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Wills: Implied revocation by divorce of testator-property settlement

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the less, good where a substantially accurate translation had been made to the testator before execution.[5]

Georgia goes farther than most states in permitting the probate of wills of blind testators when its Supreme Court held that "it is not indispensably necessary to the validity of a will executed by a blind man that it should be read over to him in the presence of the subscribing witnesses before execution. It is sufficient if he know that it is his will."[6] Arkansas places this matter before the jury, leaving it to them whether or not the inability of the testator to read or hear read the will is sufficient to deny probate. The Supreme Court of Arkansas says: "When a will appears to have been legally executed, the onus of showing fraud or undue influence therein is on the party contesting its validity, and the circumstances that the testator could not read and did not hear the will read at the time of the signing is a fact to be weighed by the jury, with other circumstances, in determining whether or not he knew its contents."[7] The question is discussed in L. R. A.[8] and it is said that the presumption that the testator knew the contents of the will arises from the execution of it by the testator whose eyesight is so impaired that he could not read the instrument.

From this, it can be seen that the whole trend of the courts has been towards leniency in dealing with the wills of blind testators and all possible benefits are granted in order that such wills may be admitted to probate. The object of the courts seems to be to combine leniency with protection and it can be seen readily that a judicious admixture of these two policies is giving to the blind a knowledge and assurance that they may rely implicitly on the courts to see that their wishes are carried out, whether they can or cannot read or hear read, the will, and that the fact of blindness on the part of a testator will not prove him to be without mental capacity.

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Wills: Implied revocation by divorce of testator—property settlement.—In the recent case of *In re McGraw's Estate*, 228 Mich. 1; 199 N. W. 686, Mary H. McGraw, divorced wife of Howard A. McGraw, deceased, presented for probate a will made by the deceased during coverture, wherein she was made sole legatee. The marriage took place in 1912, the will was executed in 1918, and an absolute divorce was granted to her in 1921. No alimony was demanded nor received and upwards of two years had elapsed after the decree, in which time it could have been demanded. Proponent's dower was barred by the statute of limitations. No express property settlement was made between the parties either before or after divorce. As the testator left no children, the will was contested by his brother and sister. They contended that the decree of divorce, with its attendant conditions and circumstances, had wrought an implied revocation. The court held that

[5] *Benrud v. Anderson*, 174 N. W. 617, 144 Minn. 111.
[6] *Clifton v. Murray*, 7 Ga. 565, 50 Am. Dec. 411.
[7] *Guthrie v. Price*, 23 Ark. 407, 49 Cent. 270 & 389.
[8] L. R. A. 1918 D. p. 747, *Ross v. Ross*, 147 N. W. 1105.

there was an implied revocation of the will by virtue of the divorce coupled with the attending circumstances.

The Michigan statute[1] governing this matter provides that "No will nor any part thereof shall be revoked, unless by burning, tearing, etc. . . . Nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition of circumstances of the testator."[2] In a former Michigan case, *Lansing v. Haynes*,[3] this statute was held to apply where there had been a divorce coupled with a property settlement between the parties pending the suit. In that case, the foundation or reason for an implied revocation by divorce was said to be "the resonable presumption of an alteration of the testator's mind, arising from conditions since the making of the will, producing a change in his previous obligations and duties."[4] The rule as set out in the above statute is also the common law rule.[5] Due to the infrequency of divorces at common law, however, there were practically no specific applications of this rule.

It has often been held, and may be considered as settled law, that a divorce alone does not revoke a previously executed will.[6] The case in hand, at first view, would seem to directly oppose this settled doctrine. However, the court, in deciding, was very careful to point out that what its views might be on the bare question of a divorce was a question unnecessary to decide at the time. The court held that the proponent, in having allowed the statute of limitations to bar her dower right and the doctrine of laches to bar her right to alimony, had waived that to which she was entitled and also that for which she had neglected to ask. The court then proceeded on the theory that, with both dower and alimony waived, the property matters of the parties were as effectually settled as though the parties themselves had made a voluntary settlement. This case is thus brought within the holding of *Lansing v. Haynes, supra.*[7]

The common law doctrine of implied revocation (as embodied in the

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[1] C. L. 1915, Section 11825.

[2] Subsequent changes in the condition or circumstances of a testator which revoke a will or a part thereof by implication, within the rule embodied in this statute, have commonly been applied to a change in the testator's property, in his family, or in his beneficiaries. See note to *Grahm v. Burch*, 28 Am. St. Rep. 339; (47 Minn. 171).

[3] 95 Mich. 168; 54 N. W. 699; 35 Am. St. Rep. 545.

[4] 4 Kent's Comm. 521.

[5] 4 Kent's Comm. 524.

[6] *Baacke v. Baacke*, 50 Neb. 18; 69 N. W. 303; *In re Brown's* Estate, 139 Iowa 219; 117 N. W. 260; *Charlton v. Miller*, 27 Ohio St. 298; 22 Am. Rep. 307; *Jone's Estate*, 211 Pa. St. 364; 69 L. R. 940; 107 Am. St. Rep. 581; 3 Am. & Eng. Ann. Cas. 221, and note; *Card v. Alexander*, 48 Conn. 492; 40 Am. St. Rep. 187; *Donaldson v. Hall*, 106 Minn. 502; 119 N. W. 219; 130 Am. St. Rep. 621 and note.

[7] *Will of Battis*, 143 Wis. 234; 126 N. W. 9; 139 Am. St. Rep. 1101; *Wirth v. Wirth*, 149 Mich. 687; 113 N. W. 306; *Martin v. Martin*, 109 Neb. 289; 190 N. W. 872.

Michigan statute) has not been retained in several of the states, principally because of statutory inhibition and, as in Iowa, because of judicial construction.[8]

Although the statute in the instant case may have been stretched somewhat to cover the facts of the case, the holding is in accord with the spirit of the rule as stated in *Donaldson v. Hall*[9] where it was said that if accorded substance and merit, the rule "must serve the purpose of doing by implication what the testator should have done, in justice to those entitled to his bounty, had his attention been directly called to the matter after the change of circumstances and before his death."

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[8] *In re Brown's Estate,* 139 Iowa 219; 117 N. W. 260; *Jone's Estate,* 211 Pa. St. 364; 3 Am. & Eng. Ann. Cas. 221, and note; *Charlton v. Miller,* 27 Ohio St. 298; 22 Am. Rep. 307; *In re Comassi,* 107 Cal. 4; 40 Pac. 16.

[9] 106 Minn. 502; 119 N. W. 219; 130 Am. St. Rep. 621.