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 ch. 237 and in s. 238.04.

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.

Undue influence case: Estate of Maxcy, 258 W 360, 46 NW (2d) 479.

Testator not subject to undue influence. Will of Dobson, 258 W 587, 46 NW (2d) 758.

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.

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.

"Heirs at law" means the same as "next of kin," except that "heirs at law" denotes the blood relatives who inherit the real property of an intestate whereas "next of kin" denotes the blood relatives who inherit the personal property of an intestate. The terms "heirs" and "heirs at law" are frequently used as being synonymous with "next of kin" in legal instruments describing persons who are to take interests in personal property. In construing a will making provision for the "heirs and next of kin" of the testator, the trial court was in error in attempting to differentiate and classify a surviving sister and brother as "next of kin" and a surviving niece and nephew as "heirs" of the testator, when all 4 were at the same time both next of kin and heirs at law of the testator. Will of Bray, 260 W 9, 49 NW (2d) 716.

"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 a contarry intention on the part of the testator to that of a per capita distribution. The fact 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 by reason of the use of words such as "in equal shares" or "share and share alike" or any other equivalent words intimating an equal division. 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.

Under a paragraph of a will giving one-sixth of the residue of the testator's estate to a living sister, or her heirs, and five-sixths to nieces and nephews, children of deceased sisters and brothers, "to be divided equally among them, share and share alike. All of such nieces and nephews shall take per stirpes and not per capita and it is my desire that the issue of any deceased niece or nephew shall take their parents' share," and a paragraph giving the entire residue to such nieces and nephews in case the living sister predeceased the testator, and containing language similar to that above quoted, the testator intended that the surviving nieces and nephews should share in his estate as a class, on a share-and-share-alike basis, and not by right of representation, and that the children of any predeceased niece or nephew were to take their parents' share; it being evident that the use of the words as to taking "per stirpes and not per capita" was due to a lack of knowledge of their meaning and was so clearly contradictory to the manifest intention of the testator as to render them nugatory. Estate of Blackbourn, 260 W 25, 49 NW (2d) 755.

A prior will may be admitted in evidence and considered in ascertaining the intention of the testator, at least where the will under consideration was modeled on the prior will. Estate of Blackbourn, 260 W 25, 49 NW (2d) 755.

The term "heirs" means those to whom the law assigns intestate property, and the presumption that a testator used the term with that meaning in his will is overcome only by clear evidence in the context of a different intention. 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.

See note to 318.06, citing Will of Dolph, 260 W 291, 50 NW (2d) 448.

A joint will executed by husband and wife, reciting that all of their property was held or intended to be held jointly, and providing that neither would revoke such will, and that they mutually gave to each other any property which might be questioned as not held in joint tenancy at the death of either, and giving their farm and personal property to a son on the death of the surviving parent, and giving certain specific legacies, and giving the residue of the estate in equal shares to 3 daughters, and an accompanying agreement as to executing such joint will and not revoking it, and reciting, among other things, that the parties owned their farm in joint tenancy and had agreed to hold as joint property all other property which they then owned or might thereafter acquire while both parties were living, were intended to apply 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.

When the "use" of property is given to a donee under the will, the word "use" is synonymous with giving a "life estate." Under a will giving the testator's property to his widow "for her use, benefit and enjoyment during her lifetime, with full power of sale and of making other disposition thereof, and with the right to use and enjoy the principal, as well as the interest, if she shall have need thereof for her care, comfort or enjoyment," and giving the residue to certain named persons, the widow was given an absolute life estate, not merely a life support estate, and the accumulations of income became her separate property. 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.

Provisions in wills, that determinations of executors and trustees shall not be open to review but shall be final and conclusive, place absolute discretionary powers in the hands of executors and trustees only in the absence of bad faith, fraud or mere arbitrary action. Estate of Teasdale, 261 W 248, 52 NW (2d) 366.

See notes under 318.06, for extent to which will can be used to ascertain meaning of final judgment. Will of Hill, 261 W 290, 52 NW (2d) 867.

Undue influence established. Will of Roehl, 261 W 466, 53 NW (2d) 180.

The words "I hereby declare it to be my express desire," used by the testator in his will in requesting that a certain attorney be retained as counsel, were more than precatory, and were in the nature of a direct request. Estate of Ogg, 262 W 181, 54 NW (2d) 175.

Undue influence not proved. Estate of Beyer, 262 W 441, 55 NW (2d) 401.

See note to 318.06, citing Will of Greiling, 264 W 146, 59 NW (2d) 241.

Although the testator had only nephews living at the time, the inclusion of the words "my nieces and nephews" in the residuary clause of the will, drawn by an attorney who testified that the words "nieces" was included through his error, could be considered as surplusage caused by harmless inadvertence, and as not militating against the mental competency of the testator. Will of Klagstad, 264 W 269, 58 NW (2d) 636.

The evidence sustained a finding that an aged testator, who had made an earlier will leaving most of his property to an unmarried son living with him, and who made a later will leaving his entire estate to the children of an incompetent and institutionalized daughter, had sufficient mental capacity to make a valid will at the time of executing the later will. 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.

Finding of incompetency sustained. Will of Wright, 266 W 89, 62 NW (2d) 409.

Undue influence not proved. Will of Knierim, 268 W 596, 68 NW (2d) 545.

When provision is made in a will for the child of some person other than the testator 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.

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 Koos, 269 W 478, 69 NW (2d) 598.

With reference to 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. Estate of Cobeen, 270 W 545, 72 NW (2d) 324.

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, but had only the right to occupy the homestead or to rent it and to receive the income from the remaining property. Where the will gives only the use of the estate to the wife for life, and does not provide for sale or reinvestment of funds, a trustee should be appointed, even though the will is silent as to such an appointment. Estate of Cobeen, 270 W 545, 72 NW (2d) 324.

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.

In construing wills, courts do not have power to reform the same even in the case of an obvious mistake on the part of the testator, and it makes no difference that the mistake was occasioned by the oversight or inadvertence of the draftsman of the will. A provision in 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," was not ambiguous, was capable of only one meaning, and bequeathed the entire estate to the wife, although the will also contained a residuary clause bequeathing "all of the rest and residue of my estate" to the testator's 3 sisters. Estate of Gray, 265 W 217, 61 NW (2d) 467.

Where a will bequeathed the residue of the testator's property in trust with 10 per cent of the yearly net income therefrom to be paid to each of 3 named persons and the remaining 70 per cent to named charitable and educational institutions, and provided that on the death of any of such 3 named persons his share should go to the survivors, without any direct provision for this portion of the income going over to any other beneficiary on the death of the last surviv-

ing of such 3 named persons, but where the will also provided that in case any bequests lapsed they should be used to pay other bequests in full and, if not needed for that purpose, should pass into the residuary clause—the provision for the last survivor, as well as for the other 2 named persons, was only the granting of an income for life, and did not vest 30 per cent of the corpus in such 3 named persons and would not entitle the last survivor to 30 per cent of the corpus, but the bequest to them would lapse on the death of the last survivor and the provision relating to lapsed bequests would then become effective. Estate of Ogg, 265 W 432, 61 NW (2d) 876.

A provision in the will of a childless testator, devising to his wife "such homestead and dower rights in all of the real estate of which I may die seized as she would have if I had died intestate," devised to the wife, in fee, the entire real estate of which the testator died seized, although the will also contained a residuary clause devising and bequeathing the residue to the testator's brother in trust for certain purposes. Will of Hipsch, 265 W 446, 62 NW (2d) 18.

Where a will generally divided testatrix's 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 making several devises and bequests, including substantial immediate provision for the testator's son, and leaving the residue of the estate in trust for the benefit of the testator's daughter for a period of 5 years during which the daughter was to receive the income, and further providing that "in the event of the death of my said daughter" within such 5 year period 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.

Under a will of a childless testator giving his 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," the testator intended to devise and bequeath to her her dower and homestead rights in his estate and a one-third interest in the personal property, to which she was legally entitled and of which she might not be deprived, and thereunder she did not take the entire estate to the exclusion of the testator's 2 nephews named in the residuary clause. (Will of Pfeiffer, 231 W 117, applied; Estate of Gray, 265 W 217, and Will of Hipsch, 265 W 446, distinguished.) Will of Klinkert, 270 W 362, 71 NW (2d) 279.

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 to the extent that the testator shall leave other property subject to payment of the same. When devised to any of the persons mentioned in section 237.025, the same exemptions shall apply as set forth therein.

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.

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.

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 this section 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.

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 nuncupative 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.

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.

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. Evidence sufficient to meet the burden discussed. Will of Mattes, 268 W 447, 68 NW (2d) 18.

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.

Under 322.07 (1) (Stats. 1951) the legal status of an adopted child is changed to 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.

This section 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.

This section 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.

238.135 Disposition of renounced legacy. (1) If any legacy other than a bequest of the residue or any interest therein is renounced or refused, such legacy shall not escheat but in the absence of other directions in the will shall become part of the residue of the estate.

(2) If any legacy consisting of the residue of an estate or any interest therein including legacies which have become a part of the residue under subsection (1) shall be renounced or refused, such residue or legacy of an interest therein shall not escheat but in the absence of other directions in the will shall descend or be distributed as intestate property.

History: 1951 c. 699.

238.136 Escheat of intestate property on failure of heir. If there is no known heir of the decedent, the residue of the estate, not disposed of by will, shall escheat and shall be ordered paid into the state school fund.

Cross Reference: For escheat procedure, see 318.02 and 318.03.

History: 1951 c. 699.

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.

The intention of a testatrix to revoke a bequest in her will must be established by clear and satisfactory evidence. In a typewritten will, drawn by attorneys and kept in a good state of preservation in an unlocked trunk in the residence of a testatrix who was a good business woman and was in good physical and mental health until her death, lightly drawn pencil marks, made by the testatrix, consisting of interlineations scratching out certain sums and adding others, making changes of addresses and additional bequests, drawing parenthesis marks around the name of a predeceased sister-in-law, and, in a paragraph leaving the residue of the testatrix's estate to 3 named cousins, drawing a mark through the name of a predeceased cousin and writing below such paragraph the word "dead," showed that the testatrix contemplated changes in her will, but did not show that she thereby intended to revoke or had revoked the legacy to the predeceased cousin nor any other provision of the will; hence, the trial court, admitting all other provisions, should also have admitted the provision as to the predeceased cousin. 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. Will of Donigian, 265 W 147, 60 NW (2d) 732.

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.

238.15 Deposit of wills with county judge; redelivery. Any will, being enclosed 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. (1) No nuncupative will shall be good when the estate bequeathed shall exceed the value of $150 that is not proved by the oath of 3 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 10 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.

(2) Except when the bequest is to a spouse, the value of an estate bequeathed by a nuncupative will shall not exceed $500 and if it exceeds that value the bequest shall be invalid and of no effect as to such excess. This limitation shall not apply to the disposition by a soldier in actual service or by a mariner on shipboard of his wages and other personal estate by nuncupative will. Where the bequest by a nuncupative will is solely to the spouse there shall be no limitation as to the value of the estate bequeathed.

History: 1955 c. 411.

The provision in 325.16, that no person in his own behalf or interest shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person in any civil action or proceeding, rendered the sole beneficiary, who was also one of the 3 subscribing witnesses, of an alleged nuncupative will an incompetent witness thereto, so that, such will not being provable by 3 competent witnesses as required by 238.16, its admission to probate was properly denied. Will of Repush, 257 W 528, 44 NW (2d) 240.

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. No will shall pass either real or personal property unless it has been admitted to probate as provided in these statutes, or unless a certificate of assignment has been issued under section 310.075; and the admission to probate of a will shall be conclusive as to its due execution.

History: 1951 c. 594.

238.20 Certificate of proof and record. Every will, when proved and allowed as prescribed by statute, 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 certificate of proof 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. This section shall not apply to wills proved and allowed before April 10, 1903.