

## Rights of Bona Fide Purchaser from Apparent Devisee or Distributee

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was, at least, *some* evidence of an agency on the face of the instrument.<sup>51</sup> It is submitted that the court indulged in an unwarranted circumvention of the statute.

Lastly, what might be the consequences of such a rule, if followed? There is no doubt that the decision defies the very wording of the statute which requires words of representation to appear on the instrument itself. The procedure of the *Azzarello* case, if followed, may have the effect of rendering the applicable provision of the Negotiable Instruments Law wholly nugatory; the statute itself, and not its previous interpretation, must be applied. Such a rule would doubtless have its effect on the transferability of negotiable paper, since the *sine qua non* of negotiability is certainty in all respects, which requires the maximum amount of freedom from the uncertainties of extrinsic evidence. Regardless of the holder's knowledge, one placing his or her signature on an instrument in such an unequivocal manner must be held to intend the legal consequences of such an act, and it should be no defense that the signer maintains an erroneous belief as to the legal effect of such a signature. A holder could not be certain that payment would be forthcoming on an instrument though, on its face, it admits of clear and unambiguous liability. Lengthy and expensive litigation is not to be considered as a mere remote possibility, and the chance of ultimately escaping liability would be incentive enough to unscrupulous persons to introduce perjured testimony to contradict the holder's averments of good faith. In effect, the purchaser of the instrument would be buying a lawsuit. If the "eye of common sense" is to be used to relieve the agent of personal liability, it should also serve as a guide to a holder where no other construction is possible from the face of the instrument. It is submitted that a closer adherence to statutory mandates is required to establish the necessary degree of certainty which must attach to transactions involving negotiable instruments.



## RIGHTS OF BONA FIDE PURCHASER FROM APPARENT DEVISEE OR DISTRIBUTE

### *Introduction*

Once real property has been removed from the public domain, and title thereto has been vested in an individual, there must at all times be someone in whom title to that property is vested. This con-

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<sup>51</sup> See *Azzarello v. Richards*, 198 Misc. 723, 99 N. Y. S. 2d 597 (Syracuse Munic. Ct. 1950) (cases cited therein).

clusion is dictated by the judicial refusal to permit title to be held in abeyance.<sup>1</sup> Thus upon the death of a person seized of real property, title thereto vests *immediately* in the devisee, if there be a will, or in the distributee, if there be intestacy.<sup>2</sup>

Though this result preserves the desired continuity of title-holding, it has nevertheless created some problems. These become evident when it is realized that the person who apparently took title upon death may not be the one actually vested with title. The problem becomes even more acute when a bona fide purchaser has bought the land from the devisee or distributee in whom title was apparently vested. The court must then either (a) divest the purchaser of the title he bought, or (b) deprive the real devisee or distributee if a prior probate is set aside.

After considering this conflict of interest, the courts have handed down decisions which may be categorized as follows: (1) where the heir or devisee assumed his rights as such, without court intervention, and (2) where the heir or devisee has resorted to the courts to establish his claim to the property.

### *Judicial Treatment*

The courts, in the first situation, have uniformly permitted the devisee under an after-discovered will to recover property held by a purchaser from the heir.<sup>3</sup> By utilization of the relation back theory, the successful probate of the will is held to refer back to the death of the testator, vesting title in the devisee on that date and avoiding all dispositions or conveyances of the property attempted by the heirs contrary to the dispositive provision of the will.<sup>4</sup> The devisee's title can be defeated only by his own act of conveyance, by prescription, or under principles of estoppel.<sup>5</sup> Other courts have reached the same conclusion, reasoning that since the purchaser did not rely on a record, or official administrative act, but solely on the apparent succession to the decedent's heir, he assumed the risk of the correctness of the

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<sup>1</sup> See *Carter v. Wroten*, 187 S. C. 432, 198 S. E. 13, 15 (1938).

<sup>2</sup> "By the common law, and under the statutes of most of the states, the title to real property vests in the heir or heirs immediately on the death of the intestate, subject in most jurisdictions . . . to . . . the right to sell for payment of debts." *Ibid.*; *Waxson Realty Corp. v. Rothschild*, 255 N. Y. 332, 174 N. E. 700 (1931) (by implication); see *Kingsland v. Murray*, 133 N. Y. 170, 174, 30 N. E. 845, 846 (1892). The New York position has been modified by the Decedent Estate Law, Section 123, as interpreted by *Matter of Burstein*, 153 Misc. 515, 275 N. Y. Supp. 601 (Surr. Ct. 1934).

<sup>3</sup> *Cole v. Shelton*, 169 Ark. 695, 276 S. W. 993 (1925); *Reid's Adm'r v. Bengé*, 112 Ky. 810, 66 S. W. 997 (1902); *Cooley v. Lee*, 170 N. C. 18, 86 S. E. 720 (1915).

<sup>4</sup> See *Cooley v. Lee*, *supra* note 3, 86 S. E. at 723.

<sup>5</sup> See *Reid's Adm'r v. Bengé*, *supra* note 3, 66 S. W. at 998.

heir's determination.<sup>6</sup> These decisions have rendered the title to lands conveyed in this manner subject to subsequent attack by a true devisee or his assigns, regardless of the number of years after death that the will is offered for probate.<sup>7</sup>

The problem is viewed differently, however, when, as in the second situation, the purchaser buys the property from an heir or devisee<sup>8</sup> whose rights have been adjudicated by the court. This new element has resulted in a sharp divergence of judicial opinion as to the party entitled to the property.

The majority of jurisdictions confronted with this problem have protected the purchaser from attack by the true devisee,<sup>9</sup> provided he has proven the good faith of his purchase.<sup>10</sup> This protection has been afforded even in situations where the prior devisee knowingly probated a forged will, establishing record title in himself for the purpose of conveying the property to another.<sup>11</sup> These same courts have applied the property rule of shelter to such cases, affording protection to all grantees from a bona fide purchaser, including those with notice of the conflicting claims.<sup>12</sup>

A few courts, however, have permitted the actual devisee to successfully assert his claim to the title against a bona fide purchaser. In some of these jurisdictions, the decisions were dictated by the governing statutory probate procedures, which, unlike most jurisdictions,

<sup>6</sup> ". . . [P]rotection is extended *only* in cases of reliance on official acts of administration, not to persons claiming under individual acts of supposed heirs, or supposed devisees, whose rights are cut out by the subsequent discovery and probate of a will . . ." *Simpson v. Cornish*, 196 Wis. 125, 218 N. W. 193, 204 (1928) (emphasis added).

<sup>7</sup> Wills have been probated many years after decedents' death. See *Haddock v. Boston & Maine R. R.*, 146 Mass. 155, 15 N. E. 495 (1888) (63 years); *Davis v. Gaines*, 104 U. S. 386 (1881) (42 years); *Fox v. Fee*, 167 N. Y. 44, 60 N. E. 281 (1901) (29 years).

<sup>8</sup> The right of a purchaser from an heir or devisee will be considered together. The essential similarity of the rights of both was expressed in the case of *Wright v. Eakin*. There the court, after discussing the rights of a bona fide purchaser from the devisee, stated: "We see no reason why the innocent purchaser of land from the heir of one supposed to have died intestate should not *likewise* be protected . . ." *Wright v. Eakin*, 151 Tenn. 681, 270 S. W. 992, 994 (1925) (emphasis added).

<sup>9</sup> *Foulke v. Zimmerman*, 14 Wall. 113 (U. S. 1871); *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980 (1883); *Wright v. Eakin*, *supra* note 8; *Geary v. Rumsey*, 30 Ky. L. R. 86, 97 S. W. 400 (1906); *Reaves v. Hager*, 101 Tenn. 712, 50 S. W. 760 (1899); *Steele v. Renn*, 50 Tex. 467 (1878); *Joplin v. Caldwell-Degenhardt*, 292 S. W. 958 (Tex. Civ. App.), *rev'd on other grounds*, 300 S. W. 28 (1927); *cf. Houston v. Wilcox*, 121 Md. 91, 88 Atl. 32 (1913); *Seldner v. McCreery*, 75 Md. 287, 23 Atl. 641 (1892); *Newbern v. Leigh*, 184 N. C. 166, 113 S. E. 674 (1922).

<sup>10</sup> ". . . [T]he burden is on the . . . vendee to show the bona fides of his purchase and that he has no knowledge of debts due by the ancestor . . ." *Wright v. Eakin*, *supra* note 8, 270 S. W. at 993.

<sup>11</sup> *Foulke v. Zimmerman*, *supra* note 9; *accord, Steele v. Renn*, *supra* note 9.

<sup>12</sup> See *Newbern v. Leigh*, *supra* note 9, 113 S. E. at 674.

are not final and do not pass valid title under the will. Therefore, when the will is successfully contested within the stated period, the will, and all titles derived thereunder, must fall.<sup>13</sup>

The minority view as expressed in *Cooley v. Lee*,<sup>14</sup> allowing the true heirs to trace and recover the property from the purchaser, has applied the relation back theory to its logical extent, nullifying *ab initio* any conveyance by the apparent heir or devisee. Unless the actual devisee conveys the land himself, or has lost his title through estoppel or prescription, his right to the land is secure.<sup>15</sup>

The result produced by the reasoning of the minority view flies in the face of the oft-expressed policy of the law to encourage the free and unrestricted alienation of realty.<sup>16</sup> Moreover, it would be practically impossible in such jurisdictions to establish the marketability of title to property that had once been devised, inasmuch as the will may at any time be set aside and all titles acquired thereunder declared void. Title to such property would remain forever defeasible not only in the hands of adjudicated devisees or heirs but also in the hands of bona fide purchasers.<sup>17</sup>

One of the *rationes decidendi* advanced by the majority of courts in support of their view, and apparently not considered by the minority decisions, is the necessity for preserving the sanctity of public records. Since the purposes of recording statutes are to facilitate the free alienation of land and establish security and stability in the law of property conveyancing and to protect purchasers,<sup>18</sup> it has been held that the purchaser had a right to rely on the devolution of title as shown in the record.<sup>19</sup> To refuse protection to such purchaser would destroy the efficacy of the statute. This conclusion would also weaken public confidence in court adjudications determining successors' rights.<sup>20</sup>

<sup>13</sup> *Hughes v. Burriss*, 85 Mo. Rep. 660 (1885); *Fallon v. Childester*, 46 Iowa 588 (1877); see *Johnson v. Brewn*, 277 Mo. 392, 210 S. W. 55, 57 (1919); *Hines v. Hines*, 243 Mo. 480, 147 S. W. 774, 776 (1912); see Mo. Rev. Stat. § 468.470 (1949).

<sup>14</sup> 170 N. C. 18, 86 S. E. 720 (1915).

<sup>15</sup> See *Reid's Adm'r v. Benge*, 112 Ky. 810, 66 S. W. 997, 998 (1902).

<sup>16</sup> See *Simpson v. Cornish*, 196 Wis. 125, 218 N. W. 193 (1928).

<sup>17</sup> "To hold that a title, acquired by a bona fide purchaser . . . could be defeated by a will turning up . . . would be . . . contrary to familiar and long settled policies of the law." *Wright v. Eakin*, 151 Tenn. 681, 270 S. W. 992, 994 (1925). See *Geary v. Rumsey*, 30 Ky. L. R. 86, 97 S. W. 400 (1906) ("It is not the policy of the law to . . . paralyze the property rights of devisees . . ."); *Steele v. Renn*, 50 Tex. 467, 481 (1878) (it will ". . . cast a cloud on such titles, lessen their market value and retard their transfer."); *Reaves v. Hager*, 101 Tenn. 712, 50 S. W. 760, 761 (1899).

<sup>18</sup> See LEG. DOC. No. 65(E), 1940 REPORT, N. Y. LAW REVISION COMMISSION 163.

<sup>19</sup> *Eckland v. Jankowski*, 407 Ill. 263, 95 N. E. 2d 342 (1950).

<sup>20</sup> See *Steele v. Renn*, *supra* note 17, at 483.

Some of the courts composing the majority have proceeded on the theory that the probate proceedings being actions *in rem* bind all the world, unless set aside on appeal or by direct action.<sup>21</sup> Even if the court lacked jurisdiction, its decree vested the apparent devisee or heir with voidable title.<sup>22</sup> Therefore, any conveyance by such person renders the title in the purchaser indefeasible cutting off all unrecorded claims to the property.

Although the majority view achieves a result contrary to the testator's final will, and works a hardship on the truly entitled devisee, he is not left remediless. He may recover the property remaining in the possession of the apparent heir or devisee.<sup>23</sup> Moreover, where the property has been sold, he may recover the proceeds of the sale from the grantor. No action, however, lies against the original executor or administrator in the absence of negligence or wasting of the assets of the estate.<sup>24</sup>

### *Statutory Treatment*

With respect to the conflicting rights of apparent and true heirs or devisees, the legislatures of several states in an attempt to prevent undue hardship on one of the two equally innocent parties have undertaken to apportion the hardship between both parties without thereby restricting the free alienation of property. To this end the statutes have uniformly provided for a specific period of time within which after-appearing devisees or heirs are permitted to assert their claims against bona fide purchasers and regain title to the property.<sup>25</sup> To the extent of the prescribed period, therefore, the true devisee's or heir's title is secure, indefeasible and enforceable against all. Thereafter his title is defeasible, but *only* when the apparent owner conveys to a purchaser for value and without notice of any adverse claims. These statutes have thus modified the one-sided approach of the judiciary and have granted limited rights where formerly there were none.<sup>26</sup> Although these rights have not been made absolute, the

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<sup>21</sup> See *Glover v. Coit*, 36 Tex. Civ. App. 104, 81 S. W. 136, 139 (1904); *Reaves v. Hager*, 101 Tenn. 712, 50 S. W. 760, 762 (1899).

<sup>22</sup> See *Glover v. Coit*, *supra* note 21, 81 S. W. at 139; *Reaves v. Hager*, *supra* note 21, 50 S. W. at 762; *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980, 981 (1883); *Newbern v. Leigh*, 184 N. C. 166, 113 S. E. 674, 676 (1922).

<sup>23</sup> See *Cousens v. Advent Church*, 93 Me. 292, 45 Atl. 43, 44 (1899); *Thompson v. Samson*, *supra* note 22, 30 Pac. at 981.

<sup>24</sup> See *Thompson v. Samson*, *supra* note 22, 30 Pac. at 981.

<sup>25</sup> CAL. PROBATE CODE § 322 (Deering, 1949) (4 years after death); OHIO CODE ANN. § 10504-68 (Baldwin, 1948) (6 months after settlement); VA. CODE §§ 64-91, 64-92 (1950).

<sup>26</sup> These statutes have granted to the bona fide purchaser from the apparent heir a security of title not afforded by case law. The actual heir or devisee is now guaranteed limited protection which formerly was denied in the jurisdiction holding the majority view, while a bona fide purchaser under the minority concept would appear to receive new protection.

statutes have afforded the greatest measure of protection which could in justice be granted to both parties consistent with the policy of the law to facilitate the free alienation of property.

Such statutes, however, are neither numerous nor entirely adequate. A few states, when treating this problem, have limited their consideration to situations involving a bona fide purchaser from an heir,<sup>27</sup> while a few have set up the rights of the bona fide purchaser when he purchases from either an apparent heir or devisee.<sup>28</sup>

New York, the most populated state, with the highest death toll of all forty-eight states<sup>29</sup> and with the greatest likelihood of such a situation arising, lacks a comprehensive statutory scheme satisfactorily setting forth the rights of the parties. The Decedent Estate Law has but one pertinent section,<sup>30</sup> Section 46,<sup>31</sup> which provides for a period of two years<sup>32</sup> after the decedent's death within which the title to the property in the heir is secure, but after which, the title acquired by the bona fide purchaser is indefeasible.

But this statute comprises all the New York legislation on the problem, leaving untouched the situation in which there is the most litigation in the other states, *i.e.*, where the purchaser buys from a devisee under a will which is subsequently set aside. The determination of the rights of the parties in this situation has been left to the judiciary, where but one lower court decision<sup>33</sup> is reported. This

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<sup>27</sup> CAL. PROBATE CODE § 322 (Deering, 1949); IND. STAT. ANN. § 7-402 (1933); N. Y. DEC. EST. LAW § 46.

<sup>28</sup> MASS. ANN. LAWS c. 192, § 3 (1932); OHIO CODE ANN. § 10504-68 (Baldwin, 1948); VA. CODE §§ 64-91, 64-92 (1950).

<sup>29</sup> See THE WORLD ALMANAC AND BOOK OF FACTS FOR 52, WORLD TELEGRAM AND SUN 439.

<sup>30</sup> N. Y. DEC. EST. LAW § 46.

<sup>31</sup> *Ibid.* "The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within two years after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or without the state; or, if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate."

<sup>32</sup> The period was formerly four years under Section 2628 of the Code of Civil Procedure.

<sup>33</sup> *Cipperly v. Link*, 135 Misc. 134, 237 N. Y. Supp. 106 (Sup. Ct. 1929). ". . . [S]ection 46 of the Decedents Estates Law. This section relates only to a title acquired from an heir and provides that such title shall not be affected unless within four years [now two] after the testator's death the will devising the same is admitted to probate or established by judgment of a court having competent jurisdiction. The bar of this statute is limited to a title acquired

case, in a very brief discussion, concluded that Section 46 was not controlling. The title of the purchaser was held immune from attacks by the actual heir or devisee at any time. New York thus gives an after-appearing devisee an opportunity to recover his land for two years after the testator's death if the deceased was formerly adjudicated intestate, but none if a prior will admitted to probate is subsequently found not to be the last will and testament of the deceased. Thus because of this omission in the statute, the law in New York is inconsistent and inequitable.

### *Conclusion*

In the problem considered by this article, the judiciary has shown and explained the pitfalls, inequities and benefits of the different conclusions, but it has not adequately protected all interested parties. It is now for the legislatures to step in and define the rights of the parties. This some have done adequately, others have attempted, but most have neglected. Therefore, it is submitted, New York, which has an inadequate statutory treatment of this problem, should amend Section 46 of the Decedent Estate Law so as to preserve the rights of the true devisee against a sale by a prior devisee, just as it protects him against sales by the apparent heir. Further, it should codify the rights of the actual devisee or heir against those receiving property under the will, even to the extent of making them account for the proceeds of a sale of the realty. It is also submitted that the extension of the statutory period for those under disabilities should be reduced, or removed entirely, since they over-extend the period of time during which title to real property may be attacked.

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from an heir and does not affect a title acquired by a legatee or his grantee under a will duly established at the time of the conveyance. I do not think that this statute applies to this situation or that the statute should be extended beyond the scope of its precise language." *Id.* at 137, 237 N. Y. Supp. at 109.