CHAPTER 238.

WILLS.

238.01 Who may devise lands, etc. Every person of full age and any married woman of the age of 18 years and upward and any other minor who is a member of the military or naval forces of the United States, being of sound mind, seized in his or her own right of any lands or of any right thereto or entitled to any interest therein, descendible to his or her heirs, may devise and dispose of the same by last will and testament in writing; and all such estate not disposed of by will shall descend as the estate of an intestate, being chargeable in both cases with the payment of all his or her debts except as provided in the next preceding chapter and in section 238.04. [*1943 c. 11, effective Jan. 1, 1942*]

Note: Precatory words in a will for continuing the services of a testator's housekeeper for the benefit of his son held mandatory, and to impose an obligation upon the guardian accordingly. In re Platt's Will, 205 W 290, 237 NW 109.

A will, irrespective of testamentary capacity, is invalid if its provisions are materially influenced by insane delusions. The will in this case was held to be so influenced. Will of Lundquist v. Hanson, 205 W 667, 238 NW 861.

The evidence is held insufficient to show undue influence in connection with a will, made by a testator two weeks before his death, and giving his entire estate to his stepson and the latter's wife near whom he had lived for many years and with whom he expressed a desire to be during his last illness, although he had brothers and sisters living. Will of Truehl, 220 W 134, 264 NW 254.

A will giving to the testator's wife all that part of his estate to which she would be entitled had no will been made, followed by provisions giving his home to one who the testator believed was his legally adopted son, subject to the homestead and dower rights of the testator's wife, and giving the residue of the property to the adopted son and a sister of the testator, is construed as intended to vest, and as vesting, the wife with only a homestead and dower interest in the home, notwithstanding the invalidity of the adoption proceeding by which the son was adopted. Will of Bresnahan, 221 W 51, 266 NW 93.

The elements necessary to establish undue influence in the making of a will are a person unquestionably subject to undue influence, another's opportunity to exercise such influence and effect the wrongful purpose, a disposition to influence unduly for the purpose of procuring an improper favor, and a result clearly appearing to be the effect of the supposed influence. Will of Leisch, 221 W 641, 267 NW 268.

Testators' erroneous views of the law are not "delusions". A "delusion" such as to void a will must be an "insane delusion." A testator cannot be presumed incompetent merely because he was afflicted with old age and disease. A provision in a will that bequests to the testator's children should not take effect until the death of the testator's divorced wife with whom he had made a property settlement, although indicating that the testator may have believed that she would take part of his property under the law if he did not provide otherwise by his will, which was an erroneous view of the law, did not show an insane delusion such as to void the will, where there was otherwise no showing of insanity. Will of Jacobson, 223 W 508, 270 NW 923.

A will, giving all of testator's property to his wife "for her use and enjoyment during her life," and directing division of "balance" after her death by payment of stated sums to named persons and "remainder" to testator's nephews and nieces for their lives, with remainder to hospital absolutely, gave testator's widow right to expend, use, and consume such part of principal as she deemed necessary for her support. Will of Doerfler, 225 W 418, 273 NW 460.

The law presumes that every gift, whether in trust or not, is accepted until the contrary is proved. Estate of Mead, 227 W 311, 277 NW 694, 279 NW 18.

In determining the testator's intent, all the terms of the will should be considered—not only those tending in themselves to indicate an absolute and unlimited power of disposition, but those tending to indicate a limited power in that respect—and such conflicting terms as exist in the will should be so harmonized or considered in connection with each other as to express the real intent of the testator. Giving the "use" of a thing, as by will, does not give the thing itself, but implies that the thing is to be held and employed for the benefit or enjoyment of the beneficiary. Estate of Holmes, 233 W 274, 289 NW 638.

Where a will by separate paragraphs provided, respectively, for the testator's charities, his friends, his daughter-in-law and grandchildren, and his housekeeper, and then by a concluding paragraph gave to his only child the residue of his estate, "also my farm in the town of S" the testator, independently of any other provision, intended a specific devise of such farm to the son, so that the farm was not subject to the payment of general bequests made in preceding paragraphs of the will. Will of Smith, 235 W 66, 292 NW 443.

Where a testator at the time of executing his will and at the time of his death did not own any bonds in a certain corporation and none were on the market on either date—but the testator did own and left in

his estate stock in such corporation, a provision in the will giving to the testator's housekeeper the sum of $5,000 par value of "bonds" is construed as a bequest of $5,000 par value of "stock" in such corporation, and not a bequest of bonds or, in case such bonds could not be delivered, of $5,000 in cash. In construing wills, the court may correct misdescriptions in bequests of personalty as well as misdescriptions in devises of real estate. Will of Smith, 235 W 66, 292 NW 443.

The title to real estate passes by will, when duly probated, and not by decree of the court. Malzahn v. Teagar, 235 W 631, 294 NW 36.

With respect to the charge of undue influence, it has been held necessary that four elements be proved in order to establish the fact of undue influence: (1) A person unquestionably subject to undue influence; (2) opportunity to exercise such influence and effect the wrongful purpose; (3) a disposition to influence unduly for the purpose of procuring an improper favor; and (4) a result clearly appearing to be the effect of the supposed influence. Will of Stanley, 226 W 354, 356, 276 NW 353; Estate of Scherrer, 242 W 211, 7 NW (2d) 848.

Mental incompetency to make a will and susceptibility to undue influence must be established by clear, convincing and satisfactory evidence. The burden of establishing undue influence is on the party alleging it. The mere fact that a testatrix prefers one legatee over another is not sufficient to establish undue influence. Estate of Sawall, 240 W 265, 3 NW (2d) 373.

Findings that a testator, who had no relatives, bequeathed his property, held in joint tenancy with his wife, to close relatives of the wife, by a will executed on the same day that the wife executed a will similarly disposing of her property, was mentally incompetent to make a will at the time of signing, and that the instrument was procured by undue influence exercised on the testator by the executors and principal legatees, were against the great weight and clear preponderance of the evidence. Will of Knoepfle, 243 W 572, 11 NW (2d) 127.

The tests as to the validity of a will executed by one suffering from an insane delusion is not whether the testator had general testamentary capacity, but whether the insane delusion materially affected his will. Will of Elbert, 244 W 175, 11 NW (2d) 626.

The question of competency to make a will is to be determined as of the time of its execution. Estate of Kesich, 244 W 374, 12 NW (2d) 688.

Title to trust real estate passes under the will creating the trust to the named trustees without any order of court assigning the property to them. Estate of Trowbridge, 244 W 519, 13 NW (2d) 66.

See note to 310.06 citing Will of Faulks, 246 W 319, 17 NW (2d) 423.

Although a testatrix may have been generally competent and not subject to undue influence, her will is nevertheless not to be admitted to probate if insane delusions affecting the disposition of her property were present at the time of executing the will. Estate of Week, 247 W 197, 19 NW (2d) 184.

A provision in a will making a bequest to the Salvation Army of Appleton, Wisconsin, and "It is my wish that this money be expended by the Salvation Army for the benefit of the needy people in the city of Appleton," created a charitable trust within recognized definitions of a charitable trust, the words "It is my wish," etc., being construed as mandatory and not merely advisory. Estate of Rowell, 248 W 520, 22 NW (2d) 604.

Where a husband and wife executed mutual wills whereby the residuary estate of either was to go to the survivor in the event that he or she survived the other for a period of 30 days, otherwise to go to named legatees, and the wife survived the husband for more than 30 days, the alternative bequests became inoperative, and there was no contract for the disposition of their property such as might have given a person, named as an alternative legatee in the mutual wills, standing as an interested party to object to the probate of the wife's subsequent will. Estate of Buffington, 249 W 172, 23 NW (2d) 517.

In examining a will to discover a purpose, it is well to proceed in the reading of it as if the language is unambiguous, and if, taking the will as a whole in the light of the subjects with which it deals, its meaning is plain, there is no legitimate room for judicial construction. Estate of Britt, 249 W 602, 26 NW (2d) 34.

238.02 Construction of devise. Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate.

Note: Under a will giving the testator's widow his entire estate, consisting of his farm and personal property, and a city lot, "to have, use and enjoy the same for and during her natural life," with power to sell any of the real estate and deal with the proceeds thereof as personal property or convert the same into other real estate in her discretion, and further providing that on the widow's death, "it is my will that all of the principal of said estate as it may exist at that time, vest in" a trustee for the purpose of converting the real estate, if any, into cash and dividing it among the testator's children and grandchildren, the widow took only a life estate in the real estate, and not an estate in fee simple. Meister v. Francisco, 233 W 319, 289 NW 643.

The words "heirs and assigns forever," when used in a will, are ordinarily considered to be descriptive of the estate devised, and their use ordinarily repels the inference that a substituted devise or bequest was intended, but the context of the will may indicate that such words were in fact intended to create such a bequest. Estate of Britt, 249 W 30, 23 NW (2d) 498.

238.03 After-acquired estate. Any estate, right or interest in lands acquired by the testator after the making of his will shall pass thereby in like manner as if possessed at the time of making the will if such shall manifestly appear by the will to have been the intention of the testator.

238.04 Devise of homestead, etc. When any homestead shall have been disposed of by the last will and testament of the owner thereof the devisee shall take the same free of all judgments and claims against the testator or his estate, except mortgages lawfully executed thereon and laborers' and mechanics' liens; provided, that if such owner shall not leave a widow or minor child or other property than his homestead sufficient to pay the expenses of his last sickness, his funeral and the costs and charges of administering his estate such homestead shall be subject to such expenses, costs and charges; and provided further, that if he shall not leave a widow, child or grandchild nor other property sufficient to pay his debts and liabilities such homestead shall be liable therefor.

Note: Homestead rights acquired in realty after a judgment has become a lien thereon do not supersede the judgment lien upon the death of the homesteader. In re Hogan's Estate, 229 W 600, 282 NW 5.

238.05 Who may bequeath personalty. Every person of full age and every married woman of the age of 18 years and upward and any other minor who is a member of the military or naval forces of the United States, being of sound mind, may, by last will and testament in writing, bequeath and dispose of all his or her personal estate remaining at his or her decease and all his or her rights thereto and interest therein, subject to the payment of debts, and all such estate not disposed of by the will shall be administered as intestate estate. [*1943 c. 11, effective Jan. 1, 1942*]

238.06 How wills to be executed. No will made within this state since the first day of January, 1896, except such nuncupative wills as are mentioned in this chapter, shall be effectual to pass any estate, whether real or personal, or to charge or in any way affect the same unless it be in writing and signed by the testator or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses in the presence of each other; if the witnesses are competent at the time of such attesting their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will if it be otherwise satisfactorily proved.

Note: The touching of the pen by an aged and infirm testatrix while the scrivener made her mark to her will was sufficient participation in the act to make the mark that of the testatrix and not of the scrivener, and satisfied the statute as to signing by the testatrix herself. Will of Wilcox, 215 W 341, 254 NW 529.

Request by scrivener in presence and hearing of testator to sign as attesting witnesses is sufficient publication and sufficient attestation where witnesses sign in presence of testator and in presence of each other, since the request and assent may be implied from circumstances. The signing of the testator at the top instead of the bottom of the will was a mere irregularity. Signing by the testator at the beginning of the will instead of at the end, if intended as his authenticating signature, is sufficient. 68 Corpus Juris 661, s. 294, citing many cases. Estate of Lagershausen, 224 W 479, 272 NW 469.

The attestation of a will by two witnesses is not only prima facie evidence, but raises strong presumption, that the instrument was properly executed, and the fact that witnesses subscribed before testator cannot be found without very clear and convincing proof. Absolute unquestioned proof of attesting witnesses' signatures to will and its apparent regularity raised presumption requiring finding, in absence of contrary evidence, that testator signed will before presenting it to witnesses for attestation. Testator need not sign it in witnesses' presence; it being sufficient if he signed it before its attestation by witnesses. Will of Johnston, 225 W 140, 273 NW 512.

This case "so closely coincides with its facts and the law involved in the cases of Estate of Lagershausen, 224 Wis. 479, 272 NW 469, and Will of Johnston, 225 Wis. 140, 273 NW 512, recently decided, that we see no reason to discuss further the law involved. Two propositions were there decided: That the signature of the testator inserted in the blank space left in a printed form of a will for writing of the testator's name at the beginning of a will, if written as and for his signature to the will in executing it as his will is sufficient, and that if the signature of the testator is on the instrument when the witnesses signed it, it is immaterial that the witnesses did not see him affix the signature or see the signature, if the instrument was at the time declared by the testator to be his will and was signed by the witnesses in his presence and the presence of each other for the purpose of attesting it. We let these propositions stand upon the support given them in those opinions." Will of Home, 231 W 227, 232, 284 NW 766, 285 NW 754.

In Wisconsin it is not necessary that a testator formally publish an instrument as his will. A witness to a will need not know the nature of the instrument in order to be competent to sign as a witness. A will drawn in accordance with the instructions of the testator, executed in due form of law, is valid even though written in a language not understood by the testator, where it is shown that he had full and accurate knowledge of its contents. A will may be sustained in opposition to positive testimony of one or more of the subscribing witnesses as to the mental capacity of the testator, if by the preponderance of evidence from other witnesses proof is made that the testator was of sound mind and there was a valid execution of the will. The attestation clause in itself creates a presumption in favor of due execution of the will which can be overcome only by clear and satisfactory evidence. While helpful it is not necessary for an attesting witness to have knowledge of the mental capacity of the person executing a will in order to be competent to sign as a witness. Will of Zych, 251 W 108, 28 NW (2d) 316.

238.07 Foreign wills. A last will and testament executed without this state in the mode prescribed by the law either of the place where executed or of the testator's domicile shall be deemed to be legally executed and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state; provided, said last will and testament is in writing and subscribed by the testator; and provided further, that this section shall not affect such noncupative wills as are mentioned in this chapter.

238.08 Witnesses to will not to take under it. All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto, or to the husband or wife of a subscribing witness thereto, shall be wholly void unless there be two other competent subscribing witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will.

Note: A devise to the husband of an attesting witness to a will, where there was only one other subscribing witness, was wholly void. Estate of Rosenthal, 247 W 555, 20 NW (2d) 643.

238.09 When devise to witness saved. But if such witness or the husband or wife of such witness, to whom any beneficial devise may have been made or given, would have been entitled to any share of the estate of the testator in case the will was not established,

then so much of the share that would have descended or been distributed to such witness or to the husband or wife of such witness as will not exceed the devise or bequest made to him in the will shall be saved to him, and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

238.10 Provision for child born after will made. When any child shall be born after the making of his parent's will and no provision shall be made therein for him such child shall have the same share in the estate of the testator as if he had died intestate; and the share of such child shall be assigned to him as provided by law in case of intestate estates unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child.

238.11 Provision for child omitted by mistake, etc. When any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, and it shall appear that such omission was not intentional but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in section 238.10.

Note: Whether the omission of a testator to provide in his will for a child or for the issue of a deceased child was not intentional but was made by mistake or accident, so as to entitle such child or issue to the same share in the estate of the testator as if he had died intestate, is to be determined on evidence, and not solely from the face of the will. Will of Kurth, 241 W 426, 6 NW (2d) 233.

238.12 From what estate provision in such cases taken. When any share of the estate of a testator shall be assigned to a child born after the making of a will or to a child, or the issue of a child, omitted in the will as hereinbefore mentioned, the same shall first be taken from the estate not disposed of by the will, if any; if that shall not be sufficient so much as shall be necessary shall be taken from all the devisees or legatees in proportion to the value of the estate they may respectively receive under the will unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated; in which case such specific devise, legacy or provision may be exempted from such apportionment and a different apportionment may be adopted in the discretion of the county court.

238.13 Rights of issue of deceased legatee. When a devise or legacy shall be made to any child or other relation of the testator and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator unless a different disposition shall be made or directed by the will.

Note: Under a will giving one third of the testator's estate to his wife "and to her heirs and assigns forever," the devise and bequest lapsed by reason of the fact that the wife predeceased the testator. Even if a further provision of the will, authorizing the executors to sell the realty, worked an equitable conversion of that part of the estate composed of realty, nevertheless the will would vest in the devisee, if she survived, a full title. Will of Peters, 223 W 411, 270 NW 921.

Where property was devised to testator's four children with a provision that if an absent son did not return within a reasonable time after the probate of the estate that son's share should go to his two children and the son returned and predeceased the testator, that son's children took their father's share under the will. In re Campbell's Estate, 229 W 610, 282 NW 58.

In a nonlapsable residuary bequest to sons and daughters and "their respective heirs," the term "heirs" should be given its ordinary meaning of those to whom the estate of the devisee or legatee would go by the laws of descent, and hence the wife of a son who predeceased the testatrix without issue was entitled to the son's share. Estate of Hoermann, 234 W 130, 290 NW 608.

This section does not prevent a lapse, nor inferentially provide for a lapse, where a predeceased legatee leaves no issue. Estate of Hoermann, 234 W 130, 290 NW 608.

A will merely making a gift to a class does not indicate a purpose on the part of the testator that the issue of deceased persons within the class description, but deceased when the will was made, should share in the bounty. Estate of Phillips, 236 W 268, 294 NW 824.

A provision in a will, bequeathing to the testator's brother a mortgage securing a note from the brother to the testator for a loan, made a legacy to an "other relation of the testator," within 238.13, so that such legacy did not lapse by reason of the death of the legatee before the testator, where the predeceased legatee left issue who survived the testator, but such issue took the legacy given under the will. In cases coming within the provisions of 238.13, the issue of a legatee predeceasing the testator take under that section, and not the legatee's heirs under the general statutes relating to descent. Brener v. Raasch, 239 W 300, 1 NW (2d) 181.

The testator's cancellation of his predeceased daughter's notes to him, induced by his mistaken belief that the effect of her death was to cause her legacy and devise in his will to lapse, whereas the only effect was that the daughter's children would take her share, constituted a mistake of law, and the cancellation of the notes will not be held nugatory for such mistake, where, although such a holding would relieve the testator's surviving children from his mistake, it would also, because the amount represented by the notes exceeded the amount of the share of the testator's predeceased daughter under the will, deprive her surviving children of their right to her share under the will and the statute. Estate of Pardee, 240 W 19, 1 NW (2d) 803.

Unless a different disposition is made or directed by the will, the word "issue" includes grandchildren as well as children of a legatee, so that where a legatee and her only child predecease, but the latter's child survives, the testatrix, such surviving grandchild takes in their stead. Will of Vedder, 244 W 134, 11 NW (2d) 642.

A residuary clause giving half of the residue of the testator's estate "share and share alike," to the testator's 3 named brothers, "being to each a one-third part thereof," "to them and their heirs forever," did not use the words "to them and their heirs forever," as words of limitation, but intended that the heirs take as purchasers

and created substituted bequests to them, particularly in view of the other quoted language of the residuary clause, and the circumstance that the testator knew that 2 of the brothers were dead when he made his will and that he did not change the will after the death of the third brother; hence the legacies did not lapse so as to result in an intestacy. Estate of Britt, 249 W 30, 23 NW (2d) 498.

238.14 Wills, how revoked. No will nor any part thereof shall be revoked unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator or by some person in his presence and by his direction, or by some other will or codicil in writing, executed as prescribed in this chapter, or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. The power to make a will implies the power to revoke the same.

Note: Where testatrix failed to change will when her circumstances were altered, it must be presumed she intended to leave will as written. In re Kendrick's Estate, 210 W 218, 246 NW 306.

Where later will did not become effective because invalid, effort to revoke earlier will at time later will was executed is relative and dependent, and earlier will remained effective. In re Lundquist's Will, 211 W 541, 248 NW 410.

Destruction of a will by testator's sister was not a revocation, where destruction was not by testator's direction nor in his presence, there was no subsequent expression of intent that will was revoked, and no change in testator's condition or circumstances from which revocation could be implied. Estate of Murphy, 217 W 472, 259 NW 430.

Lines drawn by a testatrix through the names of her brothers wherever their names appeared in her will and through provisions relating to the brothers, although the marks were not drawn as they would have been drawn by a competent scrivener and the result was somewhat ungrammatical, clearly indicated that the testatrix intended to strike out the provisions for her brothers, and constituted a sufficient cancellation. Will of Byrne, 223 W 503, 271 NW 48.

Joint or mutual will lacking contractual elements may be revoked at any time by either testator in the same manner as other wills. Will of Sechler, 224 W 613, 272 NW 854.

The provisions of a will or codicil will not be construed to cut down a gift already made unless that intention be shown by definite and positive words. None of the rules devised to assist in the discovery of the testator's intention should be permitted to interfere with the manifest intention disclosed by the will itself, and no rule of construction is more effective to discover the testator's intention than that which requires that words in a will shall be given their plain and ordinary meaning. Estate of Melville, 234 W 327, 291 NW 382.

A codicil, which merely changed the executors and otherwise expressly ratified and confirmed the original will, which contained a general residuary clause, operated to republish the will as of the date of the codicil, and hence, in the absence of any evidence of an intent to the contrary, operated as an execution of a testamentary power of appointment which the testator then had as a beneficiary under a trust of personal property in respect to his share in the principal of the trust, whether or not the original will, executed before the testator had the power of appointment, operated as an execution of the power. Horlick v. Sidley, 241 W 81, 3 NW (2d) 710.

At common law, marriage alone does not revoke the antenuptial will of a man who at the time of his marriage had no issue. The common-law rule is not so fixed as to be within the protection of sec. 13, art. XIV, Const., and, being a rule of implication, it is one in which changes of circumstances can change specific applications of it; but the application made of the rule by the supreme court (that statutes making the wife the heir of the husband in the absence of issue have not so changed the relationship of the parties as to result in the revocation of the husband's antenuptial will by the marriage alone) has become a rule of property which should not be disturbed by the court. Applying the rule to this case, a will made by a widower without issue, giving his property to brothers and sisters, was not revoked by his subsequent marriage alone so as to be a nullity as against his surviving wife. Will of Wehr, 247 W 98, 18 NW (2d) 709.

The destruction or mutilation of a conformed or other copy of a will, as distinguished from a duplicate, is not effective to accomplish a revocation of the will. Will of Wehr, 247 W 98, 18 NW (2d) 709.

238.15 Deposit of wills with county judge; redelivery. Any will, being inclosed in a sealed wrapper and having indorsed thereon the name of the testator and his place of residence and the day when and the person by whom it is delivered, may be deposited by the person making the same or by any person for him with the judge of the county court of the county where the testator lives, and such judge shall receive and safely keep such will and give a certificate of the deposit thereof. A will so deposited shall, during the lifetime of the testator, be delivered only to himself or to some person authorized by him, by an order in writing, duly proved by the oath of a subscribing witness, to receive the same.

238.16 Nuncupative wills, when good. No nuncupative will shall be good when the estate bequeathed shall exceed the value of one hundred and fifty dollars that is not proved by the oath of three witnesses, at least, that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will or to that effect; nor unless such nuncupative will were made at the time of the last sickness of the deceased and in the house of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more next before the making of such will except where such person was unexpectedly taken sick, being from home, and died before he or she returned to the place of his or her habitation.

238.17 How same proved. After six months shall have passed after speaking any pretended testamentary words no testimony shall be received to prove the same as a nuncupative will unless the said words or the substance thereof were reduced to writing within six days after the same testamentary words were spoken. Nor shall letters testamentary

or probate of any nuncupative will be issued by any county court until fourteen days, at least, after the decease of the testator be fully expired; nor shall any nuncupative will be at any time approved and allowed unless notice shall have first been given to the widow and other persons principally interested, if resident within the state, to the end that they may contest the same if they please. Nothing herein contained shall prevent any soldier being in actual service nor any mariner being on shipboard from disposing of his wages and other personal estate by a nuncupative will.

238.18 Wills must be proved and allowed. No will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the county court as provided in these statutes, or on appeal in the circuit court or in the supreme court, except as provided in section 238.19; and the probate of a will of real or personal estate as above mentioned shall be conclusive as to its due execution.

Note: The interests of legatees and devisees in the property of a decedent pass to them at the time of the death of the testator and, although this section provides that no will is effectual to pass either real or personal estate "unless" it has been proved and allowed in the county court, nevertheless when a will is proved and allowed it relates back to and is effective from the time of the death of the testator, and is to be treated as speaking from that moment. Will of Marshall, 236 W 132, 294 NW 527.

Testimony of the attorney who drew the will and was one of the subscribing witnesses, as well as testimony of the testator's attending physician under the circumstances in this case, as to the testator's competency to make a will at the time of executing it, may not be lightly brushed aside or permitted to be outweighed by circumstances giving rise merely to suspicion. Undue influence is a species of fraud that must be established by clear, convincing, and satisfactory evidence. Estate of Kesich, 244 W 374, 12 NW (2d) 688.

An alteration of a will in a material part since its execution, if not explained, must avoid the instrument; and a material alteration of a will by a person claiming under it invalidates the will. Recitals in the attestation clause of a will showing due execution thereof are presumed to be true, and can only be overcome by clear and satisfactory evidence; and if an attesting witness tries to impeach the instrument to which his signature gives credit, his testimony should be received with caution. Will of Frederiksen, 246 W 263, 16 NW (2d) 819.

See note to 310.06, citing Will of Faulks, 246 W 319, 17 NW (2d) 423.

238.19 Foreign wills, record and effect. When a will devising lands in this state, or any interest therein, shall have been duly proved and allowed in the proper court of any other of the United States or the territories thereof a copy of such will and of the probate thereof, duly authenticated, may be recorded in the office of the register of deeds of any county in which any such lands are situated, and when so recorded, and all such as may have heretofore been so recorded, shall be as valid and effectual to pass the title to such lands as if such will had been duly proved and allowed by the proper court in this state; and the record of such copy or a duly certified transcript thereof shall be presumptive evidence of the authority of any person authorized by such will to convey or otherwise dispose of any such lands.

238.20 Certificate of proof and record. Every will, when proved and allowed as prescribed in these statutes, shall have a certificate of such proof indorsed thereon or annexed thereto, signed by the judge of the county court and attested by the seal of such court. An attested copy of every will devising lands or any interest therein and of the probate thereof and of the final judgment in the estate assigning such lands or interest therein, shall be recorded in the office of the register of deeds of the county in which the lands so devised and assigned are situated; provided, however, that this act shall not apply to wills heretofore proved and allowed.