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Chapter 169.

Wills.

Wills.

Sec. 1. Will, by whom and how made.—A person of sound mind and of the age of 21 years and a married person, widow or widower of any age may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request and in his presence, and subscribed in his presence by 3 credible attesting witnesses, not beneficially interested under said will. (R. S. c. 155, § 1. 1951, c. 375, § 1.)

I. GENERAL CONSIDERATION.

History of section.—See Warren v. Baxter, 48 Me. 193; Smalley v. Smalley, 70 Me. 545; Marston, Petitioner, 79 Me. 25, 8 A. 87. See Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325; Clark, Appellant, 114 Me. 105, 95 A. 517; Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

The underlying purpose of this section is to grant to a person of sound mind the right to dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under the will. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

Testamentary power, execution and efficacy of wills, depend upon statute law.—The power to make wills, and the manner of executing them, and their efficacy, depend upon certain special provisions of statute law. Gerrish v. Nason, 22 Me. 438.

And court is not at liberty to ignore requirements of statute.—This section clearly prescribes the method of transmitting property by will, which the court is not at liberty to ignore, although in particular instances the actual intention and desire of a person respecting the disposition of his property may be defeated by adhering to the rule prescribed. Fitzsimmons v. Harmon, 108 Me. 456, 81 A. 667.

But requirements of section are to be sanely interpreted.—The requirements as to the execution of a will are safeguards. They are intended to prevent fraud and deceit. They have been sanely interpreted by our court for the purpose intended. They are facts to be proved. When compliance by word or act is found upon credible evidence, specious objections will not be allowed to thwart the validity of the instrument. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

Section applies to bequest of personalty as well as to devise of realty.—A bequest of personal property, as well as a devise of real estate, in order to be effectual is required to be made by an instrument in writing signed by the testator and subscribed by three attesting witnesses. Fitzsimmons v. Harmon, 108 Me. 456, 81 A. 667.

Gift inter vivos violates section where delivery is to be made after death.—A gift, inter vivos, will not be sustained if the agent was not to deliver the property until after the death of the donor. Such a disposition would be inoperative under the statute of wills. Augusta Savings Bank v. Fogg, 82 Me. 538, 20 A. 92.

Interlineations made by testator without new attestation are disregarded.—To give effect to an interlineation made by

the testator, without a new attestation, would be to disregard the statute requirement. On the other hand, to hold the whole will void for that cause, would be to defeat the intention of the testator. Such interlineations are therefore disregarded, and the will approved according to the original draft, as if nothing had been done to it. Doane v. Hadlock, 42 Me. 72.

As are interlineations made by legatee.—Interlineations, made by the legatee himself, will at most only avoid the legacy so altered. The other bequests will not be destroyed thereby. Doane v. Hadlock, 42 Me. 72.

Or by stranger.—Interlineations, made by a stranger, when the original legacy is known, will have no effect, and the will will be approved as it originally stood. Doane v. Hadlock, 42 Me. 72.

Incorporation by reference.—Even a letter or other document containing explicit directions for the disposition of property cannot become part of a will by reference, unless it be shown to have been in existence at the time the will is executed, and be so clearly and precisely described and referred to in the will as an existing document as to be readily identified as the particular paper intended by the testator. Fitzsimmons v. Harmon, 108 Me. 456, 81 A. 667.

Evidence showing attempted testamentary disposition in violation of section.—The evidence showed not a gift in presenti, either inter vivos or causa mortis, but an attempted testamentary disposition of property after death, violative of the statute of wills. McDonough v. Portland Savings Bank, 136 Me. 71, 1 A. (2d) 768.

Undue influence.—See Barnes v. Barnes, 66 Me. 286; Goodridge, Appellant, 119 Me. 371, 111 A. 425; Rogers, Appellant, 126 Me. 267, 138 A. 59; Look, Appellant, 129 Me. 359, 152 A. 84; Eastman, Appellant, 135 Me. 233, 194 A. 586; In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

Applied in Withee v. Rowe, 45 Me. 571; Thompson, Appellant, 114 Me. 338, 96 A. 238; Thompson, Appellant, 116 Me. 473, 102 A. 303; Heath, Appellant, 146 Me. 229, 79 A. (2d) 810.

Cited in Hamilton v. McQuillan, 82 Me. 204, 19 A. 167.

II. TESTAMENTARY CAPACITY.

The essential qualification for making a will is a sound mind, which is one in which the testator had a clear consciousness of the business he was engaged in, a knowledge, in a general way, without prompting, of his estate, and an understanding of the disposition he wished to make of it by his will, and of the persons and objects he desired to participate in his bounty. This includes a recollection of those related to him by ties of blood and affection, and of the nature of the claims of those who are excluded from participating in his estate. A person in such state and condition is capable of willing. In re Loomis' Will, 133 Me. 81, 174 A. 38.

"Sound mind," within the statute of wills, comprehends ableness enough to recollect property and beneficiaries, and conceive the practical effect of the will. The expression does not mean a perfectly balanced mind. A mind naturally possessing power, and not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence, is, in legal contemplation, a "sound mind." In re Loomis' Will, 133 Me. 81, 174 A. 38.

"Disposing mind."—A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds. Hall v. Perry, 87 Me. 569, 33 A. 160; In re Chandler's Will, 102 Me. 72, 66 A. 215; Rogers, Appellant, 126 Me. 267, 138 A. 59.

If the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes his bounty, it is sufficient. Randall, Appellant, 99 Me. 396, 59 A. 552; In re Chandler's Will, 102 Me. 72, 66 A. 215.

"Disposing memory."—A "disposing memory" exists when one recalls the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them and act with some sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold

them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in relation to them. Hall v. Perry, 87 Me. 569, 33 A. 160; In re Chandler's Will, 102 Me. 72, 66 A. 215; Rogers, Appellant, 126 Me. 267, 138 A. 59.

Soundness is matter of degree.—The law does not undertake to test the intelligence, and define the exact quality of mind which a testator must possess. Soundness is a matter of degree. In re Loomis' Will, 133 Me. 81, 174 A. 38.

The word sanity is used here in its legal and not its medical sense. In law, every mind is sound that can reason and will intelligently, in the particular transaction being considered, and every mind is unsound or insane that cannot so reason and will. The law investigates no further. This definition clearly differentiates the sound from the unsound mind, in the legal sense. In re Chandler's Will, 102 Me. 72, 66 A. 215.

Mere intellectual feebleness must be distinguished from unsoundness of mind. The requirement of a "sound and disposing mind" does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age, and failing memory, from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of property by will. Hall v. Perry, 87 Me. 569, 33 A. 160; In re Chandler's Will, 102 Me. 72, 66 A. 215.

Intellectual and physical weakness, with partial failure of mind and memory, is said not to be solely an indication of inability to make a will. In re Loomis' Will, 133 Me. 81, 174 A. 38.

It is not necessary that greatest mental strength shall prevail.—That a man may make a valid will, it is not necessary that the greatest mental strength shall prevail. In re Loomis' Will, 133 Me. 81, 174 A. 38.

Age and bodily disease are not disqualifications.—Stage of life and resultant weakness of body do not necessarily deprive one of right to make a will. Neither age nor bodily disease is, of itself, a disqualification. In re Loomis' Will, 133 Me. 81, 174 A. 38.

Proof that testator had mental faculties sufficient to transact ordinary business is sufficient.—To prove a testator to have been of sound mind, it is sufficient to prove that he was in the possession of mental faculties sufficient for the transaction of ordinary business, and with an intelligent understanding of his own acts. Barnes v. Barnes, 66 Me. 286.

And one lacking faculty to transact business may have testamentary power.—Although a person of age does not have, as between living persons, the faculty to transact business, he may nevertheless have testamentary power and may still be capable of making a will. Eastman, Appellant, 135 Me. 233, 194 A. 586.

To invalidate will, derangement must be such as to establish inefficacy generally.—Derangement, to invalidate a will, must usually be of such broad character as to establish inefficacy generally, or some narrower form of insanity under which testator is hallucinated or deluded, and such abnormality must have been of proximate ascendency. In re Loomis' Will, 133 Me. 81, 174 A. 38.

Or will must be direct offspring of insane delusion.—To invalidate a will, an insane delusion must be operative on testation. A person whose mind is affected by such a delusion, however unreasonable and absurd, may make a valid will, provided the delusion is not of influence. To affect its soundness, the will must be the direct offspring of delusion controlling the mind. In re Loomis' Will, 133 Me. 81, 174 A. 38. As to insane delusion, see also Barnes v. Barnes, 66 Me. 286.

Want of capacity must relate to time of testamentary act.—The want of capacity, when urged as a ground for invalidating a testamentary act, must relate to the time of the act. Incompetency may exist before or after, and still the will be valid. Martin, Appellant, 133 Me. 422, 179 A. 655; In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

The crucial question to be determined is the mental capacity of the testator at the time the instrument offered for probate was executed. Rogers, Appellant, 126 Me. 267, 138 A. 59.

Mental condition before or after that time is unimportant.—Except in so far as it may tend to show the quality of testator's mind at the time of executing the will, the condition of his mind before or after that time is unimportant. If he was then rational and acting rationally, or, in popular phrase, knew and understood what he was about, the will is valid. In re Loomis' Will, 133 Me. 81, 174 A. 38.

Insane person may make will in lucid interval.—Although fixed insanity has been established, it may be shown that execution was during a lucid interval. There may, in a case of senile dementia, be such a thing as a "lucid interval," during which

the person is qualified to will. In re Loomis' Will, 133 Me. 81, 174 A. 38.

Person under guardianship may make will.—See c. 158, § 29, and note.

But proof must be sufficient to overcome all disabilities.—Whether the testator was in an insane asylum, under guardianship, or under no legal disability, the question is whether, under all the circumstances in the particular case under consideration, he was of sound and disposing mind. The proof must be sufficient to overcome all disabilities, however originating and however imposed. When the proponents have sustained the burden of proof upon this proposition, it matters not how the obstacles to be overcome were created. In re Chandler's Will, 102 Me. 72, 66 A. 215.

Effect of proof that testator was of unsound mind before making will.—If a testator, a short time before making his will, is proved to have been of unsound mind, it throws the burden of proof upon those who come to support the will to show the restoration of his sanity. Halley v. Webster, 21 Me. 461.

Sanity of testator is not presumed.—The presumption that the person making a will was, at the time, sane, is not the same as in the case of the making of other instruments; sanity must be proved. Gerrish v. Nason, 22 Me. 438.

On the question whether a will shall be established, there is no legal presumption of the testator's sanity. It is a fact to be proved. Cilley v. Cilley, 34 Me. 162.

And burden is on proponents to prove it.—There is no exception or qualification to the requirement that a person must be of sound mind to make a valid will. The burden rests upon the proponents affirmatively to prove it. In probating a will the sanity of the testator must be proved and is not to be presumed. In re Chandler's Will, 102 Me. 72, 66 A. 215.

Question is whether testator had capacity to make any will.—The question in every case is, had the testator, as compos mentis, capacity to make a will; not, had he capacity to make the will produced. If compos mentis, he can make any will, however complicated; if non compos mentis, he can make no will, not the simplest. In re Chandler's Will, 102 Me. 72, 66 A. 215; Rogers, Appellant, 126 Me. 267, 138 A. 59.

But unreasonableness of will may be evidence of incapacity.—Where the will is unreasonable in its provisions and inconsistent with the duties of the testator with reference to his property and family, it furnishes some ground which the jury may consider upon the question of loss of memory, undue influence and other incapacity. In re Chandler's Will, 102 Me. 72, 66 A. 215.

And just, reasonable and natural will may indicate competent testator.—In determining the question of competency, the character of the will itself is extremely significant. A rational act, rationally done, is convincing proof that a rational being did it. The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself. Indeed, sometimes the intrinsically reasonable character of a will gives rise to a presumption that it was executed during a lucid interval, though the testator be chronically insane. So, if the provisions of the will are just, reasonable and natural, they point towards a normal testator. In re Chandler's Will, 102 Me. 72, 66 A. 215.

It is duty of witnesses to inquire into capacity of testator.—The statutory requirement that wills be witnessed was intended to protect a testator, who might be in extremis, or greatly debilitated by age or infirmity, from fraudulent practices, and makes them, in some sense, the judges of sanity. It is their duty to inquire into this matter, and if they think the testator not capable, they should remonstrate and refuse their attestation. In re Paradis' Will, 147 Me. 347, 87 A. (2d) 512.

But their failure to do so does not invalidate will.—The rule that an attesting witness is under a duty to observe the mental capacity of the testator is, in some respects, honored more in the breach than in the observance, since courts which uphold it do not carry it to the extent of invalidating a will for the reason that the attesting witnesses did not perform the duty imposed by the rule. In re Paradis' Will, 147 Me. 347, 87 A. (2d) 512.

Subscribing witness may testify as to sanity of testator.—A subscribing witness to a will may testify his opinion of the sanity of the testator. Look, Appellant, 129 Me. 359, 152 A. 84.

But such testimony is not essential to establishment of will.—While the subscribing witnesses to a will may give opinions as to the sanity of the testator, when the facts are stated upon which their opinions are founded, it is not essential to the establishment of the will that any of the subscribing witnesses should testify to any opinion respecting the sanity of the testator. Cilley v. Cilley, 34 Me. 162. See In re Paradis' Will, 147 Me. 347, 87 A. (2d) 512.

Capacity is a question of fact to be resolved on the evidence presented. It is not an issue to be decided on such a techni-

cal ground as that some particular person or persons, even those selected as witnesses to attest execution, formed no opinion on it. In re Paradis' Will, 147 Me. 347, 87 A. (2d) 512.

III. EXECUTION OF WILL.

The signature is not rendered invalid by the fact that another guided the hand of the testator when he signed the will. In order to uphold the validity of such signature it is not necessary that an express request for the assistance be given. It may be inferred from the circumstances of the case. It is necessary, however, that it should appear that the testator, at the time of requesting or receiving the aid and the signing of the instrument, had the present volition to affix the signature, and was aware and fully cognizant of the details of the instrument of will or testament to which he, by the aid of the other, was affixing his signature. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

Testator need not sign in presence of witnesses.—It is not required that the testator should sign his name to the will in the presence of the attesting witnesses or that the witnesses should see the very act of signing. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

Acknowledgment of signature is sufficient.—The witnesses need not see the testator sign; his acknowledgment of his signature to each separately by word or act, accompanied with a request for them to attest as witnesses, is clearly sufficient. Deake, Appellant, 80 Me. 50, 12 A. 790.

The only inquiry is whether upon the evidence it may be reasonably inferred that the testator signed his name to the instrument, as and for his will, and that he acknowledged that fact to the witnesses, either directly, or by acts equivalent to an acknowledgment. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

But witnesses must subscribe in presence of testator.—This section does not require the testator to sign in the presence of the witnesses, but does require them to subscribe in his presence, in order that he may identify the instrument which they subscribe as his will. Deake, Appellant, 80 Me. 50, 12 A. 790.

Though they need not subscribe in presence of each other.—The witnesses need not subscribe at the same time or in the presence of each other. Deake, Appellant, 80 Me. 50, 12 A. 790.

The witnesses need not know that the instrument subscribed by them is a will, where, from the fact that it is in his own handwriting, there is sufficient evidence that the testator knew its contents and intended it to be his will. Deake, Appellant, 80 Me. 50, 12 A. 790.

And need not be cognizant of its contents.—An exception based on the ground that there was no testimony that the witnesses saw the actual will is without merit where there is testimony from each one that they actually saw the testatrix sign the will. The law does not require that witnesses shall be cognizant of its contents. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

To publish a will requires no set form of words. It is sufficient if it be made to appear, by competent testimony, that the testator was at the time of executing the instrument fully apprised of its contents, that he knew it to be his will, and intended it as such. Cilley v. Cilley, 34 Me. 162; In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

Formal publication of the will is not necessary when the attendant circumstances demonstrate that the business of the moment was the making and execution of a will; that by the request of the testatrix the necessary parties were present; that the instrument which the testatrix signed was actually her will; that she knew they were aware of the fact and wished them to attest it. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

It is not essential that the testatrix should declare the instrument to be her last will and testament in the presence of the subscribing witnesses, or that the witnesses should subscribe in the presence of each other. It is sufficient under the statutes of this state if it appears that she did sign her name to the instrument as her will, that she by words or acts acknowledged it as her instrument in the presence of the subscribing witnesses, either already signed by her, or signed in their presence, and that the witnesses at her request subscribed to it in her presence. Goodridge, Appellant, 119 Me. 371, 111 A. 425; In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

Actual verbal request to witnesses to sign is unnecessary.—Where the testatrix sent for the witnesses, and recognized them when they came in, and both she and the witnesses understood the purpose for which they were in attendance, and that they were acting in accordance with her desire, this was a sufficient compliance with statutory requirements, although it did not appear that the testatrix actually made a verbal request to the witnesses to sign after she had signed the will herself. In re Cox's Will, 139 Me. 261, 29 A. (2d) 281.

No testimonium clause is necessary.—As this section simply requires a will to be "subscribed in his (testator's) presence by three credible attesting witnesses," no testimonium clause is necessary. Deake, Appellant, 80 Me. 50, 12 A. 790.

IV. COMPETENCY OF SUBSCRIBING WITNESSES.

A. In General.

Cross reference.—See c. 113, § 116, re disqualification of witnesses for interest.

"Credible" witness means "competent" witness.—By "credible" witnesses, in the statute of wills, is meant "competent" witnesses. Jones v. Larrabee, 47 Me. 474. See Smalley v. Smalley, 70 Me. 545; Marston, Petitioner, 79 Me. 25, 8 A. 87; Clark, Appellant, 114 Me. 105, 95 A. 517; Cox, Appellant, 126 Me. 256, 137 A. 771; Look, Appellant, 129 Me. 359, 152 A. 84.

The term "credible witness," as used in the statute of wills, means "competent witness." That is, a witness whom the law will trust to testify before a jury. Warren v. Baxter, 48 Me. 193.

All credible witnesses not beneficially interested under will may attest execution.—All who are credible, that is competent witnesses, provided they are not beneficially interested under the provisions of a will, may attest its execution. Jones v. Tebbetts, 57 Me. 572.

But this section excludes those whom the will benefits from attesting as subscribing witnesses. Look, Appellant, 129 Me. 359, 152 A. 84.

Witness beneficially interested under will is incompetent.—If a witness is "beneficially interested under said will," by the terms of this section, such witness is incompetent and the instrument purporting to be a will becomes nugatory. Clark, Appellant, 114 Me. 105, 95 A. 517.

It is important that the safeguards which the law has thrown around the execution of wills should not be withdrawn or weakened, and to that end, a will which provides a pecuniary benefit, absolute or contingent, to a legatee, should not be witnessed by such legatee. He is interested, and therefore not credible or competent. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325; Clark, Appellant, 114 Me. 105, 95 A. 517.

Purpose of requirement that witnesses be not beneficially interested under will.—It appears to have been the dominant purpose of the legislature that the witnesses before whom the testator publishes his will should be free from any bias or temptation arising from pecuniary interest in the establishment of the will. Usually a will is not produced, or its contents known, until after the death of the testator, and public policy, as well as the protection of interested parties, requires that the testimony to establish the will should come from the mouths of witnesses to it who can fairly, disinterestedly and impartially state the facts as to its execution, and give an honest and unbiased opinion as to the soundness of mind of the testator. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

Word "credible" is modified by clause "not beneficially interested under will."—As "credible" witnesses are those free from interest, the clause "not beneficially interested under the will," was introduced into this section for the purpose of eliminating the element of interest from the term "credible," which formerly included it, and to define and modify the interest which should thereafter disqualify one from subscribing a will. Marston, Petitioner, 79 Me. 25, 8 A. 87.

By an act approved April 4, 1859, c. 120, the words "not beneficially interested under the provisions of the will" were inserted in this section in lieu of the word "disinterested." The object of this change was probably to authorize the attestation of a will by executors or trustees, they not being "beneficially interested," under its provisions, as devisees or legatees. It was to remove doubts. It was to enlarge, rather than to restrict the rules of evidence. Jones v. Tebbetts, 57 Me. 572.

And disqualifying interest must be both "beneficial" and "under will."—Where witnesses are competent in every respect other than that of interest, so far as their interest should thereafter render them incompetent, it must not only be a "beneficial interest," but such as would be directly derived from or "under the will." Marston, Petitioner, 79 Me. 25, 8 A. 87.

Thus, not every interest disqualifies. Look, Appellant, 129 Me. 359, 152 A. 84.

Direct, certain, vested and pecuniary interest is "beneficial interest."—Direct, certain, vested and pecuniary interest, at the time of attestation, is a "beneficial interest." Cox, Appellant, 126 Me. 256, 137 A. 771; Look, Appellant, 129 Me. 359, 152 A. 84.

The interest which will disqualify a person from being a witness must be a present, certain, legal, vested interest. Warren v. Baxter, 48 Me. 193.

The interest contemplated was direct, not remote and contingent. Jones v. Tebbetts, 57 Me. 572.

But indirect, uncertain and contingent interest may also be "beneficial interest."—If an interest under a will is direct, certain, vested and pecuniary it is a "beneficial interest." If however it is indirect, uncertain and contingent it may still be a "beneficial interest" if it has a present appreciable pecuniary value so that the witness may reasonably be said to gain financially because of it. Cox, Appellant, 126 Me. 256, 137 A. 771; Look, Appellant, 129 Me. 359, 152 A. 84.

And a contingent beneficiary may not be a witness. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325; Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

Fact of benefit, not measure of value, controls.—It is the fact of the benefit, direct or contingent, and not the measure of its value, which controls the competency of the witness. Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

But disqualifying interest must result in appreciable pecuniary gain.—The true principle deducible from all the authorities is that an interest to be beneficial must be one that will result in an appreciable pecuniary gain to the witness. Cox, Appellant, 126 Me. 256, 137 A. 771.

The rule of disqualification by beneficial interest is held down to one that is personal. It is not held down to one that is substantial, and it is not required that it be direct. Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

Competency of witnesses must be determined by reference to will.—The test of the competency of witnesses must be applied by reference to the will itself. Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

The true test is, whether the will itself conferred directly or conditionally, a beneficial interest upon the witness. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

And test is competency at time of attestation.—Any will, to be valid, must be subscribed in the presence of the testator by "three credible attesting witnesses, not beneficially interested" thereunder. The test, at all times, by express statutory language, is competency of the witness at the time of attestation. Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

Thus failure of contingency upon which interest depends does not restore competency.—If the will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event which may happen, he has a beneficial interest under it, in contemplation of law, and if the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competency. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325; Clark, Appellant, 114 Me. 105, 95 A. 517.

And witnesses cannot be competent for one purpose and incompetent for another.—Under § 2 the witnesses must be competent at the time of the execution of the will. They cannot be competent for one purpose and incompetent for another. The statute makes no such division. Clark, Appellant, 114 Me. 105, 95 A. 517.

C. 10, § 22, Rule XXV inapplicable.—See note to c. 10, § 22, Rule XXV.

B. Illustrative Cases.

1. Witnesses Held Competent.

Witness who testifies against interest is not disqualified.—When a witness is produced to testify against his interest, the rule that interest disqualifies does not apply. Smalley v. Smalley, 70 Me. 545.

Thus heir at law wholly or partially disinherited by will may be witness.—An heir at law who is disinherited by the will is a competent witness in its support. It is against his interest to support the will, and whether entirely or partially disinherited the same rule must apply, so long as it is in his interest to defeat the will. Smalley v. Smalley, 70 Me. 545.

One receiving a trivial legacy under a will, by which he is deprived of a larger estate as heir, is not to be regarded as beneficially interested under the same so that he cannot be an attesting witness thereto. Smalley v. Smalley, 70 Me. 545.

If a witness is an heir at law of the testatrix and would receive less under the will than he would receive as heir, he would be competent, it being against his interest to have the will sustained. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

And legatee may be witness where he stands indifferent.—If it stand indifferent to the witnesses, whether the will, under which they are legatees and to which they are witnesses, is valid or not, the witnesses, though legatees, are "credible." Smalley v. Smalley, 70 Me. 545.

As where he would take same interest under earlier will.—When an attesting witness would take the same interest under a former will to which he was not a witness, as under a later will, he stands indifferent in point of interest and is a good witness to prove the later will. Smalley v. Smalley, 70 Me. 545.

The prospective heirs at law of a legatee are competent. They take nothing

under the will. Jones v. Tebbetts, 57 Me. 572; Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

The children of a legatee are not beneficially interested under the provisions of the will. There is no devise nor legacy to them. The beneficial interest of the father is not the beneficial interest of the son. Jones v. Tebbetts, 57 Me. 572.

Executor may be attesting witness.—A will is duly attested, notwithstanding one of the attesting witnesses is named therein as executor. Jones v. Larrabee, 47 Me. 474. See Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

Interest of guardian is not beneficial interest within section.—The interest of a guardian, by judicial appointment, of an orphan ward devisee of real estate, is not a beneficial interest within the prohibition of this section. Look, Appellant, 129 Me. 359, 152 A. 84.

Inhabitant of town may witness will containing legacy or devise to town.—The fact that a will contains a legacy or devise to a town in trust does not render a tax-paying inhabitant thereof an incompetent witness to the will. Marston, Petitioner, 79 Me. 25, 8 A. 87. See Piper v. Moulton, 72 Me. 155; Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

Member of unincorporated social club may witness will making bequest to club.—Where a member of an unincorporated social club witnesses a will making a bequest to the club, the witness will with other members enjoy greater club comforts which will be a benefit, but not, within the meaning of this section, a pecuniary benefit. The chance that the witness may be benefited by reduction of club dues, the possibility that he may be saved from liability for club debts, the contingency that he may receive a share of accrued income upon the club's dissolution, are so remote, uncertain and contingent that they have no present pecuniary value. Cox, Appellant, 126 Me. 256, 137 A. 771.

Member of church not disqualified as witness to will leaving legacy to church.—The fact that a person is a member of a particular church and society, worshipping in a certain meeting house, or that he owns a pew in that meeting house, does not, of itself, disqualify him as a witness to a will containing a legacy to that church and society. Warren v. Baxter, 48 Me. 193.

Stockholder of corporate legatee is competent.—The legislature did not intend to declare incompetent a subscribing witness to a will which contained a legacy to a corporation of whose stock the witness happened to hold one or more shares. Marston, Petitioner, 79 Me. 25, 8 A. 87.

Minor may be attesting witness.—This section imposes no restriction as to the age of witnesses. The court has no power to impose any, or to adopt any rule other than that prescribed by the statute. A minor, not beneficially interested under the provisions of a will, may be an attesting witness thereto, precisely to the extent that he is a witness generally. Jones v. Tebbetts, 57 Me. 572.

Witness is not incompetent because he is judge of probate.—If one of the three attesting witnesses to a will is otherwise a competent witness, he is not rendered incompetent because he was, at the time of its attestation and at the time of its approval and allowance, judge of probate for the county. Patten v. Tallman, 27 Me. 17.

2. Witnesses Held Incompetent.

The husband or wife of a beneficiary may not be a witness. Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

A wife is not a competent attesting witness to a will which contains a devise to her husband. Clark, Appellant, 114 Me. 105, 95 A. 517.

The power of disposition of property is the equivalent of ownership, and if, under the terms of a will, the executor is given "power of disposition" over certain articles, the title thereto will vest in him, under the will, and remain with him until he passes it elsewhere, and he is not a competent witness. Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

And it is immaterial whether will vests title or power of appointment in legatee.—It is immaterial whether the words of a will might be construed to vest title to the property to which they relate in one of the three persons who subscribed the document as an attesting witness for his beneficial use, or merely to confer upon him a power of appointment over the same. In either case the will cannot be allowed, because he was not such a witness as this section contemplates. Richburg, Appellant, 148 Me. 323, 92 A. (2d) 724.

A limitation over to the witness after failure of issue of the first taker, would be a disqualifying interest. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

Bequest to take effect only if another legatee predeceases testator.—A bequest to a witness to take effect only if another legatee predeceases the testator renders the witness beneficially interested under the will and thus incompetent. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

V. PROOF OF EXECUTION.

Burden of proof is on proponent.—The burden of proof is upon the proponent to show that the will in controversy has been duly signed, executed and published by the party whose will it purports to be, and that he was of a sound and disposing mind. Barnes v. Barnes, 66 Me. 286. See Rogers, Appellant, 126 Me. 267, 138 A. 59; Look, Appellant, 129 Me. 359, 152 A. 84.

And he must show that testator knew instrument was his will.—Where the will is not in the handwriting of the deceased, and the witnesses are present and competent to testify, it is incumbent on the party who would establish the will to satisfy the jury from the proof, that the testator knew, at the time of the execution of the instrument, that it was his will, and this must appear either from positive testimony, or from circumstances furnishing satisfactory proof of the fact. Gerrish v. Nason, 22 Me. 438.

The true function of witnesses to wills is to prove due execution, and that is done by the identification of the signatures of the testator and themselves. In re Paradis' Will, 147 Me. 347, 87 A. (2d) 512.

Signatures are prima facie evidence that statutory requisites were complied with.—The signatures of witnesses under the usual attestation clause, in case of the death, absence from the state, or failure of memory must be given the effect of prima facie evidence of all the requisite formalities having been complied with. Goodridge, Appellant, 119 Me. 371, 111 A. 425.

When all the witnesses are dead, it is well settled that proof of the genuineness of the signatures of the testator and of the witnesses is prima facie proof that all the requisites of this section have been complied with. Deake, Appellant, 80 Me. 50, 12 A. 790.

Attestation clause is likewise presumptive evidence of compliance.—A proper attestation clause, showing that all the statute formalities have been complied with, will, in the absence of proof to the contrary, be presumptive evidence of the fact, after the death of the attesting witnesses or their failure to recollect what took place at the execution of the will. Barnes v. Barnes, 66 Me. 286.

Though evidence shows that certain nonessentials stated therein were not complied with.—The ordinary form of attestation clause includes matters not essential under the statutes of this state to be proved to entitle a will to be admitted to probate. Because the evidence shows that certain of these nonessentials were not complied with, it does not deprive the attestation clause, duly signed, of its effect as prima facie evidence of the essential formalities having been complied with in case of the failure of memory or death of witnesses. Goodridge, Appellant, 119 Me. 371, 111 A. 425.

As to necessity for testimony of subscribing witnesses upon probate of will, see McKeen v. Frost, 46 Me. 239.

As to proof of testamentary capacity, see this note, analysis line II, "Testamentary Capacity."

Sec. 2. Competency of witnesses; property not willed.—When the witnesses are competent at the time of attestation, their subsequent incompetency will not prevent the probate of the will. Property not disposed of by will shall be distributed as the estate of an intestate. (R. S. c. 155, § 2.)

Cross reference.—See note to § 1, re competency of witness having contingent interest under will.

Competency determined by facts existing at time of attestation.—The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation. Patten v. Tallman, 27 Me. 17.

The question of the competency of the witnesses to the will is to be determined by their condition at the time the will was executed. Warren v. Baxter, 48 Me. 193.

The competency of the witness is to be settled by his situation at the time of attestation, with respect to the subject matter and the contents of the will. Trinitarian Congregational Church, Appellant, 91 Me. 416, 40 A. 325.

Applied in Davis v. McKown, 131 Me. 203, 160 A. 458.

Stated in Clark, Appellant, 114 Me. 105, 95 A. 517.

Sec. 3. Will rendered invalid, or revoked.—A will executed under the provisions of section 1 is valid until it is destroyed, altered or revoked by being intentionally burnt, canceled, torn or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will, codicil or writing executed as a will is required to be; or revoked by operation of law from sub-

sequent changes in the condition and circumstances of the maker. (R. S. c. 155, § 3.)

A will is ambulatory during the life of the testator. It is his present act, when made; but it cannot take effect until after his decease. Until that time, it is under his control, to be changed, modified, or revoked, according to his good pleasure. It derives its prospective efficacy from his present intention. Its continuing and final validity depends on such continuing intention. That intention the law regards as continuing unless a change of purpose is shown in the manner required by the statute. The intention is the element which gives vitality; and that is only ascertainable by and from the acts and declarations of the testator. Collagan v. Burns, 57 Me. 449, op. of Appleton, J.

Revocation must be within terms of statute.—As the statute directs how a will shall be made, so it prescribes as to its revocation. A will, not in accordance with the statute, is not valid. A revocation, not within its terms, leaves the will in full force. Collagan v. Burns, 57 Me. 449, op. of Appleton, J.

And act must be done with intent to revoke.—A will legally made stands until legally revoked. It cannot be revoked by any act of destruction, unless the act is done with an intention to revoke. Rich v. Gilkey, 73 Me. 595.

Which intent must be plain and without doubt.—When a will is once regularly made, the presumption of law is strong in its favor and the intention to revoke must be plain and without doubt. Lord, Appellant, 106 Me. 51, 75 A. 286.

Will not affected if accidentally torn or destroyed.—If torn by a stranger, the will is, notwithstanding this, the testator's will. So it is equally the testator's will though he may have torn or destroyed it, if done by accident or mistake, without the intent to cancel. Collagan v. Burns, 57 Me. 449, op. of Appleton, J.

But will in possession of testator presumed canceled from tear or obliteration.—When a will is left in the charge of the testator, and is not found, or is found torn or obliterated, the presumption is that the tearing or obliteration was with the intent to cancel. These acts, if done by the testator, imply an intent to revoke what before it was his intent to establish. Collagan v. Burns, 57 Me. 449, op. of Appleton, J.

Which presumption is rebuttable.—The presumption, when the will, left in the custody of the testator, is found torn, that the tearing was by him and with the intent to cancel the same, may be rebutted. Collagan v. Burns, 57 Me. 449, op. of Appleton, J.

Cancellation cannot be shown by declaration of testator.—The cancellation of a will cannot be shown by the declarations of the testator, the will being produced, for there would not be the statutory revocation. His declarations would be unavailing against a formal uncanceled will. Collagan v. Burns, 57 Me. 449, op. of Appleton, J.

The destruction of a will by a person not possessing testamentary capacity is not a revocation of such will. Rich v. Gilkey, 73 Me. 595.

A person who has not testamentary capacity, cannot revoke a will in any manner whatever. Rich v. Gilkey, 73 Me. 595.

A person not having testamentary capacity cannot have an intention to revoke a will; he is legally incapable of it. Rich v. Gilkey, 73 Me. 595.

Nor is destruction resulting from undue influence a revocation.—Where the destruction of a will by the testator is the effect of the exercise upon his mind of undue influence it is not a revocation of the will. Rich v. Gilkey, 73 Me. 595.

Doctrine of dependent relative revocation.—When it appears that a will was destroyed under a mistaken belief that another valid will had been executed, the revocation is not necessarily absolute, but may be deemed to have been made on condition that the later will was a valid one. This is the doctrine of dependent relative revocation. The revocation is dependent upon the assumption that another valid will has been made. Thompson, Appellant, 114 Me. 338, 96 A. 238.

The doctrine of dependent relative revocation is firmly established. It is stated as follows: "When the act of destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore if the will intended to be substituted is inoperative from defect of attestation or any other cause, the revocation fails also and the original will remains in force." Thompson, Appellant, 116 Me. 473, 102 A. 303.

Second will disallowed for undue influence not admissible as revocatory document.—In proceedings for the probate of a will, a writing purporting to be a later will, but then already totally disallowed because procured by undue and improper

influence, cannot properly be offered in evidence as a revocatory document. O'Brion, Appellant, 120 Me. 434, 115 A. 169.

A will can be revoked in whole or in part by cancellation or obliteration. Townshend v. Howard, 86 Me. 285, 29 A. 1077; O'Brion, Appellant, 120 Me. 434, 115 A. 169.

To cancel is to cross out. To obliterate is to blot out. The former leaves the words legible. The latter leaves the words illegible. By either method a will can be legally revoked in whole or in part. Townshend v. Howard, 86 Me. 285, 29 A. 1077.

By pencil or pen.—Cancellations or obliterations are as effectual when made with a pencil as when made with a pen. Townshend v. Howard, 86 Me. 285, 29 A. 1077.

And entire will revoked if essentials are canceled.—If that which is essential to the validity of the whole will is canceled or obliterated, animo revocandi, the whole will is revoked. Townshend v. Howard, 86 Me. 285, 29 A. 1077.

But, if only a single clause is so canceled or obliterated, then that clause only is revoked. Townshend v. Howard, 86 Me. 285, 29 A. 1077.

Erasures of clauses in the body of the will affect only the dispositions erased. Erasure of the signature strikes at the existence of the whole instrument. Townshend v. Howard, 86 Me. 285, 29 A. 1077.

Will may be revoked by change in circumstances of the maker.—Our statutes recognize the fact that a will may be revoked by operation of law from a change in the condition or circumstances of the maker, but they are silent as to what the changes or circumstances are, which shall have that effect. Emery, Appellant, 81 Me. 275, 17 A. 68.

But marriage will not revoke will.—The will of a feme sole is not revoked by her marriage. The rule of the common law to the contrary is not now in force in this state. Emery, Appellant, 81 Me. 275, 17 A. 68.

Nor will birth of child.—Marriage and the birth of a child do not constitute such a change in the condition and circumstances of the maker of a will as to result in a revocation of it. DeMendoza, Appellant, 141 Me. 299, 43 A. (2d) 816.

Implied revocation is recognized in this section. Emery v. Union Society, 79 Me. 334, 9 A. 891.

And devise is revoked by subsequent conveyance of same property.—When a testator devises real estate and subsequently conveys it to a person other than the devisee, the devise thereby becomes impliedly revoked. Emery v. Union Society, 79 Me. 334, 9 A. 891.

But such conveyance does not revoke remainder of will.—The alienation of real estate by the testator himself, after he has devised the same by will, is a revocation of the will only as to the part thus alienated. The will being suffered to remain uncanceled, evinces that his intention was not changed with respect to the other property therein devised or bequeathed. Carter v. Thomas, 4 Me. 341.

Sec. 4. Lands of testator.—Lands into which the testator, at the time, has a right of entry although not seized of them, and lands of which he is subsequently disseized, pass by his will, as they would, if not devised, have descended to his heirs; and his devisee has the same remedy for their recovery, as his heirs would have had. (R. S. c. 155, § 4.)

Sec. 5. After-acquired lands.—Real estate owned by the testator, the title to which was acquired after the will was executed, will pass by it when such appears to have been his intention. (R. S. c. 155, § 5.)

Section mitigates severity of common law.—This statute was passed to mitigate the severity of the common-law rule that prevented after-acquired real property from passing under a devise, on the theory that a devise of real property was held at common law to be in the nature of a conveyance, and to speak imperatively as of the date of its execution. Young v. Mosher, 115 Me. 56, 97 A. 215.

And abolishes distinction between lapsed devise and lapsed legacy.—There is a distinction in the English authorities between a lapsed devise of real estate, and a lapsed legacy of personal estate; and while the latter falls into the residuary estate and passes by the residuary clause, if any there be, and, if not, passes to the next of kin, the former does not pass to the residuary devisee, but, the devise becoming void, the estate descends to the legal heir. But this distinction has been abolished by this section, by which a devise will pass subsequently acquired real estate. Drew v. Wakefield, 54 Me. 291.

So that after-acquired realty will pass by will, such appears to have been the intention. Blaisdell v. Hight, 69 Me. 306.

This statute declares that real estate, owned by a testator, the title to which was

acquired after the will was executed, will pass by it, when such appears to have been his intention. And at common law, personal property passes, unless a contrary intent clearly appears. Paine v. Forsaith, 84 Me. 66, 24 A. 590.

At common law, a testator could devise only such lands as he owned when his will was executed, and any after-acquired real estate could not pass by will unless, after its acquisition, there was a republication of the will. Statutes have generally made possible the passing of subsequently acquired real estate. Spear v. Stanley, 129 Me. 55, 149 A. 603.

Section applies only to issue of testacy or intestacy. — This statute is invoked where the question lies between certain property passing by the will or by descent; in other words between testacy and intestacy. It does not affect the issue where testacy is admitted and the issue is whether the after-acquired property passed under a specific devise or the residuary clause. Young v. Mosher, 115 Me. 56, 97 A. 215.

Intent of testator is question involved in case under this section. — In all cases under this statute, the question involved becomes one of construction, and the intent of the testator must be sought. Spear v. Stanley, 129 Me. 55, 149 A. 603.

Testator held not to have intended after-acquired property to pass by will.— See Spear v. Stanley, 129 Me. 55, 149 A. 603.

After-acquired real estate held not included in word "possessions."—See Blaisdell v. Hight, 69 Me. 306.

Sec. 6. Property taken from devisee for payment of debts, loss borne equally.—When property is taken by execution from a devisee or legatee thereof, or is sold by order of court for payment of debts, all the other devisees, legatees and heirs shall pay him their proportion thereof, so as to make the loss fall equally on all, according to the value of the property received by each from the testator, except as provided in the following section. (R. S. c. 155, § 6.)

Sec. 7. Marshaling of assets for payment of debts. — If the testator has made a specific bequest, so that by operation of law it is exempted from liability to contribute for payment of debts, or if he has required an application of his estate for that purpose different from the provisions of the preceding section, the estate shall be appropriated according to the will. No part of the estate can be exempted from liability for payment of debts if required therefor. (R. S. c. 155, § 7.)

No part of estate exempted from payment of debts if required.—The testator's property is primarily held for the payment of his debts, and may be sold by his administrator for that purpose. Such a sale necessarily defeats all testamentary titles. The right to dispose of property by her will is subject to this express statutory provision, that no part of the estate can be exempted from liability for the payment of debts, if required. Hill v. Treat, 67 Me. 501.

Quoted in Hathaway v. Sherman, 61 Me. 466.

Cited in Hamilton v. McQuillan, 82 Me. 204, 19 A. 167; Given v. Curtis, 133 Me. 385, 178 A. 616.

Sec. 8. Posthumous child to take share of estate, as if no will.—A child of the testator, born after his death and not provided for in his will, takes the same share of his estate as he would if his father had died intestate. Such share shall be assigned by the judge of probate and taken from all the devisees in proportion to the value of what they respectively receive under the will, unless by a specific devise or some other provision thereof a different apportionment is necessary to give effect to the intention of the testator respecting that portion of his estate which passes by the will. (R. S. c. 155, § 8.)

Provision for unborn child must be made specifically.—To relieve the judge of probate from the duty imposed in this section, there must be provision made specifically for the unborn child. He cannot be disinherited like a child, or the issue of a deceased child, when it appears that the omission to refer to him was intentional. Unless he is "provided for," the conclusive presumption is that he was not expected, and the law declares that he shall take the same share of his father's estate as if the father had died intestate. Waterman v. Hawkins, 63 Me. 156.

While the insufficiency of the provision in the will might not entitle the posthu-

mous child to claim a distributive share, in order to bar him, it must definitely appear that some provision relating expressly to him was made. Waterman v. Hawkins, 63 Me. 156.

And general devise to heirs is not sufficient.—A child of a testator, born after his death, cannot, in any proper sense of the term, be deemed "provided for in his will" by a general devise of a reversion to the heirs of the testator. Waterman v. Hawkins, 63 Me. 156.

Delivery of property to legatee no defense to action for child's benefit. — That the executor has delivered the bequeathed property to the legatee of it, before the birth of the child, is not defense to a suit brought for the child's benefit upon the executor's bond, to obtain her share of it; especially where the court of probate has made a decree, not appealed from, establishing and assigning her share under this section. Waterman v. Hawkins, 63 Me. 156.

Sec. 9. A child or his issue, having no devise, to take as heir.—A child, or the issue of a deceased child not having any devise in the will, takes the share of the testator's estate which he would have taken if no will had been made, unless it appear that such omission was intentional, or was not occasioned by mistake, or that such child or issue had a due proportion of the estate during the life of the testator.

Upon the hearing on the petition for allowance of such will, or thereafter prior to allowance of the final account, upon special petition alleging the facts and after such reasonable notice as the judge of probate may order, evidence may be offered in the probate court and the judge of probate may determine as a fact that such omission was intentional or was not occasioned by mistake or that such child or issue had a due proportion of the estate during the life of the testator, from which decree an appeal will be to the supreme court of probate. Upon final judgment being entered, such child or issue shall be thereupon barred from claiming his said share in the testator's estate. A copy of such decree shall be filed in the registry of deeds in each county or district where real estate affected by it is located. (R. S. c. 155, § 9.)

This statute raises a presumption that the omission to provide for a child in a will is not intentional. Walton v. Roberts, 141 Me. 112, 39 A. (2d) 655.

But the presumption is rebuttable.—It is a presumption of the law that the omission to provide for a child, or the issue of a deceased child, living when a will is made, is the result of forgetfulness, infirmity, or misapprehension, and not of design. But this presumption is rebuttable. With the wisdom or propriety of the act of the testator, in pretermitting his child from his will, the law has nothing to do. Ingraham, Appellant, 118 Me. 67, 105 A. 812. See Walton v. Roberts, 141 Me. 112, 39 A. (2d) 655.

By those who oppose the child's claim. —This presumption is rebuttable, and the burden of rebutting it is on those who oppose the claim of the child. Walton v. Roberts, 141 Me. 112, 39 A. (2d) 655.

And if omission was intentional child takes nothing.—A child, or its issue, takes no share of the testator's estate when it appears that the omission of a devise in the will was intentional, or was not occasioned by mistake. Merrill v. Hayden, 86 Me. 133, 29 A. 949.

That omission was intentional may be proved by all competent evidence.—In its language, the statute is broad enough to embrace all competent evidence tending to prove that such omission was intentional and not occasioned by mistake. Seeking the testator's intention it is pertinent to inquire, consonantly with the law of evidence, concerning him and his son; the affection or lack thereof, that subsisted between them; of the motives which may be supposed to have operated with with the testator and to have influenced him in the disposition of his property. All the relevant facts and circumstances, may be shown. Ingraham, Appellant, 118 Me. 67, 105 A. 812.

Including that which is extrinsic to the will.—That such omission was intentional, or was not occasioned by mistake on the part of the testator, may be established by evidence extrinsic to the will itself. All the relevant facts and circumstances may be shown. Ingraham, Appellant, 118 Me. 67, 105 A. 812.

Such as testator's declarations. — Evidence aliunde the will is admissible to show that an omission of provision for some of his children in a father's will was intentional; and evidence of his declarations is admissible upon the question. Whittemore v. Russell, 80 Me. 297, 14 A. 197.

Declarations of a testator are admissible to rebut the presumption raised by this section. Walton v. Roberts, 141 Me. 112, 39 A. (2d) 655.

Applied in Norwood v. Packard, 125 Me. 219, 132 A. 519.

Cited in Smalley v. Smalley, 70 Me. 545; DeMendoza, Appellant, 141 Me. 299, 43 A. (2d) 816.

What constitutes "mistake."—The word "mistake," as here used, is not to be construed as meaning such mistake as would or might have caused the testator to entertain a different intention from that which omission from the will would show, but mistake or accident in the will or in its transcription. It must, in the context, refer to such mistake or mistakes as are likely accidentally to occur in the preparation of a will, as momentary rather than purposed forgetfulness, owing to the distress of the testator; or error on the part of the scribe or otherwise, in reducing the testator's intention in that behalf to writing; and not to misapprehension or misunderstanding as to matters outside the will, whether of law or of fact. Ingraham, Appellant, 118 Me. 67, 105 A. 812.

Sec. 10. Certain devisees die before testator, lineal heirs take devise.—When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived. (R. S. c. 155, § 10.)

History of section.—See Snow v. Snow, 49 Me. 159.

Section changes common law. — The general rule is that, if a legatee dies before the testator, or before the condition upon which the legacy is given is performed, or before it is vested in interest, the legacy is extinguished. The common law has been changed by this statute, so that this principle has been modified in cases where a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived. This provision cannot apply where it does not appear that the legatee left lineal descendants, nor that he died before the testator. Snow v. Snow, 49 Me. 159.

Generally, if a legatee dies before the testator, the legacy lapses. But to this rule there is an exception in favor of relatives. Elliot v. Fessenden, 83 Me. 197, 22 A. 115; McKellar, Appellant, 114 Me. 421, 96 A. 734.

Where a devisee dies before the testator, what was intended for him would, under a general rule of the common law, in the absence of any controlling language to the contrary in the will, lapse and become intestate property. To this common-law rule, this statute has created an exception which prevents the lapsing of a devise under the circumstances mentioned, when the devisee was a relative of the testator and died before him leaving lineal descendants, who take by substitution. Morse v. Hayden, 82 Me. 227, 19 A. 443.

The common-law rule that a devise to a devisee who dies prior to the death of the testator will lapse has been modified under certain conditions in this state by this section. Farnsworth v. Whiting, 102 Me. 296, 66 A. 831.

The general rule is that a legacy or devise will lapse when the legatee or devisee dies before the testator. The application of this rule is narrowed by the provisions of this section. Nelson v. Meade, 129 Me. 61, 149 A. 626.

And it is in furtherance of presumed intent of testator. — This statute is in furtherance of what may be presumed to have been the intention of the testator, and prevents the operation of the common law, and upholds devises which would otherwise lapse. Bray v. Pullen, 84 Me. 185, 24 A. 811.

And should be construed liberally.— This statute is in furtherance of what may fairly be presumed to have been the intention of the testator, and in order to effect its object it should be construed liberally. Nutter v. Vickery, 64 Me. 490.

Section has regard to class for whose relief it is interposed.—The intent of this section is to save to the lineal descendants of the person named as devisee in the will, the benefit of a devise which would at the common law fail of effect by reason of the death of the original devisee before the testator. The statute has regard rather to the class of individuals for whose relief it is interposed, than to any technical distinction in the manner of the failure against which it proposes to guard them. Nutter v. Vickery, 64 Me. 490.

Lineal descendants entitled to bequest though legatee dead at date of will.—Upon reason, principle and authority, the lineal descendants of a relative of the testator having a bequest in the will are entitled

to the legacy given to their ancestor by virtue of this section, though the original legatee was in fact dead at the date of the will. Nutter v. Vickery, 64 Me. 490; Moses v. Allen, 81 Me. 268, 17 A. 66; Bray v. Pullen, 84 Me. 185, 24 A. 811.

Unless will provides to the contrary.— The share of a predeceased legatee, although a relative of the testator, where the clear, unambiguous, and express language of the will, provides, under such circumstances, that the legacy shall "lapse," remains undisposed of, and passes as intestate property to the heirs at law. Hay v. Dole, 119 Me. 421, 111 A. 713.

Whether legatee named or merely designated by relationship. — It makes no difference in the application of the rule laid down in this section whether the bequest is made to the relative by name, or whether he is designated in the will only by his relationship. Bray v. Pullen, 84 Me. 185, 24 A. 811.

Descendants take under the will. — The purpose and effect of the statute seem clear. It preserves such a devise from lapsing by substituting in place of the deceased devisee his lineal descendants. By force of the statute they take under the will in his place, and they take the same estate he would have taken thereunder. McKellar, Appellant, 114 Me. 421, 96 A. 734.

And not through estate of deceased devisee. — By force of this statute, the title to the devise or legacy comes to the lineal descendants directly from the testator through the will, and not through the estate of the deceased devisee or legatee. McKellar, Appellant, 114 Me. 421, 96 A. 734.

The mother is not a "lineal descendant" of her son within the meaning of this section. Morse v. Hayden, 82 Me. 227, 19 A. 443.

And wife of legatee has no interest in bequest.—The wife of such deceased devisee or legatee, either individually or as the representative of his estate, has no interest in such a devise or bequest; and, therefore, has no right of appeal from the allowance of the will or codicil in which such devise or legacy is made. McKellar, Appellant, 114 Me. 421, 96 A. 734.

But an adopted child is lineal descendant of parent.—A legally adopted child is a lineal descendant of its adopting parents within the meaning of this section, and, as such, may take a legacy given by will to one of its adopting parents, and thus prevent the legacy from lapsing, when the legatee dies before the testator. Warren v. Prescott, 84 Me. 483, 24 A. 948; Wilder v. Butler, 116 Me. 389, 102 A. 110.

Section not applicable if legatee was not relative of testator. — If a legatee who predeceased the testator was not a relative of the testator, his heirs do not take, under this statute, by substitution. Strout v. Chesley, 125 Me. 171, 132 A. 211.

And this statute intended to provide for a relationship by blood. Keniston v. Adams, 80 Me. 290, 14 A. 203.

And it does not include one connected with testator by marriage. — The word "relative," in this section means one connected with the testator by blood; a blood relation. It does not include within its meaning one connected with the testator by marriage only. Elliot v. Fessenden, 83 Me. 197, 22 A. 115.

A devise by a wife to her husband, between whom there is no relationship outside of that which arises from their marriage, lapses by his death during her lifetime. He is not a relative of his wife within the meaning of this statutory provision. Keniston v. Adams, 80 Me. 290, 14 A. 203.

The wife of the testator is not a relative of the testator within the meaning of this statute. Farnsworth v. Whiting, 102 Me. 296, 66 A. 831; Nelson v. Meade, 129 Me. 61, 149 A. 626.

And a relative can only be one whose descendants would also be relatives. Keniston v. Adams, 80 Me. 290, 14 A. 203.

Applied in Merrill v. Winchester, 120 Me. 203, 113 A. 261.

Cited in Stetson v. Eastman, 84 Me. 366, 24 A. 868; In re Brown's Estate, 86 Me. 572; Woodcock, Appellant, 103 Me. 214, 68 A. 821; Strout v. Strout, 117 Me. 357, 104 A. 577; Dow v. Bailey, 146 Me. 45, 77 A. (2d) 567.

Sec. 11. Contribution to loss of devisee.—When a share of the testator's estate descends as provided in sections 8 and 9, the person taking it is liable to contribute, and may claim contribution, as provided in section 6. (R. S. c. 155, § 11.)

Sec. 12. When one cannot contribute, loss borne by others.—When a person, liable to contribute as provided in section 6, cannot pay his proportion, the others bear the loss, each in proportion to the value of the property received by him. If anyone liable to contribute dies without having paid his proportion,

his executor or administrator is liable therefor as for a debt of the deceased. (R. S. c. 155, § 12.)

Sec. 13. Real estate not devised applied to pay debts before that devised.—When a part of the real estate of a testator is not disposed of by his will, and the personal estate is not sufficient to pay his debts, such undevised real estate shall be applied for that purpose in exoneration of the real estate devised, unless it appears that a different arrangement was made in the will for that purpose, and then the assets shall be applied according to its provisions. (R. S. c. 155, § 13.)

Lapsed devise subject to payment of debts before specific devise. — Where no specific provision is made for the payment of his debts by the testator, personal estate is the primary fund for their payment. If that is not sufficient, then the lapsed devise may be applied thereto. If debts still remain, then specific devises must contribute pro rata. Morse v. Hayden, 82 Me. 227, 19 A. 443.

Sec. 14. Cases of contribution, determination.—All cases of contribution, arising under the provisions of this chapter, may be determined in an action at law if the case will allow it, or in the probate court subject to appeal, or by a bill in equity. (R. S. c. 155, § 14.)

Applied in Kimball v. Tate, 75 Me. 39.

Sec. 15. Will to be effective, proved and allowed.—No will is effectual to pass real or personal estate unless proved and allowed in the probate court. Its probate by that court is conclusive proof of its execution. (R. S. c. 155, § 15.)

Quoted in Farington v. Putnam, 90 Me. 405, 37 A. 652.

Cited in Knapp, Appellant, 145 Me. 189, 74 A. (2d) 217.

Sec. 16. Construction of devise.—A devise of land conveys all the estate of the devisor therein, unless it appears by his will that he intended to convey a less estate. (R. S. c. 155, § 16.)

Section changes common law. — This statute provides that a devise of land should be construed to convey all the estate of the devisor therein, unless it appears by the will that he intended to convey a lesser estate. Prior to this section, as to realty, the presumption was the other way. By the common law, a devise in general terms, without words of inheritance added, was not efficacious to convey an estate in fee; unless the intention of the testator to that effect could be collected from that in connection with all other parts of the will. Copeland v. Barron, 72 Me. 206.

Prior to the passage of this section the rule was that a devise of land, without words of inheritance, conveyed a life estate only, unless from the whole will it affirmatively appeared that a fee was intended by the testator. Bromley v. Gardner, 79 Me. 246, 9 A. 621.

And words of inheritance are now implied from general devise.—Words of inheritance are now prima facie implied by a general or naked devise. From the nature of things, any power of disposal added to such a devise cannot extend it. It now only serves to emphasize and repeat the gift. But a limited or special power of disposal annexed to a general devise, with limitation over, may restrain and limit the devise to the lifetime of the devisee. Copeland v. Barron, 72 Me. 206; Barry v. Austin, 118 Me. 51, 105 A. 806.

So that fee simple will pass in absence of such words.—Notwithstanding that the devise contains no words of inheritance, that the words, "her heirs and assigns," are omitted, the devise may be sufficient to pass an estate in fee simple, there being nothing in the will to indicate that the testator intended to convey a less estate. Baldwin v. Bean, 59 Me. 481.

For, under this section, a devise means to the devisee "and his heirs." Richardson v. Richardson, 80 Me. 585, 16 A. 250.

Unless it clearly appears that a less estate was intended.—The omission from the several subsequent revisions of the word "clearly" which appeared next before "appears" in this section in the revision of 1841, c. 92, § 26, does not change the meaning. A devisee takes a fee, unless it clearly appears by the will that a less estate was intended. Nash v. Simpson, 78 Me. 142, 3 A. 53.

But every devise without words of in-

heritance does not convey an absolute estate.—This section does not declare that every devise without words of inheritance conveys an absolute estate. It is clearly a matter of intent and construction. Gregg v. Bailey, 120 Me. 263, 113 A. 397.

And limitation or remainder over may be sufficient to indicate such an estate was not intended.—It has not become firmly established as a rule of construction in this state, that where there is a gift or devise in general terms without words of inheritance or a general power of disposal in the first taker, a limitation or remainder over at his death may never be sufficient to indicate that a fee or an absolute estate was not intended in the first taker. Gregg v. Bailey, 120 Me. 263, 113 A. 397.

Where there are no words of inheritance, there being no fixed rule of interpretation that a gift or devise in general terms of itself conveys an absolute estate, it becomes in all cases a question of construction from the whole will to determine the testator's intent, which must control. The gift of a remainder over may alone, in the light of the other provisions of the will, be sufficient, under the statute, to rebut the presumption that follows from a general gift or devise, without words of limitation that a fee or an absolute estate was intended. Gregg v. Bailey, 120 Me. 263, 113 A. 397.

In every case in this state where the remainder or gift over has been held void from Ramsdell v. Ramsdell, 21 Me. 288, to Morrill v. Morrill, 116 Me. 154, 100 A. 756, including Shaw v. Hussey, 41 Me. 495; Jones v. Bacon, 68 Me. 34; Mitchell v. Morse, 77 Me. 423, 1 A. 141; Wallace v. Hawes, 79 Me. 177, 8 A. 885; Loring v. Hayes, 86 Me. 351, 29 A. 1093; Taylor v. Brown, 88 Me. 56, 33 A. 664; Bradley v. Warren, 104 Me. 423, 72 A. 173; Lord v. Pearson, 108 Me. 565, 83 A. 1102, there have either been words of inheritance or a general power of disposal express or implied added to the general devise, and the intent to create an absolute estate in the first taker has been clear. Gregg v. Bailey, 120 Me. 263, 113 A. 397.

The court in Mitchell v. Morse, 77 Me. 423, 1 A. 141, said "that in a large majority of cases, both in England and in this country, it is held that a mere devise over will not cut down the estate given to the first taker." This is true, if the estate in the first taker was clearly intended to be absolute; but if by this, it is meant that the cases expressly hold that a presumptive fee under this section, when viewed in the light of the other provisions of the will, may not be so cut down, it is not sustained by the authorities cited in the opinion, nor has any such plethora of authorities as are suggested by the language of the opinion, been called to our attention. Gregg v. Bailey, 120 Me. 263, 113 A. 397.

But gift over fails if absolute estate in first taker was intended. — Only where there is a simple devise or bequest without words of inheritance or any power of disposal, either express or implied, in the first taker, or in any other provision showing an intent to create an absolute estate in the devisee first named, may a provision for a disposal of the property after the death of the first taker overcome the presumption created by this section that an absolute estate was intended in the first taker, and the remainder be given effect. In case it otherwise appears, either by words of inheritance or an unqualified power of disposal, that an absolute estate was intended in the first taker, a remainder over must fail. Methodist Church v. Fairbanks, 124 Me. 187, 126 A. 823.

Thus gift over is void in case of general devise with absolute power of disposal.—If a devise is expressed in such general terms as to create an estate of inheritance under this section, and an absolute and unqualified power of disposal is added, either in express language or by implication, with a gift over of any estate that may remain at the death of the first taker, the gift over is repugnant and void. Barry v. Austin, 118 Me. 51, 105 A. 806.

But not if power of disposal is qualified.—If a devise is expressed in such general terms as would otherwise create an estate of inheritance under this section, and these general terms are followed by a qualified and restricted power of disposal in the first taker, a life estate by implication is created and the limitation over is valid. Barry v. Austin, 118 Me. 51, 105 A. 806; Smith v. Walker, 118 Me. 473, 109 A. 10.

If however the devise is expressed in such general terms as would otherwise create an estate of inheritance under this section, and these general terms are followed by a qualified and restricted power of disposal in the first taker, a life estate by implication is created and the limitation over is valid. The fact that there is no limitation over does not affect the application of the rule so far as the creation of the life estate by implication is concerned. The validity of the limitation over is not the cause of the creation of a valid life estate, but the result, and the rule itself applies with equal force whether the

life estate is followed by a limitation over to persons named by the testator, or by intestacy and the consequent distribution among his unnamed heirs at law. Reed v. Creamer, 118 Me. 317, 108 A. 82.

Gift of income from land is gift of land. —It is a settled rule of testamentary construction that a gift of the perpetual income of real estate is a gift of the real estate itself, and a gift of the income for life is a gift of the real estate for life, where there are no overruling words in the will establishing the contrary. Words of inheritance are not necessary. Reed v. Creamer, 118 Me. 317, 108 A. 82.

Devisee held to take life estate only.—See Nash v. Simpson, 78 Me. 142, 3 A. 53; Hopkins v. Keazer, 89 Me. 347, 36 A. 615.

Applied in Mitchell v. Morse, 77 Me 423, 1 A. 141; Wallace v. Hawes, 79 Me. 177, 8 A. 885; Fuller v. Fuller, 84 Me. 475, 24 A. 946.

Quoted in Jones v. Leeman, 69 Me. 489; Mansfield v. Mansfield, 75 Me. 509.

Cited in Moulton v. Chapman, 108 Me. 417, 81 A. 1007.

Sec. 17. Legacy payable on condition and no time stated; payment. —When executors or trustees are directed to pay a legacy to a person or a corporation, on conditions precedent, and no time is stated in the will or in the charter or by-laws of the corporation for their performance, a reasonable time is allowed therefor, not exceeding 5 years from the probate of a will; and if not so performed, it shall be administered as undivided estate, unless otherwise disposed of by the will. (R. S. c. 155, § 17.)

Applied in Piper v. Moulton, 72 Me. 155.

Nuncupative Wills.

Cross Reference.—See c. 154, § 18, re nuncupative wills may be approved.

Sec. 18. Nuncupative wills.—A nuncupative will must be made during the last sickness of the testator, at his home or at the place where he resided 10 days before making it, unless he is suddenly taken sick from home and dies before returning to it. But a soldier in actual service or mariner at sea may dispose of his personal estate and wages without regard to the provisions of this chapter. (R. S. c. 155, § 18.)

History of section. — See Leathers v. Greenacre, 53 Me. 561.

Nuncupative wills depend on evidence of testator's oral declarations.—Wills are of two sorts—written and verbal, or nuncupative—the latter depending merely upon evidence of the declarations of the testator, made ore tenus, in the presence of witnesses and subsequently reduced to writing. Leathers v. Greenacre, 53 Me. 561.

And they should be critically examined. —In general, nuncupative wills should be examined with a very critical eye, especially when made by persons who were among friends and dependents, and in situations where a written will might easily have been made. In such circumstances, it is the duty of the court to see that the statute is strictly complied with, and the rights of heirs duly protected. Parsons v. Parsons, 2 Me. 298.

Soldiers and mariners may dispose of estate as at common law. — By this section, soldiers in actual service or mariners at sea are so far relieved from the formalities to be observed by others in the making of their wills, that, either by written will or by nuncupation, they may dispose of their personal estate and wages as they might have done under the common law. Leathers v. Greenacre, 53 Me. 561.

As to the soldier in actual service and the mariner at sea, the right to dispose of his personal estate and wages still remains substantially as under the civil law in the days of Justinian. And in our state, under this section, nuncupations may still be made by other citizens under restrictions which have long obtained. Leathers v. Greenacre, 53 Me. 561.

Officers of the army and soldiers, who are actually in an expedition and not in a condition to observe all the formalities which the law requires in testaments, are relieved from observing those which their present state does not allow them to comply with. Such substantially is the privilege granted to the soldier under our laws, propter nimiam imperitiam ejus, and while he is in such a position that it cannot be reasonably presumed that he might obtain instruction from those learned in the law. Leathers v. Greenacre, 53 Me. 561.

And this exemption is liberally construed.—While it is true that the policy of the law is well settled to regard wills as inoperative unless executed with the

formalities which the law requires as safeguards against imposition, it is also true that the exemption of soldiers in actual service and seamen at sea from the observance of these formalities has always been liberally considered; and so it is stated that "their form was properly to have no form." Leathers v. Greenacre, 53 Me. 561.

But soldier must be engaged in prosecution of warfare. — The true meaning of the phrases "engaged in an expedition," "in actual service," (the decisions recognize them as synonymous) is that there must be actual warfare, in the prosecution of which the soldier is at the time engaged. Leathers v. Greenacre, 53 Me. 561, holding that a soldier, having marched into the enemy's country from which he never returned, and encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters and not, at the time of making his will, occupied with any present movement of the troops, but was on some service detached from his own regiment, would be deemed a "soldier in actual service," and his will be sustained, if good at common law.

And if quartered in peaceful colony his will must be executed with usual formalities.—The will of a soldier, made while he is quartered in barracks at home, must be executed with the formalities required of others. And the same is true if, having left home, he is thus quartered in a peaceful colony. Leathers v. Greenacre, 53 Me. 561.

Cited in Huse v. Brown, 8 Me. 167.

Sec. 19. Proved within 6 months. — No testimony can be received to prove any testamentary words as a nuncupative will after the lapse of 6 months from the time when they were spoken, unless the words or the substance of them were reduced to writing within 6 days after they were spoken. (R. S. c. 155, § 19.)

Sec. 20. Limitation as to property affected. — No nuncupative will is effectual to dispose of property exceeding in value $100, unless proved by the oath of 3 witnesses who were present at the making of it and were requested by the testator to bear witness that such was his will. (R. S. c. 155, § 20.)

Evidence sufficient to establish nuncupative will under former statute. — See Parsons v. Parsons, 2 Me. 298.