Chapter 112

Intestate Succession and Wills

112.015 to 112.115

NOTES OF DECISIONS

1. Under former similar statute

(1) In general. Husband's conveyance to wife of his rights in her property which he would acquire as heir in statute, contravened public policy and was void. Jenkins v. Hall, (1894) 26 Or 79, 37 P 62.

The persons entitled to take under a bequest to "heirs at law" were determined by application of the intestate succession statutes. Ramsey v. Stephenson, (1899) 34 Or 408, 56 P 520, 57 P 195.

Widow could take possession of the personal property belonging to the estate until an administrator was appointed. Casto v. Murray, (1905) 47 Or 57, 81 P 388, 883.

Dispensation of damages received under the Employe's Liability Act for death of a decedent was made to the person or persons entitled by that Act to bring the action, and not to the distributees under the statute. McFarland v. Ore. Elec. Ry. (1914) 70 Or 27, 138 P 458, Ann Cas 1916B, 527.

A child had no standing to assert or defend any interest which he might anticipate in the estate of a living parent. Wade v. Northrup, (1914) 70 Or 569, 574, 140 P 451.

An administrator's sale of ancestor's real property destroyed the lien upon such land, of any judgment rendered against the heir. Yeaton v. Barnhart, (1915) 78 Or 249, 150 P 742, 152 P 1192.

Possession of heirs was not adverse to a purchaser at an administrator's sale for the payment of debts, because the heirs took subject to payment of the ancestor's debts. Acton v. Lamberson, (1922) 102 Or 472, 481, 202 P 421, 202 P 732.

Debts owed by an heir to the intestate could not be set off against realty passing to such heir by descent. Stanley v. United States Nat. Bank, (1924) 110 Or 648, 659, 224 P 835.

A mortgage note payable to husband and wife and given for real property which they owned by entireties belonged upon the husband's death one-half to his estate and the other one-half to the widow. Nunner v. Erickson, (1935) 151 Or 575, 617, 51 P2d 839.

Where intestate's estate consisted in part of money deposited in another state, the domiciliary law at time of death governed distribution. Wood v. Sprague, (1940) 165 Or 122, 136, 106 P2d 287.

The intestate succession statutes would necessarily apply to a will in which there was no express or implied provision of survivorship, where a legatee entitled to one-third share of residue was dead. State Land Bd. v. McCoy, (1951) 193 Or 1, 236 P2d 311.

The estate vested in the heirs immediately upon death of the owner. Wright v. Kroeger, (1959) 219 Or 102, 345 P2d 809.

(2) Heirs. It was by virtue of statute that the right to take by inheritance existed. Leet v. Barr, (1922) 104 Or 32, 202 P 414, 206 P 548; In re Miller's Estate, (1926) 117 Or 399, 244 P 526.

Where one died leaving no lineal descendants, wife, father, mother, brother, sister, nor issue of any brother or sister, the estate descended to his paternal grandmother and maternal grandparents, one-third to each. Shadden v. Hembree, (1888) 17 Or 14, 18 P 572.

Where two of intestate's four surviving children died childless and unmarried, real proerty inherited by them from intestate, their mother, descended to their father to the exclusion of the other children. Stitt v. Bush, (1892) 22 Or 239, 29 P 737.

The statutes of this state, rather than Indian tribal customs, determined the rule for descendent of real property. Non-She-Po v. Wa-Win-Ta, (1900) 31 Or 213, 62 P 15.

Title to realty passed directly to the heirs as tenants in common, subject to the administrator's possession to pay debts. De Bow v. Wollenberg, (1908) 52 Or 404, 432, 96 P 536, 97 P 707.

A residue, not lawfully devised, descended to the heirs in accordance with the statute. Whitney v. Whitney, (1912) 61 Or 314, 122 P 289.

A living person could have no heirs. Wade v. Northrup, (1914) 70 Or 569, 574, 140 P 451.

The right of an heir to his ancestor's real property was extinguished by an administrator's sale of the premises to pay decedent's indebtedness. Yeaton v. Barnhart, (1915) 78 Or 249, 150 P 742, 152 P 1192.

"Descend" meant the vesting of an estate in real property in the heir by operation of law upon the death of the ancestor. Leet v. Barr, (1922) 104 Or 32, 202 P 414, 206 P 548.

Second husband was the heir where testatrix had no children by either husband, and first husband had children by a former wife. In re Reinbrecht's Estate, (1925) 116 Or 184, 240 P 223.

A son predeceasing his father never became the father's heir. Root v. Arnold, (1930) 133 Or 417, 290 P 1005.

"Heir" was a person appointed by law to whom property of a deceased ancestor not otherwise lawfully devised descended or was distributed. Id.

FURTHER CITATIONS: Armstrong v. Armstrong's Estate, (1855) 1 Or 207, 75 Am Dec 555; Chambers v. Chambers, (1871) 4 Or 153; Gager v. Henry, (1878) 5 Sawy 237, Fed Cas No. 5,172; Winkle v. Winkle, (1879) 8 Or 194; Holmes v. Ore. and Calif. Ry., (1881) 5 Fed 523, 543; Cutting v. Cutting, (1882) 6 Sawy 396, 6 Fed 259, 268; Proebstel v. Hogue, (1883) 15 Fed 581, 587; Smallman v. Powell, (1890) 18 Or 367, 23 P 249; Wheeler v. Taylor, (1898) 32 Or 421, 425, 52 P 183; Parr v. United States, (1907) 153 Fed 462; Chauncey v. Wollenberg, (1911) 59 Or 214, 115 P 419; Kaser v. Kaser, (1913) 68 Or 153, 137 P 187; Howell v. Howell, (1915) 77 Or 539, 544, 152 P 217; Stadelman v. Miner, (1917) 83 Or 348, 155 P 708, 163 P 585, 163 P 983; In re Sturtevant's Estate, (1919) 92 Or 269, 178 P 192, 180 P 595; Palmateer v. Reid, (1927) 121 Or 179, 254 P 359; Gomoll v. Temple, (1933) 145 Or 299, 27 P2d 1018; Holman v. Ways, (1936) 154 Or 241, 247, 59 P2d 392; In re Preston's Estate, (1937) 157 Or 631, 73 P2d 369; In re McLeod's Estate, (1938) 159 Or 687, 82 P2d 884; Cordon v. Gregg, (1940) 164 Or 306, 314, 97 P2d 732, 101 P2d 414; State Land Bd. v. Norton, (1945) 177 Or 342, 162 P2d 379; In re Frazier's Estate, (1947) 180 Or 232, 177 P2d 254; Windle v. Flinn, (1952) 196 Or 654, 251

P2d 136; Daniel v. Donohue, (1959) 215 Or 373, 333 P2d 1109; Wester v. State Land Bd., (1962) 231 Or 405, 373 P2d 422; Hood v. Hatfield, (1963) 235 Or 38, 383 P2d 1021.

ATTY. GEN. OPINIONS: Inheritance tax upon bequests of stock certificate, 1920-22, p 9; Soldier's Bonus, World War I, 1920-22, p 460; inheritance tax on homestead set apart to survivor, 1920-22, p 561; when lineal and collateral heirs take by right of representation, 1928-30, p 33; computing degrees of kindred, 1928-30, p 34, 1944-46, p 486; inheriting as tenants by the entirety, 1928-30, p 613; sale of real property by administrator for purpose other than payment of claims against the estate, 1930-32, p 623; nieces and nephews to exclusion of grandnieces and grandnephews, 1934-36, p 602; child of adopted child as lineal descendant of adoptive parents, 1936-38, p 107; service on incompetent heir and next of kin of deceased heir, 1936-38, p 282; authority of State Land Board to execute quitclaim deed to remove cloud from title of heirs of decedent, 1938-40, p 53.

LAW REVIEW CITATIONS: 14 OLR 285; 16 OLR 275; 17 OLR 328; 18 OLR 82; 20 OLR 164; 23 OLR 69, 74, 87; 28 OLR 15; 2 WLJ 481; 6 WLJ 449-483.

112.025

LAW REVIEW CITATIONS: 49 OLR 361.

112.045

LAW REVIEW CITATIONS: 49 OLR 361.

112.055

NOTES OF DECISIONS

1. Under former similar statute

Administration of the estate by the probate court had to be completed before the state was entitled to possession of escheated lands. State v. O'Day, (1902) 41 Or 495, 69 P 542; State v. Simmons, (1905) 46 Or 159, 79 P 498.

The State Land Board had a right to appear in probate proceedings and assert that an estate should escheat to the state for lack of legal heirs. In re Wakefield's Estate, (1939) 161 Or 330, 87 P2d 794, 89 P2d 592; In re Braun Estate, (1939) 161 Or 503, 90 P2d 484; State Land Bd. v. Long, (1950) 189 Or 537, 221 P2d 892, 20 ALR2d 219.

Title to escheated realty vested in the state immediately upon the intestate's death and the property was not subject to taxation thereafter. In re Ohlsen's Estate, (1938) 158 Or 197, 75 P2d 6.

Title vested in the state when a person died without known heirs, subject to being divested if heirs appeared and asserted their rights within the statutory period. Wood v. Sprague, (1940) 165 Or 122, 106 P2d 287.

"Without heirs" meant without descendants capable of inheriting the property. State Land Bd. v. Nortin, (1945) 177 Or 342, 162 P2d 379.

Attorneys and witnesses appearing on behalf of claimants from countries with which there was no reciprocity regarding inheritance were not entitled to fees payable out of the estate. State Land Bd. v. Sovenko, (1954) 202 Or 571, 277 P2d 781.

Personal property of an Oregon resident who died in a Veterans' Administration Hospital, intestate and without heirs, did not escheat but went by federal statute to the United States as trustee for use of veterans. United States v. Oregon, (1961) 366 US 643, 6 L Ed 2d 575, 81 S Ct 1278, reversing 222 Or 40, 352 P2d 539, rehearing denied, 368 US 870, 82 S Ct 24, 7 L Ed 2d 70.

FURTHER CITATIONS: Whitney v. Canadian Bank of Commerce, (1962) 232 Or 1, 374 P2d 441.

ATTY. GEN. OPINIONS: Taxability of escheated property, 1930-32, p 694, 1938-40, p 604, 1942-44, p 76; escheat of personalty held by a nonresident, 1924-26, p 682, 1936-38, pp 213, 375; rights of veteran's administration when veteran dies without heirs, 1938-40, p 372; escheat law applied to various fact situations, 1940-42, p 401.

State Land Board's authority in escheat matters, 1928-30, p 158, 1930-32, p 51, 1934-36, p 559, 1936-38, p 687, 1938-40, p 52; duties of state officials in handling money realized by escheat, 1938-40, p 417.

Taxability of escheated property, 1930-32, p 695; payment of money realized by escheat to an heir, 1932-34, p 329; status of lien acquired by the state through escheat in relation to a tax lien, 1940-42, p 335.

LAW REVIEW CITATIONS: 20 OLR 390.

112.065

NOTES OF DECISIONS

Under former similar statute parent's demise entitled child to take by right of representation, such child sharing equally with brothers and sisters of deceased parent. Grant v. Paddock, (1897) 30 Or 312, 47 P 712.

Under former similar statute the question of right of representation arose only upon intestacy. In re Buell's Estate, (1941) 167 Or 295, 117 P2d 832.

FURTHER CITATIONS: Bones v. Lollis, (1951) 192 Or 376, 234 P2d 788; Andrews v. First Nat. Bank, (1951) 192 Or 230, 234 P2d 791.

112.075

NOTES OF DECISIONS

Under former similar statute a posthumous child, not named or provided for in the will, took his distributive share by inheritance as if his parent had died intestate. Northrop v. Marquam, (1888) 16 Or 173, 186, 18 P 449.

112.095

CASE CITATIONS: Smallman v. Powell, (1890) 18 Or 367, 23 P 249, 17 Am St Rep 742; In re Miller's Estate, (1926) 117 Or 399, 244 P 526.

ATTY. GEN. OPINIONS: Stepparents not heirs of child, 1920-22, p 560; computation of degree of kindred, 1928-30, p 33; half brothers and half sisters are relatives, 1932-34, p 215; nieces and nephews to exclusion of grandnieces and grandnephews, 1934-36, p 602; nieces and nephews to exclusion of cousins, 1944-46, p 486.

LAW REVIEW CITATIONS: 23 OLR 87.

112.105

NOTES OF DECISIONS

1. Under former similar statute

Where parents formally married and cohabited within the terms of the statute, though not in lawful wedlock, children born were legitimate, and they and their descendants could inherit through their mother as her representatives. McCalla v. Bane, (1891) 45 Fed 828.

Illegitimate son of Indian allottee took patent subject to estate of curtesy in allottee's husband. Beam v. United States, (1908) 162 Fed 260.

The declaration, act or admission of a member of a family who is deceased or out of the state is admissible as evidence of common reputation on question of pedigree. State v. McDonald, (1910) 55 Or 419, 103 P 512, 104 P 967, 106 P 444.

The former statute changed the common law rule against inheritance by illegitimate children. State v. McDonald, (1911) 59 Or 520, 117 P 281.

Neither legitimate nor illegitimate children of intestate bastard's mother could inherit from the intestate bastard. State v. Looney, (1935) 149 Or 287, 40 P2d 735.

The strong presumption of a valid marriage increased in strength with lapse of time. In re Wakefield's Estate, (1939) 161 Or 330, 87 P2d 794, 89 P2d 592.

FURTHER CITATIONS: Wadsworth v. Brigham, (1928) 125 Or 428, 259 P 299, 266 P 875; In re Gregoire's Estate, (1937) 156 Or 111, 64 P2d 1328; Walker v. Sherriff, (1970) 2 Or App 322, 468 P2d 655; Thom v. Bailey, (1970) 3 Or App 97, 471 P2d 809, aff'd, 257 Or 572, 481 P2d 355; Deckard v. Newberg, (1970) 4 Or App 204, 476 P2d 808, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Illegitimate child as heir of father, 1924-26, p 171; descent of property of an illegitimate child dying intestate without spouse, mother or lawful issue, 1924-26, p 153; right of collateral heirs to inherit through deceased mother of illegitimate child, 1926-28, p 51; right of mother to give illegitimate child putative father's name, 1926-28, p 541; production of birth records by court order, 1942-44, p 191.

LAW REVIEW CITATIONS: 12 OLR 340; 15 OLR 74; 23 OLR 69; 6 WLJ 449-483.

112.115

NOTES OF DECISIONS

Under former similar statute the common law rule that an heir shall not take by devise where he may take the same estate by descent was not abrogated by the statute, nor did the fact that a father's estate was devised in trust to his minor son, take the case out of the rule. Cordon v. Gregg, (1940) 164 Or 306, 97 P2d 732, 101 P2d 414.

112.135

NOTES OF DECISIONS

1. Under former similar statute

Equity would not impress an equitable lien for advancements on the undistributed share of certain heirs of an intestate in lands. Belle v. Brown, (1900) 37 Or 588, 61 P 1024.

Value of advancements was required to be taken into consideration in making the distribution, but title was not divested. Id.

The question of advancement could arise only in the distribution of the estate of an intestate. Fletcher v. Yates, (1922) 105 Or 680, 211 P 179.

FURTHER CITATIONS: Velton v. Carmack, (1892) 23 Or 282, 31 P 658, 20 LRA 101; Seed v. Jennings, (1905) 47 Or 464, 83 P 872; Fletcher v. Yates, (1922) 105 Or 680, 211 P 179; Henderson v. State Tax Comm., (1963) 1 OTR 392.

112.145

NOTES OF DECISIONS

Under former similar statute title to the advanced portion was not divested in making the distribution of the estate. Belle v. Brown, (1900) 37 Or 588, 61 P 1024.

FURTHER CITATIONS: Fletcher v. Yates, (1922) 105 Or 680, 211 P 179.

112.175

NOTES OF DECISIONS

Under former similar statute an adopted child had the right to inherit from his adopting parent who died intestate. In re Buell's Estate (1941) 167 Or 295, 117 P2d 832.

FURTHER CITATIONS: Furgeson v. Jones, (1888) 17 Or 204, 20 P 842, 11 Am St Rep 808, 3 LRA 620; In re Hayes' Estate, (1939) 161 Or 1, 86 P2d 424, 87 P2d 766; In re Frazier's Estate, (1947) 180 Or 232, 177 P2d 254, 170 ALR 729; Hood v. Hatfield, (1963) 235 Or 38, 383 P2d 1021; Department of Rev. v. Martin, (1970) 3 Or App 594, 474 P2d 355, Sup Ct **review denied.**

ATTY. GEN. OPINIONS: Rights of adoptive parents to bonus of deceased veteran, 1920-22, p 465; taxation status of legacy to child, adopted in Iowa by married spouse without formal approval of other spouse, 1932-34, p 723; inheritance tax on legacy to adopted child, 1936-38, p 106; descent of property of child who dies intestate after death of adoptive parents, 1936-38, p 412.

LAW REVIEW CITATIONS: 4 OLR 233; 32 OLR 89; 43 OLR 88.

112.225

NOTES OF DECISIONS

1. In general
2. Testamentary capacity
3. Fraud and undue influence
4. Under former similar statute
   (1) Right to make will
   (2) Disposition made in will
   (3) Testamentary capacity
      (a) Physical condition
      (b) Sound mind or insanity
      (c) Delusions
   (4) Sufficiency of evidence of incapacity
   (5) Fraud and undue influence

1. In general

Every person, if he possesses testamentary capacity and exercises his own will and judgment, has absolute dominion over his property, and may bestow it upon whomsoever he pleases without regard to natural or legal claim upon his bounty. Vsetecka v. Novak, (1970) 4 Or App 463, 478 P2d 655, Sup Ct **review denied;** In re Turner's Will, (1908) 51 Or 1, 93 P 461.

2. Testamentary capacity

A testator is presumed to have testamentary capacity if the will is executed in due form. Vsetecka v. Novak, (1970) 4 Or App 463, 478 P2d 655, Sup Ct **review denied;** White v. Morton, (1950) 190 Or 15, 222 P2d 1005.

Competency at the time of making the will is determinative of testamentary capacity. Vsetecka v. Novak, (1970) 4 Or App 463, 478 P2d 655, Sup Ct **review denied.**

Proponent of a will has the burden of proving a testamentary capacity. Golden v. Stephan, (1971) 5 Or App 547, 485 P2d 1108; Ehry v. Blackford, (1961) 228 Or 248, 364 P2d 626; Martin v. United States Nat. Bank, (1969) 1 Or App 260, 457 P2d 662, Sup Ct **review denied.**

If a testator, at the time of making his will, (1) comprehends the nature of the act in which he is engaged, (2) knows the nature and extent of his property, (3) has in mind the persons who are, should or might be, the objects of his bounty and (4) is cognizant of the scope and reach of the provisions of the written instrument, he has testamentary capacity. Vsetecka v. Novak, (1970) 4 Or App 463, 478 P2d 655, Sup Ct **review denied;** Chrisman v. Chrisman,

(1888) 16 Or 127, 18 P 6; Re Phillips' Will, (1923) 107 Or 612, 213 P 627; McCracken v. McCracken, (1923) 109 Or 83, 219 P 196; In re Johnson's Estate, (1939) 162 Or 97, 91 P2d 330; In re Walther's Estate, (1945) 177 Or 382, 163 P2d 285; Tombley v. McKenney, (1951) 191 Or 90, 228 P2d 417; Hill v. Henderson, (1953) 198 Or 307, 256 P2d 735; In re Cook Estate, (1962) 231 Or 133, 372 P2d 520.

No particular degree of acumen could serve as the standard for testamentary capacity; instead every case was to be decided on its own facts and circumstances. In re Estate of Riggs, (1926) 120 Or 38, 241 P 70, 250 P 753; In re Johnson's Estate, (1939) 162 Or 97, 91 P2d 330.

3. Fraud and undue influence

The burden of showing the exercise of undue influence at the time of the execution of a will is upon the contestant. Golden v. Stephan, (1971) 5 Or App 547, 485 P2d 1108; Allen v. Breding, (1947) 181 Or 332, 181 P2d 783; Trombly v. McKenney, (1951) 190 Or 90, 228 P2d 417; Detsch v. Detsch, (1951) 191 Or 161, 229 P2d 264; Cline v. Larson, (1963) 234 Or 384, 383 P2d 74; Soumie v. McLean, (1963) 234 Or 485, 382 P2d 1.

The mere fact a beneficiary occupies a confidential relationship to the testator does not of itself allow an inference of improper influence. Golden v. Stephan, (1971) 5 Or App 547, 485 P2d 1108; In re Turner's Will, (1908) 51 Or 1, 93 P 461; Campbell v. Beal, (1950) 190 Or 140, 224 P2d 572; Detsch v. Detsch, (1951) 191 Or 161, 229 P2d 264; Soumie v. McLean, (1963) 234 Or 485, 382 P2d 1.

A disputable presumption of undue influence arises if a beneficiary who sustains to the testator a confidential relationship participates in drafting the will. Golden v. Stephan, (1971) 5 Or App 547, 485 P2d 1108; Cline v. Larson, (1963) 234 Or 384, 383 P2d 74; Soumie v. McLean, (1963) 234 Or 485, 382 P2d 1.

4. Under former similar statute

(1) Right to make will. The right to make a testamentary disposition of property was purely a creation of statute. Mathews v. Tobias, (1921) 101 Or 605, 201 P 199; Leet v. Barr, (1922) 104 Or 32, 202 P 414, 206 P 548; McDermid v. Bourhill, (1921) 101 Or 305, 199 P 610; Hindman v. United States, (1950) 190 Or 63, 223 P2d 393.

A person of the required age and of sound mind could dispose of his property by will without regard to relatives. Re Phillips' Will, (1923) 107 Or 612, 213 P 627; Talbert v. Skilbred, (1928) 125 Or 545, 267 P 396.

The statute of wills as passed by the legislature was complete within itself and common law rules regarding testamentary disposition were impliedly repealed. Hindman v. United States, (1950) 190 Or 63, 223 P2d 393.

It was the right of every person who qualified to dispose of his property as he saw fit. Martin v. United States Nat. Bank, (1969) 1 Or App 260, 457 P2d 662, Sup Ct **review denied.**

(2) Disposition made in will. A testator's right to dispose of his property was unlimited, and his wishes as expressed by will were required to be respected, without reference to his recognition or disregard of natural claims upon his bounty, or the judiciousness of his gifts. Holman's Will, (1902) 42 Or 345, 70 P 908; Hill v. Henderson, (1953) 198 Or 307, 256 P2d 735; Martin v. United States Nat. Bank, (1969) 1 Or App 260, 457 P2d 662, Sup Ct **review denied.**

A parent could disinherit a child and devise his property to others, or cut them all off and devise it to strangers so long as his motive was not resolvable into mental perversion. Potter v. Jones, (1891) 20 Or 239, 25 P 769, 12 LRA 161.

A woman competent to make a will could agree to make a particular testamentary disposition of her real property. Mathews v. Tobias, (1921) 101 Or 605, 201 P 199.

The statute permitted every person of lawful age to devise and bequeath his property to the Federal Government since it implied that any entity having capacity to hold title to property could be the recipient of a testamentary gift. Hindman v. United States, (1950) 190 Or 63, 223 P2d 393.

A provision in a will stating that a devisee would forfeit her rights if she married a Catholic before she reached 32 was valid. United States Nat. Bank v. Snodgrass, (1954) 202 Or 530, 275 P2d 860.

(3) Testamentary capacity. Competency at the time of making the will was determinative of testamentary capacity. Talbert v. Skilbred, (1928) 125 Or 545, 267 P 396; Trombly v. McKenney, (1951) 191 Or 90, 228 P2d 417; Postelle & Running v. Shuholm, (1951) 192 Or 441, 235 P2d 869.

Testamentary capacity was mainly a question of fact to be determined from a consideration of all the evidence. Chrisman v. Chrisman, (1888) 16 Or 127, 18 P 6.

Mental condition before and after execution of the will was only important as it threw light upon the testator's actual condition of mind when the will was executed. Id.

Appointment of a guardian created a rebuttable presumption of mental incapacity to make a will. In re Provolt's Estate, (1944) 175 Or 128, 151 P2d 736.

A will was valid if mental capacity existed at the time of its execution, notwithstanding the dementia if the testator before and after execution. Id.

Testator, though mentally incompetent to execute contracts, deeds or other bilateral engagements, could have testamentary capacity. In re Walther's Estate, (1945) 177 Or 382, 163 P2d 285.

When testamentary capacity was challenged great weight had to be given to the testimony of subscribing witnesses. Postelle & Running v. Shuholm, (1951) 192 Or 441, 235 P2d 869.

The probate of a will was sustained on the testimony of subscribing witnesses, even though physicians and nurses testified without rebuttal that the testatrix did not have testamentary capacity. Id.

The findings of the trial judge are strongly persuasive in a will contest. Id.

A lucid interval of an insane person was a full return of the mind to sanity that placed the person in possession of the powers of his mind enabling him to understand and transact his affairs as usual. Kastner v. Husband, (1962) 231 Or 133, 372 P2d 520.

A will made by an insane person could be valid if made during a lucid interval. Kastner v. Husband, (1962) 231 Or 133, 372 P2d 520; Martin v. United States Nat. Bank, (1969) 1 Or App 260, 457 P2d 662, Sup Ct **review denied.**

Evidence was not sufficient to show testatrix was subject to monomania at the time she executed the will. Soumie v. McLean, (1963) 234 Or 485, 382 P2d 1.

In determining testamentary capacity, the knowledge one must have of the nature and extent of his property was a general one, and the size and the intricacy of the estate were not important in this regard. Martin v. United States Nat. Bank, (1969) 1 Or App 260, 457 P2d 662, Sup Ct **review denied.**

Where codicil to will was in proper form, proponents of codicil were entitled to presumption that testatrix was competent. Id.

(a) Physical condition. Old age, sickness, distress or debility of body did not incapacitate, provided the testator had possession of his mental faculties and understood the business in which he was engaged. Chrisman v. Chrisman, (1888) 16 Or 127, 18 P 6; In re Cline's Will, (1893) 24 Or 175, 178, 33 P 542, 41 Am St Rep 851; Ames' Will, (1902) 40 Or 495, 67 P 737; Buren's Will, (1905) 47 Or 307, 83 P 530; Trombly v. McKenney, (1951) 190 Or 90, 228 P2d 417.

It was not the bodily health but the soundness of mind at the time of making the will that was determinative of testamentary capacity. Chrisman v. Chrisman, (1888) 16 Or 127, 18 P 6.

Positive testimony of persons present establishing testa-

mentary capacity notwithstanding testator's age and debilitated condition would support a conclusion in favor thereof as against the opinion of medical experts. In re Pickett's Will, (1907) 49 Or 127, 89 P 377.

If a testatrix sufficiently comprehended the nature of the business in which she was engaged, her testamentary capacity was not necessarily impaired merely by reason of her old age, debility and sickness. In re Walther's Estate, (1945) 177 Or 382, 163 P2d 285.

(b) Sound mind or insanity. A "sound mind" implied that the testator fully understood what he was doing and how he was doing it; he had to know his property and how he wished to dispose of it among those entitled to his bounty. Hubbard v. Hubbard, (1879) 7 Or 42.

The burden of proving sanity when that question was directly in issue was upon the party asserting it in a civil proceeding, notwithstanding the general presumption in favor of sanity. Chrisman v. Chrisman, (1888) 16 Or 127, 18 P 6; Trombly v. McKenney, (1951) 190 Or 90, 228 P2d 417.

A presumption of sanity arose in favor of the testator from due execution of the will, and such presumption was sufficient to authorize probate in the absence of counter evidence overcoming or rebutting its force. Greenwood v. Cline, (1879) 7 Or 17, 26; Chrisman v. Chrisman, (1888) 16 Or 127, 18 P 6.

The term "sound mind" as used in the statute was synonymous with "sane mind." Estate of Allen, (1925) 116 Or 467, 241 P 996; In re Johnson's Estate, (1939) 162 Or 97, 91 P2d 330.

(c) Delusions. A delusion was a belief that had no reasonable basis in fact; if there were any facts or circumstances that led the testator to entertain a particular belief, such belief was not a delusion. Potter v. Jones, (1891) 20 Or 239, 25 P 769, 12 LRA 161; In re Cline's Will, (1893) 24 Or 185, 33 P 542, 41 Am St Rep 851.

Connection of a delusion with the will by influencing the provisions thereof had to be shown before the will could be set aside and declared void. Potter v. Jones, (1891) 20 Or 239, 25 P 769, 12 LRA 161; In re Walther's Estate, (1945) 177 Or 382, 163 P2d 285.

A persistent belief in facts having no real existence except in the testator's perverted imagination and against all evidence and probability, amounted to insane delusion. Id.

A belief based upon neighborhood gossip, that testator's daughter-in-law would take measures to possess herself of his property, was not an insane delusion. In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951.

An erroneous or unjust conclusion or belief constituting a controlling factor in the making of a will was not an insane delusion where such belief could be upheld upon any hypothesis deducible from the evidence. Parrott v. Creson, (1930) 132 Or 234, 285 P 224.

Although an 85 year old testator was misled and in probable error as to his son's designs on his bonds, his belief did not constitute an insane delusion. In re Jackson Estate, (1950) 189 Or 328, 220 P2d 96.

(4) Sufficiency of evidence of incapacity. Person who talked to picture of founder of his church, was enfeebled and in failing health, and after will was drawn had guardian appointed was held to have testamentary capacity. In re Ames' Will, (1902) 40 Or 495, 67 P 737.

Testator had testamentary capacity where he transacted business in normal manner, including having a new will prepared, but was subject to a dazed condition caused by temporary physical ailments. In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951.

Evidence that testatrix was physically weak, and that she left her estate to philanthropies was insufficient to show lack of testamentary capacity. Talbert v. Skilbred, (1928) 125 Or 545, 267 P 396.

Testatrix who suffered severe paralytic strokes, attempted suicide, and made numerous false accusations was held incapacitated. In re Kober's Will, (1930) 132 Or 421, 285 P 1032.

Evidence that testatrix did not comprehend nautre of act when signing will and would comply with any suggestion made to or of her was held sufficient to show lack of testamentary capacity. In re Johnson's Estate, (1939) 162 Or 97, 91 P2d 330.

Testimony that tended to establish testatrix's irrational acts, religious fanaticism and emotional instability was relevant to prove lack of testamentary capacity. In re Murray's Estate, (1944) 173 Or 209, 144 P2d 1016.

Evidence of hallucinations, a failure at times to recognize friends, and the use of morphine in treatment of testatrix while at a hospital shortly before the making of her will did not establish lack of testamentary capacity. In re Walther's Estate, (1945) 177 Or 382, 163 P2d 285.

Appointment of a guardian less than two months after the execution of a will did not establish lack of testamentary capacity at time of execution. Allen v. Breding, (1947) 181 Or 332, 181 P2d 783.

Evidence did not substantiate charge that elderly testatrix suffered from delusions and hallucinations and did not have testamentary capacity. Detsch v. Detsch, (1949) 186 Or 1, 205 P2d 180.

(5) Fraud and undue influence. Burden of proof of disproving undue influence rested upon a beneficiary actively participating in the preparation or execution of a will, where a confidential relationship existed between the beneficiary and testator. Allen v. Breding, (1947) 181 Or 332, 181 P2d 783; Trombly v. McKenney, (1951) 190 Or 90, 228 P2d 417; Detsch v. Detsch, (1951) 191 Or 161, 229 P2d 264.

Evidence showing testatrix's execution of prior will two weeks earlier leaving property to her son, and evidence of unexplained statement of testatrix, made in presence of those charged with undue influence, that she was induced to sign papers instituting suit against her son, revoking his power of attorney and changing her will, supported a finding of undue influence in the execution of the will. Newman v. Stover, (1952) 196 Or 376, 248 P2d 1069.

Influence arising from gratitude or esteem was not undue, nor could it become such unless it destroyed the free agency of the testator at the time the instrument was made, and resulted in determining the execution in the particular manner adopted. In re Darst's Will, (1898) 34 Or 58, 54 P 947.

To warrant setting aside a will, fraud or undue influence had to be such as to overcome the testator's free volition or conscious judgment and to substitute the wicked purpose of another, and must have been the efficient cause without which the obnoxious disposition would not have been made. Turner's Will, (1908) 51 Or 1, 93 P 461.

Freedom from restraint was a requisite of a valid will. In re Allen's Estate, (1925) 116 Or 467, 241 P 996.

Evidence that pastor of testatrix's church prevailed upon testatrix to leave her estate to a church charity did not establish undue influence by pastor. Talbot v. Skilbred, (1928) 125 Or 545, 267 P 396.

Evidence that testatrix was colored and beneficiary, white, where latter was preferred over testatrix's colored collateral relatives, did not establish undue influence. Allen v. Breding, (1947) 181 Or 332, 181 P2d 783.

Evidence that testator's sister-in-law took over the household, sought his money, turned the testator against his children and influenced the 85 year old testator into making a new will in her favor warranted setting the will aside on grounds of undue influence. In re Jackson Estate, (1950) 189 Or 328, 220 P2d 96.

Slight evidence of undue influence by a beneficiary, who was a fiduciary of the testator, was sufficient to invalidate an unnatural will. Campbell v. Beal, (1950) 190 Or 140, 224 P2d 572.

To prove undue influence the contestant had to show more than motive and opportunity to influence. Postelle & Running v. Shuholm, (1951) 192 Or 441, 235 P2d 869.

Where a confidential relationship existed it took slight evidence to place the burden of explanation on the proponent of a will. Id.

It was proper to offer as evidence the business and personal relations between proponent and testatrix when attempting to prove undue influence. Id.

Active participation in the preparation of the will which gave rise to a presumption of improper influence must go to the substance of the testamentary act. Soumie v. McLean, (1963) 234 Or 485, 382 P2d 1.

FURTHER CITATIONS: McCrary v. Biggers, (1905) 46 Or 465, 81 P 356, 114 Am St Rep 882; Chance v. Weston, (1920) 96 Or 390, 190 P 155; Leet v. Barr, (1922) 104 Or 32, 202 P 414, 206 P 548; Shelley v. Shelley, (1960) 223 Or 328, 354 P2d 282; Streight v. Streight, (1961) 226 Or 386, 360 P2d 304.

ATTY. GEN. OPINIONS: Advisibility of State Land Board contesting testamentary capacity, 1938-40, p 595.

LAW REVIEW CITATIONS: 14 OLR 494; 15 OLR 286; 18 OLR 82; 21 OLR 178.

112.235

NOTES OF DECISIONS

1. Under former similar statute

(1) Compliance with statute. Donor who dispossesed himself of the property absolutely, parting with all control and dominion over it, made a valid gift causa mortis. Deneff v. Helms, (1902) 42 Or 161, 70 P 390.

A transaction tantamount to a testamentary disposition of the estate was of no effect as such to the extent it was not executed in conformity to the statute. Hillman v. Young, (1913) 64 Or 73, 127 P 793, 129 P 124.

An executed writing or will giving land on the understanding that plaintiffs would furnish testator home and care for life satisfied the requirements of the statute. Woods v. Dunn, (1916) 81 Or 457, 159 P 1158.

A letter written after execution of a will by the testator could not be considered a part thereof. In re Johnson's Estate, (1921) 100 Or 142, 196 P 385, 1115.

A gift causa mortis which was not to be consummated until after the death of the donor was void in absence of a written will attested by witnesses and executed in the manner required. Miller v. Medford Nat. Bank, (1925) 115 Or 366, 237 P 361.

A strained and technical construction to defeat a will could not be adopted where the capacity and intention were plain and by fair and reasonable intendment the statute had been complied with. In re Estate of Shaff, (1928) 125 Or 288, 266 P 630.

It was essential that the signatures be genuine, that they be found upon an instrument which all three persons intended to sign, and that attesters signed in testator's presence. In re Demaris' Estate, (1941) 166 Or 36, 110 P2d 571.

An attorney who drafted a will or supervised its execution could be a competent witness within the meaning of the statute. Campbell v. Beal, (1950) 190 Or 140, 224 P2d 572.

(2) Signature. Signing a will for a blind person by another at the request of the testator, where the latter could hear and speak and was present, was sufficient. In re Pickett's Will, (1907) 49 Or 127, 89 P 377.

Holding and guiding the hand of the testatrix constituted a signing by the testatrix, and not a signing by another requiring such other person to subscribe his name as witness. In re Heaverne's Estate, (1926) 118 Or 308, 246 P 720.

(3) Attestation. The special statute on wills, and not the general law defining a subscribing witness, was controlling in the execution of a will. In re Estate of Shaff, (1928) 125 Or 288, 266 P 630; In re Christofferson's Estate, (1948) 183 Or 75, 190 P2d 928.

If the testator actually signed the will and the witnesses attested the signature at his request, the will was sufficient even though the witnesses did not know the purport or contents of the instrument. In re Christofferson's Estate, (1948) 183 Or 75, 190 P2d 928.

The attorney who drafted the will could be one of the subscribing witnesses. Postelle & Running v. Shuholm, (1951) 192 Or 441, 235 P2d 869.

An attestation clause which recited compliance with the statute and was signed by the witnesses, was prima facie evidence of the due execution of the instrument. Id.

(4) Signing in testator's presence. The attesting witnesses were not required to sign in the presence of each other. In re Estate of Neil, (1924) 111 Or 282, 226 P 439; In re Estate of Shaff, (1928) 125 Or 288, 266 P 630; Dodge v. Smith, (1966) 243 Or 444, 413 P2d 431; Wishard v. Turner, (1970) 4 Or App 278, 478 P2d 438.

Actual visible eyesight of the attesting witness was not always necessary to being in the presence of the testator. In re Estate of Shaff, (1928) 125 Or 288, 266 P 630.

The reason for requiring signing in testator's presence was to prevent witnesses from committing a fraud by changing the document. Id.

Consciousness of the fact that attesting signatures were being written was indispensable. In re Demaris' Estate, (1941) 166 Or 36, 110 P2d 571.

Attestation and execution need not be in the same room if attesters were so near that they were in range of any of testator's senses. Id.

Any of testator's senses which enabled him to know whether another was near and what he was doing, could be employed by him in determining whether attesters were in his presence. Id.

(5) Request that witnesses sign. To prove attestation of a will it had to be shown, in addition to other requirements, that the witnesses subscribed their names at the request of the testator. Luper v. Werts, (1890) 19 Or 122, 23 P 850. **But see** Campbell v. Beal, (1950) 190 Or 140, 224 P2d 572.

A person who had seen a testator sign a will and then signed as a witness thereto signs "at the request" of the testator if the latter understood what was being done and apparently assented thereto. In re Ames' Will, (1902) 40 Or 495, 67 P 737.

An assumption of signing at testator's request was warranted where an attorney called the witness who signed as a witness, and the attesting clause recited without direct denial that the witness signed at the request of the testator. In re Skinner's Will, (1902) 40 Or 571, 579, 62 P 523, 67 P 951.

A blind testator's will was properly attested where witnesses were requested by testator's attorney, in testator's presence, to act in that capacity. In re Pickett's Will, (1907) 49 Or 127, 89 P 377.

Testator's request that his physician prepare a will implied a request for an attestation. In re Demaris' Estate, (1941) 166 Or 36, 110 P2d 571.

Although a subscribing witness could not recall that there was a signature on the will, that it was the testatrix's or that the testatrix indicated the instrument to be her last

will and testament, where the will was actually signed by the testatrix, the act of the drafting attorney whom the witness knew was acting for the testatrix of asking him in the presence of the testatrix to witness the will was a sufficient request to meet the requirements of this section. In re Christofferson's Estate, (1948) 183 Or 75, 190 P2d 928.

(6) Knowledge of instrument's character. A will executed in proper form was valid without any publication or any statement by the testator that it was his will or codicil. In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951.

The testator need not declare the instrument to be his last will and testament, it being sufficient if he actually signed it and witnesses attested his signature at his request, though they were unaware of the instrument's contents. In re Estate of Neil, (1924) 111 Or 282, 226 P 439; In re Estate of Shaff, (1928) 125 Or 288, 266 P 630; In re Davis' Will, (1943) 172 Or 354, 142 P2d 143.

(7) Evidence. An attestation clause which recited due execution of the instrument created a strong presumption in favor of due execution unless overcome by clear and convincing evidence. In re Davis' Will, (1943) 172 Or 354, 142 P2d 143; Harrington v. Sax, (1932) 138 Or 283, 4 P2d 635, 79 ALR 389; In re Mendenhall's Will, (1903) 43 Or 542, 72 P 318, 73 P 1033; Campbell v. Beal, (1950) 190 Or 140, 224 P2d 572.

Where one attesting witness failed to remember whether or not testator requested witness to sign, or whether or not testator had signed, the balance of necessary evidence was supplied by the presumption from the attestation clause. In re Skinner's Will, (1902) 40 Or 571, 62 P 523, 67 P 951.

Direct testimony by subscribing witnesses that testatrix had not signed the will in question nor acknowledged its execution in their presence overcame presumption of due execution arising from recital thereof in attestation clause. In re Mendenhall's Will, (1903) 43 Or 542, 72 P 318, 73 P 1033.

Testimony of contestants and their handwriting experts was insufficient to overcome positive testimony of subscribing witnesses that testator signed will. Wendl v. Fuerst, (1913) 68 Or 283, 136 P 1.

Where all parties were in same room, testator could have looked had he so desired, there being no opportunity nor reason for witnesses to fraudulently alter the document, evidence was sufficient to show signing in testator's presence. In re Estate of Shaff, (1928) 125 Or 288, 266 P 630.

A prima facie case of due execution was established by proponents who, together with the attestation clause, showed the genuineness of the testatrix's and subscribing witnesses' signatures. Harrington v. Sax, (1932) 138 Or 283, 4 P2d 635, 79 ALR 389.

Adverse testimony of some or all subscribing witnesses did not as a matter of law overcome the presumption of due execution arising from a recital thereof in the attestation clause. Id.

The testimony of a subscribing witness who sought to impeach due execution of the will was received with caution and viewed with suspicion. Id.

That testator asked that the will be prepared and that both witnesses were present when he signed was considered in determining whether he knew the signatures were being written. In re Demaris' Estate, (1941) 166 Or 36, 110 P2d 571.

The statute did not bar the admissibility of evidence to show the meaning of the language employed by a testator or to apply the description to the land actually covered in the writing, but did exclude evidence offered to show an intention not otherwise expressed in the writing. Putnam v. Jenkins, (1955) 204 Or 691, 285 P2d 532.

In the absence of testimony or other evidence to the contrary, the attestation clause in itself was sufficient proof that the will bore the signature of the testator at the time the witnesses' signatures were affixed to the document. Dodge v. Smith, (1966) 243 Or 444, 413 P2d 431.

FURTHER CITATIONS: Moreland v. Brady, (1880) 8 Or 303, 34 Am St Rep 581; Richardson v. Orth, (1901) 40 Or 252, 66 P 925, 69 P 455; Montague v. Schieffelin, (1905) 46 Or 413, 80 P 654; McCracken v. McCracken, (1923) 109 Or 83, 219 P 196; Estate of Engle, (1929) 129 Or 77, 276 P 270; Lofskog v. Am. Nat. Red Cross, (1940) 111 F2d 88; Minsinger v. United States Nat. Bank, (1961) 228 Or 218, 364 P2d 615; Kastner v. Husband, (1962) 231 Or 133, 372 P2d 520; Dodge v. Smith, (1966) 243 Or 444, 413 P2d 431.

LAW REVIEW CITATIONS: 39 OLR 181; 42 OLR 133-175, 263.

112.245

NOTES OF DECISIONS

1. Under former similar statute

A witness to a will was not disqualified thereby from taking under the will a trust estate in which he had no beneficial interest. Hogan v. Wyman, (1868) 2 Or 302, 304.

A clause in a will appointing testator's attorney to assist the executor in settling the estate did not disqualify the attorney as a witness. In re Pickett's Will, (1907) 49 Or 127, 89 P 377.

A legatee who could take was not precluded from asserting that one who witnessed the will cannot take. Christianson v. Talmage, (1914) 69 Or 440, 138 P 452.

112.255

CASE CITATIONS: In re Clayson's Will, (1893) 24 Or 542, 34 P 358; Montague v. Schieffelin, (1905) 46 Or 413, 80 P 654; In re Noyes' Estate, (1947) 182 Or 1, 185 P2d 555.

ATTY. GEN. OPINIONS: Sufficiency of authentication of certified copies of foreign will and probate thereof to convey property located in Oregon, 1924-26, p 219.

112.265

LAW REVIEW CITATIONS: 37 OLR 71.

112.275

NOTES OF DECISIONS

1. Under former similar statute

A will could be revoked by implication or operation of law; a conveyance of property previously devised worked a revocation of the devise. Coulson v. Holmes, (1878) 5 Sawy 279, Fed Cas No. 3,274.

The statute did not impliedly repeal another providing that the will of an unmarried woman would be revoked by her subsequent marriage; nor the statute removing the common-law disabilities of married women. Booth's Will, (1901) 40 Or 154, 61 P 1135, 66 P 710.

A letter written by testator after the execution of his will could not be considered as part of the will, though it showed the testator's true intent and supplied omissions in the original will. In re Johnson's Estate, (1921) 100 Or 142, 196 P 385, 1115.

A written will could only be altered or revoked in the manner provided by law. Lay v. Proctor, (1934) 147 Or 545, 34 P2d 331.

Marks on a will, regardless of their depth, faintness or other characteristics, were effective to revoke the will if it could be proved decedent employed them with the intent to revoke the will. In re Dougan's Estate, (1936) 152 Or 235, 53 P2d 511.

The cutting of a will was equivalent to tearing it within

the meaning of the statute. In re Bond's Estate, (1943) 172 Or 509, 143 P2d 244.

Pencilled notations on will were not a revocation where requisite intent was not shown. Van Wassenhove v. Heltzel, (1956) 208 Or 207, 300 P2d 783.

When a will was duly executed and was in possession of a testator but could not be found upon his death, a disputable presumption of revocation arose. Salter v. Salter, (1957) 209 Or 536, 307 P2d 515.

Burden was upon person submitting copy of will to prove will was in existence when testator died. Id.

If a will was burnt, torn, canceled, or obliterated by the testator, the act would have been effective to revoke the will if that was the intention. Minsinger v. United States Nat. Bank, (1961) 228 Or 218, 364 P2d 615.

If the intent of the testator was only to revoke the mutilated portions of the will and those provisions could be ascertained, the mutilations would be disregarded, and the will as originally executed given effect. Id.

There was no provision in Oregon for partial revocation of a will. Id.

FURTHER CITATIONS: Sappinfield v. King, (1907) 49 Or 102, 89 P 142, 90 P 150, 8 LRA(NS) 1066; Stever v. Holt, (1940) 164 Or 195, 100 P2d 1016; Branchflower v. Massey, (1949) 187 Or 40, 208 P2d 341; Price v. Ward, (1969) 254 Or 259, 456 P2d 500.

112.295

NOTES OF DECISIONS

Under former similar statute intent to revive the first will could be shown by the terms of an instrument of revocation, if there was one or expressed in a writing by which testator republished his first will. Estate of Engle, (1929) 129 Or 77, 276 P 270.

112.305

NOTES OF DECISIONS

Under former similar statute adding a codicil after marriage revived the will. Flory v. Meeker, (1952) 194 Or 257, 240 P2d 1177.

Under former similar statute, although reciprocal will was revoked by remarriage, equity would specifically enforce, in part, the oral contract for the making of reciprocal wills and carry out certain terms of the revoked will. Patecky v. Friend, (1960) 220 Or 612, 350 P2d 170.

FURTHER CITATIONS: In re Booth's Will (1901) 40 Or 154, 61 P 1135, 66 P 710; Bagley v. Bagley, (1924) 110 Or 368, 222 P 722; In re Shepard's Estate, (1948) 183 Or 629, 194 P2d 425; Branchflower v. Massey, (1949) 187 Or 40, 208 P2d 341; Schomp v. Brown, (1959) 215 Or 714, 335 P2d 847, 337 P2d 358; Crone v. First Nat. Bank, (1966) 243 Or 341, 413 P2d 406.

112.325

NOTES OF DECISIONS

1. Under former similar statute

A conveyance of property previously devised worked a revocation of such devise notwithstanding the conveyance was to the devisee accompanied by a trust in favor of the devisor. Coulson v. Holmes, (1878) 5 Sawy 279, Fed Cas No. 3,274.

A voluntary conveyance for a valuable consideration of land which the party previously devised took such property out of the operation of the will. Watson v. McLench, (1910) 57 Or 446, 110 P 482, 112 P 416.

Testator's will could not be attacked on ground that during his lifetime he diminished or encumbered any of the bequests made by a sale of his real property holdings. In re Wilson's Estate, (1917) 85 Or 604, 167 P 580.

The provision related to a bond, covenant or agreement for sale of real estate where the testator retained title and had simply agreed to convey or make provision for conveying; it did not relate to or govern the case where an absolute conveyance of real estate, which had previously been devised, was made. Pape v. U.S. Nat. Bank, (1931) 135 Or 650, 297 P 845.

FURTHER CITATIONS: Re Estate of Denning, (1924) 112 Or 621, 229 P 912.

112.335

NOTES OF DECISIONS

Under former similar statute a conveyance of land antecedently devised took such property out of the operation of the will, though a bond, covenant or agreement to convey was not deemed a revocation of the prior devise. Watson v. McLench, (1910) 57 Or 446, 110 P 482, 112 P 416; Pape v. United States Nat. Bank, (1931) 135 Or 650, 297 P 845.

FURTHER CITATIONS: Nowrocki v. Kirkpatrick, (1954) 200 Or 660, 268 P2d 363.

LAW REVIEW CITATIONS: 34 OLR 211.

112.345

NOTES OF DECISIONS

1. Under former similar statute

The statute abolished the common law rule in so far as wills were concerned. Lytle v. Hulen, (1929) 128 Or 483, 275 P 45, 114 ALR 587; Hawkins & Roberts v. Jerman, (1934) 147 Or 657, 35 P2d 248.

Will was held to create contigent remainders in children of life tenants dependent on their attaining majority and surviving or leaving issue surviving the life tenant; fees vested absolutely in children of full age, subject to temporary restraint on alienation, upon death of life tenant; children under full age took defeasible fees dependent on reaching full age. Buchanan v. Schulderman, (1883) 11 Or 150, 1 P 899.

A devise of a share to testator's son in fee changed by a codicil provided that such share be for son's sole use, independent of his wife, and over to others if he died without issue, gave son but a life estate, and the son's issue in being at the execution of the codicil vested remainders. Love v. Walker, (1911) 59 Or 95, 115 P 296.

Testator's widow took the entire fee under his will which gave her his property for life with full power to sell or convey it and what was left of the property at her death to their daughters. Bilger v. Nunan, (1912) 118 CCA 23, 199 Fed 549.

A devise of all his property to testator's wife for her natural life, and on her death one part to go to his children, and other to the wife's heirs, vested an estate for life only in the wife, notwithstanding that will also appointed the wife as executrix with power to convert some of testator's real property into personalty. Estate of Reinbrecht, (1925) 116 Or 184, 240 P 223.

Where a will gave widow a mere life estate in the land with vested remainders in testator's children, widow could not sell land without consent of remainderman and invest proceeds even though income from land was insufficient to adequately support her. Soules v. Silver, (1926) 118 Or 96, 245 P 1069.

A devise to testatrix's son for life with remainder to his heirs, and such remainder over to others if son died without issue, which event occurred, vested a life estate only in the son; his widow was not an heir within the intention of

testatrix. Connertin v. Concannon, (1927) 122 Or 387, 259 P 290.

A devise for the life of a person and after his death to the heirs of his body did not create an estate in fee simple in those who were the heirs presumptive of the life tenant subject only to such tenant's life estate; a contingent remainder in the heirs was created and the fee vested when the contingency ceased. Jerman v. Nelson, (1931) 135 Or 126, 293 P 592.

LAW REVIEW CITATIONS: 20 OLR 103; 21 OLR 81; 23 OLR 200; 30 OLR 1.

112.355

NOTES OF DECISIONS

1. Under former similar statute

(1) Devise of all the estate or interest of testator. Under a will giving the widow all real and personal property for certain uses, with power to sell and dispose thereof when she deemed it advantageous, there being no words of limitation, she had the right to convey a fee title though she might be required to account for the proceeds. Savage v. Savage, (1908) 51 Or 167, 94 P 182.

The term "heirs" or other words of inheritance were not necessary to create or convey a fee. Irvine v. Irvine, (1914) 69 Or 187, 136 P 18.

Under a devise to two sons and their male heirs, and if either should die without male heirs, to their female heirs, and in case of death without issue to the testatrix's daughters, the heir of daughter on death of one devisee became entitled to the property under the executory devise despite this statute. Bilyeu v. Crouch, (1920) 96 Or 66, 189 P 222.

Devise with condition that devisee should not sell or encumber before he reached a certain age and a further provision for payment of encumbrances from the estate gave devisee a fee. Imbrie v. Hartrampf, (1921) 100 Or 589, 198 P 521.

Under a will devising property to a widow "so long as she shall remain my widow," and providing that upon remarriage she shall take for use one-half the remaining property and the children the rest, without disposal of the remainder upon her death, she took a fee-simple title subject to be divested of an undivided one-half. Anderson v. Anderson, (1935) 150 Or 476, 46 P2d 98.

(2) Intention to devise a less estate. Will devising real estate to testator's wife "during her life, or while she remained unmarried, to support herself, and to maintain and educate minor children" gave wife life estate only, without power to sell the fee. Winchester v. Hoover, (1902) 42 Or 310, 70 P 1035.

An attempt to limit enjoyment or power of alienation by the same will or instrument passing to a beneficiary legal title to a life estate was void. Mattison v. Mattison, (1909) 53 Or 254, 100 P 4, 133 Am St Rep 829, 18 Ann Cas 218.

A codicil declaring that a share devised be for testator's son's sole use, independent of his wife, and that on his death without issue the devise should go over to others gave son a life estate only. Love v. Walker, (1911) 59 Or 95, 115 P 296.

It had to clearly appear from the will that testator intended to devise less than a fee where it was claimed that he had devised a life estate only; the recital of the devisee's power to deal with the property in full and absolute terms described the quantity of a fee title. Bilger v. Nunan, (1912) 199 Fed 549.

A will devising one-half of residuary estate to testator's two grandsons subject to provision that their interests were to be held in trust until age 30, and on death of either or both before that age over the other or into residue, gave such devisees only a qualified or determinable fee. Stubbs v. Abel, (1925) 114 Or 610, 233 P 852, 236 P 505.

Where fee estate was given in one clause of a will in explicit terms, the interest of the devisee could not be diminished by a subsequent vague or general expression, or by an inference deducible therefrom, that might be repugnant to the estate given. Howell v. Deady, (1943) 48 F Supp 104.

FURTHER CITATIONS: Schomp v. Brown, (1959) 215 Or 714, 355 P2d 847, 337 P2d 358.

112.365

NOTES OF DECISIONS

1. Under former similar statute

A settler under the Donation Act had no estate in the land which he could devise until he qualified himself under the Act to take the land. Hall v. Russell, (1879) 101 US 503, 25 L Ed 829.

After-acquired property passed by a residuary devise of real property if such appeared to be the testator's intention. Hardenbergh v. Ray, (1894) 151 US 112, 14 S Ct 305, 38 L Ed 93.

Where a devisable interest in a mortgage in realty was given by a will to residuary legatees, acquisition of title to the property by testator after execution of the will by foreclosure did not prevent the land from passing upon his death to such legatees unless such was testator's intention. Brown v. Hilleary, (1934) 147 Or 185, 32 P2d 584.

112.395

NOTES OF DECISIONS

1. Under former similar statute

At common law, death of devisee before testator caused lapse. Scott v. Ford, (1908) 52 Or 288, 97 P 99; Stevens v. Carroll, (1913) 64 Or 417, 129 P 1044, LRA 1918E, 1095.

A sister was a relative within the meaning of the statute. In re Buell's Estate, (1941) 167 Or 295, 117 P2d 832; Hardenbergh v. Ray, (1894) 151 US 112, 14 S Ct 305, 38 L Ed 93.

The death of a legatee who disappeared without being heard from was presumed only as of the expiration of the seven-year period. Massachusetts Bonding & Ins. Co. v. Holman, (1933) 62 F2d 902.

The adopted child of testarix's sister was a lineal descendant of the adopting sister within the meaning of the section. In re Buell's Estate, (1941) 167 Or 295, 117 P2d 832.

Although the section was in effect prior to the adoption statutes, an adopted child could take property bequeathed to the adopting parent who predeceased testator. Id.

The statute applied to testamentary disposition of both real and personal property. Reed v. Reed, (1958) 215 Or 91, 332 P2d 1049.

Statutes which prevented lapse were not mandatory. Bruner v. First Nat. Bank, (1968) 250 Or 590, 443 P2d 645.

If the will showed the testator did not intend his property should pass in accordance with the statute, effect would be given to his intention. Id.

FURTHER CITATIONS: Miller v. Miller, (1926) 117 Or 399, 244 P 526; Gomoll v. Temple, (1933) 145 Or 299, 27 P2d 1018; In re Frazier's Estate, (1947) 180 Or 232, 177 P2d 254; Daniel v. Donohue, (1959) 215 Or 373, 333 P2d 1109; Shields v. Kudrna, (1965) 242 Or 74, 408 P2d 210.

ATTY. GEN. OPINIONS: Applicability of section where devisee is dead at date of execution of will, 1932-34, p 214.

LAW REVIEW CITATIONS: 39 OLR 181; 44 OLR 251.

112.405

NOTES OF DECISIONS

1. Under former similar statute

The object of the statute was not to compel parents to make testamentary provision for children, but to prevent the consequences of forgetfulness or oversight. Gerrish v. Gerrish, (1880) 8 Or 351, 34 Am Rep 585; Barnstable v. United States Nat. Bank, (1962) 232 Or 36, 374 P2d 386; Towne v. Cottrell, (1963) 236 Or 151, 387 P2d 576; Voden v. Yates, (1968) 252 Or 110, 447 P2d 94; Barnstable v. United States Nat. Bank, supra, **distinguished in** Card v. Stirnweis, (1962) 232 Or 123, 130, 374 P2d 472.

Where a testatrix's will referred to her late husband's will, and adopted the provisions therein contained naming her children and grandchildren, such children were "named and provided for" in the testatrix's will within the meaning of the statute. Gerrish v. Gerrish, (1880) 8 Or 351, 34 Am Rep 585.

Children not named or provided for took under the law of descent in all respects as if no will had been made. Northrop v. Marquam, (1888) 16 Or 173, 186, 18 P 449.

A will not naming or providing for a child born after making the will was void as to such child; and a sale of land under authority of the will did not divest the child's estate therein. Worley v. Taylor, (1892) 21 Or 589, 28 P 903, 28 Am St Rep 771.

A will devising "to each of my heirs at law the sum of one dollar" did not mention or provide for children or their descendants as provided by the statute. Boman v. Boman, (1892) 49 Fed 329.

The word "heirs" used in a testator's will leaving his property to his wife "to have and to hold the same during her natural life or to sell and convey the said property for the benefit of herself and her heirs," was not equivalent of "children," and he died intestate so far as his children were concerned. Neal v. Davis, (1909) 53 Or 423, 99 P 69, 101 P 212.

The will was not binding on grandchildren of testator where it did not mention testator's only child or his children. Howell v. Howell, (1915) 77 Or 539, 544, 152 P 217.

Parol evidence was incompetent to establish the intention of a testator to omit to provide for or name an heir in his will. Roots v. Knox, (1922) 107 Or 96, 212 P 469, 213 P 1013.

A provision in testator's will giving $5 to any person claiming to be a legal heir who should legally establish such claim did not name or provide for a child of the testator who contested the will. Wadsworth v. Brigham, (1928) 125 Or 428, 259 P 299, 266 P 875.

An intent to disinherit a child of the testator must be clearly shown by the words of the will naming or providing for the child. Id.

Will leaving $5 to plaintiff's father, testator's son who predeceased testator, provided for plaintiffs within the meaning of the statute since they took the $5 which would have gone to their father. Reed v. Reed, (1958) 215 Or 91, 332 P2d 1049.

It was not necessary that the beneficiary correspond in all respects to the description, it being sufficient if he correspond thereto in enough particulars to make it reasonably certain that he and no other person was intended. Barnstable v. United States Nat. Bank, (1962) 232 Or 36, 374 P2d 386. **Distinguished in** Card v. Stirnweis, (1962) 232 Or 123, 130, 374 P2d 472.

The statute did not require that the children be designated by name. Voden v. Yates, (1968) 252 Or 110, 447 P2d 94.

FURTHER CITATIONS: Re Estate of Moore, (1925) 114 Or 444, 236 P 265; Green v. Terwilliger, (1892) 56 Fed 384; Smith v. Smith, (1958) 212 Or 481, 320 P2d 275.

LAW REVIEW CITATIONS: 21 OLR 205; 30 OLR 273; 39 OLR 181; 44 OLR 250-253; 47 OLR 88-94.

112.425

NOTES OF DECISIONS

Under former similar statute plaintiff could not recover executor's statutory fees where defendant, the administrator of the estate, wrongfully withheld the will of the decedent which appointed plaintiff executor. Wilson v. Hendricks, (1940) 164 Or 486, 102 P2d 714.

FURTHER CITATIONS: Van Vlack v. Van Vlack, (1947) 181 OR 646, 182 P2d 969, 185 P2d 575.

112.455 to 112.555

NOTES OF DECISIONS

1. Under former similar statute

The purpose of the statute was to prevent an heir, devisee, legatee or surviving spouse who had feloniously caused the death of a decedent from inheriting or receiving any part of the decedent's estate. Wenker v. London, (1939) 161 Or 265, 88 P2d 971.

Where a man murdered decedent, his mother, his son did not take as the decedent's heir since the murderer, his father, was not dead; nor was the son's blood corrupted, as he was never the decedent's, his grandmother's, heir. Norton v. Norton, (1944) 175 Or 115, 151 P2d 719, 156 ALR 617.

A son, because of his allegedly felonious slaying of his parent, was not appointed by law to succeed to the estate of the decedent; nor was a new hair created by virtue of the statute. In re Norton's Estate, (1944) 175 Or 115, 151 P2d 719, 156 ALR 617.

A slayer was deprived of rights he might otherwise have asserted by reason of certificate of life or accident insurance. Id.

Where an intestate's only surviving relatives, in addition to her sister, since deceased, were her son who feloniously took her life, and the son's son, the estate of the deceased sister was entitled to the estate of the intestate, to the exclusion of the grandson or the right of the state to an escheat. In re Norton's Estate, (1945) 177 Or 342, 162 P2d 379.

Wife's homicide of husband, though wrongful and a felony, did not constitute a "felonious taking" of husband's life within the meaning of the statute. Hatcher v. Aetna Life Ins. Co., (1952) 105 F Supp 808.

Upon the murder of one cotenant by the other, a tenancy by the entirety was subjected to a constructive trust in favor of the victim's heirs, except the survivor was entitled to one-half the rents and profits for his lifetime. Hargrave v. Taylor, (1964) 236 Or 451, 389 P2d 36. Overruling Wenker v. Landon, (1939) 161 Or 265, 88 P2d 971.

FURTHER CITATIONS: Apitz v. Dames, (1955) 205 Or 242, 287 P2d 585.

ATTY. GEN. OPINIONS: Beneficiary of member of Public Employes' Retirement System murdered by her husband, 1964-66, p 251.

112.575

NOTES OF DECISIONS

This section contains a rule of substantive law rather than a rule of evidence. State Land Bd. v. Long, (1950) 189 Or 537, 221 P2d 892, 20 ALR2d 219.

This section does not create a presumption of survivorship or simultaneous death, but merely places the burden

of proving survivorship upon the person whose claim depends on that fact. Id.

To meet the burden of proof created by this section, the claimant must produce sufficient evidence to satisfy an unprejudiced mind. Id.

LAW REVIEW CITATIONS: 30 OLR 172.

112.685

CASE CITATIONS: Beam v. United States, (1908) 162 Fed 260; Parr v. United States, (1907) 153 Fed 462; Moore v. Schermerhorn, (1957) 210 Or 23, 307 P2d 483, 308 P2d 180; Booth v. First Nat. Bank, (1960) 220 Or 534, 349 P2d 840; Stanley v. Mueller, (1960) 222 Or 194, 315 P2d 125, 350 P2d 880; Wilson v. Parent, (1961) 228 Or 354, 365 P2d 72; Pfifer v. First Nat. Bank, (1963) 235 Or 561, 385 P2d 1007; Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9; Taylor v. United States Nat. Bank, (1968) 248 Or 538, 436 P2d 256.

LAW REVIEW CITATIONS: 6 WLJ 449-483.

112.695

NOTES OF DECISIONS

Representations made by the administrator and his attorney concerning the widow's dower without authority of the heirs or their grantees did not estop the heirs and their grantees from relying on the defense of the statute of limitations. Rose v. Russell, (1946) 178 Or 394, 166 P2d 137.

Where widow's right to recover dower was barred by the statute of limitations, she was also barred from a recovery of the issues, incomes and profit since the death of her husband. Id.

FURTHER CITATIONS: Ferry v. Troy Laundry Co., (1917) 238 Fed 867; Haggerty v. Nobles, (1966) 244 Or 428, 419 P2d 9.