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REVOCATION OF A WILL BY BIRTH OF A CHILD

By William Lentz*

In the April, 1934 term of the Court of Appeals, there was presented, apparently for the first time in Maryland, the question whether the will of a testator executed after marriage was revoked by operation of law by the subsequent birth of a child.¹ The decision in the affirmative came as a surprise to most Maryland lawyers as they had theretofore considered that the only variance from the statutory provisions for revocation² was the well recognized doctrine that when marriage and birth of issue both occurred subsequent to the execution of a will, the instrument was revoked by operation of law. It is the purpose of this paper to discuss the Karr v. Robinson case in the light of previous expressions of the Court and the cases cited by it and to consider whether the present state of the law is satisfactory either to testators or to the legal profession.

The first case throwing any light on the attitude of the Court of Appeals toward extra-statutory revocation is Sewell v. Slingluff.³ In that case Mrs. Slingluff, the wife of Fielder C. Slingluff, executed a last will and testament in 1867 by which she bequeathed all of her property unto her mother, Mrs. Sewell. Mrs. Slingluff was then childless but later in the same year she gave birth to a child who died a year later. In 1868, a second child, Richard, was born. When Mrs. Slingluff died in 1869, she was survived by her mother, her husband, and this son. The will had been delivered by Mrs. Slingluff to her husband, who, in turn, had passed it over to Mrs. Sewell. When in 1875, Mrs. Sewell declared her intention to present the will for probate and assert her rights as legatee thereunder, Mr.

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¹ Karr v. Robinson, 167 Md. 375, 173 Atl. 584 (1934); noted in (1935) 35 Col. L. Rev. 787.
² Md. Code, Art. 93, Sec. 383.
³ 57 Md. 537 (1882).

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* Of the Baltimore City bar; A.B., 1912, St. John's College; Graduate Student, 1912-1913, Johns Hopkins University; LL.B., 1916, Harvard Law School; Lecturer on Wills and Administration, University of Baltimore Law School.
Slingluff filed a bill in equity on behalf of his son, Richard, and himself, alleging that the testatrix had executed the will and delivered it to him with the request and positive understanding and direction that it was not to be held or taken or probated as her last will and testament in case she should die leaving issue, but in the event of her leaving issue, should be wholly inoperative so that her estate should pass as if it had never been executed. The prayer of the bill was that Mrs. Sewell be enjoined from offering the paper for probate and that she be ordered to produce the same for cancellation. After hearing the testimony in support of the allegations of the bill, the Court passed a decree practically in accordance with the prayers and enjoined Mrs. Sewell from offering the will for probate and directed that it be brought into Court for cancellation.

On appeal by Mrs. Sewell, the Court of Appeals, speaking through Judge Stone, reversed the lower court and dismissed the bill, holding that the will was valid when made and that parol declarations of the testatrix "whether made before, after or at the time of the execution of the will" were not admissible to render that will inoperative at some future time and in the event of some future contingency, for to do so would be nothing more or less than to allow a parol revocation of it. After noting that "the paper itself contains no condition whatsoever but gives the whole property of the testatrix to her mother unconditionally", the Court observed that "every condition allowed by law can be put in a will and no good reason can be shown why every testator who desires a conditional will does not make one". Judge Stone solemnly declared that the Code

*Sewell v. Slingluff, supra note 3, 549, 551.

5Md. Code, Art. 93, Sec. 302 (now Sec. 333) reads as follows: "No will in writing devising lands, tenements or hereditaments, or bequeathing any goods, chattels or personal property of any kind as heretofore described, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same, by the testator himself or in his presence, and by his direction and consent; but all devises and bequests so made shall remain and continue in force until the same be destroyed by burning, cancelling, tearing or obliterating the same by the testator or by his direction, in manner aforesaid, unless the same be altered by some other will or codicil in writing or other writing of the devisor signed as hereinbefore said in the presence of two or more witnesses declaring the same."
pointed out the only mode by which a will could be revoked or annulled. He stated:

"This statute is imperative in its terms and no mere verbal declarations of a testator, however strongly expressed and however earnestly he may wish or intend so to do, can have any effect upon a will after its execution. It can only be revoked in the manner prescribed by the statute." (Italics supplied.)

The section of the Code referred to is modelled after Section Six of the famous Statute of Frauds, passed in 1667, and was embodied in the Maryland law by the acts of 1798. It is to be noted, however, that Section Six of the Statute of Frauds related only to real estate, testamentary disposition of personalty being provided for in Section Twenty-two and that the closing phrase of Section Six "any former law or usage to the contrary notwithstanding" is not included in our statute.

A few years after the decision of Sewell v. Slingluff, the Court of Appeals in Baldwin v. Spriggs, sustained a ruling of the Orphans' Court that the will of a testator executed after his first marriage and the birth of issue, was revoked by the subsequent marriage and birth of a child, in the absence of any provision in the will for the children of the subsequent marriage. The testator had executed his will in 1865, disposing of all of the property he then possessed to his wife, Ruth, and his children by her. Ruth died in 1871 and the testator thereafter intermarried with one Maggie E. Bane and by her had several children. He died in 1886 leaving his second wife, a child by the first wife and children by the second wife, surviving him. The caveat was filed by the testator's second wife in behalf of herself and her children.

The opinion in the Baldwin case was likewise written for the Court by Judge Stone. He found that in the June Term, 1884, the same question had been before the Court in the unreported case of Sedwick v. Sedwick, wherein the order

* Sewell v. Slingluff, supra note 3, 548.
* 29 Chns. II, cap. 3.
* Acts 1798, Ch. 101, Subch. 1, Sec. 4.
* 65 Md. 373, 5 Atl. 265 (1886).
of the Orphans' Court refusing probate of a will made before marriage and birth of a child had been affirmed. In recognizing the general rule that a will was revoked by the subsequent marriage and birth of a child, the Court referred to the exception where "the testator had made provision for his children born after the execution of the will. As the origin of the rule was the duty of the parent to provide for his offspring, this exception seems right and proper".10

After briefly reviewing the English cases decided in favor of the rule, the Court expressly repudiated Lord Mansfield's view that the rule should rest on the presumption that the testator intended to revoke his will if he married and had issue. This view was held to be "irreconcilable with the Statute of Frauds. It would, in effect, allow the will to be revoked by the subsequent intention of the testator, without such intention being evidenced by the positive acts so expressly required by that statute".11 The true basis of the rule, the Court determined, was that enunciated by Lord Kenyon that there was "a tacit condition annexed to the will when made that it should not take effect if there should be a total change in the situation of the testator's family".12

Despite Judge Stone's observation that "the origin of the rule was the duty of the parent to provide for his offspring", it seems to have been regarded as the settled law of Maryland prior to 1934 that there must be a concurrence of marriage and birth of a child in order for a prior will in which no provision is made for after-born children, to be revoked, and that birth of a child alone did not operate to revoke an existing will.

Edward Otis Hinkley (who incidentally represented Mrs. Sewell in Sewell v. Slingluff) in his treatise13 quotes with apparent approval from Jarman on Wills that prior to the Act of 1 Victoria, Chapter 26, marriage of a woman absolutely revoked her will but marriage of a man had no

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10 Baldwin v. Spriggs, supra note 9, 381.
11 Ibid.
12 Ibid.
13 Testamentary Law of Maryland, 1878, Sec. 116.
such effect. Quoting further from Jarman, the text continues:

"Nor did birth of a child alone revoke a will made after marriage since a married testator must be supposed to contemplate such event, and the circumstances that the testator left his wife en ciente without knowing it, was held not to impart to the posthumous birth any revoking effect. Marriage and birth of a child jointly, however, revoked a will whether of real or personal estate; these circumstances producing such a total change in the testator's situation as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged."

In the supplement to his treatise Mr. Hinkley stated: "As a general rule marriage and the birth of issue operated as a revocation of a will previously made" and cited Baldwin v. Spriggs but nowhere did he intimate that birth alone revoked.

It is interesting to observe that evidently the bar accepted Mr. Hinkley's statement of the law, for such distinguished counsel as John P. Poe and S. Teackle Wallis did not see fit, according to the summary of their argument as reported in the Sewell case, even to suggest the possibility that birth of a child operated as a matter of law as a revocation of Mrs. Slingluff's will. Nor did counsel in their briefs in the Baldwin case in any way intimate that anything less than marriage and subsequent birth would operate as an implied revocation.

It is also to be noted that the Court in the Slingluff case would have been glad to find in favor of the surviving husband and son rather than the mother of the testatrix, for Judge Stone said:

"If it (parol evidence) were in any such case admissible, we would be unwilling to reject it in this, as the straightforward testimony and disinterested conduct of the husband of the testatrix presents a strong

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14 5th Amer. Ed. from the 4th London Ed., 1880, Ch. VII, Sec. 1.
15 In Sec. 117 Mr. Hinkley refers to the case of Tongue v. Morton, 6 H. & J. 21 (1823) in which the Court of Appeals referred to the question whether marriage and birth of child revoked a will previously made but refrained from passing upon it.
16 1888, Sec. 117-A.
case, and one with many equitable features strongly appealing to our sense of justice. But we must take the law as we find it; and as in all the long period that has elapsed since the passage of the Act of 29th Charles II no court has permitted such testimony to be received, we cannot do so now.17

Sewell v. Slingluff has been cited with approval by the Court of Appeals in at least a half a dozen cases as authority for the proposition that parol evidence is not admissible to vary the terms of a will.18

Baldwin v. Spriggs and some of the English authorities were discussed and approved in Roane v. Hollingshead.19 In that case a feme sole in 1889 executed her last will and testament. She married in 1891 and died the following year. When the will was propounded, the surviving husband filed a caveat claiming that it had been revoked by the subsequent marriage of his wife. The Court of Appeals sustained the Orphans’ Court and ruled that the will had not been revoked. Judge McSherry pointed out20 that by the Code a married woman had the right to dispose of her property the same as a married man in that all the common law restrictions formerly imposed upon disposition of property by a married woman had been removed. He indicated the Court’s approval of the doctrine that marriage and birth of issue effected a revocation because of the tacit condition annexed to the will when made that it should not take effect if there should be a total change in the situation of the testator’s family. “Marriage alone never did revoke the will of a man but marriage and birth of issue did, because the will when made was made with the tacit condition that it would not take effect upon such a contingency coming to pass.”21

Again, in 1917 in Redwood v. Howison,22 the Court of Appeals, speaking through the late Judge Thomas, approved Baldwin v. Spriggs. The will of Dr. R. Dorsey

17 Sewell v. Slingluff, supra note 3, 554.
18 The latest such case is Garner v. Garner, 167 Md. 423, 173 Atl. 386 (1934).
21 Ibid, 374.
22 129 Md. 577, 99 Atl. 863 (1917).
Coale left everything to his wife. As she had predeceased him, her next of kin claimed her share under the statute preventing the lapsing of legacies. Dr. Coale's kin, however, contended, *inter alia*, that his wife's death brought about a complete change in his family and with it an implied revocation of his will. The Court refused to extend the doctrine of *Baldwin v. Spriggs* and held that the will of the testator was not revoked by the death of his wife and stated that if marriage of a man did not work a revocation of his will, certainly the death of his wife cannot have that effect.

In view of the foregoing decisions and language of the Court of Appeals, and the attitude of leading members of the bar, it was at first blush somewhat startling to read that the Court had ruled in *Karr v. Robinson* that birth of a child alone effected a revocation of a testator's will made prior to that event, and after marriage.

In this case the testator, Alfonso P. Robinson, executed his will on November 20, 1929, after the death of his first wife and after his second marriage but before the birth of any children by his second wife. When he died on December 31, 1933, he was survived by two daughters by his first wife, his second wife and a child by the second wife, and another child was expected shortly. By the terms of the will he devised and bequeathed all of his property in trust, one-third for the benefit of his surviving wife and one-third for the benefit of each of his two daughters by the earlier marriage. The widow individually and as next friend of her child filed a caveat on the ground that there had been a total change in the situation of the family of the testator by the birth of one child and the strong probability that another would be born, and that therefore, by said change in the status of the family, the alleged will had been revoked impliedly and by operation of law.

Apparently there was attached to Robinson's will and introduced in evidence a letter written by him on July 19, 1933, addressed to his attorney, Harry E. Karr, Esq., and reading as follows:
Regarding my Will, in view of my having another heir, it should be changed somewhat. The name of that lady is 'Sarah Riley'.

'I also wish to eliminate that part of my will in which I make my sister's children beneficiaries. Instead, I wish the trusteeship dissolved and the money turned over to each of my children at the age of thirty-five. I, however, wish to continue the trusteeship for my wife.'

In passing, it is difficult to reconcile the admission in evidence of the letter with the repeated statements by the Court that parol evidence is not admissible to effect a change in a will. At most, the letter shows an intention by Robinson to change his will but such an intention should not have any effect unless it is executed in conformity with the requirements of the Wills Act.

From the action of the Orphans' Court of Harford County in refusing to admit the will to probate, Mr. Karr, as the Executor named therein and as guardian of the daughters by the first marriage, appealed. The appellate court frankly recognized the sole question to be "whether the subsequent birth of a child alone without a subsequent marriage was sufficient to revoke the will." In deciding in the affirmative, the Court, speaking through Judge Pattison, quoted from Baldwin v. Spriggs and reviewed the theories upon which the doctrine announced in that case rested. The opinion laid particular stress on the point that the ground upon which Lord Kenyon placed the rule was that there was "a tacit condition annexed to the will when made that it should not take effect if there should be a total change in the situation of the testator's family." The relative rights of the widow and of the child born subsequent to the execution of the will were considered and emphasis laid upon the fact that the widow's rights at common law had been greatly enlarged and extended by statute so that now she might take as an heir of her husband as well as contract with her husband at the time of marriage for the payment of an additional amount. On the other hand, it was stated a child for whom no provision had been made in the will was neither in a position to contract with his parent nor did the
law make any provision for him in that situation, and should such child receive nothing from his parent's estate, the child "is deprived of the moral obligation due him from the parent to provide for him upon the parent's death."

It seemed an illogical and unreasonable construction to the Court "to hold under the circumstances that the wrong done to the subsequently born child cannot be righted unless it be shown that the marriage of the parents was subsequent to the will, a fact of little or no import as affecting the rights of the wife or mother. . . ."23

In support of this conclusion Judge Pattison referred to the case of Johnston v. Johnston24 (decided by the Ecclesiastical Court in 1817) as holding that a will may be revoked by the birth of a child alone without the concurrence of a subsequent marriage. Then the opinion, after referring to the fact that although it was generally held that marriage and birth of a child subsequent to the execution of a will are sufficient to revoke the will by implication, subject to certain exceptions, noted that the authorities were not in accord whether the concurrence of both of such facts is essential. "In most of the states, statutes have been passed relative thereto. In this state no such statute has been passed, nor has there been any case before this Court where this question has been raised upon facts similar to those in this case . . . and hence we are at liberty to follow either line of decisions, and, as those holding that the concurrence of the facts named are not essential appear to us to be most logical, we will hold that the will, in this case, was impliedly revoked."25

With due deference to the learned Judge, it seems that he overlooked some very significant facts relative to the Johnston case from which he quoted at length and that he ignored entirely subsequent decisions and statutory enactments in England.

Just two years prior to the Johnston decision the Court of the King's Bench had decided that the birth of a post-

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23 Karr v. Robinson, supra note 1, 380, 381.
24 1 Phillim. 447 (1817).
25 Karr v. Robinson, supra note 1, 382, 383.
humorous child alone did not revoke a previously executed will when the pregnancy of the wife was unknown to her or the testator at the time of his death.° Lord Ellenborough, C. J., speaking for the King’s Bench, said, in part:

"The argument seems to be, that because the testator, had he known his situation ought to have revoked his will, therefore the law will impliedly revoke it. But if it is to be understood that every will is made upon a tacit condition that it shall stand revoked whenever the testator by the circumstance of the birth of a child becomes morally bound to provide for it, I do not see why the birth of any one of a numerous succession of children would not equally work a revocation. But where are we to stop? Is the rule to vary with every change which constitutes a new situation giving rise to new moral duties on the part of the parent? Marriage, indeed, and the having of children, where both these circumstances have occurred, has been deemed a presumptive revocation, but it has not been shown that either of them singly is sufficient." (Italics supplied.)

In the Johnston case the testator executed his will in Jamaica on July 21, 1793. At the time, he was married, had one girl and one boy and expected additional issue. By his will he left 10,000 pounds to his daughter, a like sum to any child, or if more than one, to each child, of which his wife was then ensient, and the residue of his estate to his son. His wife was apparently adequately taken care of by reason of her ownership of valuable real estate. The testator died suddenly from apoplexy in England on July 31, 1815, leaving surviving him the son and daughter living at the time the will was made and four additional children born subsequent thereto, one of whom had been born shortly after the execution of the will and was therefore provided for in it. Although the will of July 21, 1793, was found among the testator’s effects in Jamaica, among his papers in England there was found a sketch of a will in his handwriting, undated and unsigned but apparently written after July 6, 1814, in which paper he in-

° Doe ex dem White v. Barford, 4 M. & S. 10 (1815).
dictated an intention to provide for all of his children on a more or less equal basis.

The three youngest children contended, through their guardian, that their father died intestate. Counsel in support of the will cited *White v. Barford* but the ecclesiastical court found that the will was revoked "by subsequent birth of other children left unprovided for, aided by other circumstances concurring clearly to show that it was not the intention of the testator that the will should operate." These other circumstances were: the sketch of a will indicating that the testator intended to make a new will; his equal fondness for all of his children and his intention to treat them all alike; the old will was dated twenty-two years before and was found in Jamaica so he could not have physically destroyed it while in England; his sudden death as a result of a stroke of apoplexy; statements made to his wife intimating that he intended to execute a new will and that he was satisfied with the distribution made by law in cases of intestacy.

Sir John Nicholl, speaking for the Court, declared that it was settled law (1) that implied revocation was not within the Statute of Frauds; (2) that marriage and birth together amount to implied revocation; (3) that marriage alone does not; (4) *that birth alone does not.* (Italics supplied.) The question, therefore, was "whether subsequent birth accompanied by circumstances as in this case and leaving no doubt as to the testator's intention raised an implication of revocation." He called attention to the fact that although under the civil law birth alone revoked a pre-existing will, under the English decisions this fact standing unaccompanied by other circumstances did not amount to a revocation. Thus, Sir John agreed with the decision in *White v. Barford* because in that case he said there was no evidence of an intention of the testator to revoke his will, for neither he nor his wife knew that she was pregnant and "therefore the husband could not in effect have intended to revoke and the will could only be

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*2* Ibid.
held to be revoked by fiction of law." But the Court, in *White v. Barford*, did not say, contended Sir John, "that no possible combination of circumstances accompanying subsequent birth of children cannot amount to implied revocation unless marriage be one of the concurrent circumstances." He therefore concluded "under all the circumstances in this (*Johnston*) case taking the subsequent birth of issue as the essential basis of the proof and accompanied as it is by the other concurrent circumstances, I am of the opinion that the intention of the testator is plain and without contradiction and that, therefore, I am warranted in law and justice to pronounce against this will upon the ground that it has been revoked." 28

It must be remembered that at the time Sir John was speaking, the administration of the personal property of a decedent was under the jurisdiction of the ecclesiastical courts and that these courts were not governed by the same rules of evidence in force in the law courts, and that the former, according to Sir John, would always receive parol evidence upon questions of factum and revocation and that the declarations of the testator were received as corroborative evidence of his intent.

It is submitted, therefore, that the *Johnston* case does not support the conclusion reached in *Karr v. Robinson*. If it be contended that there were other circumstances in the *Robinson* case, to-wit, the letter addressed to Mr. Karr, to bring it within the scope of the *Johnston* case, the Court of Appeals, although it referred to the letter, laid no emphasis upon it and, as heretofore stated, declared the sole question to be "whether the subsequent birth of a child alone without a subsequent marriage was sufficient to revoke the will."

Furthermore, the practice of the ecclesiastical courts in permitting parol evidence to prove the testator's intention in variance with his validly executed will was never adopted by the common law courts. Thus *Marston v. Roe ex dem*

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28 Supra note 21, 1 Phill. 447, 494-6.
Fox and Halton decided by fourteen out of the fifteen judges of the three Courts of Westminster Hall, on writs of error from the Court of Queen's Bench, refused to admit evidence of the testator's intention that his will should not be revoked to rebut the presumption of law that revocation has taken place by marriage and birth of a child. Tindal, C. J., said:

"And we all concur in the opinion that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and consequently that no such evidence is admissible. The plaintiff in error, in support of the proposition for which he contends, has relied on the authority of various decisions of cases as well in the Ecclesiastical Courts as in the Courts of Common Law. With respect to the former we cannot but entertain considerable doubt whether their authority can be held to apply to the present question. For, whilst we are entirely convinced of the importance of uniformity of decision between the Courts of ecclesiastical and of common law jurisdiction, where the same state of facts is under investigation, or the same principle of law is under discussion in each; and entertaining, as we do, at the same time, the highest respect for the learning and ability of those by whom justice is administered in the Ecclesiastical Courts; we cannot forget that in the question now before us we have to deal with the provisions of a statute with which the questions ordinarily coming before them are wholly unencumbered. The question now before us relates to the revocation or non-revocation of a will devising real property; it is a question whether such revocation shall be allowed to depend upon evidence of intention, that is, upon evidence of which parol declarations of the testator may confessedly form a part; whilst the Statute of Frauds has anxiously and carefully excluded evidence of that nature, with respect both to the original making and the revoking of wills of land. The Ecclesiastical Courts, on the other hand, are concerned in the granting of probate of wills and testamentary papers, relating to personality only, in which cases no statutory enactment has excluded parol evidence of the intention of the tes-

8 Ad. & E. 14 (1838).
tator as to what shall or shall not be a testamentary paper, or what shall or shall not amount to a revocation or republication of a will. On the contrary, the evidence bearing on those points is generally mixed up with declarations of the party, and frequently consists of such declarations alone. The decisions therefore in the Ecclesiastical Courts, referred to by the counsel for the plaintiff in error, may be sound decisions with respect to the subject-matter to which they relate, and may yet furnish no authority on the case now in judgment before us. And, if that question is to be decided, as we think it is, by the weight of the authorities to be found in the Courts of Common Law, the balance preponderates greatly in favor of the proposition that no evidence of intention is to be admitted to rebut the presumption of law that a will is revoked by subsequent marriage and the birth of a child."

In this case John Fox made a will on January 17, 1835, devising certain lands to Anne Bakewell for life or so long as she remained sole and unmarried, and after her decease or marriage, to William Marston. Fox was contemplating marrying Anne at the time and did, in fact, marry her on February 21, 1835. On May 4 he was taken ill and died in two hours. A child was born in October, 1835, the only son and heir of John Fox. Marston claimed the lands as devisee under the will and in the ejectment proceedings brought against him, contended that the will had not been revoked by subsequent marriage and birth of issue because of certain declarations Fox had made after his marriage to the effect that he intended that the will should stand. The Court of Exchequer Chambers affirmed the judgment of the Queen's Bench that this evidence should not be admitted and held the will to have been revoked.

In Israell v. Rodon, the Privy Council on appeal from the Court of Ordinary in Jamaica, held that the will of Henry Rodon was revoked by his subsequent marriage and birth of child notwithstanding that he had previously and in contemplation of marriage executed a settlement wherein he had made provision for his wife and the children.

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30 Ibid, 55-56.
31 2 Moore P. C. 51 (1839).
of such marriage. Sir Herbert Jenner, in writing the opin-
ion, did not refer to the Johnston case and was undoubtedly
influenced by Marston v. Roe. He did not rest his opinion
entirely on the latter decision, but referred to the practice
of the ecclesiastical courts and considered other facts such
as the remarriage of the surviving wife of the testator, the
execution of the will in England and the death of the tes-
tator in Jamaica and the failure of the marriage settlement
to make adequate provision for any children.

The Johnston case had, however, been cited by the Privy
Council in Castle v. Torre\(^2\) wherein a paper in the testa-
tor’s handwriting dated four months prior to his death
but lacking the essential requisites of a valid will, was nev-

ertheless admitted to probate as a second codicil by the
Ecclesiastical Court, as authority for the proposition that
a paper of the testator not valid as a will could not be
admitted to probate unless it “be shown that the testator
adhered to the intention expressed in the paper but was
prevented from finishing it.”

In an effort to put an end to the confusion existing by
reason of the conflicting opinions in the various courts of
the realm, Parliament in 1837 passed the Wills Act,\(^3\) where-
in it was definitely provided by Section XVIII “That every
Will made by a man or a woman shall be revoked by his
or her marriage (except a will made in exercise of a power
of appointment . . . .),” and by Section XIX, “That no
Will shall be revoked by any presumption of Intention on
the ground of an Alteration in Circumstances.” By Sec-


**Footnotes:**

\(^2\) 2 Moore P. C. 133 (1837).
\(^3\) 7 Wm. IV and 1 Vict. cap. 26.
\(^4\) 1 Sw. & Tr. 34 (1858).
testator had executed his will in March, 1828, devising his real estate to his intended wife, Elizabeth, for life and after her death to all of his children by his intended wife living at the time of his death or born in due time afterward. His personalty he bequeathed to his intended wife absolutely. He married Elizabeth apparently prior to the enactment of the Wills Act and died leaving her and four children of the marriage surviving. Sir C. Carswell held on the authority of *Marston v. Roe* and *Israell v. Rodon* that the will had been revoked.

The *Cadywold* case has been much criticized because it ignored entirely the statement of the Court of Exchequer in *Marston v. Roe* that if provision were made in the will for the wife and after-born children, it should not be revoked. And although the case was decided without reference to the Wills Act of 1837, nevertheless, for some unaccountable reason, it seems to have been regarded as fixing the law under the Wills Act until the law was modified in 1925 by the Law of Property Act which provides:

> "A will expressed to be made in contemplation of marriage shall, notwithstanding anything in section eighteen of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnization of the marriage contemplated."

In view of the failure of the English common law courts to follow the decision in the *Johnston* case and its virtual repudiation by the Act of Parliament in 1837, it seems that it should not at this late date be considered of much persuasive force by our courts.

No American cases are cited in support of the opinion in *Karr v. Robinson* although the learned judge refers to the fact that there is a split in the authorities. He ob-

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35 Supra note 29.
36 Supra note 31.
37 15 Geo. V., cap. 20, Sec. 177.
38 It seems, however, that there is very little American authority, outside of the statutes, which holds that birth alone amounts to a revocation. See Rood, Treatise on the Law of Wills, Sec. 381; 68 Corpus Juris 840, tit. Wills, Sec. 540.
serves that in most of the states statutes have been passed relative to the rights of after-born children. It has been suggested by another writer that the opinion was influenced by the trend of legislation in other states.

About seventeen years ago, Professor E. C. Goddard made the charge that the courts had been guilty of "judicial usurpation resulting in rules of law flatly contradictory to the words of the statutes" when they held that a will was revoked by subsequent marriage and birth of issue. It was argued that while the courts in many instances expressly disclaim any intent of deciding contrary to the Statute of Frauds and contend that the Statute was not intended to affect certain matters before recognized as amounting to a revocation, yet they seem, nevertheless, to have ignored completely the final clause of Section Six of the Statute of Frauds (providing for the revocation of devises) which reads: "... any former law or usage to the contrary notwithstanding."

Whether we agree with Professor Goddard's criticism or not, it is a fact that Baldwin v. Spriggs is regarded as a leading case in line with the weight of authority and is frequently quoted as supporting the proposition that marriage and birth of issue, both concurring, revoke a will previously made. It is possible that Karr v. Robinson may gain similar eminence. On the other hand, the latter opinion leaves unanswered many questions which are suggested by it.

1. Does birth of child revoke a will of a mother as well as that of a father if such birth occurs subsequent to the execution of the will?

2. Does the exception to the rule announced in Baldwin v. Spriggs still apply, namely, that a will, if it provides for after-born children, will not be revoked by such birth?

3. If the exception still applies, what amounts to making provision for after-born children? Suppose $5 is left

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Supra note 9.
for each after-born child? Is this sufficient? If not, how much has to be left to each after-born child?  

4. Does the birth of an illegitimate child revoke the will of his mother and also that of the putative father?  

5. If a child is adopted subsequent to the execution of a will, does the adoption have the same effect as birth?  

6. Would the death of the after-born or adopted child revoke the revocation and revive the old will? Would it make any difference whether such deceased child left issue or spouse surviving?  

7. If the birth of a child revokes the parent's will, should not the Orphan's Court make inquiry into the facts in each case and declare a revocation regardless of whether a caveat is filed on behalf of the after-born child?  

8. Many a husband has executed a will leaving all of his estate to his wife. The birth of issue has in no way changed his wish as expressed in the will. He has full confidence that his wife will adequately provide for the children and does not desire that separate estates be set up for them with the resulting expense and annoyance of guardianship proceedings or the like. Does not Karr v. Robinson require that such a testator execute a new will if he wishes to die testate?  

Many other questions may occur to the reader. This is particularly so in view of the intimation by Chief Judge Bond in a case following shortly after Karr v. Robinson, that the Court recognizes that revocation may take place by reason of changes in the testator's domestic relations. The result is that confusion exists where there should be certainty. To provide for a more definite standard for the guidance of Orphan's Courts, attorneys, and testators, it is recommended that the Legislature seriously consider the enactment of a statute relating to the rights of children

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4 See In re Mitchell’s Estate, 144 N. Y. Misc. 262, 258 N. Y. S. 440 (1932).  
45 In matter of Horst, 264 N. Y. 236, 190 N. E. 475 (1934).  
46 In matter of Horst, 264 N. Y. 236, 190 N. E. 475 (1934).  
47 Under the practice in the Orphans' Court for the County of Philadelphia, Pennsylvania, the petition filed by the executor for the probate of a will must contain information stating whether any children were born since the execution of the will.  
born or adopted after the execution of the parent's last will and testament. Undoubtedly, the courts would welcome such legislation.

The Committee on Land Laws and Inheritance Laws of the Maryland State Bar Association is considering the proposal of a statute along these lines. In their most recent report, Transactions of the Maryland State Bar Association, 1936, Volume 41, page 41, they say: "Among other subjects, the Commission (sic) is considering, and may propose bills to provide: (c) To provide that the birth of an after-born child or children alone shall not revoke a will drawn previous to the birth of said child (and after marriage), but that as to such child or children, the parent shall be deemed to have died intestate, and such child or children shall be entitled to a proportionate share of the estate of the parent."

It has been stated that in all but two of the American states birth of issue alone without marriage will work a partial or total intestacy for the benefit of neglected issue, (1935) 35 Col. L. Rev. 787.

In connection with the possibility of statutory revision of the Maryland rule, it might be well to consider the existing provisions of the statutes of representative Eastern states. The Massachusetts statute, Annotated Laws, Vol. VI, Ch. 191, Secs. 8, 9, in effect provides a total intestacy where marriage follows the execution of the will, unless intention otherwise is indicated. In New York, McKinney's Consolidated Laws, Annotated, Book 13, Decedent Estate Law, Secs. 26, 28, 35, an after-born child neither provided for nor mentioned takes an intestate share. In New Jersey, Compiled Statutes, Volume 4, Wills, Secs. 20, 21, an after-born child takes an intestate share, but if there were no issue living at the time of the execution of the will, the subsequent birth works a total revocation unless there were provision for or mention of possible subsequent issue. In Virginia, Code, 1930, Wills, Secs. 5242, 5243, apparently subsequent birth of child works a partial intestacy, but if such child die before reaching twenty-one, his share reverts to the original beneficiaries under the will. The comprehensive Pennsylvania statute, Purdon's Pennsylvania Statutes Annotated, Title 20, Sec. 273, provides a partial intestacy in favor of a subsequently married spouse or subsequently born or adopted children, if such spouse or children survive the testator. This latter statute is worthy of careful consideration in the event that legislative change is to be undertaken in Maryland.