Michigan Law Review

Volume 36 | Issue 1

1937

WILLS - EXECUTORS AND ADMINISTRATORS -TITLES - EFFECT OF THE REVOCATION OF PROBATE DECREES ON THE TITLE TO REALTY ACQUIRED BY BONA FIDE PURCHASE FROM HEIR OR DEVISEE

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WILLS — EXECUTORS AND ADMINISTRATORS — TITLES — EFFECT OF THE REVOCATION OF PROBATE DECREES ON THE TITLE TO REALTY ACQUIRED BY BONA FIDE PURCHASE FROM HEIR OR DEVISEE — There are probably few chains of title to realty that do not contain at

least one link consisting of a conveyance from one who claimed as heir or devisee of a decedent. The ability of the grantor to convey resulted from the fact that he was heir of an intestate or was a devisee under the last will of his testator. Sometimes it has occurred that the grantee has purchased for value and with no knowledge or suspicion of an impending attack on his grantor's title, only to have it subsequently determined in a judicial proceeding that his grantor's ancestor had left a will, that his grantor was not heir, claimed under an invalid will, or that there was a later testamentary instrument. So the question arose, what title could the bona fide purchaser for value claim as against the heir or devisee normally entitled to the land?

This comment will consider that question,[1] dividing the discussion into the following sections: (1) the situation in which the purchaser's title has been protected; (2) the legal theory on which such protection may be explained; (3) the considerations of policy underlying the grant of protection. The following fact situations will appear in the course of the comment: (1) purchase from an heir whose ancestor's estate had not gone through administration, followed by the probate of a will devising the realty; (2) same situation except that the ancestor's estate had been administered prior to the purchase; (3) purchase from an heir after administration proceedings, followed by a successful attack on the grantor's heirship; (4) purchase from a devisee under a probated will, followed by a vacation of probate; (5) purchase from a devisee under a probated will, followed by the probate of a later will; (6) purchase from the devisee followed by a will contest. This list is not intended to be inclusive of all possible situations.[2]

The following qualifications should be noticed. The study will be confined to cases involving domestic realty. It will, furthermore, be assumed that the probate of a will, until successfully attacked in an appropriate proceeding instituted for that purpose, is as conclusive with respect to the title to realty as it is in the case of personalty. For while a few jurisdictions, by decision or statute,[3] apparently adhere to the earlier English rule[4] that the validity of the will may at any time

[1] There will be no discussion of purchaser from executor or administrator. The situations are somewhat analogous but present separate problems.

[2] No material is included on the question of estoppel or laches on the part of the claimant under the subsequently probated will. On that topic, see 57 L. R. A. 253 (1903).

[3] Fla. Comp. Gen. Laws (1927), § 5474. But see Cum. Supp. (1934), § 5541 (69). Also Fallon v. Chidester, 46 Iowa 588 (1877); Velsor v. Freeman, 118 Misc. 276, 194 N. Y. S. 191 (1922).

[4] This rule was changed by statute making probate in solemn form conclusive as to realty. 20 & 21 Vict., c. 77, § 62 (1857). American jurisdictions apparently make no distinction at this point between probate in solemn and in common form.

be put in issue in an action involving the title to the devised realty, it is believed that the rule is no longer in force in most jurisdictions.[5] Further, all questions relating to purchase pending a normal appeal are excluded, so that no doctrine of *lis pendens* will be involved except as may appear in the discussion of other proceedings.

Before proceeding further, it would be well to notice the variety of statutes offering protection to the purchaser. In the absence of express statute there is no time limit for the probate of a will, since the normal statute of limitations is held to be inapplicable.[6] In six states, statutes set absolute time limits, ranging from three to twenty years, for the probate of a will.[7] And in sixteen, the probate of a will is of no effect against bona fide purchasers from heirs, and occasionally devisees, unless filed for probate within a period ranging from the final decree of distribution to six years.[8] An exception is frequently made in the case of infant devisees. The statutes setting a limited period after probate for the contest of a will have been construed to constitute statutes of limitation on probate.[9] These cases hold that the probate of a second inconsistent will involves a "contest" of the first and must be filed for probate within the contest period. Contest statutes have been enacted in at least thirty states.[10]

I.

Two cognate cardinal principles may be advanced at the outset: that, in the absence of estoppel or laches on the part of the heir or devisee claiming under proceedings instituted subsequent to the pur-

[5] ATKINSON, WILLS 429 (1937). Cases collected in 68 C. J. 1229, note 97 (1934).

[6] 57 L. R. A. 253 at 254 (1903) (cases collected).

[7] Alabama, Connecticut, Maine, North Dakota, Ohio, and Texas. It should be observed, with reference to this and succeeding notes, that these statutes contain innumerable individual differences and must be individually examined to be thoroughly understood.

[8] California, Colorado, Florida, Indiana, Kansas, Massachusetts, Montana, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Virginia, and West Virginia.

[9] Watson v. Turner, 89 Ala. 220 (1889); Hardy v. Hardy's Heirs, 26 Ala. 524 (1855); Bartlett v. Manor, 146 Ind. 621, 45 N. E. 1060 (1896); Burns v. Travis, 117 Ind. 44, 18 N. E. 45 (1888); Sebik's Estate, 300 Pa. 45, 150 A. 101 (1930); State ex rel. Wood v. Superior Court, 76 Wash. 27, 135 P. 494 (1913); Davis v. Seavey, 95 Wash. 57, 163 P. 35 (1917). *Contra*: Campbell v. Logan, 2 Bradf. (N. Y. Surr.) 90 (1852); Estate of Moore, 180 Cal. 570, 182 P. 285 (1919) [now enacted into statute, Probate Code (1931), § 385].

[10] Alabama, Arizona, California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.

chase, the purchaser cannot expect to be protected unless he acquired the realty following a proceeding subjecting the estate of his grantor's decedent to administration.[11] But the bona fide purchaser who acquires the property in reliance on a decree of the court which expressly or impliedly adjudicates the fact of heirship, intestacy or testacy will be protected from the effect of a subsequent contest of heirship, will probate or will contest.

The first group of cases illustrating these points involves a purchase from the heir[12] of a supposed intestate followed by the probate of a will. The reported cases have divided fairly evenly on the question of protecting the purchaser's title.[13] Those refusing to do so have reached their decision on the basis of the doctrine which causes the title of the devisee to relate back to testator's death upon probate of the will.[14] But in none of the cases so holding is there any evidence that the estate of the decedent had gone through administration. The importance of a prior administration is made apparent by the case of *Simpson v. Cornish.*[15] Following an express adjudication of intestacy and a final decree of distribution specifically allotting realty, the heirs conveyed to good faith purchasers. The court said in protecting the vendees from the effect of a subsequent probate of decedent's will:[16]

> "the distinction is made clear between acts of a supposed heir or a supposed devisee and one whose rights have been established either by official acts of administration or a decree of distribution. . . . the title . . . acquired as *bona fide* purchasers is founded . . . upon the order or decree of intestacy [and] upon the final decree of distribution. . . . It therefore follows that . . . [the purchasers] are entitled to the protection of this court. . . ."

Prior administration is given significance because of the adjudica-

[11] Obviously the rule must be qualified under some circumstances if a statute provides for the determination of heirship in a separate proceeding.

[12] In most jurisdictions the devisee cannot make out title to the realty until the will has been probated. 1 PAGE, WILLS, § 525 (1926). Thus it is not surprising that no cases have been found in which property was conveyed without prior probate of the will.

[13] Pro devisee: Cooley v. Lee, 170 N. C. 18, 86 S. E. 720 (1915); Reid's Admr. v. Benge, 112 Ky. 810, 86 S. W. 997 (1902); Cole v. Shelton, 169 Ark. 695, 276 S. W. 993 (1925); and see Bowen v. Allen, 113 Ill. 53 (1885). Pro purchaser: Simpson v. Cornish, 196 Wis. 125, 218 N. W. 193 (1928); Wright v. Eakin, 151 Tenn. 681, 270 S. E. 992 (1924) (generally cited to stand for the proposition that purchaser will be protected even in the absence of administration; but is probably based on application of the doctrine of laches). And see Stelges v. Simmons, 170 N. C. 42, 86 S. E. 801 (1915).

[14] See especially Reid's Admr. v. Benge, 112 Ky. 810, 66 S. W. 997 (1902).

[15] 196 Wis. 125, 218 N. W. 193 (1928).

[16] Ibid. at 153-154. In an action brought by devisees after probate to remove cloud from title.

tion of intestacy upon which the purchaser is assumed to have relied. It may be made expressly,[17] may be implied from the appointment of an administrator,[18] or from the making of the final decree or order of distribution.[19] The purchaser may well be held to have relied upon the final decree of distribution even though it does not undertake to distribute or allocate the realty.[20] It is the adjudication of intestacy, relied on by the purchaser, which is necessarily disputed by the devisee claiming the property under the decedent's will.

The vendee's title, acquired following an adjudication of heirship, will not be affected by an attack upon his grantor's heirship in the form of a motion to vacate,[21] nor can it be questioned in an ejectment action brought by the true heir.[22] It should be noticed, however, that in a number of jurisdictions, not only is there no statutory provision for the determination of heirship[23] but the final decree makes no distribution or allocation of realty. In that case, if the attack on the purchaser's title involves his vendor's heirship and not the question of intestacy, the fact of an administration can hardly benefit him.[24]

The purchaser from a devisee under a will admitted to probate is protected from the effect of a subsequent revocation of probate resulting from a motion to vacate.[25] It should be immaterial whether the revocation is the result of an action brought solely for that purpose, or comes in the form of a proceeding to probate a later will.[26]

[17] As in Simpson v. Cornish, 196 Wis. 125, 218 N. W. 193 (1928).

[18] Merrill Trust Co. v. Hartford, 104 Me. 566, 72 A. 745 (1908) (dictum); Snyder v. McGill, 265 Pa. 122, 108 A. 410 (1919).

[19] Simpson v. Cornish, 196 Wis. 125, 218 N. W. 193 (1928).

[20] As stated in 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 562 (1923), the final decree adjudicates the right of the next of kin to decedent's property. No such right could exist unless decedent died intestate. Thus, even though the realty is not dealt with, there can be no denial of the fact that the purchaser acquiring the same may do so in reasonable reliance on the finding of intestacy.

[21] St. Paul Gaslight Co. v. Kenny, 97 Minn. 150, 106 N. W. 344 (1906).

[22] Succession of Derigny, 156 La. 142, 100 So. 251 (1924).

[23] While the finding of heirship is normally as conclusive as any other judicial determination, some of the statutes declare the findings to be only prima facie correct. 3 Mich. Comp. Laws (1929), § 15752; Ill. Rev. Stat. (1935), c. 3, ¶ 148. In such case the purchaser could hardly plead reliance.

[24] Since intestate realty passes directly to the heirs, there may be some question as to whether, absent a statute, the probate court has any jurisdiction to "distribute" the reality on final decree or to make any other separate decree determining heirship. Woerner points out the possible jurisdictional defect, but indicates that as a matter of practice some jurisdictions do "distribute" intestate realty and make such findings. 3 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 562a (1923).

[25] See Reeves v. Hager, 101 Tenn. 712, 50 S. W. 760 (1898). Also Foulke v. Zimmerman, 81 U. S. 113 (1871).

[26] However, some jurisdictions do not allow probate of a second will until the probate of the first will has been revoked in a separate proceeding. 2 WOERNER,

In these cases, the adjudication relied on by the vendee and disputed by the heir or the devisee under the later will is that the testamentary instrument first filed for probate is the valid will, or the last will, of the decedent.

Although the statutes governing the admission of wills to probate usually do not specify what facts must be determined, there can be little doubt that the probate decree does adjudicate all the facts going to the validity of the will.[27] There is also authority to the effect that the decree implies a finding that the instrument so admitted was testator's last will.[28] Even if a court were to refuse to hold that the admission of the will to probate implied such findings, it would hardly go so far as to refuse to infer such adjudications from the final order or decree of distribution. For it would be hardly reasonable to conclude that a court had ordered distribution under an instrument which it had not determined to be the last valid will of the decedent.[29]

The final situation to be considered involves the setting aside of the probate of the will under a statutory right of contest. These statutes, which apparently are modified versions of probate in solemn form,[30] establish a contest period, ranging from six months to several years, during which the probate of a will may be questioned. Infants and persons of unsound mind usually are given like periods after removal of their disability. Here the decisions are not so uniform, due to differing interpretations of the procedural aspects of the statutes. The majority of jurisdictions having reported cases protect the vendee who purchased within the contest period, because of his reliance on the probate proceedings; [31] but at least one jurisdiction, Missouri, refuses to

AMERICAN LAW OF ADMINISTRATION, § 227 (1923). See Conzet v. Hibben, 272 Ill. 508, 112 N. E. 305 (1916); Estate of Butts, 173 Mich. 504, 139 N. W. 244 (1915).

[27] 1 PAGE, WILLS, § 622 (1926). Cases collected in 68 C. J. 1230 (1934).

[28] Bowen v. Allen, 113 Ill. 53 (1885); Estate of Parsons, 196 Cal. 294, 237 P. 744 (1925) (dictum); Sutton v. Hancock, 118 Ga. 436, 45 S. E. 504 (1903) (dictum).

[29] See note 20, supra.

[30] Probate in common form required merely formal proof of execution and of the other requisites, made by the executor and the witnesses. There was no publication of notice and no real trial of issues nor adverse testimony. But if challenged by a request for probate in solemn form, the action was inter partes, with a genuine trial. The modern probate and contest substantially coincides with this procedure. See 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, §§ 216, 217 (1923).

[31] Thompson v. Sampson, 64 Cal. 330 (1883); Newbern v. Leigh, 184 N. C. 166, 113 S. E. 674 (1922) [for further facts on this case see In re Hinton's Will, 180 N. C. 206, 104 S. E. 341 (1920)]; Arterburn's Exrs. v. Young, 77 Ky. 509 (1879); Glover v. Coit, 36 Tex. Civ. App. 104, 81 S. W. 136 (1904); Steele v. Renn, 50 Tex. 467 (1878); Jopling v. Caldwell-Degenhardt, (Tex. Civ. App. 1927) 292 S. W. 958.

protect the purchaser, holding that contest is in the nature of an appeal, and applying the doctrine of *lis pendens*.[32] This conflict will be discussed in the following section.

In view of the broad statements in the cited cases to the effect that the titles of persons purchasing from heir or devisee in reliance on probate orders and decrees are not impaired by a subsequent revocation of such orders or decrees, there may be some question as to why such emphasis has been placed upon the adjudication and subsequent dispute of specific facts. The reasoning is as follows. As stated in the cases, the purchaser is protected because of his reliance on the decrees of the court. He is given the right to treat the fact findings made therein as res adjudicata. But this can hardly mean that he is free from all nature of attacks on his title, nor that the rule will prevent attack on the basis of issues not adjudicated in probate. In other words, it is believed that these cases do not mean to distort the doctrine of res adjudicata to the extent of providing a blanket protection for the purchaser's title, but mean only to apply it for his benefit to the facts determined in the proceeding and relied on by him. And so, if the facts upon which the later claimant depends have not been adjudicated and do not dispute the fact findings of the probate court, it cannot be said that there has been any denial of the purchaser's right to rely on the judgment of the court. For example, if the administration of an intestate's property did not involve a determination of heirship, an ejectment action brought by the true heir against the purchaser would not conflict with the doctrine of res adjudicata. Likewise, if the probate of a will decided only that it had been properly executed, there would be no reason to protect the purchaser from the effects of the probate of a later will or of a revocation through contest or motion to vacate on some other grounds.

2.

The courts protecting the purchaser in the various situations have based their decisions on the conclusiveness of the probate orders and decrees relied on. A number of the cases have thrown some additional light on the legal theory pursued, asserting that the orders and decrees were at least voidable until reversed or set aside.[33] The argument of conclusiveness is inadequate, and leaves much to be implied. The question to be answered is this: What is the nature of the subsequent attack on the probate decree? If in the nature of an appeal, may not the

[32] Hughes v. Burriss, 85 Mo. 660 (1885); Hines v. Hines, 243 Mo. 480, 147 S. W. 774 (1912); Byrne v. Byrne, 289 Mo. 109, 233 S. W. 461 (1921) (dictum).

[33] Thompson v. Sampson, 64 Cal. 330 (1883); Glover v. Coit, 36 Tex. Civ. App. 104, 81 S. W. 136 (1904); Reeves v. Hager, 101 Tenn. 712, 50 S. W. 760 (1898).

doctrine of *lis pendens* apply? And if a collateral attack, can we escape the conclusion that, if successful, not only are the original orders void, but titles derived thereunder as well? These questions will be discussed in relation to the statutory will contest, and the conclusions applied to the other forms of attack.

It is clear that the statutory action to contest a will after probate is not a collateral attack but is a form of direct proceedings.[34] There is, however, a decided difference of opinion as to whether or not it is a form of appeal.[35] A considerable line of Missouri cases hold that it is, and refuse to protect the prior purchaser on the ground that he takes *pendente lite*.[36] The Ohio courts have held that while contest possesses some of the characteristics of an appeal,[37] it is not a true appellate proceeding.[38] The Ohio cases pointed out a number of differences. Contest, unlike appeal, is an independent action begun by service of process. Probate is usually in rem while contest is inter partes,[39] so that there is a difference in parties. Further, contest is usually provided for in addition to an appeal and may possibly be brought after that remedy has been pursued unsuccessfully. But the most marked difference distinguishing it from appeal is the fact that the proceeding is entirely *de novo* as to the evidence introduced. It is not a review but involves the original introduction of the contestant's evidence.[40]

This comment suggests that contest is in the nature of a statutory action to vacate judgment on the basis of newly discovered evidence.[41] While the contest statutes do not set up requirements of diligence or after-discovery, such requirements normally could be fulfilled, else the original entrance of the probate decree would have been opposed. Examining the crucial features of the motion or action to vacate, we find authority to the effect that it may be brought by third parties prejudiced by the judgment.[42] While the treatises generally deny the

[34] Dibble v. Winter, 247 Ill. 243, 93 N. E. 145 (1910); Chilcote v. Hoffman, 97 Ohio St. 98, 119 N. E. 364 (1918); Haynes v. Haynes, 33 Ohio St. 598 (1878). And see cases in notes 31, 32 supra.

[35] The following cases hold that contest is not an appeal. Chilcote v. Hoffman, 97 Ohio St. 98, 119 N. E. 364 (1918); Bradford v. Andrews, 20 Ohio St. 208 (1870). And see Glos v. Glos, 341 Ill. 447, 173 N. E. 604 (1930).

[36] See note 32, supra.

[37] Haynes v. Haynes, 33 Ohio St. 598 (1878).

[38] Chilcote v. Hoffman, 97 Ohio St. 98, 119 N. E. 364 (1918); Bradford v. Andrews, 20 Ohio St. 208 (1870).

[39] 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 217 (1923).

[40] In the normal appeal the court merely reviews the findings of the court below. 2 R. C. L. 193 et seq. (1914).

[41] On the requirements for after-discovery and due diligence, see 1 FREEMAN, JUDGMENTS, § 252 (1925); 23 CYC. 929 (1906).

[42] 1 FREEMAN, JUDGMENTS, § 260 (1925); cases collected in 34 C. J. 345, note 73 (1924). But see 23 CYC. 898 (1906); 15 R. C. L. 697 (1917).

authority, absent a statute, of a court to vacate a merely erroneous judgment at a subsequent term, they imply that such practice exists in many jurisdictions.[43] Possibly the most material difference arises from the fact that under many statutes contest is not brought in the probate but in the equity or law court. Normally, only the court entering a judgment may entertain a motion to vacate it.[44] However, there is no apparent reason why rules as to the time and court in which vacation may be effected cannot be varied by the legislature.

If a judgment is merely voidable and not void, the vacation of the judgment will not affect the title of innocent purchasers who bought in reliance thereon.[45] In the normal will contest, the attack is upon the fact findings of the probate court, and not upon its jurisdiction. In such case its decrees should be considered merely erroneous and not void.[46] Thus it would appear that to hold contest to be in the nature of a motion to vacate offers a technically satisfactory explanation for the protection given the purchaser.

The similarity to the action to vacate also appears in the case of the probate of a later will. This resemblance is strikingly emphasized by the fact that in some jurisdictions the probate of a second will is not allowed until the first probate has been revoked in a separate action.[47] These cases very irritatingly do not state by what manner of action revocation is effected. It is more probably in the nature of vacation than collateral attack, for to suggest the latter is to rely on the thoroughly outmoded rule that the proceedings of the probate court are void if the decedent left a later will.[48] It therefore follows that in those jurisdictions not requiring a prior revocation of the first probate,

[43] 1 FREEMAN, JUDGMENTS, § 196 (1925); 23 CYC. 902-904 (1906); 15 R. C. L. 690 (1917).

[44] 1 FREEMAN, JUDGMENTS, § 210 (1925); 23 CYC. 890-891 (1906).

[45] 1 FREEMAN, JUDGMENTS, § 303 (1925); 23 CYC. 973 (1906); 34 C. J. 385 (1924). And see Howard v. Entreken, 24 Kan. 428 (1880); Van Noy v. Jackson, 68 Okla. 44, 171 P. 462 (1918).

[46] See 1 FREEMAN, JUDGMENTS, § 321 et seq. (1925). To the effect that mistake in fact findings will normally not invalidate a judgment, see 15 R. C. L. 862 (1917).

[47] 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 227 (1923); ATKINSON, WILLS 447 (1937); Conzet v. Hibben, 272 Ill. 508, 112 N. E. 305 (1916). For cases not setting up such a requirement, see: Schultz v. Schultz, 51 Va. 358 (1853); Waters v. Stickney, 12 Allen (94 Mass.) 1 (1866); Bowen v. Johnson, 5 R. I. 112 (1858); Vance v. Upson, 64 Tex. 266 (1885). In some of these, probate of the prior will was expressly revoked in the process of the second proceedings, but apparently that action was not essential, as the Schultz case indicates.

[48] On the development of the rule in England, see 1 WILLIAMS, EXECUTORS AND ADMINISTRATORS, 11th ed., 468 et seq. (1921). The rule is clearly not applicable in this country. 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 274 (1923). And see language in Brock's Admr. v. Frank, 51 Ala. 85 at 91 (1874).

the second impliedly operates as a vacation of the first. To further emphasize the resemblance, the writer raises the question as to whether there may be a requirement that, as in the case of vacation because of newly discovered evidence, the second will must have been discovered after the probate of the first.[49]

The analogy is also applicable in the case of the probate of a will following intestate administration.[50] These last two situations avoid at least one of the procedural inconsistencies noted in the case of contest, for the subsequent proceedings will normally be brought in the same court originally administering decedent's estate. And in respect to any possible doubt as to the power of the probate courts to vacate judgment after the expiration of the term,[51] the best answer is that, in most jurisdictions, apparently they do it.[52] It may also be observed that while, in the case of contest, it is at least possible to talk in terms of appellate procedure, here the only alternative to cataloguing these proceedings as being in the nature of motions to vacate, is to take the eminently unsatisfactory position of calling them collateral attacks. In concluding this section the writer admits a suspicion that all these probate proceedings are to a certain extent sui generis, being born of the necessity of handling problems peculiar to probate courts, and not the result of applying the procedural concepts of the common law. However, it should be helpful to be able to explain their operation on the basis of recognized procedures.

3.

The question of policy remains unanswered. The conclusions previously reached can be sustained more readily if based on sound considerations of policy.

The case of the vendee who, in the absence of administration proceedings, purchased from the person allegedly entitled as heir, requires only brief consideration. He relied solely on the representations

[49] For indications of such a possible requirement, note the language employed in ATKINSON, WILLS 557 (1937), and 2 WOERNER, AMERICAN LAW OF ADMINISTRATION 768-769 (1923). But see Waters v. Stickney, 12 Allen (94 Mass.) 1 (1866).

[50] See Zechman's Estate, 26 Pa. Dist. 693 (1916).

[51] Recognizing that probate jurisdiction is peculiarly controlled by individual statutory differences, it may be stated as a general proposition that probate courts have in most jurisdictions the same power to vacate judgment as may be possessed by any other court. See 15 R. C. L. 688 (1917); 1 FREEMAN, JUDGMENTS, § 214 (1925). See note 43, supra, and the accompanying text.

[52] See Glenn v. Mitchell, 71 Colo. 394, 207 P. 84 (1922); Charlebois v. Bourdon, 6 Mont. 373 (1887); Conzet v. Hibben, 272 Ill. 508, 112 N. E. 305 (1916). And at this point the writer indulges in a bit of justifiable circular reasoning by pointing also to the cases in which a second will was probated without prior revocation of the first.

of the individual to the effect that he was heir and that his decedent died intestate. If his reliance was misplaced, there is no apparent reason why such mistaken reliance should operate to prejudice the rights of innocent third parties.

Protection is given to the title of the vendee acquiring subsequent to probate proceedings because of the fear that the opposite conclusion would result in clouds on title derived from heir or devisee, impairment of marketability and sale value, and, in effect, would create restraints on alienation.[53] These fears are voiced by the Wisconsin court in *Simpson v. Cornish.*[54] The case involved an action to remove cloud from title, brought by the devisee under a subsequently probated will against persons who had acquired from the heirs following intestate administration. The court said:[55] "To hold that a *bona fide* purchaser . . . cannot rely upon an adjudication of intestacy or upon a final decree, would have a tendency . . . to suspend the power of alienation. . . . If the rule contended for . . . be adopted by the court . . . then the title to all property passing under the intestate laws of this state may be involved under a cloud which will effectually restrict its alienation and which will vitally affect the value of the real estate." And in *Steel v. Renn,*[56] protecting the purchaser from the devisee from the effect of a revocation of the probate decree, the Texas court observed that under a contrary holding "no title derived from a devisee but may be swept from under the purchaser at any time, however remote, while the probate of the will is subject to attack. This fact when known must cast a cloud on all such titles, lessen their market value and retard their transfer." These arguments bear considerable weight, for the free transfer of inherited or devised realty might well be impeded if a possible revocation of probate were to hang, like the sword of Damocles, over the purchaser's title.

It cannot be denied that the result reached may work hardship on the heir or devisee normally entitled, but this is lessened by the fact that he may pursue the purchase price into the vendor's hands.[57] Also, the normal administration proceedings take long enough to give him a fair opportunity to make a search into the fact situation before the administration of the estate is closed.

The contest statutes require additional consideration. Even though we decide that contest is not an appeal, the question remains whether

[53] Newbern v. Leigh, 184 N. C. 166, 113 S. E. 674 (1922); Simpson v. Cornish, 196 Wis. 125, 218 N. W. 193 (1928); Reeves v. Hager, 101 Tenn. 712, 50 S. W. 760 (1898); Steele v. Renn, 50 Tex. 467 (1878).

[54] 196 Wis. 125, 218 N. W. 193 (1928).

[55] Id. at 153.

[56] 50 Tex. 467 at 481 (1878).

[57] Thompson v. Sampson, 64 Cal. 330 (1883).

or not to apply a doctrine of notice. That is, whether to imply a legislative intent to create a period during which there can be no good faith purchase. The only discovered case[58] discussing the purpose of contest statutes indicates that they were enacted to afford the next of kin a definite period during which to unearth evidence to attack probate, but makes no mention of possible intervening rights. Studying the usual[59] contest statute, we find that six months or a year after the probate of the will is designated for contest, minors and persons of unsound mind being given a like period after removal of disability. To hold that titles derived from the devisees are taken subject to the right of infants and mental incompetents to contest upon removal of disability would have the effect of impairing alienability and beclouding titles for an indefinite period, possibly lasting a number of decades. This writer suggests that such a rule should not be followed since it would impair profitable alienability for an unduly extended period. The possible benefit to minors and others legally incompetent to contest is not commensurate to the burdens which such an absolute right would impose. But in the case of the definite, comparatively short contest period provided for normal adult heirs, the restraint would not be so burdensome on the devisees, since in the usual case the period probably expires before final distribution. Unless the power of good faith purchase is suspended during this period, the benefit of the contest statute might conceivably be nullified entirely. It should be noticed that there is no apparent reason why those under a disability should not be allowed the right to contest, through a guardian or next friend, during this period, and thus mitigate the possible harshness of the suggested interpretation of contest after removal of disability.

It must be admitted that there is nothing on the face of the statutes to warrant the distinction between the normal and the extended indefinate contest period as suggested in the preceding paragraph, and there are some authorities, deciding both for and against the purchaser in both situations, for the refusal to make any.[60] On the other hand there

[58] Matter of Kellum, 50 N. Y. 298 (1872).

[59] In Kansas, Massachusetts and Ohio, the purchaser is protected from contests not begun within the normal period, by specific statutory enactment. The Utah statute apparently protects the purchaser from all contests.

[60] In Quinn, "Land Titles in Illinois and Indiana as Affected by Infant-Disability Statutes," 18 ILL. L. REV. 447 at 469 (1924), the author suggests that purchase from the devisee is made subjects to infants' right to contest. Presumably the same conclusion would be reached as to contest during the normal period. But in Glover v. Coit, 36 Tex. Civ. App. 104, 81 S. W. 136 (1904) and Jopling v. Caldwell-Degenhardt, (Tex. Civ. App. 1927) 292 S. W. 958, the purchaser was protected from contest begun within the normal period. Presumably the same conclusion would be reached in the case of contest by minors after removal of disability.

are several cases which offer some support.[61] Admitting that the suggested interpretation looks suspiciously like judicial legislation, the fact remains that either of the other possible interpretations may work undue hardship, on the devisee and purchaser, or on the heir. And since the legislatures probably drafted these statutes without considering their operation in this situation, there is no apparent reason why the courts should not work out a sensible interpretation.

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[61] See Thompson v. Sampson, 64 Cal. 330 (1883); Arterburn's Exrs. v. Young, 77 Ky. 509 (1879). Although both decisions relied heavily upon specific language in the local statutes, the writer hazards a guess that some such policy as has been suggested influenced the court in reaching its decision.