

THE WILLS ACT, 1873.

sup. This defect in the old statute is cured by the new Act, which renders void a devise or legacy to the wife or husband of the attesting witness.

We now approach the important subject of the revocation of wills. The provisions of the statute on this subject are not absolutely new to our law; for, as before observed, the Act, 32 Vict., c. 8, contains the chief provisions of the English statute, 1 Vict., c. 26, regarding revocation. In one important particular, however, it is conceived that our statute, 32 Vict., c. 8, is defective. It contains no provision regarding obliterations, interlineations, or other alterations which form the subject of the 21st section of the English Act. The omission of such a provision would, it seems, lead to the unfortunate result that whilst a will cannot be totally revoked except by the means provided by the Act, it may be partially revoked by obliteration in the same manner as before the Act was passed. Obliteration was permitted by the Statute of Frauds as a means of either total or partial revocation of a will of real estate. The 20th section of the English Act, 1 Vict., c. 26, from which the 5th section of 32 Vict., c. 8, was adopted, was held in England to apply to total and not to partial revocation, and the words "otherwise destroying," which are substituted in that section for the words "cancelling" and "obliterating," which occur in the Statute of Frauds, were held not to comprise cancellation or obliteration. (See 1 Williams Exors. 139, and cases cited in notes.) Assuming, as we must, that the same construction would be placed by our courts on the words of the 5th section of 32 Vict., c. 8, it follows that that section does not apply to partial revocations. Hence it must appear that though a will cannot be wholly revoked except in the manner prescribed by 32 Vict., c. 8, it may be partially revoked by obliteration to the same extent

as before the passing of that Act. As the new Act applies only to wills *made* after the 31st December, 1873, the anomaly referred to will continue after the new Act comes into force.

The new statute provides that marriage *alone* shall be a revocation of a will made before marriage. Under the old law marriage was always a revocation of the will of a woman, but marriage *and the birth of issue* were necessary to constitute a revocation of the will of a man made before marriage. And, in certain cases, where provision was made by a man for his issue, by settlement or otherwise, even the concurrence of the two events of marriage and the birth of issue did not operate as a revocation of his will. The wording of the new statute, however, respecting the revoking effect of marriage is express and positive. A will made in exercise of a power is excepted, under certain circumstances mentioned in the Act, from the operation of marriage as a means of revocation.

Marriage is the only alteration in circumstances to which a revoking effect is given, section 16 providing that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

Reference has been made to the words "otherwise destroying," which were substituted in the 20th section of the English Act for the words "cancelling or obliterating," contained in the Statute of Frauds. These words also occur in the 17th section of the new Act. They have the effect, as has been before remarked, of depriving "cancellation" and "obliteration" of the efficacy as a means of *total* revocation which they formerly possessed. The destruction implied in the words "otherwise destroying" is a destruction effecting the same physical results as burning or tearing. (See remarks of the Court in *Stephens v. Taprell*, 2 Curt. 458), not a mere cancel-