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Elizabeth Durfee
University of Michigan Law School

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*Elizabeth Durfee**

Among the oldest rules in the law of wills are those by which a will is held to be revoked by implication by certain changes in the circumstances of the testator. The purpose of this paper is to investigate these rules. Special reference will be made to statutes, both those which deal generally with the subject and those which provide specifically for the effect of particular events, such as marriage; no attempt will be made, however to analyze the latter type of statute exhaustively. By way of introduction, a brief historical survey of the doctrine should be made.

I

Under the early English common law, wills were held to be revoked by operation of law by certain changes in the domestic relations of the testator.[1] Thus, a man's will was revoked by subsequent marriage and birth of issue,[2] and that of a woman was revoked by marriage alone.[3] The theory behind these two rules was not the same. In the case of the male testator, it was said that with a complete change in his domestic situation, and the appearance of a new heir, he was presumed to intend a revocation of his prior will; at first this presumption was rebuttable, but eventually the courts came to consider it as a conclusive rule of law, "a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of his family."[4] That the basis of the rule was not simply that the new heir needed protection from disherison seems evident from the fact that the concurrence of marriage and birth of issue was necessary in order to work a

* A.B., A.B.L.S., J.D., University of Michigan. Research Assistant, University of Michigan Law School.—*Ed.*

[1] The doctrine appeared both in the ecclesiastical and common-law courts. Since it was treated similarly in the two courts, and since the common-law courts adopted the rules laid down in the ecclesiastical courts, the expression "common-law" will be used to include both. For a more extensive historical study, 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).

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

[3] Hodsden v. Lloyd, 2 Bro. C. C. 534, 29 Eng. Rep. 293 (1789).

[4] Doe d. Lancashire v. Lancashire, 5 T. R. 49 at 58, 101 Eng. Rep. 28 (1792).

revocation. Thus, if the marriage had occurred before the execution of the will, the later birth of issue had no effect on the will, for it was deemed to have been made in contemplation of issue being born of the marriage.[5] On the other hand, marriage alone did not revoke a man's will because the wife, not being an heir of the husband, could not benefit by its revocation; moreover, she could take her dower against the will, so she did not need any protection.[6]

A woman's will was considered to be necessarily revoked by her marriage, since a married woman was incapable of making a will (except as to her separate equitable estate or in the exercise of a power or by antenuptual contract) and hence was incapable of revoking one already made. Thus, if it were not revoked by marriage it would in effect be irrevocable during coverture, and this was regarded as inconsistent with the ambulatory nature of wills.[7] The will was not revived by the death of the husband.[8]

Even after the enactment of the Statute of Frauds,[9] which declared that no devise should be revocable except by certain acts, "any former law or usage to the contrary notwithstanding," the courts continued to apply the doctrine of implied revocation, on the ground that the statute applied only to intentional revocations, and did not preclude revocation by operation of law.

II

What is the status today of the doctrine of implied revocation? In England its use was forbidden by the explicit terms of the Statute of Wills of 1837.[10] In this country, only two states—North Carolina and Rhode Island—have a similar statutory prohibition, providing that "No will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances."[11]

Twelve states expressly recognize the doctrine in their statutes.[12] Delaware and Vermont merely list implied revocation along with other

[5] Doe d. White v. Barford, 4 M. & S. 10, 105 Eng. Rep. 739 (1815).

[6] Wellington v. Wellington, 4 Burr. 2165, 98 Eng. Rep. 129 (1768).

[7] Case No. 16, Gouldsborough 109 (1588).

[8] Hodsden v. Lloyd, 2 Bro. C. C. 534, 29 Eng. Rep. 293 (1789); 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 at 399 (1930); 4 BURN, ECCLESIASTICAL LAW, 9th ed., 67 (1842).

[9] 29 Car. II, c. 3, § 6 (1677).

[10] 7 Wm. IV & 1 Vict., c. 26, § 20 (1837).

[11] N. C. Code (1935), § 4135; R. I. Gen. Laws (1938), c. 566, § 18.

[12] Del. Rev. Code (1935), § 3715; Me. Rev. Stat. (1930), c. 88, § 3; Mass.

modes of revocation, while in the remaining ten states the section on express methods of revocation contains a proviso, of which the following Michigan provision is typical:

> "... nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."[13]

New Hampshire adds "or his family, devisees, legatees or estate,"[14] and Maine uses the words "by operation of law" rather than "implied by law."[15]

The remaining thirty-four states make no mention of the doctrine in their statutes, but provide that no will shall be revoked otherwise than by certain specified methods, such as burning, cancelling, or by a subsequent will. In a number of these states, however, the courts have resorted to implied revocation, in spite of the fact that the statutory language would seem to preclude it, on the same reasoning which permitted its use after the statute of frauds—viz., the statute was intended to cover only intentional revocations, and does not preclude the use of the doctrine of implied revocation.[16] In other states, however, it has been held that the statute is exclusive, and prevents any use of the doctrine.[17]

At the outset the question arises whether the presence or absence of express statutory approval of the doctrine of implied revocation is im-

Gen. Laws (1932), c. 191, § 8; Mich. Comp. Laws (Supp. 1940), § 16289-2(9); Minn. Stat. (Mason, Supp. 1940), § 8992-39; Neb. Comp. Stat. (1929), c. 30, § 210; Nev. Comp. Laws (1929), § 9912; N. H. Pub. Laws (1926), c. 297, § 14; Ohio Code (Throckmorton, 1940), § 10504-47; Vt. Pub. Laws (1933), § 2756; Wis. Stat. (1939), § 238.14; Wyo. Rev. Stat. (1931), § 88-105.

[13] Mich. Comp. Laws (Supp. 1940), § 16289-2(9).

[14] N. H. Pub. Laws (1926), c. 297, § 14.

[15] Me. Rev. Stat. (1930), c. 88, § 3.

[16] Brown v. Scherrer, 5 Colo. App. 255, 38 P. 427 (1894), affd. Scherrer v. Brown, 21 Colo. 481, 42 P. 668 (1895); Goodsell's Appeal, 55 Conn. 171, 10 A. 557 (1887); Tyler v. Tyler, 19 Ill. 151 (1857); Fallon v. Chidester, 46 Iowa 588 (1877); Baldwin v. Spriggs, 65 Md. 373, 5 A. 295 (1886); Karr v. Robinson, 167 Md. 375, 173 A. 584 (1934); Garrett v. Dabney, 27 Miss. 335 (1854); In re Estate of Teopfer, 12 N. M. 372, 78 P. 53 (1904).

[17] In re Patterson's Estate, 64 Cal. App. 643, 222 P. 374 (1924); Morris v. Foster, (App. D. C. 1921) 278 F. 321; Pacetti v. Rowlinski, 169 Ga. 602, 150 S. E. 910 (1929); Gartin v. Gartin, 371 Ill. 418, 21 N. E. (2d) 289 (1939); Succession of Cunningham, 142 La. 701, 77 So. 506 (1918); Robertson v. Jones, 345 Mo. 828, 136 S. W. (2d) 278 (1940); In re Crounse's Will, 168 Misc. 359, 6 N. Y. S. (2d) 32 (1938); In re Nenaber's Estate, 55 S. D. 257, 225 N. W. 719 (1929); Morgan v. Davenport, 60 Tex. 230 (1883); Thorndike v. Reynolds, 63 Va. 21 (1872).

portant in its interpretation by the courts. Apparently it is not. Having found that the doctrine may be used, either because the statute provides for its use, or because the statute does not forbid it, the courts seem to be no longer concerned with the legislature, and proceed to a determination of the question in hand without reference to legislative intent. As might be expected under these conditions, almost any case decided under a statute recognizing the doctrine can be matched with one from a jurisdiction without such a statute.

III

In general it may be said that the courts have followed the old common-law rules, but like most general statements, this is subject to qualification in many jurisdictions. A few courts have held that the doctrine cannot be used beyond its common-law applications,[18] but the majority extend the theory to new situations. This is done on the reasoning that the doctrine was not an inflexible rule of law, limited to the two situations of marriage plus issue, or marriage alone in the case of a woman, but rather an application of a general principle that changes in the domestic situation of the testator, with their consequent creation of new social obligations, raise a conclusive presumption of revocation. The courts frequently couch their decisions in terms of what the average testator would intend, but the basic idea today seems to be the necessity of protecting an heir coming into existence after the making of the will. Thus, while the cases continue to say that marriage and birth of issue revoke a man's will,[19] a few have extended the rule to the case where the marriage took place before execution of the will,

[18] Statute provided for implied revocation: Vanek v. Vanek, 104 Kan. 624, 180 P. 240 (1919); Swan v. Hammond, 138 Mass. 45 (1884); Vandeveer v. Higgins, 59 Neb. 333, 80 N. W. 1043 (1899); Hoitt v. Hoitt, 63 N. H. 475, 3 A. 604 (1885); Mundy's Exrs. v. Mundy, 15 Ohio Cir. Ct. 155, 8 O. C. D. 44 (1897).

Statute did not provide for implied revocation: Goodsell's Appeal, 55 Conn. 171, 10 A. 557 (1887); Easterlin v. Easterlin, 62 Fla. 468, 56 So. 688 (1911); Brown v. Brown, 139 Iowa 219, 117 N. W. 260 (1908); Hoy v. Hoy, 93 Miss. 732, 48 So. 903 (1908).

[19] Statute provided for implied revocation: Belton v. Summer, 31 Fla. 139, 12 So. 371 (1893) (posthumous child); Shorten v. Judd, 60 Kan. 73, 55 P. 286 (1898) (common-law marriage); Glascott v. Bragg, 111 Wis. 605, 87 N. W. 853 (1901) (in this case the child was adopted, and the court held that this had the same effect as the birth of a child, under a statute providing that adopted children should have all the rights of children born in wedlock).

Statute did not provide for implied revocation: Baldwin v. Spriggs, 65 Md. 373, 5 A. 295 (1886); Brush v. Wilkins, 4 Johns Ch. (N. Y.) 506 (1820); Wilcox v. Rootes, 1 Va. 140 (1792).

with birth of issue following execution.[20] This is based on the theory that the new heir should be provided for regardless of when the marriage took place, and that the presumption that the will was made in contemplation of the birth of issue is artificial.

In a state where the wife is made heir of the husband, some courts say that this creation of a new heir is sufficient change of circumstances to work a revocation of the husband's will made prior to marriage,[21] but in at least two cases it was held that this was immateral, inasmuch as she could take against the will.[22]

The courts have quite uniformly held that the marriage of a woman no longer revokes her will;[23] such a result is to be expected, in view of the reason behind the common-law rule and the fact that married women now are capable of holding separate property and of making wills. Where the husband is made heir of the wife, however,

[20] Statute did not provide for implied revocation: Fallon v. Chidester, 46 Iowa 588 (1877); Karr v. Robinson, 167 Md. 375, 173 A. 584 (1934).

Contra, though with evident misgivings: Easterlin v. Easterlin, 62 Fla. 468, 56 So. 688 (1911). The Florida statute did not provide for implied revocation.

In Padelford's Estate, 190 Pa. 35, 42 A. 381 (1899), a will disinheriting the child of testator's wife because testator believed he was not the father was held not to be revoked by testator's admission of paternity in legal proceedings, the court admitting evidence that he did not in fact consider himself the father but made the admission of paternity only because he was in law the father.

[21] Statute did not provide for implied revocation: Brown v. Scherrer, 5 Colo. App. 255, 38 P. 427 (1894), affd. Scherrer v. Brown, 21 Colo. 481, 42 P. 668 (1895); Morgan v. Ireland, 1 Idaho 786 (1880); Tyler v. Tyler, 19 Ill. 151 (1857); In re Lewis' Will, 41 N. M. 522, 71 P. (2d) 1032 (1937).

Contra, where statute provided for implied revocation: Vanek v. Vanek, 104 Kan. 624, 180 P. 240 (1919); Hulett v. Carey, 66 Minn. 327, 69 N. W. 31 (1896); Mundy's Exrs. v. Mundy, 15 Ohio Cir. Ct. 155, 8 O. C. D. 44 (1897).

Contra, where the statute did not provide for implied revocation: Goodsell's Appeal, 55 Conn. 171, 10 A. 557 (1887); Hoy v. Hoy, 93 Miss. 732, 48 So. 903 (1908).

[22] Statute provided for implied revocation: Hulett v. Carey, 66 Minn. 327, 69 N. W. 31 (1896).

Statute did not provide for implied revocation: Hoy v. Hoy, 93 Miss. 732, 48 So. 903 (1908).

[23] Statute provided for implied revocation: Emery, Appellant, 81 Me. 275, 17 A. 68 (1889); Noyes v. Southworth, 55 Mich. 173, 20 N. W. 891 (1884); Kelly v. Stevenson, 85 Minn. 247, 88 N. W. 739 (1902); Fellows v. Allen, 60 N. H. 439 (1881); Morton v. Onion, 45 Vt. 145 (1872); Will of Ward, 70 Wis. 251, 35 N. W. 731 (1887).

Statute did not provide for implied revocation: In re Will of Tuller, 79 Ill. 99 (1875); Hastings v. Day, 151 Iowa 39, 130 N. W. 134 (1911); Roane v. Hollingshead, 76 Md. 369, 25 A. 307 (1892); Lee v. Blewett, 116 Miss. 341, 77 So. 147 (1917); Webb v. Jones, 36 N. J. Eq. 163 (1882).

Contra, where statute provided for implied revocation: Swan v. Hammond, 138 Mass. 45 (1884); Vandeveer v. Higgins, 59 Neb. 333, 80 N. W. 1043 (1899).

marriage alone may continue to revoke her will, not on the old common-law basis of incapacity during coverture, but because of the creation of a new heir.[24] There is but slight authority on the question whether birth of issue revokes a woman's will. Two cases held there was no revocation where the will was made after marriage,[25] while another held the will to be revoked by testatrix's subsequent marriage and birth of issue.[26]

Most of the states now have some statutory provision covering the effect of marriage,[27] and all except Wyoming provide either for an afterborn or for a pretermitted child. No attempt will be made to analyze such statutes exhaustively, nor to cite cases decided under them, but the question arises as to their effect on the doctrine of implied revocation. The use of the doctrine would seem to be supplanted by these express statutory provisions, but the statute may fail to provide for all situations. Thus, where the statute provided for implied revocation, and also provided specifically that a will executed by an unmarried woman was revoked by her marriage, it was held that the will of a married woman was not revoked by her remarriage; it was said that the express mention of unmarried women and the omission of married women showed a legislative intent to exclude the latter from the operation of the statute.[28]

In contrast with this view, however, is a case in which the statute provided for posthumous children and for children born after execution of the will when there were children born before the will was

[24] Statute provided for implied revocation: Colcord v. Conroy, 40 Fla. 97, 23 So. 561 (1898).

Statute did not provide for implied revocation: In re Estate of Teopfer, 12 N. M. 372, 78 P. 53 (1904).

[25] Statute provided for implied revocation: Will of Kendrick, 210 Wis. 218, 246 N. W. 306 (1933).

Statute did not provide for implied revocation: Masionis v. Kraulikauckas, 103 N. J. Eq. 66, 142 A. 246 (1928).

[26] Durfee v. Risch, 142 Mich. 504, 105 N. W. 1114 (1905). The statute provided for implied revocation.

The scarcity of cases on the effect of birth of issue on a will may perhaps be explained by the fact that every state except Wyoming now makes some provision for afterborn or pretermitted children.

[27] Of the twelve states with statutory provision for implied revocation by change of circumstances, the following have clauses providing for the effect of marriage: Del. Rev. Code (1935), § 3727; Mass. Gen. Laws (1932), c. 191, § 9; Minn. Stat. (Mason, Supp. 1940), § 8992-40; Nev. Comp. Laws (1929), §§ 9914, 9915; Ohio Code (Throckmorton, 1940), § 10504-53.

[28] Estate of Lufkin, 32 Haw. 826 (1933); In re Walters' Estate, 60 Nev. 172, 104 P. (2d) 968 (1940).

made; the court held that this statute did not preclude the use of the doctrine of implied revocation where marriage and birth of issue followed the making of the will.[29]

Which of these two positions a court will take will depend on its philosophy of statutory construction and its desire to protect the spouse or child in question. The problem is not likely to arise frequently in the case of afterborn children, for most statutes now provide for all children born after the execution of the will, or for all children not mentioned therein. But the statutes on the effect of marriage are less general in their wording, so that problems of construction of these statutes may continue to vex the courts; and the doctrine of implied revocation will be more likely to be used in the case of marriage than in the case of the birth of issue.

IV

In view of these statutes which are limiting the use of the doctrine of implied revocation, its most important application today is in the case of divorce.[30] With the possible exception of a Michigan case to be discussed below, apparently no court has yet said that divorce alone, or coupled with alimony, is such a change of circumstances as to cause a revocation.[31] If the divorce is accompanied by a property settlement, however, whether voluntary or by court decree, several cases have held that the will is thereby revoked as to the divorced spouse's share,[32] on the theory that there has been a complete change in the testator's circumstances, and a full provision for the wife's claims.

[29] Shorten v. Judd, 60 Kan. 73, 55 P. 286 (1898). The Kansas statute at that time made provision for implied revocation.

[30] On this subject, see Evans, "Testamentary Revocation by Divorce," 24 Ky. L. J. 1 (1935).

[31] Statute provided for implied revocation: Charlton v. Miller, 27 Ohio St. 298 (1875); Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303 (1896); In re Arnold's Estate, 60 Nev. 376, 110 P. (2d) 204 (1941).

Statute did not provide for implied revocation: Card v. Alexander, 48 Conn. 492 (1881); Murphy v. Markis, 98 N. J. Eq. 153, 130 A. 840 (1925), affd. 99 N. J. Eq. 888, 132 A. 923 (1926); Jones' Estate, 211 Pa. 364, 60 A. 915 (1905).

[32] Statute provided for implied revocation: Lansing v. Haynes, 95 Mich. 16, 55 N. W. 699 (1893); Wirth v. Wirth, 149 Mich. 687, 113 N. W. 306 (1907); Donaldson v. Hall, 106 Minn. 502, 119 N. W. 219 (1909); In re Estate of Bartlett, 108 Neb. 681, 189 N. W. 390, 190 N. W. 869 (1922); In re Martin's Estate, 109 Neb. 289, 190 N. W. 872 (1922); Pardee v. Grubiss, 34 Ohio App. 474, 171 N. E. 375 (1929); Will of Battis, 143 Wis. 234, 126 N. W. 9 (1910); Johnston v. Laird, 48 Wyo. 532, 52 P. (2d) 1219 (1935) (annulment plus property settlement).

To the effect that a property settlement in anticipation of a divorce which was never obtained is not a revocation, see In re Blanchard's Estate, 267 Mich. 189, 255 N. W. 190 (1934). The statute provided for implied revocation.

All the cases holding the will revoked by divorce and property settlement are from jurisdictions whose statutes expressly permit implied revocation; and conversely, no state with such a statute has held that the will was not revoked. The writer has found only one case on the question from a state which recognizes implied revocation without statutory approval of the doctrine, and that case denied revocation.[33] It is probably too early, however, to conclude that express statutory approval of the doctrine is necessary in order to work a revocation by divorce and property settlement, especially in view of the fact that this single case is in a state which interprets the doctrine strictly. With the exception of this one case, those which refuse to imply a revocation go on the ground that the statutory methods of revocation are exclusive and forbid the use of the doctrine of implied revocation.[34]

In re McGraw's Estate[35] comes near to holding that divorce alone works a revocation. In this case the wife did not ask for alimony; the court said that she waived it, and proceeded as if there had been a settlement and hence held the will revoked by a conclusive presumption. But, as the dissenting opinion points out, the husband was not personally served in the divorce proceeding, so that the wife could not get alimony; to hold that she has waived it under these circumstances is an obvious legal fiction, and it is submitted that this case might be argued as precedent for a holding that divorce alone impliedly revokes a will. An earlier hearing of the same case[36] indicates that the court did not then deem the presumption conclusive, since it develops a series of facts to strengthen the presumption of revocation. In the later hearing, however, the court states that it was assumed by counsel, and so not argued in the earlier opinion, that it was a conclusive presumption. There was some evidence in the case to indicate that the testator did not consider his will as having been revoked.[37]

[33] Brown v. Brown, 139 Iowa 219, 117 N. W. 260 (1908).

[34] In re Patterson's Estate, 64 Cal. App. 643, 222 P. 374 (1924); Succession of Cunningham, 142 La. 701, 77 So. 506 (1918); Robertson v. Jones, 345 Mo. 828, 136 S. W. (2d) 278 (1940); In re Nenaber's Estate, 55 S. D. 257, 225 N. W. 719 (1929). But see Titus v. Bassi, 182 App. Div. 387, 169 N. Y. S. 49 (1918), holding that the will was revoked by the property settlement, not by implication, but under § 40 of the Decedent Estate Law, which provides for revocation by an instrument wholly inconsistent with the will. By the terms of the settlement the wife gave the husband power to will his property as though she were dead.

[35] 233 Mich. 440, 207 N. W. 10 (1926). The statute provided for implied revocation.

[36] 228 Mich. 1, 199 N. W. 686 (1924).

[37] The ruling of this case was rejected in In re Arnold's Estate, 60 Nev. 376, 110 P. (2d) 204 (1941).

V

It has been said that the doctrine of implied revocation operated at English common law to revoke pro tanto a devise of land the subject matter of which was alienated by the testator during his lifetime, so that if he later reacquired it, it passed by intestacy rather than under the will. Probably, however, the true basis of this rule was another rule, viz. that after-acquired property could not pass by the will. Whether or not this is true is beyond the scope of this paper. At any rate, with the rule regarding after-acquired property abolished by statute in most jurisdictions, and by judicial legislation in the others, there would seem to be no reason today why alienation should revoke a devise or legacy, other than the obvious fact that a will cannot pass property which the testator does not have at death; and most cases now hold that if he reacquires the property after conveying it away, it may pass under the will, even under a specific devise or legacy.[38]

In connection with this subject, *In re Estate of O'Connor*[39] should be mentioned. In this case testator disposed of most of his property during his lifetime, and the court held the entire will to be revoked by implication on the theory that the remaining estate was so small relatively that the testamentary plan failed.

VI

The doctrine of implied revocation has been urged, but rejected by the courts, in several other situations. Thus, the will was held to be in force in spite of the death of the spouse or a child,[40] the birth

[38] The leading case for the opposing view is Phillippe v. Clevenger, 239 Ill. 117, 87 N. E. 858 (1909), but this holding was cut into by Strang v. Day, 362 Ill. 110, 199 N. E. 263 (1935). These two cases are the subject of a comment in 34 MICH. L. REV. 1272 (1936).

To the effect that property acquired with the purchase money cannot pass under a specific devise or bequest, see 3 A. L. R. 1497 (1919). To the effect that there is no revocation if the attempted conveyance is invalid for some reason, see ATKINSON, WILLS 408-409 (1937), and cases therein cited.

[39] 191 Minn. 34, 253 N. W. 18 (1934). The statute provided for implied revocation.

[40] Statute provided for implied revocation: Warner v. Beach, 70 Mass. 162 (1855); Bennett v. Brown, 222 Mass. 283, 110 N. E. 266 (1915); Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303 (1896). The Bennett case is especially striking because the whole estate, except for $15 left to the children, was bequeathed to the wife, who predeceased testator.

Statute did not provide for implied revocation: Redwood v. Howison, 129 Md. 577 at 589, 99 A. 863 (1917); Thorndike v. Reynolds, 63 Va. 21 at 33 (1872).

But see Estate of Judson, 168 Wis. 361, 170 N. W. 254 (1919), where the will made gifts to certain persons and their heirs and assigns. It was held that the will

of several grandchildren,[41] insanity of the testator,[42] a great increase in the value of testator's property,[43] or a decrease in its value,[44] or by a combination of several of these events.[45] Nor was a will impliedly revoked where testator was forcibly prevented from changing it,[46] or where testator expected to survive his wife (who was the chief legatee) but in fact predeceased her,[47] or where testator's attitude toward his daughters changed from disapproval to affection.[48]

VII

One question has not been dealt with, except incidentally; that is, whether the presumption of revocation by change of circumstances is today considered as conclusive. Though a few early cases stated that the presumption was rebuttable, the courts have uniformly come to regard it as conclusive in all situations, so that it has become a rule of law which applies regardless of testator's intention. In most of the cases this question is assumed without argument, probably because there was no evidence of intention offered. In a number of cases, however, the will was held to be revoked in the face of the strongest evidence of a contrary intention on the testator's part, this evidence being termed immaterial. Thus, in *Nutt v. Norton*,[49] the testatrix made a will on the eve of her marriage, in favor of the children of her first marriage; the second husband was a subscribing witness, and knew the contents of the will, yet it was held that the marriage revoked her will by implication. Again, in *Johnston v. Laird*,[50] the husband made his will in favor of his wife about six months after she was committed to an insane asylum, yet

was revoked by the death of all the legatees, the words "and their heirs" being merely words of limitation.

[41] Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303 (1896).

[42] Warner v. Beach, 70 Mass. 162 (1855). The statute provided for implied revocation.

[43] The statute provided for implied revocation: Aten v. Tobias, 114 Kan. 646, 220 P. 196 (1923); Warner v. Beach, 70 Mass. 162 (1855); Hill v. Hill, 106 Neb. 17, 182 N. W. 578 (1921).

[44] Will of Kendrick, 210 Wis. 218, 246 N. W. 306 (1933). The statute provided for implied revocation.

[45] Warner v. Beach, 70 Mass. 162 (1865). The statute provided for implied revocation.

[46] Minor v. Russell, 126 Miss. 228, 88 So. 633 (1921). The statute did not provide for implied revocation.

[47] Ater v. McClure, 329 Ill. 519, 161 N. E. 129 (1928). The statute did not provide for implied revocation.

[48] Aten v. Tobias, 114 Kan. 646, 220 P. 196 (1923). The statute provided for implied revocation.

[49] 142 Mass. 242, 7 N. E. 720 (1886).

[50] 48 Wyo. 532, 52 P. (2d) 1219 (1935).

the will was held to be revoked by his subsequent procuring of an annulment on the ground of her insanity although he made the will knowing her condition. And in at least three of the divorce-plus-settlement cases [51] the will was held to be revoked in spite of evidence that testator continued in friendly relations with the divorced wife, and made statements to the effect that he had provided for her by will.

Is it desirable to make the presumption of revocation conclusive? The answer to this question should depend on the reason behind the application of the doctrine; and the various situations in which it is used should be distinguished. Thus, in the case of marriage, or birth of issue, though most of the courts speak in terms of the intention of the average testator, and though the doctrine originated in these terms, the reason for revoking the will is to protect the spouse or child from disherison, and the presumption must be made conclusive in order to effectuate this policy. That this is the policy of the courts is seen in those cases holding that the will is revoked by marriage where the spouse is made an heir, and by the birth of issue without the concurrence of marriage.

In the case of divorce and property settlement, however, the reason for holding the will revoked is entirely different. Here there is no policy to be effectuated, no new heir to protect; rather, the theory is that the duty of providing for the wife has been entirely satisfied by the settlement, and that she no longer has any claim on the husband's bounty. Here it is more accurately a presumption based on the intention of the average testator, and it should therefore be rebuttable, and evidence of the testator's contrary intention should be admitted.

VIII

What will be the future of the doctrine of implied revocation? Its use to protect the afterborn child will probably disappear, in view of the almost universal statutory provisions for afterborn or pretermitted children; if the child is given an intestate share by statute, there is no necessity for holding the entire will revoked.

While many states have some statutory provision dealing with the effect of marriage, there are still enough without any such provision, or with incomplete provisions, so that the doctrine of implied revocation will continue to be used when the testator marries after making his will, unless the courts follow the cases mentioned above in which it was

[51] In re McGraw's Estate, 233 Mich. 440, 207 N. W. 10 (1926); In re Martin's Estate, 109 Neb. 289, 190 N. W. 872 (1922); Will of Battis, 143 Wis. 234, 126 N. W. 9 (1910).

held that the right to take against the will provides adequate protection for the widow.

The doctrine is most likely to survive in the case of divorce plus property settlement. To date, only three states[52] have statutes on the subject, providing that the gift to the divorced spouse is revoked by divorce alone. In these states, of course, the express statutory provision should control, but in the other states the courts will probably continue to apply the doctrine of implied revocation.

Will the doctrine be expanded to cover new situations? Probably not. As already indicated, its use has been denied in a number of situations, and the courts have shown no tendency to become more liberal in this regard. Indeed, the doctrine is viewed with disapproval by many courts, even in some of the jurisdictions whose statutes recognize it.[53] This is proper. The modern philosophy of wills is that the statutory methods of revocation should be exclusive, and the doctrine of implied revocation should be resorted to only to effectuate the policy of protecting the new heir from disherison. Though its application to the situation of divorce and property settlement seems to be well enough entrenched to remain as part of the doctrine, this use of it is questionable, at least if the presumption of revocation is made conclusive.

[52] Kan. Gen. Stat. (1939 Supp.), c. 59, § 610; Minn. Stat. (Mason, Supp. 1940), § 8992-40; Wash. Rev. Stat. (Remington, 1931), § 1399.

[53] See, for example, In re Walters' Estate, 60 Nev. 172, 104 P. (2d) 968 (1940).