GENERAL STATUTES

OF THE

STATE OF MINNESOTA

IN FORCE

JANUARY 1, 1889.

COMPLETE IN TWO VOLUMES.

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WITH

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state be filed in the proper probate court in this state, cannot maintain an action in this state for trespass upon real estate here. Pott v. Pennington, 16 Minn. 509, (Gil. 460.)
See Crippen v. Dexter, 13 Gray, 330.

§ 23. Omission to provide for child.

Testator's will contained certain specific legacies and devises, and devised and bequeathed all the remainder of his property to his wife, with this clause: "And her rights under this residuary provision shall not be affected or changed by the birth of any child of mine, if any shall be born to me before or after my decease." Held to manifest an intention not to provide for a child born after the execution of the will. Prentiss v. Prentiss, 14 Minn. 18, (Gil. 5.)

§ 35. Recording will.

Cited, Spencer v. Sheehan, 19 Minn. 345, (Gil. 298.)

*§ 37. Probate proceedings—Defective notice—Limitation.

That any will duly executed, and which has heretofore been actually admitted to probate by any probate court within this state, whether proper notice thereof had previously been given or not, and which will, or a certified copy thereof, has been of record in the office of the register of deeds of the county where the real estate thereby affected was at the time of the making of such record, or is situate, for a period of not less than ten years prior to the passage of this act, may be read in evidence in any court within this state, and shall have the same force and effect as if the proper notice of probate of such will had been given, and no right, title, or estate in lands situate within this state derived under such will shall be held invalid or set aside by reason of any defect in such notice, unless the action in which the validity of such title shall be called in question be commenced, or the defense alleging its invalidity be interposed, within ten years after the actual recording of such will as aforesaid: *provided*, that persons under disability, by reason of being minors, insane persons, idiots, persons in captivity, or in any country with which the United States were at war when such record was made, may commence such action or interpose such defense at any time within ten years after the removal of such disability: *provided, further*, that such action shall be commenced with reasonable diligence in all cases. (1887, *c.* 202, § 1.*)

*§ 38. Act not retrospective.

That nothing herein contained shall be construed to apply to any action or proceeding now pending in which the validity of such probate is involved. (*Id.* § 2.)

CHAPTER 49.

PROBATE COURTS.†

§ 2. Jurisdiction.

When it appears that a probate court has jurisdiction of the subject of the appointment of an administrator of the estate of a person deceased, the letters of administration issued by such court are, in a collateral proceeding, conclusive evidence of the due

*"An act defining the force and effect of wills heretofore admitted to record, and to limit the time within which the same may be questioned." Approved March 3, 1887. Took effect from and after January 1, 1888.

†The duties of commissioners are imposed upon probate judges by *§§ 20, 20*a*, *c.* 53, *post*.
For percentages to be paid into the county treasuries by executors, administrators, and guardians in proceedings for the settlement of estates, see *ante*, *c.* 7, *§§ 8, 8*a*.
See provision of Gen. Laws 1887, *c.* 159, in relation to the revision and codification of probate laws.

appointment of the person therein named as administrator. Moreland v. Lawrance, 23 Minn. 84.

SUBD. 5. Where a county "established," but not organized, nor authorized to have a probate court, is attached for judicial purposes to an "organized" county, the probate court of the latter has jurisdiction over the former. State v. Wilcox, 24 Minn. 143.

§ 3. Further jurisdiction.

General powers and jurisdiction of probate courts. Sitzman v. Pacquette, 13 Wis. 291; Chase v. Whiting, 30 Wis. 544; Tryon v. Farnsworth, Id. 577; Melia v. Simmons, 45 Wis. 335.

Power to relieve against probate. Holden v. Meadows, 31 Wis. 284; Archer v. Meadows, 33 Wis. 166.

Power to annul and revoke orders and correct proceedings. Brunson v. Burnett, 2 Pin. 185; In re Fisher, 15 Wis. 511; Betts v. Shotton, 27 Wis. 667.

SUBD. 2. An administrator cannot resign his trust. An acceptance by the probate court, indorsed on the resignation, and filed, there being no entry in the record of appointments of administrators, etc., and orders relating to the same, and nothing further being done, is not equivalent to an order of removal, or revoking the letters. Rumrill v. First Nat. Bank, 28 Minn. 202, 9 N. W. Rep. 731.

SUBD. 6. A probate court of this state may properly appoint a guardian for a non-resident minor, as respects any estate which the minor may have in the county where such probate court is established. If a general guardian be appointed in such circumstances, the appointment is good to the extent of the minor's estate within the jurisdiction in which it is made. Davis v. Hudson, 29 Minn. 27, 11 N. W. Rep. 136.

SUBD. 7. Jurisdiction over the general subject of guardianship, as well of insane persons as of minors, or others, and including appointment of guardians, is vested by the constitution in the probate courts. The acts of the legislature authorizing judges of probate to examine and commit insane persons to the hospital for the insane merely regulate the exercise of the jurisdiction, and are valid. State v. Wilcox, 24 Minn. 143.

PROCEEDINGS IN PROBATE COURT.

§ 7. Proceedings—Powers of judge.

The written files of a probate court are, by this section, placed on the same footing as records as entries in the minutes. Dayton v. Mintzer, 22 Minn. 393.

See In re Brown, 32 Minn. 443, 21 N. W. Rep. 474.

*§ 7*a*. Probate of heirship.

In case of the death heretofore or hereafter of any person intestate, seized in fee of real estate within this state, it shall be lawful for the heirs at law of such person, or any one of them, or for any person interested in such estate, or in any piece of real estate embraced therein, to make an affidavit setting forth the fact of such death, the last place of residence of said intestate, the number of the heirs of said intestate, with their names, ages, places of residence, and relationship to the deceased, respectively, and, as nearly as possible, describing such real estate, and the respective interests of such heirs therein. (1885, *c.* 50, § 1.*)

*§ 7*b*. Same—Decree—Entry—Record—Effect.

Such affidavit, when so made, shall be presented to the probate judge of any county in which any part of such real estate is situated, and said probate judge may in his discretion examine any witness or witnesses, under oath, as to the truth of the matters in such affidavit stated, and, upon being satisfied of the truth of all such matters, shall make a decree reciting the facts stated in said affidavit and found true; and thereupon such decree shall be entered in the records of said court, and a certified copy thereof may be recorded in the office of the register of deeds in each county where such lands are situated, and from the date of such record said decree shall be taken and held in all legal proceedings in this state, in respect to the succession of such real estate, as *prima facie* evidence of all the facts found in said decree. (*Id.* § 2.)

* "An act to determine the heirship to real estate in certain cases." Approved March 5, 1885.

*§ 7c. Real estate of minors and decedents—Party-walls.

That in all cases where it is desired to erect a party-wall between two tracts of land, one or both of which belongs to an undistributed estate of a deceased person, or to minors, or whenever a minor or minors are interested in such lands, it shall be lawful for the probate court of the county having jurisdiction of such estate, upon the same notice and hearing as is now provided by law in the case of the sale of real estate of minors, to license the executors or administrators of such estate, or the guardian or guardians of such minors, to enter into a contract relating to the erection, maintaining, or rebuilding of such party-wall, and the ground whereon the same is to be placed; and such contract or agreement may be executed and acknowledged by such executors or administrators, guardian or guardians, and shall bind such estates, and shall be of the same force and effect as though between other owners of real estate capable of contracting: *provided*, the same is approved by the judge of probate of the county wherein such land is situated and recorded in the office of the register of deeds for such county. (1881, *c.* 118, § 1.)

§ 8. Record-books.

SUBD. 3. Cited, Butler v. Winona Mill Co., 28 Minn. 203, 204, 9 N. W. Rep. 697.

Letters of guardianship are proper to be recorded upon the record-books of the probate court, and when recorded the records are, as records, competent evidence without the production of the original letters, and without accounting for their absence. Davis v. Hudson, 29 Minn. 28, 11 N. W Rep. 136.

SUBD. 4. The records of the probate court import absolute verity as respects a party to the proceedings of which they are records, subject to amendment and correction in a direct proceeding for that purpose, and not otherwise; and they are therefore conclusive upon such party in a collateral proceeding. Dayton v. Mintzer, 22 Minn. 393.

*§ 8a. Errors in records, etc.—Correction.

That whenever it shall appear to any probate court of this state, in any matter concerning the estates of decedents or persons under guardianship, of which at any time it has had jurisdiction, that by mistake, inadvertence, omission, or otherwise, its records and proceedings are insufficient to identify, by correct, proper, or sufficient description, the property of any such decedent or person under guardianship upon which it has administered, [in] such case, such probate court, either before or after final judgment or decree of assignment, distribution, or settlement of such estate, may, upon the petition of any person interested in such estates, upon due notice thereof given in the manner provided in and by section fourteen, chapter forty-seven, page five hundred and sixty-nine, General Statutes, and in case no cause shall be shown to the contrary, allow and make any and all such amendments and correction of errors, omission, and mistakes in its proceedings, files, records, judgments, and decree, and in pleadings or papers thereto appertaining, as shall seem to such court necessary and proper for the purpose of clearly defining, declaring, and preserving the rights of persons interested in such estates, or their heirs, legal representatives, or assigns: *provided*, that from any such order or decision an appeal may be taken to the district courts in the manner now provided by law. (1881, *Ex. Sess. c.* 76, § 1.)

*§ 10a. Law partner—Practice before judge prohibited.

No attorney, who is the law partner of any judge of probate in this state, shall appear or practice as an attorney in any action or proceedings before such judge of probate who is his partner. (1881, *Ex. Sess. c.* 80, § 1.)

*§ 10b. Clerk—Practice in probate court.

No clerk of any probate court in this state shall appear or practice as an agent or attorney in any action or proceeding in the probate court of which he is such clerk. (*Id.* § 2.)

APPEALS FROM PROBATE COURTS.

See Riley v. Mitchell, 35 N. W. Rep. 472; Auerbach v. Gloyd, 34 Minn. 500, 27 N. W. Rep. 193.

§ 13. (Sec. 14.) Appealable orders and judgments.

Cited, Mousseau's Will, 30 Minn. 204, 14 N. W. Rep. 887; Rumrill v. First Nat. Bank, 28 Minn. 203, 9 N. W. Rep. 731. See Dutcher v. Culver, 23 Minn. 415.

SUBD. 2. An order appointing an executor, unless appealed from, is a conclusive adjudication that the executor is entitled to letters testamentary, and that the issuance thereof to him is proper, notwithstanding the fact that the executor's bond is not such as is required by statute, and is therefore insufficient. Mumford v. Hall, 25 Minn. 347.

SUBD. 3. See State v. Probate Court of Ramsey Co., 19 Minn. 128, (Gil. 95.)

SUBD. 4. Cited, State v. Probate Court, 28 Minn. 382, 383, 10 N. W. Rep. 209. See Labar v. Nichols, 23 Mich. 310.

An order of a probate court, denying the application of a creditor for further time within which to present a claim against the estate of a deceased person to the commissioners upon said estate, may be brought to this court for review upon a writ of *certiorari*. Massachusetts Mut. Life Ins. Co. v. Elliot, 24 Minn. 134.

Upon appeal from the probate court, under this section, the district court acquires full jurisdiction of the subject-matter to make such determination as the probate court ought to have made; and its judgment, accordingly, stands for the judgment of the probate court. Berkey v. Judd, 31 Minn. 271, 17 N. W. Rep. 618. And where, upon such appeal, a claim is allowed and adjudged to be paid by such appellate court, and the executor has sufficient assets, it becomes his duty to pay the same as if originally allowed by the probate court. And if such executor, after proper notice and demand, refuses to pay any claim so adjudged to be paid, an action may be brought upon his bond by the aggrieved party against him and his sureties. Id.

SUBD. 6. Applied, In re Gragg, 32 Minn. 142, 19 N. W. Rep. 651.

After a probate court has made an order for the sale of real property of an estate, and it has been accordingly sold, the sale confirmed by the court, and a deed executed to the purchaser as directed by the order of confirmation, and the administrator has been discharged, the matter is out of the jurisdiction of the probate court, and it cannot entertain an application to review and set aside the sale proceedings. State v. Probate Court, 33 Minn. 94, 22 N. W. Rep. 10.

§ 14. (Sec. 15.) Who may appeal.

One against whom an administrator may bring suit, under *c.* 77, § 2, for the killing of intestate, is not entitled to appeal from an order of the probate court appointing such administrator. In re Hardy, 35 Minn. 193, 28 N. W. Rep. 219.

"Opportunity" here means such opportunity as the party is entitled to by law. Want of opportunity is some act or omission in the proceedings which denies or abridges the party's legal rights. Hence the mere fact that notice duly served by publication did not convey *actual* notice to a party does not amount to a want of opportunity, within the meaning of the statute. In re Hause, 32 Minn. 155, 19 N. W. Rep. 973.

What allegations in the affidavit for an appeal will be deemed sufficient to show that appellant "had not notice or opportunity to be heard," as to the subject of the order appealed from, see In re Brown, 32 Minn. 443, 21 N. W. Rep. 474.

See Auerbach v. Gloyd, 34 Minn. 500, 27 N. W. Rep. 193.

§ 15. (Sec. 16.) Appeal, how and when taken — Stay of proceedings.

The appeal may be taken upon questions of fact or law, or both, by the service of a notice on the adverse party, stating the appeal from the order or judgment, or some specified part thereof, and by filing a copy of the said notice in the office of the judge of probate, together with a recognizance entered into by the party appealing, with one or more sureties, to be approved by the judge of probate, conditioned that the party will prosecute his appeal with due diligence to a final determination, and pay all costs adjudged against him in the district court; which appeal shall be taken within sixty days after notice of the order or judgment appealed from. The appellant shall cause an entry of such appeal to be made by the clerk of the district court on the register of actions, and upon the calendar, on or before the first day of the next general term thereof: *provided*, that such appeal shall suspend the operation of the order or judgment appealed from, and stay proceedings thereon, until such

appeal is determined, or the district court to which such appeal is taken shall otherwise order. The district court, in which such appeal may be pending, shall have power, in the exercise of a sound discretion, or upon good cause shown, to require the appellant to give such further bonds with surety, or such further security, to be filed or deposited with the clerk of such district court, for the payment of damages in consequence of such suspension or stay which may be awarded against such appellant, in case he fail to obtain a reversal of the order or judgment so appealed from, as such district court may deem proper under the circumstances: *provided, further,* that such district court shall, upon cause shown, require the appellant to give further and other security for the payment of any costs and disbursements of such appeal, which may be adjudged against the appellant: *provided, further,* any adverse party, on whom it may be necessary to serve a notice of appeal, may be served with such notice in the same manner that notices are served in civil actions, and if such service be made on the clerk of court it shall be made on the clerk of the district court to which such appeal is taken. (*As amended* 1874, c. 74, § 2; 1878, c. 17, § 1; 1885, c. 63.)

Cited, Washburn v. Van Steenwyk, 32 Minn. 354, 20 N. W. Rep. 324; State v. Probate Court, 28 Minn. 382, 10 N. W. Rep. 209.

An appeal from an order of the probate judge, allowing or disallowing a claim against the estate of a decedent, formerly allowable by commissioners, is governed by the provisions of c. 53, and not of c. 49, Gen. St. 1878. Hence it must be taken within 60 days after the entry of the order in the register required by § 21, c. 53. The 60 days begins to run, not from the date of actual notice of the order, but from the date of its entry in the register. Auerbach v. Gloyd, 34 Minn. 500, 27 N. W. Rep. 193.

Notice of such appeal by a contestant of a will may properly be served upon the attorney of the proponent. In re Will of Brown, 32 Minn. 443, 21 N. W. Rep. 474.

An undertaking may be filed in lieu of a recognizance. In re Brown, 35 Minn. 307, 29 N. W. Rep. 131.

An appeal to the district court, from an order of the probate court, does not stay the operation of such order while the appeal is pending. Whether it would be competent for the district or probate court to direct a stay of proceedings upon an order of the latter appealed from, *quære.* Dutcher v. Culver, 23 Minn. 415.

*§ 17. Appeal on questions of law.

Cited, Washburn v. Van Steenwyk, 32 Minn. 354, 20 N. W. Rep. 324.

An appeal upon questions of law alone is to be determined upon the record of the proceedings in the probate court, including the evidence there produced, and not merely upon findings of fact which may have been declared by that court. Therefore the judgment is not to be deemed erroneous merely because not supported by the facts found. In re Post, 33 Minn. 478, 24 N. W. Rep. 184.

*§ 19. Trial in district court.

The legal effect of this section is to extend to this class of appeal cases the provisions of Gen. St. c. 66, § 199, and to place such cases upon the same footing, in all respects, with those provided for in that section, so far as relates to the trial by jury of any issues of fact involved, and the purpose and effect of any verdict rendered thereon. Marvin v. Dutcher, 26 Minn. 407, 4 N. W. Rep. 685.