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WILLS-DISCOVERY OF WILL FOLLOWING ADJUDICATION OF INTESTACY-RIGHTS OF INTERVENING PURCHASERS

Patrick J. Ledwidge
University of Michigan Law School

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WILLS—DISCOVERY OF WILL FOLLOWING ADJUDICATION OF INTESTACY—RIGHTS OF INTERVENING PURCHASERS—At the time of his death in 1945, decedent was the owner of the real estate in question. His estate was administered in the belief that he had died intestate, and the administrator was discharged in August 1946. Thereafter, the property was conveyed by decedent's heirs to buyer, and by buyer in February 1947, to the defendant, a bona fide purchaser. Subsequently, decedent's will was discovered and admitted to probate in December 1947. By the terms of the will, the plaintiff was entitled to a one-half interest in the land. Plaintiff's complaint, asking partition of the land, was dismissed by the circuit court. On appeal to the Supreme Court of Illinois, *held*, affirmed. Title obtained by bona fide purchase from the heir after a judicial determination of intestacy is immune from attack by the devisee under a will later probated. *Eckland v. Jankowski*, 407 Ill. 263, 95 N.E. (2d) 342 (1950).

In the absence of specific statute, there is no time limit after which a will may not be admitted to probate.¹ Moreover, it is usually held that the probate of a will is not barred by a prior probate of another will or a prior adjudication of intestacy.² The courts are agreed that the usual effect of the probate of a will is to vest title in the devisee from the time of testator's death.³ The problem of the principal case is whether such probate and relation back of title is effective against an intervening bona fide purchaser from the heir. Where there is no statute specifically protecting the purchaser,⁴ and no grounds for

¹ *Haddock v. Boston and Me. Ry. Co.*, 146 Mass. 155, 15 N.E. 495 (1888); 2 PAGE, WILLS, 3d ed., §584 (1941); 57 AM. JUR., WILLS §786 (1948). A collection of statutes prohibiting the probate of a will after a specified time following testator's death is found in SIMMS AND BASYE, PROBLEMS IN PROBATE LAW 275 (1946). See Ky. Rev. Stat. (1944) §395.010.

² *Walden v. Mahnks*, 178 Ga. 825, 174 S.E. 538 (1934). The cases determining whether prior adjudication of intestacy is a bar to subsequent probate of decedent's will are collected in 95 A.L.R. 1107 (1935). The cases determining whether prior probate of a will is a bar to subsequent probate of another will are collected in 107 A.L.R. 249 (1937).

³ *Murphree v. Griffis*, 215 Ala. 98, 109 S. 746 (1926); *Reid's Admr. v. Benge*, 112 Ky. 810, 66 S.W. 997 (1902).

⁴ Statutes providing that the title of a bona fide purchaser from the heir is not affected by a devise of property made by the heir's ancestor, unless the will is offered for probate within a specified time, are not uncommon. *Fox v. Fee*, 167 N.Y. 44, 60 N.E. 281 (1901); *Cooley v. Lee*, 170 N.C. 18, 86 S.E. 720 (1915).

invoking estoppel or laches against the devisee,⁵ it is generally held that purchase from the apparent heir does not confer title immune from attack by the devisee under a will later probated.⁶ However, in the few cases in which the purchase from the heir has been preceded by an adjudication of intestacy by a court having jurisdiction, the courts have protected a bona fide purchaser.⁷ The principal case is within this class. Where there has been such prior adjudication, the case does not differ in principle from cases involving bona fide purchase from an executor or administrator whose letters testamentary or letters of administration are later revoked, or those involving bona fide purchase from a devisee under a will, the probate of which is later annulled. In these analogous situations, while a few courts have reached an opposite result, the purchaser has usually been protected.⁸ The rationale of these decisions and of the principal case is sound; for although probate decrees are in many instances subject to revocation, they are at most voidable and never void, where the court has jurisdiction.⁹ Moreover, the rule adopted in the principal case is well supported by considerations of policy in that the alternative involves insecurity of titles, practical restraints on alienation, and a defective link in the recording system. While a complete resolution of the policy conflict appears impossible, these considerations outweigh the objections that protection of the purchaser is hard on the devisee and against the testator's express wishes, and there is some authority that the devisee can be recompensed from the proceeds of the sale in the hands of the heir.¹⁰

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⁵ Protection on one or both of these grounds was given the purchaser in *Stelges v. Simmons*, 170 N.C. 42, 86 S.E. 801 (1915); *Hayes v. Simmons*, 136 Okla. 206, 277 P. 213 (1923).

⁶ *Reid's Admr. v. Benge*, supra note 3; 36 MICH. L. REV. 120 (1937); ATKINSON, HANDBOOK OF THE LAW OF WILLS §184 (1937). A contrary result appears to have been reached in *Wright v. Eakin*, 151 Tenn. 681, 270 S.W. 992 (1925).

⁷ *Simpson v. Cornish*, 196 Wis. 125, 218 N.W. 193 (1928); *Cassem v. Prindle*, 258 Ill. 11, 101 N.E. 241 (1913); 2 PAGE, WILLS, 3d ed., §584 (1941). The adjudication of intestacy may be made expressly or may be implied from the decree of distribution. 36 MICH. L. REV. 120 (1935); 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., §562 (1923).

⁸ Decisions granting protection to the purchaser: *Thompson v. Samson*, 64 Cal. 330, 30 P. 980 (1883); *Newbern v. Leigh*, 184 N.C. 166, 113 S.E. 674 (1922); *Reeves v. Hager*, 101 Tenn. 712, 50 S.W. 760 (1899); *Schluter v. Bowery Savings Bank*, 117 N.Y. 125, 22 N.E. 572 (1889); *Hewson v. Shelley*, [1914] 2 Ch. 13. Decisions refusing such protection: *Byrne v. Byrne*, 289 Mo. 109, 233 S.W. 461 (1921); *Fallon v. Chidester*, 46 Iowa 588 (1877).

⁹ *Simpson v. Cornish*, supra note 7; 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, 3d ed., §274 (1923); *Thompson v. Samson*, supra note 8. The relative conclusiveness of probate decrees gives rise to many problems, the adequate solution of which would, in many jurisdictions, require comprehensive statutory changes. Suggestions for such changes are found in the Model Probate Code (1946). The code is included in SIMES AND BASYE, PROBLEMS IN PROBATE LAW (1946).

¹⁰ ATKINSON, HANDBOOK OF THE LAW OF WILLS §184 (1937); *Thompson v. Samson*, supra note 8 (dictum); *In re Walker's Estate*, 160 Cal. 547, 117 P. 510 (1911) (dictum).