On effect of adoption see notes to 48.92.

237.05 History: R. S. 1849 c. 63 s. 3; R. S. 1858 c. 92 s. 3; R. S. 1878 s. 2273; Stats. 1898 s. 2273; 1925 c. 4; Stats. 1925 s. 237.05; 1957 c. 296 s. 15; 1969 c. 339.

237.06 History: R. S. 1849 c. 63 s. 2; R. S. 1858 c. 92 s. 2; R. S. 1858 c. 111 s. 30; R. S. 1878 s. 2274; Stats. 1898 s. 2274; 1915 c. 258; 1917 c. 218 s. 2; 1925 c. 4; Stats. 1925 s. 237.06; 1943 c. 275 s. 58; 1953 c. 31 s. 43; 1957 c. 296 s. 15; 1969 c. 339.

A child born in wedlock of a marriage which is null and void is nevertheless the legitimate heir of both parents. The most conclusive and clearest proof of nonaccess of the husband is required to bastardize and disinherit a child so born. Watts v. Owens, 62 W 512, 22 NW 720.

The written acknowledgment of paternity need not have been made for the express purpose of establishing heirship or of complying with the statute, if it does in fact meet the statutory requirements. It need not be in precise formal language, but is sufficient if it declares with reasonable clearness and certainty that paternity of the child is acknowledged. Richmond v. Taylor, 151 W 633, 139 NW 435.

Evidence that the contestant in administration proceedings was received by the intestate as his son, lived as a member of his family until marriage, and afterward resided in the same neighborhood, the natural family relationship continuing until the death of the intestate, was sufficient to prove that contestant was such son without formal adoption or written acknowledgment. A contract properly witnessed, entered into jointly by contestant and the intestate with one S., stating that they, the intestate "and son," were purchasers from S., and a certain written order by the intestate for the delivery of goods "to my son," naming contestant, constituted sufficient acknowledgment. Estate of Ecker, 174 W 432, 182 NW 977.

Under the statute relating to the heirship of an illegitimate child, its paternity must be acknowledged under such facts and circumstances as to lead to a reasonable conclusion that the person making the acknowledgment is in fact the natural father of the child. Estate of Dexheimer, 197 W 145, 221 NW 737.

The legal presumption that devises to children are to legitimate children is rebutted by the fact that the testator must have intended that illegitimate children would take. In re Kaufer's Will, 203 W 299, 234 NW 504.

The evidence in this case sustained a finding that the illegitimate daughter of the decedent was acknowledged by him. Estate of Bailey, 205 W 648, 238 NW 845.

Where a decedent had been adjudged to be the father of 2 illegitimate children in illegitimacy proceedings, such illegitimate children were "heirs" of the decedent, so that they would have inherited his estate if he had died intestate. Will of Tousey, 260 W 150, 50 NW (2d) 454.

See note to 137.01, citing Estate of Schalla, 2 W (2d) 38, 86 NW (2d) 5.

Where decedent had denied paternity of a child, but agreed to support it, and later pleaded guilty on preliminary examination on a charge of failing to support "his illegitimate minor child" but the action was dismissed on motion of the district attorney because paternity had not been determined, the plea was not sufficiently a clear and unequivocal admission of paternity to permit the child to inherit. Estate of Traver, 18 W (2d) 416, 118 NW (2d) 932.

For an illegitimate child to become an heir of the father, it is necessary under 237.06 that one of 3 conditions be met: that the father acknowledge in writing paternity in the presence of a competent witness; that he be adjudged the father in a paternity action; or that he admit such paternity in open court. Krantz v. Harris, 40 W (2d) 709, 162 NW (2d) 628.

237.07 History: R. S. 1849 c. 63 s. 12; R. S. 1858 c. 92 s. 12; R. S. 1878 s. 2275; Stats. 1898 s. 2275; 1925 c. 4; Stats. 1925 s. 237.07; 1969 c. 339.

237.07, Stats. 1947, does not apply to a statute which does not provide for descent by right of representation but restricts descent to "next of kin in equal degree," as in 237.01 (4). Estate of Szaczywka, 270 W 238, 70 NW (2d) 600.

237.08 History: R. S. 1849 c. 63 s. 10, 11; R. S. 1858 c. 92 s. 11; R. S. 1878 s. 2276; Stats. 1898 s. 2276; 1925 c. 4; Stats. 1925 s. 237.08; 1969 c. 339.

237.09 History: 1887 c. 192; 1889 c. 227; Ann. Stats. 1889 s. 2276a; 1893 c. 28; Stats. 1898 s. 2276a; 1909 c. 196; 1913 c. 486; 1925 c. 4; Stats. 1925 s. 237.09; 1929 c. 321; 1951 c. 250; Sup. Ct. Order, 262 W vi; 1969 c. 339.

Editor's Note: See 1952 comment of Judicial Council under 327.28.

237.10 History: 1941 c. 284; Stats. 1941 s. 237.10; 1955 c. 505; 1969 c. 339.

Editor's Note: For foreign decisions construing the "Uniform Simultaneous Death Act" consult Uniform Laws, Annotated.

237.11 History: 1943 c. 369; Stats. 1943 s. 237.11; 1969 c. 339.

CHAPTER 238.

Wills.

238.01 History: R. S. 1849 c. 66 s. 1; R. S. 1858 c. 97 s. 1; 1859 c. 91 s. 2; 1870 c. 3 s. 1; R. S. 1878 s. 2277; Stats. 1898 s. 2277; 1925 c. 4; Stats. 1925 s. 238.01; 1943 c. 11, effective Jan. 1, 1942; 1969 c. 339.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 238 through 1969, including the effects of ch. 339, Laws 1969. Various provisions of ch. 238 are restated in a new probate code, effective April 1, 1971. For more detailed information concerning the effects of ch. 339, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 851.

1. General.
2. Competency.
3. Undue influence.

1. General.

On inherent rights see notes to sec. 1, art. I;

on descent see notes to various sections of ch. 237; and on probate of wills see notes to various sections of ch. 310.

The word "children" may be construed to include grandchildren, stepchildren, illegitimate children or descendants however remote, when there are no immediate children to whom the term can apply, or when the context shows it was used in the broad sense of issue or descendants. Scoll's Will, 100 W 650, 76 NW 616.

In a will contest, only evidence bearing on legality of execution, testamentary capacity, and whether the instrument purporting to be a particular person's will is such in fact, is legitimate. Will of Rice, 150 W 401, 136 NW 956, 137 NW 778.

A competent person may generally devise his property as he wishes within the state's public policy. In re Monaghan's Will, 199 W 273, 226 NW 306.

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.

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.

The rule that findings of the trial court cannot be set aside unless against the great weight and clear preponderance of the evidence does not apply where the interpretation of a will rests on the application of legal principles or rules of construction to known facts. Estate of Holcombe, 259 W 642, 49 NW (2d) 914.

"Share and share alike" in a will imports a per capita, and not a per stirpes, distribution where there is nothing in the will itself to indicate contrary intention. That the persons named as legatees or devisees in a will are all of different consanguinity to the testator is not sufficient in itself to rebut the presumption that a per capita distribution was intended. Will of Bray, 260 W 9, 49 NW (2d) 716.

Every provision expressed by a testator in his will should be given effect, if reasonably possible, and the various provisions of the will should be so construed as to be consistent with one another, rather than to be conflicting. Estate of Lindsay, 260 W 19, 49 NW (2d) 736.

Where testator provided "to be divided equally among them, share and share alike—per stirpes and not per capita" the designated legatees were intended to share as a class, not by right of representation, it being evident that the words "per stirpes and not per capita" were used due to a lack of knowledge of their meaning. A prior will, on which the will under consideration was modeled, may be considered in ascertaining the intention of the testator. Estate of Blackbourn, 260 W 25, 49 NW (2d) 755.

The term "heirs" means those to whom the law assigns intestate property. A testator, who had no legitimate children but had been adjudged to be the father of 2 illegitimate children, is presumed to have known that such illegitimate children were his heirs at law under 237.06, when he used the term "heirs" in his will. Will of Tousey, 260 W 150, 50 NW (2d) 454.

An absolute gift of income is not cut down or reduced by a subsequent gift of power to make use of the principal if necessary. Estate of Larson, 261 W 206, 52 NW (2d) 141.

When a fiduciary is granted absolute or conclusive powers and discretions, a court may not exact the standard of "reasonable judgment" from such fiduciary, and the court may interfere only with the bad faith, fraud, or mere arbitrary action of such fiduciary. Estate of Teasdale, 261 W 248, 52 NW (2d) 366; Estate of Koos, 269 W 478, 69 NW (2d) 598.

The word "use" as a noun, in a will, giving the use of a thing does not ordinarily give the thing itself, but implies that the thing is to be held and employed for the benefit or enjoyment of the beneficiary, whereas the word "use" as a verb means to use up or consume. Under a provision in a joint will that the property should be held by the survivor with the "use and income" thereof to be enjoyed by such survivor during the remainder of his or her life, and that at the death of the survivor "the above property" should be distributed among certain named persons, the surviving wife was not entitled to the unrestricted use of the property with the right to invade the corpus. Estate of Cobeen, 270 W 545, 72 NW (2d) 324.

When provision is made for the children of a third person and a child is adopted by that person after the death of the testator, the adopted child is not, in the absence of contrary compelling circumstances, entitled to share in a gift to children or issue of the third person. Estate of Uihlein, 269 W 170, 68 NW (2d) 816.

A contingent bequest to "natural heirs" included an adopted daughter of a deceased sister, as against a claim by children of another sister not named in the will. Estate of Rhodes, 271 W 342, 73 NW (2d) 602.

A testator has the right to make the enjoyment of his bounty dependent on the condition that the recipient renounce, embrace, or adhere to a particular religious faith, and such a condition is not void as contrary to public policy. Where a will leaves a bequest on condition that the recipient does not rear his children in a certain religious faith, a trust is the best way to carry out the testator's wishes, although the will does not provide for one. Estate of James, 273 W 50, 76 NW (2d) 553.

Where terms of a will are blank with respect to a particular item of property, it is largely fictional to talk of the testamentary intent thereby disclosed, for in truth no intent is shown, but a decision must be made, and the best that can be done is to find a solution compatible with the terms of the instrument, not incompatible with any expression or indication of intent therein contained, reasonably consistent with normal practices, and fair to all concerned. Estate of Hahn, 6 W (2d) 129, 93 NW (2d) 862.

The phrase "net rentals income from proceeds of sale" in a will must be construed as "net rents or income from proceeds of sale." Such construction does not result in any change in meaning or contradiction of express language employed by the testator, and does not violate the principle that a court in construing a will cannot reform the same and change the meaning of the express language used in order to correct a scrivener's mistake, which latter was the case here. Estate of Grove, 6 W (2d) 659, 95 NW (2d) 788.

The right of a person to transfer his property on death to whom he wishes is not enshrined in the law of descent and distribution in any form, but rather in the right to make a will; and it is only upon the failure to exercise this right that the law of descent and distribution becomes applicable. Estate of Topel, 32 W (2d) 223, 145 NW (2d) 162; Estate of Zastrow, 42 W (2d) 390, 166 NW (2d) 251.

The law of wills. Albert, 3 MLR 117.

The effect of blindness of the testator on the validity of his will. 9 MLR 206.

Outline of the law of wills. Byrne, 10 MLR 220.

The right to dispose of property by will. Scheller, 37 MLR 92.

2. Competency.

Where the question of mental competency of a testatrix was fully litigated in a guardianship proceeding, which terminated a day or 2 prior to making a will, the matter was not open to question in subsequent proceedings wherein the petitioner sought to set aside an order admitting such will to probate. In re Quatsoe's Will, 198 W 145, 223 NW 422.

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.

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.

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.

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.

In general, the test of mental competency to make a will is whether the testator had sufficient active memory to comprehend, without prompting, the condition of his property, his relations to those who might be his beneficiaries, and to hold these things in mind long enough to perceive their relations to each other and to be able to form some rational judgment in relation to them. Estate of Boston, 253 W 8, 32 NW (2d) 257.

Even if erroneous, the testator's belief that he had lost valuable income-producing properties through mismanagement by his son did not constitute an "insane delusion," where the properties were in fact lost while being managed by the son and the testator could have reasoned from the facts and circumstances that the son had lost the properties. Estate of Bauer, 264 W 556, 59 NW (2d) 481.

The testimony of the scrivener and that of his former law partner, as to the mental competency of the testator at the time of executing his last will, cannot be lightly brushed aside, and in any event it must be outweighed by evidence on the part of the contestant which is clear, convincing and satisfactory. Estate of Bauer, 264 W 556, 59 NW (2d) 481.

In order for a delusion to void a will, it must be an "insane delusion," which denotes a false belief, which belief must be shown to be of such a character that it will be adhered to against all evidence and argument showing its falsity. Where the trial court determined that a testatrix had been motivated by insane delusions toward her husband in making her will, the question before the supreme court is not whether there is any evidence on which the testatrix could base her delusions, but rather where there is any evidence from which a sane person could draw the conclusion which formed such delusions. Will of Riemer, 2 W (2d) 16, 85 NW (2d) 804.

In determining whether the will of a testator laboring under an insane delusion should be admitted to probate, it is not a question whether the testator had general testamentary capacity, but whether the insane delusion under which the testator suffered materially affected the will that he made. Will of Elbert, 244 W 175, 11 NW (2d) 626; Estate of Joslin, 4 W (2d) 29, 89 NW (2d) 822.

Insane delusions which testator harbored toward his children materially affected his will which expressly excluded the children, thereby invalidating the will and warranting the denial of its admission to probate. Estate of Mahnke, 6 W (2d) 508, 95 NW (2d) 405.

Other competency cases: Will of Cole, 49 W 179, 5 NW 346; Ballantine v. Proudfoot, 62 W 216, 22 NW 392; Davis v. Dean, 66 W 100, 26 NW 737; In re Silverthorn, 68 W 372, 32 NW 287; Allen v. Griffin, 69 W 529, 35 NW 21; McMaster v. Scriven, 85 W 162, 55 NW 149; Jones v. Roberts, 96 W 427, 70 NW 685; Butler's Will, 110 W 70, 85 NW 678; Gavitt v. Moulton, 119 W 35, 96 NW 395; Sherwood's Will, 126 W 229, 105 NW 796; Mueller v. Pew, 127 W 228, 106 NW 840; Will of Emerson, 183 W 437, 198 NW 441; In re Behm's Will, 187 W 10, 203 NW 718; Lundquist v. Hanson, 205 W 667, 238 NW 861; Will of Knoepfle, 243 W 572,

11 NW (2d) 127; Will of Klagstad, 264 W 269, 58 NW (2d) 636; Will of Wright, 266 W 89, 62 NW (2d) 409; Estate of Knutson, 275 W 380, 82 NW (2d) 196.

Insane delusions respecting members of the family and heirs at law. 31 MLR 238.

Insane delusions distinguished from highly erroneous beliefs. Hansen, 40 MLR 429.

3. Undue Influence.

With respect to the charge of undue influence, it is necessary that 4 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.

In general the same 4 elements required to establish a case for voiding a will because of undue influence are required in order to avoid on the ground of undue influence an inter vivos gift by deed on written assignment. Estate of Kesich, 244 W 374, 12 NW (2d) 489.

The evidence sustained a finding that a will whereby the testator, a widower with 2 sisters and a brother, left all of his property to a sister who had been estranged from him for 18 years, but who visited him and assisted in caring for him at a hospital about 2 months during the year preceding his death, was executed as the result of undue influence exercised on him by such sister. Findings of the trial court as to the existence of the elements necessary to establish undue influence in procuring a will are not ordinarily disturbed on appeal unless against the great weight and clear preponderance of the evidence. Will of Kramer, 254 W 202, 36 NW (2d) 64.

Where the question of partial invalidity of a will is given consideration, the matter is treated as presenting an issue of fact as to how far the influence of the offender extended. Estate of Maxcy, 258 W 360, 46 NW (2d) 479.

The evidence sustained findings that a testator, disposing of a $235,000 estate and giving only $100 to the objector, an adopted adult son whose custody had been given to the testator's first wife when she divorced the testator, was mentally competent, and that the will was not an unnatural one under the circumstances presented, and was not the result of feelings of the testator against his divorced wife amounting to insane delusions or obsessions, nor the result of undue influence exercised by his second wife. Estate of Dawley, 259 W 516, 49 NW (2d) 432.

Other undue influence cases: In re Carroll, 50 W 437, 7 NW 434; In re Farnsworth, 62 W 474, 22 NW 523; Armstrong v. Armstrong, 63 W 162, 23 NW 407; Will of Slinger, 72 W 22, 37 NW 236; McMaster v. Scriven, 85 W 162, 55 NW 149; Bryant v. Pierce, 95 W 331, 70 NW 297; Baker v. Baker, 102 W 226, 78 NW 453; In re Derse's Will, 103 W 108, 79 NW 46; Goking's Will, 104 W 28, 80 NW 1135; Deck v. Deck, 106 W 470, 82 NW 293; Roberts v. Roberts, 107 W 213, 83 NW 318; Morgan's Will, 110 W 7, 85 NW 644; Downing's Will, 118 W 581, 95 NW 876; Gavitt v. Moulton, 119 W 35, 96 NW 395; In re Muellenschlader's Will, 128 W 364, 107 NW 652; Will of Boardman, 178 W 517, 190 NW 355; Will of Williams, 186 W 160, 202 NW 314; Will of Truehl, 220 W 134, 264 NW 254; Will of Lersch, 221 W 641, 267 NW 268; Will of Knoepfle, 243 W 572, 11 NW (2d) 127; Will of Hickey, 252 W 542, 32 NW (2d) 232; Will of Klofanda, 254 W 186, 36 NW (2d) 71; Will of Dobson, 258 W 587, 46 NW (2d) 758; Will of Roehl, 261 W 466, 53 NW (2d) 180; Estate of Beyer, 262 W 441, 55 NW (2d) 401; Will of Knierem, 268 W 596, 68 NW (2d) 545; Will of Winnemann, 272 W 643, 76 NW (2d) 616; Estate of Fuller, 275 W 1, 81 NW (2d) 64; Estate of Knutson, 275 W 380, 82 NW (2d) 196; Estate of Vichman, 6 W (2d) 48, 93 NW (2d) 873.

238.02 History: R. S. 1849 c. 66 s. 2; R. S. 1858 c. 97 s. 2; R. S. 1878 s. 2278; Stats. 1898 s. 2278; 1925 c. 4; Stats. 1925 s. 238.02; 1957 c. 232; 1969 c. 339.

Sec. 2278, R. S. 1878, merely changes the common-law presumption that, unless words of inheritance or other words indicating a greater estate are used, a life estate only is intended to be devised. It does not absolutely exclude the consideration of surrounding circumstances in determining a testator's intent in a devise. Dew v. Kuehn, 64 W 293, 25 NW 212.

A condition that the land devised shall not be subject to the claims of the devisee's creditors is void. Van Osdell v. Champion, 89 W 661, 62 NW 539.

When a devise is made in fee a condition to the effect that the devisee shall not, for any period of time, convey or alien the estate is void. Zillmer v. Landguth, 94 W 607, 69 NW 568.

Where there is an absolute, unconditional devise the devisee takes at once on the testator's death. Hall v. Hall, 98 W 193, 73 NW 1000.

The common-law rule that a contract to sell specific real property devised in a will operated as a revocation of the will as to such specific property has been changed by statute. Estate of Lefebvre, 100 W 192, 75 NW 971. See also Estate of Haberli, 41 W (2d) 64, 163 NW (2d) 168.

Sec. 2278, Stats. 1919, was inapplicable to a situation where a testator devised real estate to his wife "as long as she remains my widow." Will of Ritchie, 190 W 116, 208 NW 880.

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.

Under a will which gave the testatrix' daughter a one-fifth interest in a farm unconditionally, and an estate in fee simple in the remaining four-fifths in which each of the testatrix' incompetent sons was given a life estate in a one-fifth interest, on the condition that the daughter should remain with the sons after the testatrix' death and keep house and help maintain a home for them, and further provided that if the daughter failed to do so the life estate was to become a fee in the sons, the estate in fee simple created in the daughter, as applied to the four-fifths interest in which the sons had a life estate, was subject to a condition subsequent during her lifetime, and could not be defeated after her death, which occurred before the deaths of the sons, she not having failed to carry out the condition while she was alive. Byers v. Rumppe, 251 W 608, 30 NW (2d) 192.

A devisee charged with performance of a condition subsequent is absolved from performance by death. Byers v. Rumppe, 251 W 608, 30 NW (2d) 192.

The will of a childless testator, bequeathing to his wife "the share of my estate which she would receive under the law if I died intestate," bequeathed the entire estate to the wife, although the will also contained a residuary clause bequeathing the residue to others. Estate of Gray, 265 W 217, 61 NW (2d) 467. See also Will of Hipsch, 265 W 446, 62 NW (2d) 18.

Where a will bequeathed the residue in trust, with 10% of the yearly net income to be paid to each of 3 named persons and 70% to named charitable and educational institutions, and provided that on the death of any of the named persons his share should go to the survivors, the provision for the named persons was only the granting of an income for life, and did not vest 30% of the corpus in such persons and would not entitle the last survivor to 30% of the corpus, but the bequest to them would lapse on the death of the last survivor. Estate of Ogg, 265 W 432, 61 NW (2d) 876.

Where a will generally divided testatrix' property equally between 2 sons, but provided that certain stock, of which she originally owned 40 of 160 shares outstanding, should be divided so that each son would have an equal number of shares after determining how many shares each owned at the time of her death, and where, prior to death, she had given 2 shares to one son and the other had purchased 40 shares from an outside source, her remaining 38 shares should be divided 18 shares to the first son and 20 to the second. Will of Emmerick, 268 W 186, 67 NW (2d) 374.

A will which made substantial immediate provision for testator's son, and gave the residue in trust for the benefit of testator's daughter for a period of 5 years during which the daughter was to receive the income, and further providing "in the event of the death of my said daughter" within 5 years the trust should continue and the corpus be divided as directed, is construed as intending that the daughter, if still living, should take the residue of the estate free from trust restrictions when the 5 years following the testator's death had expired. Will of Schneider, 268 W 610, 68 NW (2d) 576.

With reference to the doctrine of equitable conversion of real estate into personalty by will, a mere discretionary authority to sell is not sufficient to work a conversion; there must be a mandatory direction, express or implied, to convert, although the time of the execution thereof may be left discretionary. Estate of Dusterhoft, 270 W 5, 70 NW (2d) 239.

Where a will gave to the testator's wife "the share of my estate, both real and personal, to which she would be entitled under the laws of descent . . . in the event I were to die intestate," and directing that she should have the option to take certain property at its appraised value to apply on her "said statutory share," and that she might make up the difference with her own funds and thus acquire the fee title to such parcels if the appraised value thereof should amount to more than her "said statutory share," she was entitled only to dower and homestead rights in his estate and a one-third interest in the personal property, and she did not take the entire estate to the exclusion of the testator's 2 nephews named in the residuary clause. Will of Klinkert, 270 W 362, 71 NW (2d) 279.

Under a will which gave the residue of the estate to a named daughter and a named son in equal shares, but which made no provision for distribution of the daughter's share in the event that the testator outlived her, the share of the predeceased daughter, who died without issue, lapsed and was to be distributed as intestate property, so that another surviving son of the testator was entitled to share therein in accordance with the rules of descent, notwithstanding that such other surviving son was disinherited by the terms of the will. Will of Rosnow, 273 W 438, 78 NW (2d) 750.

A will bequeathing to "my grandchildren" a sum to be placed in trust, and providing that the income should be allowed to accumulate until the grandchildren respectively became of age, after which each was to receive the income on his share, and further providing that after each grandchild reached the age of 30 years he was to be paid his full share of the principal sum, made a gift to a class, of which class grandchildren born after the death of the testator also became members, but membership in the class closed when the oldest grandchild arrived at the age of 30 years. Estate of Evans, 274 W 459, 80 NW (2d) 408.

See note to 231.205, citing Estate of Steck, 275 W 290, 81 NW (2d) 729.

If a will provides an annuity but does not contain any indication as to how long it is to be paid, it will end with the death of the annuitant. Estate of Hoyt, 275 W 484, 82 NW (2d) 177.

Where a testator owned property designated as "1904" Sixty-second street, moved the house thereon to the rear of the lot, retaining the "1904" number, and enclosed the 80-foot-deep front portion of the lot with a fence in 1938 or 1939, and later offered such enclosed portion for sale, made a will in 1954 giving to a daughter by a former marriage "my real estate commonly known as 1904 Sixty-second

street," and built a new home numbered "1902" on the enclosed front portion in 1955, the will must be construed as giving to the daughter the old house and the land on which it was standing exclusive of the enclosed front portion. Will of Frost, 3 W (2d) 603, 89 NW (2d) 216.

A clause releasing indebtedness is strictly construed, and in order to release a debt, the provision indicative of such an intent should be clear and unambiguous. A release of debts due from a designated debtor does not, prima facie, include debts for which he is jointly, or jointly and severally liable. Estate of Argue, 5 W (2d) 1, 92 NW (2d) 233.

In the case where a will bequeaths the residue of an estate to a legatee who has murdered the testator and an alternate legatee not related to the murderer is named, a constructive trust should be imposed under which the alternate beneficiary would take the bequeathed residue as the cestui of such trust, since such disposition is more in keeping with the expressed intent of the testator than would be a disposition which handed the estate over to the heirs of the deceased. Will of Wilson, 5 W (2d) 178, 92 NW (2d) 282.

238.02 (2) is not merely a rule of evidence or solely procedural in nature so as merely to raise a presumption, but, on the contrary, it changes the rule of Will of Schaech, 252 W 299, and creates a new rule of law which in effect requires the will to create expressly an election or there is none, and such statute, which does not purport to apply to existing estates in probate, will not be construed to do so and will not be applied to cases in which the testator died prior to its effective date. Estate of Riley, 6 W (2d) 29, 94 NW (2d) 233.

The construction of a will by a court is the ascertainment of the thought content or the meaning of the words, i.e., the intention of the testator; and to do this, the court attempts to place itself in the position of the testator when he made his will and to consider the use of the words in relation to the surrounding circumstances. In doing so, the court is bound by the rules of evidence and various rules of construction, and the phrase "surrounding circumstances" normally does not include conversations which the testator had with his attorney unless the words used in the will create an ambiguity and the privileged communications are otherwise admissible. Estate of Breese, 7 W (2d) 422, 96 NW (2d) 712.

The word "issue" includes adopted children, who were adopted prior to the time of making the will, and whose adoptive parents were of an age that natural children could not be expected. Estate of Breese, 7 W (2d) 422, 96 NW (2d) 712.

Under a will bequeathing to the testator's named cousin "my farm consisting of 85 acres more or less," the testator, who purchased an additional 49.36 acres adjoining and adjacent to the 85 acres after the execution of the will, and who operated the 2 parcels of farm real estate as a farm unit during his lifetime, manifested an intent to bequeath his entire farm, consisting of 135 acres more or less, to the cousin. Estate of Buser, 8 W (2d) 40, 98 NW (2d) 425.

A will required a devisee to elect to purchase real estate within 6 months after the death of a life tenant. An oral election, communicated to the only other heir, is sufficient. The election need not be written, if not required by the will, in view of 240.07. Estate of Russell, 10 W (2d) 346, 102 NW (2d) 768.

Under a will giving the testator's entire estate to named legatees, but providing that if any one of them had passed away "at the time of the probate of this will" the remaining named legatees should take the estate, the testator is deemed to have meant to postpone the effective date of the gifts to the named legatees at least until some proceeding had been commenced toward the probate of the will. Estate of Miller, 10 W (2d) 575, 103 NW (2d) 514.

A devise of real estate subject to a 5-year restriction on alienation or mortgaging is a devise in fee simple and the restriction is inconsistent and void. Unless the will discloses a contrary intent an existing mortgage on devised real estate is to be paid out of sufficient and available personal property. It is not necessary for the devisee to file a claim for exoneration of the mortgage. Estate of Budd, 11 W (2d) 248, 105 NW (2d) 358.

Wisconsin accepts the doctrine of incorporation into a will by reference. The fact, that a document was not in existence in final form does not prevent it from being incorporated into a will by reference. As a general rule, where a person knowing that a testator, in giving him a devise or bequest, intends it to be applied for the benefit of another, and either expressly provides or, by his action at the time, implies that he will convey the testator's intention into effect, and the property is left to him in good faith on the part of the testator that such promise will be kept, the promisor will be held as a trustee ex maleficio. Estate of Brandenburg, 13 W (2d) 217, 108 NW (2d) 374.

Where evidence clearly indicates a mistake was made as to the middle initial and address of a legatee, so that a stranger is designated, the will should be reformed and the bequest given to the individual intended. Estate of Gibbs, 14 W (2d) 490, 111 NW (2d) 413.

Provisions of a will as to payment of benefits out of principal or income are discussed in Estate of Odegard, 14 W (2d) 564, 111 NW (2d) 424.

Under a residuary clause which bequeathed the residue of the estate to "my executor" and which stipulated that, "My executor shall pay the sums in his hands in his sole discretion to the person or persons which I have previously indicated to him," the executor took such residue in his official capacity, and not personally, so that testimony to establish what the oral indication to the executor-scrivener was could not be permitted in evidence, with the result that such residue constituted property undisposed of by will and descended intestate. Estate of Liginger, 14 W (2d) 577, 111 NW (2d) 407.

Where an attorney-beneficiary drafted a will for a testator whose eyesight was seriously impaired, and the will, although duly executed in form, was not read to the testator and he was not otherwise informed of its contents at the time of execution, the will was

void and could not be admitted to probate. A codicil fell with the will because it expressly referred to such will and was therefore a part of that will. Estate of Barnes, 14 W (2d) 643, 112 NW (2d) 142.

Neither the supreme court nor the county court may consider whether a will is an "unnatural will," with a view to denying probate to it. Estate of Beale, 15 W (2d) 546, 113 NW (2d) 380.

A bequest in trust, the income to be paid to grandnieces and nephews and the principal to be distributed to them when the youngest is 50, is construed as requiring all to live to the date of distribution to have any vested interest in the corpus. Will of Walker, 17 W (2d) 181, 116 NW (2d) 106.

Where a will left nothing to testatrix' son who had disappeared in 1945 while a German soldier fighting in Russia, but the testatrix left a letter with the will requesting the beneficiaries to take care of the son if he returned, the letter was not part of the will and passed nothing to the son since he did not return. Estate of Spenner, 17 W (2d) 645, 117 NW (2d) 641.

Where a testator devised his farm to a named son for life, and to the son's lawful issue effective on the termination of the son's life estate, and gave the residue of the estate to the son, and the testator sold the farm to a third person under a land contract after the execution of the will, 238.02 (1) applied so as to prevent an ademption and permit the devisees to take the same interest in the land contract that they would have taken in the land itself had the testator not sold it prior to his death. Estate of Atkinson, 19 W (2d) 272, 120 NW (2d) 109.

Existing statutory and case law is one of the extrinsic aids which may be consulted in resolving a will ambiguity by construction; and where applicable law is to be looked to as a surrounding circumstance, it is the law in effect at the time of the making of the will, not the time of the death of the testator. Estate of McDonald, 20 W (2d) 63, 121 NW (2d) 245.

A testator's mere knowledge of the birth of an illegitimate child does not rebut the presumption that a bequest to issue means only legitimate children; to rebut the presumption requires not only that the existence of the illegitimate issue was known to the testator, but also (1) that the illegitimate issue was a part of the family circle or, (2) that the illegitimate was otherwise recognized by the testator as an object of his natural bounty. (Will of Kaufer, 203 W 299, modified.) Estate of Bohnsack, 20 W (2d) 448, 122 NW (2d) 443.

A bequest of a fraction of testator's "entire estate" does not contemplate that the computation is to be made before deduction of liabilities. Estate of Seliger, 27 W (2d) 323, 134 NW (2d) 447.

Where testator had not lived with his wife for many years and expressly disinherited her but provided that if she made any claim she should receive only the minimum amount "to which she may by law be entitled," the will was ambiguous but meant that she was to receive only her dower share. Estate of Jankewicz, 29 W (2d) 713, 139 NW (2d) 662.

The law that was in force when the will was executed is the law which determines the intention of the testator, but if the will has been republished by a codicil, it is the law as it stood when the codicil was executed. Will of Adler, 30 W (2d) 250, 140 NW (2d) 219.

The supreme court is not committed to a rule that defeasible vesting is to be preferred over absolute early vesting in a trust, but it does emphasize that in determining the intention of the testator both the concept of absolute early vesting and defeasible vesting of a remainder interest as beneficiary of a trust are available for consideration. Will of McDowell, 31 W (2d) 519, 143 NW (2d) 506.

When used in a will, "descendant" means "issue" and does not include heirs or collateral relatives in the absence of clear indication of a different meaning. A gift over in favor of distributees of another part of the remainder cannot be based on the intent of the testator unless grounded on express language in the will. Contingent remainders which fail must be distributed to the testator's heirs to be determined as of the date of his death. Will of Wehr, 36 W (2d) 154, 152 NW (2d) 868.

If property which is specifically devised or bequeathed remains in existence, and belongs to the testator at his death, slight and immaterial changes in its form do not operate as an ademption. Estate of Haberli, 41 W (2d) 64, 163 NW (2d) 168.

The early vesting rule in Wisconsin. Schreiter, 47 MLR 548.

Rule of early vesting of estates. 1963 WLR 494.

Ademption by extinction and equitable conversion. 1964 WLR 149.

238.03 History: R. S. 1849 c. 66 s. 3; R. S. 1858 c. 97 s. 3; R. S. 1878 s. 2279; Stats. 1898 s. 2279; 1925 c. 4; Stats. 1925 s. 238.03; 1969 c. 339.

A will which, after making specific devises and bequests, contains a gift of the residue of the property of the testatrix, real, personal or mixed, "in possession or expectancy," without restricting the word "expectancy" to personal property, manifests an intention to dispose of after-acquired real estate, within the provisions of sec. 2279, Stats. 1898. Will of Smith, 176 W 494, 186 NW 180.

A standard residuary clause is sufficient to show an intention to dispose of after-acquired real estate. Estate of Zink, 15 W (2d) 527, 113 NW (2d) 420.

238.04 History: 1864 c. 270 s. 1; R. S. 1878 s. 2280; 1891 c. 118; Stats. 1898 s. 2280; 1925 c. 4; Stats. 1925 s. 238.04; 1949 c. 245; 1969 c. 339.

If there is a specific lien on the homestead at decease of the owner and the other estate is insufficient to discharge it the homestead may be sold; but after its discharge and payment of expenses of administration the proceeds must be invested for the benefit of the family or be used for the purchase of another homestead. Devising part of 40 acres of exempt land does not divest the remainder of the character of homestead or make it liable for debts of the testator. Johnson v. Harrison, 41 W 381.

The homestead may be devised charged with

conditions such as the payment of legacies or debts. Turner v. Scheiber, 89 W 1, 61 NW 280.

Charging debts and legacies on the homestead requires their payment out of the fund derived from its sale. Mackin v. Madden, 104 W 61, 80 NW 100.

If it becomes necessary to sell a homestead in order to divide it among children entitled to take it under a will free from judgment liens, the proceeds are also exempt from such liens. Foote v. Foote, 159 W 179, 149 NW 738.

Although a homestead passes under sec. 2280 to the widow and children free from all judgments and claims against the deceased a judgment against one of the children will attach to such child's interest, as that interest is not the child's homestead. Polzen v. Polzen, 164 W 18, 158 NW 327.

See note to 313.26, citing Will of Borchardt, 184 W 561, 200 NW 461.

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 History: R. S. 1849 c. 66 s. 4; R. S. 1858 c. 97 s. 4; R. S. 1878 s. 2281; Stats. 1898 s. 2281; 1925 c. 4; Stats. 1925 s. 238.05; 1943 c. 11, effective Jan. 1, 1942; 1969 c. 339.

During her second marriage a woman made a will giving her property to the children of her first marriage. She afterwards married again, and died without issue of the second or third marriage, leaving her husband surviving. The will was not revoked by such third marriage. Will of Ward, 70 W 251, 35 NW 731.

238.06 History: R. S. 1849 c. 66 s. 5; R. S. 1858 c. 97 s. 5; R. S. 1878 s. 2282; 1895 c. 120; Stats. 1898 s. 2282; 1925 c. 4; Stats. 1925 s. 238.06; 1969 c. 339.

An insufficiently executed testamentary writing may be so adopted by a later instrument of the same kind as to become a part of the latter and with it form a valid will or codicil. Skinner v. American B. Society, 92 W 209, 65 NW 1037.

The presumption arising from an attestation and from the professional character of a deceased witness and his relations to decedent is not sufficient to overcome the decision of the trial court that 2 of 3 witnesses did not sign in the testator's presence. Adams v. Rodman, 102 W 456, 78 NW 588, 759.

An attestation clause showing all the statutory requisites affords a strong presumption that they were present. Arneson's Will, 128 W 112, 107 NW 21.

The recitals in an attestation clause overcame the testimony of one witness tending to show improper execution of the will. Will of Grant, 149 W 330, 135 NW 833.

The fact that the testator's signature follows instead of precedes the attestation clause does not invalidate the will; and where the instrument was regularly signed and sealed at the end of the attestation clause and such signature was duly witnessed, the fact that a signature above the attestation clause was at some time wholly or partially obliterated does not prove a revocation. Will of Young, 153 W 337, 141 NW 226.

No formal attestation clause is required by sec. 2282, Stats. 1913. Neither is an express request by the testator to the witnesses that they subscribe as attesting witnesses essential. A request may be implied. Although the better way is for the witnesses to sign after the testator has signed, that order is not essential if all sign when all are present and as part of one continuous transaction. Will of Griffith, 165 W 601, 163 NW 138.

Where a will was not read to a testatrix in the presence of the subscribing witnesses and she did not say that the document was her will nor request them to sign it, but they were requested by the attorney who drew the will to witness it, such request being made in the presence and hearing of the testatrix, both witnesses seeing her affix her signature and each signing in her presence, there was a due execution. Will of Schacht, 175 W 54, 182 NW 981.

The fact that a will was drawn by an attorney and executed under his supervision is strong presumptive evidence of due execution. Although an attestation clause is not essential, when incorporated the declarations of the attesting witnesses contained therein are presumptive evidence of proper execution. Aided by these presumptions the testimony of the only surviving attesting witness was sufficient, although uncertain and wavering as to the details. Will of Maresh, 177 W 194, 187 NW 1009.

Attestation in a room other than that in which testator lay, beyond his hearing, and out of his sight, was not in his "presence." Estate of Wilm, 182 W 242, 196 NW 255.

Positive evidence of attesting witnesses, who were in the prime of life and in the full possession of their mental faculties, that they did not witness the will in the presence of each other overcame the presumption of regularity arising from the attestation clause. Will of Foxen, 186 W 640, 203 NW 328.

A will may be signed by mark although the testator was able to write. Will of Mueller, 188 W 183, 205 NW 814.

The common-law requirement that all of the attesting witnesses to a lost or destroyed will must be called or their absence explained is complied with by the proponent producing in court all of the possible subscribing witnesses. Estate of Rosencrantz, 191 W 109, 210 NW 371.

The death or unavoidable absence of a subscribing witness to a will makes the testimony of the other subscribing witness sufficient in case of a contest. Will of Garrecht, 195 W 596, 219 NW 378.

Two propositions were decided in the cases of Estate of Lagershausen, 224 W 479, 272 NW 469, and Will of Johnston, 225 W 140, 273 NW 512: 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 testa-

tor 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. Will of Home, 231 W 227, 232, 284 NW 766, 285 NW 754.

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.

An instrument on a printed deed form with the words typed in, "This deed is null and void until after death of party of the first part," signed by her and attested and subscribed by 2 competent witnesses in the manner required by 238.06, Stats. 1927, and not delivered or recorded but found in her locked purse along with money and securities after her death, is admissible to probate as a will. It is not necessary that the witnesses see the testator sign the document, as long as the signature of the testator is on the document when the witnesses sign it, or he declares the same to the witnesses to be his will, and it is not necessary that the witnesses be expressly requested to sign by the testator. Will of Wnuk, 256 W 360, 41 NW (2d) 294.

Where the signature on the instrument offered for probate was properly found to be the genuine signature of the deceased, a strong presumption of regularity of execution of such instrument attached and, under the evidence, the trial court could properly find that such presumption of regularity of execution was not overcome by the objectors, although the instrument had no attestation clause and the witnesses to the instrument did not see the deceased sign and could not remember whether the instrument was signed by the deceased when they signed as witnesses. Estate of McCarthy, 265 W 548, 61 NW (2d) 819.

An oral contract to bequeath property must be established by evidence that is clear, satisfactory and convincing, a mere preponderance of the evidence not being sufficient. Holty v. Landauer, 270 W 203, 70 NW (2d) 633.

Under evidence establishing that a testatrix signed a testamentary instrument which she had prepared in her own handwriting, that she exhibited the instrument with her signature on it to competent witnesses and requested that they sign it, and that they signed it in her presence and in the presence of each other, the instrument was properly executed, although the testatrix did not sign the instrument in the presence of the witnesses, and did not by any express words acknowledge that the signature thereon was her own nor declare or acknowledge the instrument to be her will. As used in the term "attested and subscribed," the words, "attested" and "subscribed" are synonymous in Wisconsin. Estate of White, 273 W 212, 77 NW (2d) 404.

Where a testator, who had executed a 1948 will, executed a 1951 will containing a revocation clause revoking all former wills, and later executed a 1953 will containing a similar revocation clause, and destroyed the 1951 will in the presence of a third person, and later carried the 1948 and 1953 wills to the home of such third person and in his presence there mutilated and destroyed the 1953 will and threw it into a wastebasket, the testator, whether or not there was a valid revocation of the 1953 will, could not revive or reinstate the validly revoked 1948 will merely by announcing that he wanted to reaffirm it. Estate of Eberhardt, 1 W (2d) 439, 85 NW (2d) 483.

The concept of "presence" includes a state of mind as well as physical proximity, and contemplates mental presence as well as physical presence, so that where 2 witnesses signed the document but, when each such witness signed, the other was totally unaware of the signing, though physically present in the same room, the requirement that the witnesses must sign in the "presence of each other" was not fulfilled. Estate of Hulett, 6 W (2d) 20, 94 NW (2d) 127.

The presumption that a will is valid where duly executed falls where the evidence indicates that the testator did not know the contents of the instrument at the time of its execution. Estate of Barnes, 14 W (2d) 643, 112 NW (2d) 142.

There is nothing legally invalid in the execution of a will because the separate pages of the will have not been fastened together, but it is a requirement that all the pages be present at the time of execution. Estate of Beale, 15 W (2d) 546, 113 NW (2d) 380.

It is improper from the standpoint of professional ethics for an attorney who drafted a will to continue to conduct litigation relating thereto when he knows in advance of the trial that his testimony will be required, but an attorney who violates such rule is not thereby rendered incompetent to testify. If an attorney who drafted and witnessed a will were incompetent to testify in relation thereto the striking of his testimony would not prevent the admission of the will on the testimony of the other attesting witness. Estate of Weinert, 18 W (2d) 33, 117 NW (2d) 685.

Where one fails or is unable to in any manner authorize another to sign for him, the statute's alternate requisite is not met by simply taking the testator's hand as an inanimate object and making his mark or signature. Mere use of the testator's hand does not furnish objective evidence of assent. Direction to assist the testator, like the direction to sign for him, must be actively rather than passively expressed. (Will of Wilcox, 215 W 341,

254 NW 529, overruled.) Estate of Komarr, 46 W (2d) 230, 175 NW (2d) 473.

238.07 History: R. S. 1878 s. 2283; 1879 c. 194 s. 2 sub. 18; Ann. Stats. 1889 s. 2283; 1895 c. 124; Stats. 1898 s. 2283; 1925 c. 4; Stats. 1925 s. 238.07; 1969 c. 339.

Editor's Note: For foreign decisions construing the "Uniform Foreign Executed Wills Act" consult Uniform Laws, Annotated.

The duty of the supreme court toward the public and the testator, if not toward the parties in interest, is deemed to require consideration of whether the herein propounded codicil signed in Illinois but not executed in compliance with 238.06, was nevertheless valid under 238.07 if executed in the manner prescribed in Illinois. Estate of Hulett, 6 W (2d) 20, 94 NW (2d) 127.

238.08 History: R. S. 1849 c. 66 s. 8; R. S. 1858 c. 97 s. 8; R. S. 1878 s. 2284; Stats. 1898 s. 2284; 1905 c. 128 s. 1; Supl. 1906 s. 2284; 1923 c. 243; 1925 c. 4; Stats. 1925 s. 238.08; 1969 c. 339.

An heir of a testator to whom no bequest is made is a competent subscribing witness. In re Will of Hoppe, 102 W 54, 78 NW 183.

Under secs. 2284 and 4068, R. S. 1878, a residuary legatee was a competent subscribing witness to a will, sec. 4068 not being applicable to subscribing witnesses. Estate of Johnson, 170 W 436, 175 NW 917.

The words "two other competent witnesses" mean 2 other competent subscribing witnesses Will of Johnson, 175 W 1, 183 NW 888.

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.

A provision in a will appointing the attorney who drafted it as executor, and fixing the sum of $200 for his services as executor, which sum was small considering the size of the estate, did not disqualify him from being a subscribing witness to the will. Will of Henderson, 272 W 163, 74 NW (2d) 739.

238.09 History: R. S. 1849 c. 66 s. 9; R. S. 1858 c. 97 s. 9; R. S. 1878 s. 2285; Stats. 1898 s. 2285; 1905 c. 128 s. 8; Supl. 1906 s. 2285; 1925 c. 4; Stats. 1925 s. 238.09; 1969 c. 339.

Where the bequest of the residue of an estate to a son, one of 2 heirs at law, was void under 238.08, the son was entitled to the share he would have received if there had been no will, not exceeding the bequest, and his co-heir the balance; the son does not receive such share plus one half of the balance as intestate property. Estate of Reichenberger, 272 W 176, 74 NW (2d) 740.

238.10 History: R. S. 1849 c. 66 s. 26; R. S. 1858 c. 97 s. 26; R. S. 1878 s. 2286; Stats. 1898 s. 2286; 1925 c. 4; Stats. 1925 s. 238.10; 1969 c. 339.

Children born after the making of a parent's will share in the estate as if the parent had died intestate unless a different intention appears from the will. The fact that the parent lived many years after making the will and after the birth of such children does not change the rule. Bresee v. Stiles, 22 W 120.

A will gave the wife two-thirds of the estate so long as she remained a widow, otherwise one-third to "her heir." She had no child at her husband's death, but a child was born 5 months later. The child was mentioned in the will by the use of the words "her heir," and the will showed an intention to exclude him unless the contingency should happen on which he was to take. Verrinder v. Winter, 98 W 287, 73 NW 1007.

A will which gives to children a remainder in real estate upon the majority of the youngest is a provision within the meaning of sec. 2286, R. S. 1878. In re Donges's Will, 103 W 497, 79 NW 786.

The legal adoption of a child after the making of a will entitled such child to the share which he should have had in the estate if testator had died intestate. Where language of the will is plain and makes no mention of intention to exclude the child, declarations of testator are not admissible to show intent. Sandon v. Sandon, 123 W 603, 101 NW 1089.

Where a testator having several living children gave his entire estate to his wife, with no provision in his will for such living children, the instrument indicated an intention of the testator that an after-born child should also take nothing under the will. Declarations by the testator as to such intention were inadmissible. Will of Read, 180 W 497, 193 NW 382.

Problem of pretermitted heirs. Von Briesen, 1948 WLR 475.

238.11 History: R. S. 1849 c. 66 s. 27; R. S. 1858 c. 97 s. 27; R. S. 1878 s. 2287; Stats. 1898 s. 2287; 1925 c. 4; Stats. 1925 s. 238.11; 1969 c. 339.

In order to open a will and let in a child not provided for, clear evidence of accident or mistake must be shown. It must appear that his omission from the will was not intentional, but accidental. Where it appeared that the testatrix intended to change her will if such child, then under life sentence in prison, should get his freedom, but if not, that she wished the other heirs to have her property, and such son was not pardoned until after her death, he was intentionally omitted. Moon v. Estate of Evans, 69 W 667, 35 NW 20.

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.

The question whether a testator's omission to provide for a child in his will was intentional or accidental is one of fact, and may be considered on extrinsic evidence. The burden of proof to establish an accidental omission is on the contestant. Will of Mattes, 268 W 447, 68 NW (2d) 18.

Result of omission of child through mistake or intentional disinheritance. 40 MLR 247.

238.12 History: R. S. 1849 c. 66 s. 28; R. S. 1858 c. 97 s. 28; R. S. 1878 s. 2288; Stats. 1898 s. 2288; 1925 c. 4; Stats. 1925 s. 238.12; 1969 c. 339.

238.13 History: R. S. 1849 c. 66 s. 29; R. S. 1858 c. 97 s. 29; R. S. 1878 s. 2289; Stats. 1898 s. 2289; 1925 c. 4; Stats. 1925 s. 238.13; 1969 c. 339.

The word "relation" includes only relatives by consanguinity. Cleaver v. Cleaver, 39 W 96.

On the death of a legatee during the lifetime of the testator the legatee's children are entitled to his share. Will of Griffiths, 172 W 630, 179 NW 768.

Under a will providing for a division of the residue of testator's estate among designated legatees, if the estate amounted to more than the total sum of specific bequests, all of the estate not passing under such bequests, including the amount of a bequest to testator's son who died during the testator's lifetime, would go to the residuary legatees, rather than to testator's heirs at law as intestate property. Estate of Radcliffe, 194 W 330, 216 NW 501.

Where property was devised to testator's 4 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 2 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.

238.13 does not prevent a lapse, nor inferentially provide for a lapse, where a predeceased legatee leaves no issue. In a nonlapsible 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.

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 this section, 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's 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 negatory 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.

238.13 is to be liberally construed, and all doubts must be resolved in favor of the operation thereof and the testator is presumed to have framed his will with the statute in mind. Will of Colman, 253 W 91, 32 NW (2d) 237.

The legal status of an adopted child is that of a child of the adoptive parents, so that on the death of a legatee during the lifetime of a testatrix, an adopted child of the legatee was entitled to share in her share. Estate of Holcombe, 259 W 642, 49 NW (2d) 914.

Where a joint will of a husband and wife devised their farm to a son on the death of the surviving parent, subject to the payments charged thereon of a specified sum to each of 3 named daughters, such gifts to the daughters were not to a class of persons but were to persons specifically named, and were deferred until the death of the surviving parent, so that such gift to a daughter who died after the mother, but before the father, lapsed at the death of such daughter. A lapsed specific gift ordinarily goes to the residue of the estate; but where it is a legacy charged on a devise of real estate, it sinks into the devise and the devisee takes the land free from any charge thereon in respect to such gift. Where the residuum of an estate is given by will to 2 or more individually, and not as a class, and the gift to one of them lapses, the lapsed part of the residuum passes as intestate property, unless the testator indicates an intention that the property pass in a different manner, in which case effect must be given to such intention. Estate of Schefe, 261 W 113, 52 NW (2d) 375.

238.13 is designed to prevent a lapse, and does not apply in any case to an adopted child of a devisee or legatee who dies after the testator. Estate of Uihlein, 269 W 170, 68 NW (2d) 816.

238.13 does not apply as to the surviving

issue of a predeceased child of a testator under a will leaving the residue of the testator's estate in trust for the benefit of all of "my children living at the time of my death," in equal shares. Estate of Stewart, 270 W 610, 72 NW (2d) 334.

As used in 238.13 the word "relation" includes only relatives by consanguinity and a liberal construction cannot change the clear meaning. In a bequest to an unadopted stepdaughter of the testator, who predeceased the testator and left issue who survived the testator, but who were not mentioned in the bequest to their mother, the testator did not intend that such issue should take their mother's share and 238.13 was not applicable. Estate of Dodge, 1 W (2d) 399, 84 NW (2d) 66.

238.135 History: 1947 c. 320 s. 3; Stats. 1947 s. 318.03 (2); 1951 c. 699 s. 2; Stats. 1951 s. 238.135; 1969 c. 339.

238.136 History: 1947 c. 320 s. 3; Stats. 1947 s. 318.03 (1); 1951 c. 699 s. 3; Stats. 1951 s. 238.136; 1969 c. 339.

238.14 History: R. S. 1849 c. 66 s. 10; R. S. 1858 c. 97 s. 10; R. S. 1878 s. 2290; Stats. 1898 s. 2290; 1925 c. 4; Stats. 1925 s. 238.14; 1969 c. 339.

A nuncupative codicil to a written will, operating pro tanto as a revocation of it, is prohibited. Brook v. Chappel, 34 W 405.

There was no revocation where a will was wholly on the first page of a double sheet and the testatrix wrote upon the fourth page of the sheet, "I revoke this will," with her signature and the date, but not attested or subscribed by witnesses. Declarations of an intention to revoke, not made at the time of such writing, are inadmissible. In re Ladd, 60 W 187, 18 NW 734.

Where a valid will last known to be in the possession of the testator cannot be found after his death the prima facie presumption is that it was destroyed intending to revoke it, and his declarations to that effect and the fact that he did not have it at the time of death may be proven. In re Steinke's Will, 95 W 121, 70 NW 61.

Sec. 2290, Stats. 1898, indicates the only ways in which a will may be revoked, and the expression of the testator of an intent to change his will cannot amount to a revocation. Deck v. Deck, 106 W 470, 82 NW 293.

Marriage of a testator and birth of a child operate to revoke a will made prior to marriage and not in contemplation of it, and the adoption of a child has the same effect as birth would have had. Glascott v. Bragg, 111 W 605, 87 NW 853.

The revocation of a former will by a clause in the later will is immediate and absolute. The destruction or revocation of the subsequent will does not revive the former will. The fact that the former will was redeposited with the county judge after the destruction of the subsequent will does not change this rule. In re Noon's Will, 115 W 299, 91 NW 670.

Where the will was last known to be in possession of the testator and could not be found upon his death a prima facie presumption arises that he destroyed it with the intention of revoking it. Where an attempt is made to establish a lost will the burden of doing away with such presumption is upon the proponent. Where there was evidence of declarations of the testator shortly before his death to the effect that he believed the will in existence, that the testator was unconscious for several days before his death, that the contestant had access to his rooms and papers while he was so unconscious, that the papers were found in a scattered condition in his room and that the contestant removed part of them and refused to return them, it was sufficient to sustain a finding by the court establishing the last will. Gavitt v. Moulton, 119 W 35, 96 NW 395.

A divorce followed by a final division of the property of the husband is such a changed condition of circumstances as to operate as an implied revocation of a provision in the husband's will in favor of the wife. Will of Battis, 143 W 234, 126 NW 9.

When a will cannot be found after the death of the testator there arises a presumption that it has been destroyed for the purpose of revoking it. This presumption may be overcome by evidence, the burden being upon the proponent. Wendt v. Ziegenhagen, 148 W 382, 134 NW 905.

If a testatrix attempted to cancel her duly executed will and to make a different disposition of her estate, but the proposed new disposition failed to be effectuated, the presumption in favor of revocation by the cancellation is repelled and the will stands as originally made. Will of Marvin, 172 W 457, 179 NW 508.

A last will, validly executed, revokes all former wills, whether it contains a revocation clause or not. If it contains such a provision the revocation is immediate and absolute, and the former will is not revived by the fact that the latter will has been destroyed or cannot be found. Its execution and contents may be established by extrinsic evidence, and equity may revoke the probate of the former will upon such evidence, if clear and satisfactory. Estate of Laege, 180 W 32, 192 NW 373.

A beneficiary under a will may commit a crime upon the testator resulting in his death; but if testator lives a reasonable time after the commission of the offense, retaining his competency to make a new will or revoke the old, and fails to do so, the beneficiary will take. If, by the act of the beneficiary, death of the testator results without opportunity to revoke the will the beneficiary will not take. Estate of Wilkins, 192 W 111, 211 NW 652.

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

Destruction of a will by the 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 the will was revoked, and there was 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.

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, 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, 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. 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.

See note to 274.12, citing Estate of Sweeney, 248 W 607, 22 NW (2d) 657.

The rule of dependent relative revocation may be applied in a case of revocation of a later will with an announced intention of reinstating a former one. The doctrine of dependent relative revocation is based on the testator's inferred intention, and as a matter of law the destruction of the later document is construed as conditional where it is accompanied by the expressed intent of reinstating a former will and there is no explanatory evidence; but if there is evidence that the testator intended the destruction to be absolute there is no room for the application of the doctrine of dependent revocation. Estate of Callahan, 251 W 247, 29 NW (2d) 352.

The intention of a testatrix to revoke a bequest in her will must be established by clear and satisfactory evidence. Estate of Holcombe, 259 W 642, 49 NW (2d) 914.

A divorce and division of property constituted an implied revocation of the husband's will by operation of law, so far as the will provided for the wife, although the husband died less than a year after the entry of the judgment of divorce. Testimony offered by the divorced wife to show a reconciliation between the parties, before the death of the husband during the year following the entry of the judgment of divorce, was inadmissible to overcome the effect of the unvacated judgment of divorce as an implied revocation of the husband's will by operation of law. Estate of Kort, 260 W 621, 51 NW (2d) 501.

If it is established that a testator destroyed a will in his possession with intent to revoke it, such revocation also revokes all duplicates or triplicates of the one destroyed. In order to overcome the presumption of revocation by destruction which arises from the failure to find a will last known to be in the testator's possession, the rule is that when evidence to the contrary is received, which if uncontradicted is sufficient to support a finding, the presumption is destroyed or removed. Will of Donigian, 265 W 147, 60 NW (2d) 732.

A joint or mutual will, lacking contractual elements, may be revoked at any time by either testator in the same manner as other wills. Estate of Schley, 271 W 74, 72 NW (2d) 767.

A revocation clause in a second will is effective to revoke a prior will as soon as such second will is executed by the testator. A prior will thus revoked cannot thereafter be revived and reinstated by a testator except by a written instrument executed in the manner required by 238.06. The principle of "dependent relative revocation" can never be employed for the purpose of reviving a will which has previously been validly revoked. Estate of Eberhardt, 1 W (2d) 439, 85 NW (2d) 483.

See note to 238.02, citing Will of Wilson, 5 W (2d) 178, 92 NW (2d) 282.

Changes in a will in the testator's handwriting after execution do not necessarily revoke a will nor are the attempted changes effective. Estate of Beale, 15 W (2d) 546, 113 NW (2d) 380.

Where only the second page of a will was found in testator's safe-deposit box and only he had access to the box, and where it appeared that the first page had been torn off and was not found, the will was revoked. Estate of Slama, 18 W (2d) 443, 118 NW (2d) 923.

Where the testator crossed out the names of beneficiaries in the only clause making a disposition of property and wrote "Void" in several places on the will and its backer, the

will was revoked. Estate of Helgert, 29 W (2d) 452, 139 NW (2d) 81.

Implied revocation of wills in Wisconsin. Byrne, 12 MLR 293.

238.15 History: R. S. 1849 c. 66 s. 11; R. S. 1858 c. 97 s. 11, 12; R. S. 1878 s. 2291; Stats. 1898 s. 2291; 1925 c. 4; Stats. 1925 s. 238.15; 1969 c. 339.

Where a will deposited with a county judge was withdrawn from his custody and a new will which was executed contained a clause revoking all former wills, the redeposit of the former will with the county judge did not revive it, although the last will could not be found. In re Noon's Will, 115 W 299, 91 NW 670.

238.16 History: R. S. 1849 c. 66 s. 6; R. S. 1858 c. 97 s. 6; R. S. 1878 s. 2292; Stats. 1898 s. 2292; 1925 c. 4; Stats. 1925 s. 238.16; 1955 c. 411; 1969 c. 339.

A written will cannot be revoked by a nuncupative codicil. Brook v. Chappell, 34 W 405.

All provisions of law permitting and regulating nuncupative wills must be strictly complied with. Owen's Appeal, 37 W 68.

A nuncupative will cannot pass any title to real estate or to the income thereof accruing subsequent to the death of the testator. In re Davis's Will, 103 W 455, 79 NW 761.

The provisions of 325.16 rendered the sole beneficiary, who was also one of the 3 subscribing witnesses of an alleged nuncupative will, an incompetent witness thereto, so that the admission of such will to probate was properly denied. Will of Repush, 257 W 528, 44 NW (2d) 240.

238.17 History: R. S. 1849 c. 66 s. 7; R. S. 1858 c. 97 s. 7; R. S. 1878 s. 2293; Stats. 1898 s. 2293; 1925 c. 4; Stats. 1925 s. 238.17; 1969 c. 339.

238.18 History: R. S. 1849 c. 66 s. 21; R. S. 1858 c. 97 s. 21; R. S. 1878 s. 2294; Stats. 1898 s. 2294; 1925 c. 4; Stats. 1925 s. 238.18; 1951 c. 594; 1969 c. 339.

The probate is conclusive that the will was not obtained by fraud or undue influence. Equity has no jurisdiction to set aside the probate for fraud in procuring the will, although it might interfere in case the probate itself was obtained by fraud. Archer v. Meadows, 33 W 166.

A construction of the provisions of the will at the time and on the notice required to prove its execution is not conclusive. Jones v. Roberts, 84 W 465, 54 NW 917.

Where 2 separate wills were probated as one, the latest in date being regarded as a codicil, and no appeal is taken, the parties are concluded as to their due execution, and it cannot be contended that the earlier was revoked by the later. Dicke v. Wagner, 95 W 260, 70 NW 159.

The testimony of subscribing witnesses constitutes primary evidence of the due execution of a will, and other or secondary evidence cannot be resorted to until after a showing that the subscribers are dead, beyond the jurisdiction of the court, or non compos mentis. The common law requires the production of all the subscribing witnesses, unless the impossibility of so doing is made to appear, and the only modification of this rule is provided in sec. 3788 which authorizes probate on the testimony of one witness when there is no objection. A mere bystander is not a competent witness. Will of Johnson, 175 W 1, 183 NW 838.

It is well settled that title to real estate passes by the will when duly probated and not by decree of the court. Estate of Ross, 181 W 125, 194 NW 151.

When due and formal proofs are made of their execution, wills are not to be denied probate except upon clear and satisfactory evidence. The testimony of attesting witnesses of good character should receive great consideration, but is not conclusive in a will contest. Will of Williams, 186 W 160, 202 NW 314.

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 238.18 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. 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.

238.19 History: 1957 c. 211; Stats. 1957 s. 238.19; 1969 c. 339.

A joint will executed by husband and wife pursuant to an agreement made as to the disposition of their property applied only to property owned by them at the death of either and not to property thereafter acquired by the survivor. Estate of Schefe, 261 W 113, 52 NW (2d) 375.

A will jointly executed by 2 testators or one of 2 separate wills, containing reciprocal provisions and provisions for the benefit of third persons effective on the death of the surviving testator, which is a fruition of a contract between the testators, cannot be revoked to the detriment of the third persons by the survivor after the death of the other testator and the acceptance of benefits derived from the will of the other which conformed

to the contract, without committing a breach of contract, at least not from the viewpoint of a court of equity. Schwartz v. Schwartz, 273 W 404, 78 NW (2d) 912.

A joint will which expressly or impliedly does not take effect until the death of the survivor is invalid, but in the absence of this factor, a joint will may be regarded as the will of each cotestator and probated twice, once at the death of each, whether the property bequeathed be owned severally or jointly by the testators, and especially does the rule hold true where the testators are husband and wife. Estate of Cordes, 1 W (2d) 1, 82 NW (2d) 920.

238.19 does not apply where there is a separate contract involved. It applies if the only evidence of the contract were the wills themselves and they fail to expressly reveal their contractual nature. Pederson v. First Nat. Bank, 31 W (2d) 648, 143 NW (2d) 425.

A will which is jointly executed may furnish in itself prima facie proof that it was executed pursuant to a contract between the testators, notwithstanding it does not expressly purport to have been made pursuant to contract, does not contain the words "contract" or "agreement," or include an express promise that the survivor will carry out the dispositions contained in the will. Estate of Hoeppner, 32 W (2d) 339, 145 NW (2d) 754.

Joint and mutual wills. Glinski, 24 MLR 42.

Joint and mutual wills. Dall, 38 MLR 30, 239.

Wills made pursuant to contract. 50 MLR 549.

238.20 History: R. S. 1849 c. 66 s. 38, 39; R. S. 1858 c. 97 s. 38, 39; R. S. 1878 s. 2296; Stats. 1898 s. 2296; 1903 c. 76 s. 1; Supl. 1906 s. 2296; 1925 c. 4; Stats. 1925 s. 238.20; 1949 c. 303; 1969 c. 339.

Although a will is not recorded, a purchaser from an heir having notice of such will is bound thereby. Prickett v. Muck, 74 W 199, 42 NW 256.

238.21 History: 1969 c. 82; 1969 c. 392 s. 66; Stats. 1969 s. 238.21.

CHAPTER 240.

Fraudulent Conveyances and Contracts Relating to Real Estate.

240.01 History: R. S. 1849 c. 75 s. 1; R. S. 1858 c. 106 s. 1; R. S. 1878 s. 2297; Stats. 1898 s. 2297; 1925 c. 4; Stats. 1925 s. 240.01.

A complaint which seeks to set aside a deed under sec. 2297, Stats. 1898, must either allege directly that such deed was made with a particular intent to defraud specified in the statute, or must allege facts from which such intent must be inferred. McDonald v. Sullivan, 135 W 361, 116 NW 10.

240.02 History: R. S. 1849 c. 75 s. 2; R. S. 1858 c. 106 s. 2; R. S. 1878 s. 2298; Stats. 1898 s. 2298; 1925 c. 4; Stats. 1925 s. 240.02.

240.03 History: R. S. 1849 c. 75 s. 3; R. S. 1858 c. 106 s. 3; R. S. 1878 s. 2299; Stats. 1898 s. 2299; 1925 c. 4; Stats. 1925 s. 240.03.

240.04 History: R. S. 1849 c. 75 s. 4; R. S. 1858 c. 106 s. 4; R. S. 1878 s. 2300; Stats. 1898 s. 2300; 1925 c. 4; Stats. 1925 s. 240.04.

240.05 History: R. S. 1849 c. 75 s. 5; R. S. 1858 c. 106 s. 5; R. S. 1878 s. 2301; Stats. 1898 s. 2301; 1925 c. 4; Stats. 1925 s. 240.05.

240.06 History: R. S. 1839 p. 162 s. 6; R. S. 1849 c. 75 s. 6; R. S. 1858 c. 106 s. 6; R. S. 1878 s. 2302; Stats. 1898 s. 2302; 1925 c. 4; Stats. 1925 s. 240.06; 1969 c. 285.

Editor's Note: This section is repealed, effective July 1, 1971, by ch. 285, Laws 1969. See the editor's note printed ahead of ch. 700 for information as to the provisions in the new property law which replace it.

1. Transactions covered.
2. Estate or interest in lands.
3. Operation of law, or acts of parties.
4. Deed or conveyance in writing.

1. Transactions Covered.

A contract of license to search for ore or to open and work a quarry is not within the statute. Gillett v. Treganza, 6 W 343.

An agreement for a deed and a lease of an easement in discharge of a mortgage is within the statute. Starin v. Newcomb, 13 W 519.

The sale of crops with the right to harvest them is not an interest in land. Westcott v. Delano, 20 W 514.

A right of way, either a freehold or for a fixed term, is an interest in land and cannot be created by parol. But an oral agreement for a right to draw logs across land for a term less than a year is a license revocable at will. Duinneen v. Rich, 22 W 550.

An executory agreement to release an equitable interest in land, not being in writing, is void under the statute. Gough v. Dorsey, 27 W 119.

An agreement to drain mines is not within the statute. Townsend v. Peasley, 35 W 383.

A license does not create an interest in land. Lockhart v. Geir, 54 W 133, 11 NW 245.

An agreement that A shall procure a conveyance to B from a third person, that B shall pay for the land, and that they shall work a quarry thereon and share the profits, is not within sec. 2302, R. S. 1878, as being for an interest in lands and is not within sec. 2307, R. S. 1878, as being by its terms not to be performed within a year. Treat v. Hiles, 68 W 344, 32 NW 517.

An oral agreement by which the plaintiff and another were to look up and locate lands and defendant was to enter and pay for them and take title to himself, and afterwards to sell and dispose of them for the benefit of all and pay the plaintiff one-fourth of the proceeds, is not void as creating an estate or interest in lands, the proceeds being referred to merely as a measure of the compensation to be paid plaintiff for his services. Watters v. McGuigan, 72 W 155, 39 NW 382.

If a parol agreement to convey is fully performed it is enforceable. Larsen v. Johnson, 78 W 300, 47 NW 615.

A parol agreement by S to pay A one-half the cost of a party wall on the line between their lots is not within the statute if S uses