. 1913 s. 8180; G.S. 1923 s. 9662; M.S. 1927 s. 9662.

See *Hunt v Grant*, 87 M 189, 91 NW 485; *Hunt v Burns*, 90 M 172, 95 NW 110.

573.08 COSTS; JUDGMENT, WHEN DISCHARGED.

HISTORY. R.S. 1851 c. 78 ss. 15, 16; P.S. 1858 c. 68 ss. 15, 16; G.S. 1866 c. 77 ss. 11, 12; G.S. 1878 c. 77 ss. 11, 12; G.S. 1894 ss. 5922, 5923; R.L. 1905 s. 4509; G.S. 1913 s. 8181; G.S. 1923 s. 9663; M.S. 1927 s. 9663.

See *Dent v Mattson*, 73 M 170, 75 NW 1041; *Hunt v Burns*, 90 M 172, 95 NW 1110.

573.09 HEIRS AND DEVISEES; WHEN LIABLE.

HISTORY. R.S. 1851 c. 78 ss. 17 to 19; P.S. 1858 c. 68 ss. 17 to 19; G.S. 1866 c. 77 ss. 13 to 15; G.S. 1878 c. 77 ss. 13 to 15; G.S. 1894 ss. 5924 to 5926; R.L. 1905 s. 4510; G.S. 1913 s. 8182; G.S. 1923 s. 9664; M.S. 1927 s. 9664.

General Statutes 1866, Chapter 77, and General Statutes 1866, Chapter 53, are to be read in connection with each other as one body of law relating to the same subject matter (clarified by the Probate Code, Laws 1889, Chapter 46). In this case the complaint does not state a cause of action under either law, nor on the general principles of equity. *Bryant v Livermore*, 20 M 313 (271).

A creditor having a claim against the estate of a deceased person is barred of his right to recover against the heir, if he neglects to present his claim for allowance in the course of the probate proceedings. *Hill v Nichols*, 47 M 382, 50 NW 367.

See, *Hunt v Grant*, 87 M 189, 91 NW 485; *Hunt v Burns*, 90 M 172, 95 NW 1110; *Klessig v Lea*, 158 M 14, 196 NW 655.

See where claim is for labor on the homestead. *Ramstadt v Thunen*, 136 M 222, 161 NW 413; *Anderson v Johnson*, 208 M 155, 293 NW 131.

Suit by receiver of insolvent national bank against legatees of deceased's estate to enforce stockholders' liability on stock owned by testator, does not lien when bill was filed more than one year after final settlement of the estate and more than one year after final settlement of the estate and more than one year after comptroller made the assessment. *Matteson v Dent*, 176 US 521; *Deitrick v Crowley*, 10 F(2d) 441.

573.10 APPORTIONMENT OF LIABILITY; CONTRIBUTION.

HISTORY. R.S. 1851 c. 57 ss. 53, 54; P.S. 1858 c. 44 ss. 53, 54; G.S. 1866 c. 77 ss. 16, 17; G.S. 1878 c. 77 ss. 16, 17; G.S. 1894 ss. 5927, 5928; R.L. 1905 s. 4511; G.S. 1913 s. 8183; G.S. 1923 s. 9665; M.S. 1927 s. 9665.

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ACTIONS; PERSONAL REPRESENTATIVES AND HEIRS 573.17

In the instant case the complaint does not state a cause of action under General Statutes 1866, Chapter 53, or under General Statutes 1866, Chapter 77. *Bryant v Livermore*, 20 M 313 (271).

An action to charge the distributees of the estate of a deceased stockholder with his stockholder's liability, to the extent of the estate received by them, is barred in one year after the corporation goes into insolvency. *Markell v Ray*, 75 M 138, 77 NW 788.

Tenants in common, each owing an individual one-half interest in the stock, each can be held for not to exceed one-half of the liability. *Markell v Ray*, 75 M 138, 77 NW 788.

The statute of limitations (then described in latter part of General Statutes 1894, Section 5927, now succeeded by section 573.10) is not set in motion in favor of an heir, devisee, or legatee by the allowance and establishment of a claim on account against a guardian upon whose bond his decedent was a surety. *Holden v Turrell*, 86 M 214, 90 NW 395.

Only legatee's proportionate share of the debt can be collected. *Hunt v Grant*, 87 M 189, 91 NW 485.

573.11 NEW PARTIES; ISSUES; APPORTIONMENT.

HISTORY. R.S. 1851 c. 57 ss. 55, 56; P.S. 1858 c. 44 ss. 55, 56; G.S. 1866 c. 77 ss. 18, 19; G.S. 1878 c. 77 ss. 18, 19; G.S. 1894 ss. 5929, 5930; R.L. 1905 s. 4512; G.S. 1913 s. 8184; G.S. 1923 s. 9666; M.S. 1927 s. 9666.

See *Bryant v Livermore*, 20 M 313 (271).

573.12 ESTATE OF DECEASED HEIRS, WHEN LIABLE.

HISTORY. R.S. 1851 c. 57 s. 57; P.S. 1858 c. 44 s. 57; G.S. 1866 c. 77 s. 20; G.S. 1878 c. 77 s. 20; G.S. 1894 s. 5931; R.L. 1905 s. 4513; G.S. 1913 s. 8185; G.S. 1923 s. 9667; M.S. 1927 s. 9667.

573.13 CONTRIBUTION AMONG HEIRS.

HISTORY. R.S. 1851 c. 57 s. 58; P.S. 1858 c. 44 s. 58; G.S. 1866 c. 77 s. 21; G.S. 1878 c. 77 s. 21; G.S. 1894 s. 5932; R.L. 1905 s. 4514; G.S. 1913 s. 8186; G.S. 1923 s. 9668; M.S. 1927 s. 9668.

573.14 PRIORITY AMONG DEBTS.

HISTORY. R.S. 1851 c. 78 s. 20; P.S. 1858 c. 68 s. 20; G.S. 1866 c. 77 s. 22; G.S. 1878 c. 77 s. 22; G.S. 1894 s. 5933; R.L. 1905 s. 4515; G.S. 1913 s. 8187; G.S. 1923 s. 9669; M.S. 1927 s. 9669.

On assignment for creditors, assignee's property in effect became in custodia legis, and, on assignee's allowance of employee's wage claims, they became fixed obligation under state laws, entitled to priority on assignor's subsequent bankruptcy. *Sollars Estate*, 5 F. Supp. 484.

573.15 NO PREFERENCE BETWEEN DEBTS OF SAME CLASS.

HISTORY. R.S. 1851 c. 78 s. 21; P.S. 1858 c. 68 s. 21; G.S. 1866 c. 77 s. 23; G.S. 1878 c. 77 s. 23; G.S. 1894 s. 5934; R.L. 1905 s. 4516; G.S. 1913 s. 8188; G.S. 1923 s. 9670; M.S. 1927 s. 9670.

573.16 DEFENSES; OTHER DEBTS OUTSTANDING OR PAID.

HISTORY. R.S. 1851 c. 78 ss. 22 to 24; P.S. 1858 c. 68 ss. 22 to 24; G.S. 1866 c. 77 ss. 24 to 26; G.S. 1878 c. 77 ss. 24 to 26; G.S. 1894 ss. 5935 to 5937; R.L. 1905 s. 4517; G.S. 1913 s. 8189; G.S. 1923 s. 9671; M.S. 1927 s. 9671.

573.17 REAL PROPERTY DESCENDED; LIEN OF JUDGMENT.

HISTORY. R.S. 1851 c. 78 s. 25; P.S. 1858 c. 68 s. 25; G.S. 1866 c. 77 s. 27; G.S. 1878 c. 77 s. 27; G.S. 1894 s. 5938; R.L. 1905 s. 4518; G.S. 1913 s. 8190; G.S. 1923 s. 9672; M.S. 1927 s. 9672.

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573.18 ACTIONS; PERSONAL REPRESENTATIVES AND HEIRS

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Summary probate proceedings; homestead. 20 MLR 105.

573.18 PERSONAL LIABILITY; ALIENATION BEFORE SUIT.

HISTORY. R.S. 1851 c. 78 s. 26; P.S. 1858 c. 68 s. 26; G.S. 1866 c. 77 s. 28; G.S. 1878 c. 77 s. 28; G.S. 1894 s. 5939; R.L. 1905 s. 4519; G.S. 1913 s. 8191; G.S. 1923 s. 9673; M.S. 1927 s. 9673.

573.19 HEIRS AND DEVISEES; LIMIT OF RECOVERY.

HISTORY. R.S. 1851 c. 78 s. 27; P.S. 1858 c. 68 s. 27; G.S. 1866 c. 77 s. 29; G.S. 1878 c. 77 s. 29; G.S. 1894 s. 5940; R.L. 1905 s. 4520; G.S. 1913 s. 8192; G.S. 1923 s. 9674; M.S. 1927 s. 9674.

573.20 DEVISEES, WHEN LIABLE; LIMITATIONS.

HISTORY. R.S. 1851 c. 78 ss. 28 to 30; P.S. 1858 c. 68 ss. 28 to 30; G.S. 1866 c. 77 ss. 30 to 32; G.S. 1878 c. 77 ss. 30 to 32; G.S. 1894 ss. 5941 to 5943; R.L. 1905 s. 4521; G.S. 1913 s. 8193; G.S. 1923 s. 9675; M.S. 1927 s. 9675.

573.21 DEVISEES; APPLICATION.

HISTORY. R.S. 1851 c. 78 s. 31; P.S. 1858 c. 68 s. 31; G.S. 1866 c. 77 s. 33; G.S. 1878 c. 77 s. 33; G.S. 1894 s. 5944; R.L. 1905 s. 4522; G.S. 1913 s. 8194; G.S. 1923 s. 9676; M.S. 1927 s. 9676.