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WILLS-REVOCATION BY MARRIAGE WHERE WILL MAKES NOMINAL BEQUEST TO EACH HEIR NOT MENTIONED

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WILLS—REVOCATION BY MARRIAGE WHERE WILL MAKES NOMINAL BEQUEST TO EACH HEIR NOT MENTIONED—Testatrix provided in her will that she intentionally omitted all of her heirs not specifically mentioned, "intending thereby to disinherit them," and provided further that "any such persons, or heirs, or any devisees or legatees" contesting the will should receive $1.00. She married after making the will, and this is a petition by the surviving husband to determine heirship. He claims an intestate share of the estate by virtue of a statutory provision that marriage revokes a will as to the surviving spouse "unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show

an intention not to make such provision." [1] The lower court held that the husband was provided for in the will to the extent of $1.00, and that the will was therefore not revoked by marriage. On appeal, *held*, reversed; testatrix apparently had in contemplation only the persons who at the time of execution of the will could conceivably be heirs or potential heirs. There is no claim that testatrix and contestant were engaged to marry, or even acquainted at the time the will was executed, so testatrix cannot be said to have provided for her after-acquired husband or to have mentioned him in such a way as to exclude him. *In re Axcelrod's Estate*, (Cal. 1944) 147 P. (2d) 1.

The rule that a will is revoked by marriage dates from ecclesiastical law, where marriage plus birth of issue were held to work a revocation of a man's will on the basis of a presumed intention brought about by the appearance of a new heir.[2] Marriage alone revoked a woman's will because a married woman had no testamentary capacity and hence was unable to revoke a will made before marriage.[3] This doctrine of implied revocation has been adopted and expanded by many courts in this country, and statutes in most states now provide for the effect of marriage on a prior will.[4] Since the theory of the doctrine and the statutes is that a complete change in testator's circumstances makes the will inadequate, the result of this case is both sensible and logical. At the time of making the will, testatrix apparently was not contemplating marriage, so that the word "heirs" cannot be said to include the man she afterwards married. Once accepting this view of the situation, it is clear that she did not mention him or provide for him in such a way as to prevent the statutory implied revocation by marriage. The court distinguishes an earlier California case, *Estate of Kurtz*,[5] in which testator gave $1.00 to "any person whomsoever" who might contest the will and married the day after executing the will. It was held that this language was sufficient to disinherit the spouse. The court in the principal case distinguishes the *Kurtz* case on the basis of the broader testamentary language used there, plus the fact that it was evidently made in contemplation of marriage, but the concurring opinion advocates overruling the *Kurtz* case. *Elizabeth Durfee* *

[1] Cal. Prob. Code (Deering, 1941) § 70.

[2] Marston v. Roe, 8 Ad. & El. 14, 112 Eng. Rep. 742 (1838).

[3] Hodsden v. Lloyd, 2 Bro. C.C. 535, 29 Eng. Rep. 293 (1789).

[4] In general on the subject of implied revocation of wills, see Graunke and Beuscher, "The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator," 5 WIS. L. REV. 387 (1930); Durfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator," 40 MICH. L. REV. 406 (1942).

[5] 190 Cal. 146, 210 P. 959 (1922).

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