Indiana Law Journal

Volume 15 | Issue 5 Article 5

6-1940

Review By Infant Notwithstanding Representation in Prior Suit

LEGISLATION COMMENT

REVIEW BY INFANT NOTWITHSTANDING REPRESENTATION IN PRIOR SUIT

Part I

Introduction. In 1916 Catherine Colvent, at that time an infant, was made a party defendant to an action quieting title to and partitioning real estate. Proper service of summons was had, and a guardian *ad litem* duly appointed.[1] He filed a demurrer for the infant, which was overruled, and then he filed a general denial. The court considered the merits of the case and found against the infant.[2] Upon attaining her majority in 1928, Catherine Colvert filed an original complaint to review the prior judgment for error of law appearing in the proceedings and judgment. The overruling of the demurrer to the complaint in the former suit was found to be erroneous. The prior judgment was vacated and another trial was had upon the issues. The court held: first, compliance with Indiana's procedural[3] and substantive law[4] by appointing a proper court official[5] to protect the interest of infant parties does not make the judgment binding upon them; second, an innocent purchaser of real estate who takes title founded upon a judgment takes it subject to the rights of the unsuccessful infant parties should the judgment be set aside in an action to review brought by the infants upon attaining their majority.[6]

The Statute. The statute which would justify such a staggering blow to the security of land titles based upon judgments in Indiana merits some consideration.

---

[1] Burns Ind. Stat. Ann. 1933, Sec. 2-209. An infant defendant shall appear and defend by a guardian *ad litem* appointed by the court or chosen by such infant with the consent of the court. (Acts 1881 (Spec. Sess.), Ch. 38, Sec. 15, p. 240.)

[2] Fountain Circuit Court, September 1916, Cause No. 3675.

[3] Burns Ind. Stat. Ann. 1933, Sec. 2-206 (265) (Acts 1881 (Spec. Sess.), Ch. 38, Sec. 12); Sec. 2-209 (266) (Acts 1881 (Spec. Sess.), Ch. 38, Sec. 15); Sec. 8-144 (3423) (2 R. S. 1852, Ch. 13, Sec. 8).

[4] Provisions, concerning infant parties, found in separate acts of legislature: Quieting Title—Burns Ind. Stat. Ann. 1933, Sec. 3-1405; Partition—Burns Ind. Stat. Ann. 1933, Sec. 3-2427; Decedent's Estates—Burns Ind. Stat. Ann. 1933, Secs. 6-1505, 6-1911.

[5] Guardian *ad litem* is an officer of the court. Whinery v. Hammond Trust and Savings Bank (1923), 80 Ind. App. 282, 140 N. E. 451; Ziegler v. Ziegler (1906), 39 Ind. App. 21, 78 N. E. 1066.

[6] Attica Building and Loan Association et al. v. Colvert et al. (Ind. 1939), 23 N. E. (2d) 483.

REVIEW OF JUDGMENTS—Any person who is a party to any judgment, or the heirs, devisees or personal representatives of a deceased party, may file in the court where such judgment is rendered a complaint for a review of the proceedings and judgment. Any person under legal disabilities may file such complaint at any time within one year after the disabilities are removed. But no complaint shall be filed for a review of a judgment of divorce.[7]

The grounds for filing a complaint for review are for error of law appearing in the proceedings and judgment and for material new matter discovered since the rendition of the judgment.[8]

In order to determine the intent of a legislative enactment and the purposes for which it was passed, a court usually looks to the source of the statute and the prior holdings thereon. In the principal case the court ignored this doctrine of interpretation. Instead they found that an action to review a judgment is dependent on and incidental to the original action because it has some of the characteristics of an appeal. From this the court concluded that an action to review a judgment is a direct continuation of the former action, and that therefore, the doctrine of *lis pendens* would apply.

It is true that the only court having jurisdiction to entertain an action to review is the court in which the original judgment was rendered, and the one case cited by the court holds this. But the same case says that the action to review a judgment is "in effect collateral."[9] A remedy which is *in effect collateral* can not be said to be a direct continuation of a prior action. It is therefore submitted that an action to review a judgment is a separate, original and independent action[10] and thus the doctrine of *lis pendens* is not applicable. This can be shown by following the well established rule of statutory interpretation mentioned above.

The action to review a judgment for errors appearing in the proceedings and judgment can be traced back to the early chancery practice in Indiana[11] and the writ of error as it was in the Common Law of

---

[7] Burns Ind. Stat. Ann. 1933, Sec. 2-2604 (Acts 1881 (Spec. Sess.), Ch. 38, Sec. 665, p. 240).

[8] Burns Ind. Stat. Ann. 1933, Sec. 2-2605 (670) (Acts 1881 (Spec. Sess.), Ch. 38, Sec. 666, p. 240).

[9] Ex Parte Kiley and Slatterly (1893), 135 Ind. 225, 230, 34 N. E. 989, 990.

[10] Brown v. Keyser (1876), 53 Ind. 85; Leech v. Perry (1881), 77 Ind. 422; Keepfer v. Force (1882), 86 Ind. 81.

[11] Indiana Revised Statutes of 1843 (Ch. 46, Art. 5, Sec. 121), which is a re-enactment of Ch. 73 of the Acts of 1823-24, reads as follows: "Any person who was a party to a decree of a court of chancery, his heirs, devisees, executors, or administrators, may file a bill for a review of the proceedings in which such decree was rendered, at any time within five years next after rendition of the decree; unless the person entitled to prosecute such bill of review was an infant, a married woman, or an insane person, in which case

England.[12] A comparison of the present statute set out above with the law before its adoption in 1852 clearly indicates that they are one and the same statute.[13] This position is supported by the cases.[14]. The Practice Act of 1852 merely extended the right of an independent review to actions of law and did not mean to enlarge the scope of the bill of review in so doing.[15] It may be concluded, therefore, that the Practice Act of 1852[16] did no more than re-enact the existing law of 1843. The importance of this conclusion is that the re-enactment of a statute after it has been construed by the court is strong, if not conclusive, evidence that the legislature adopted the construction placed upon the statute by the court.[17] Prior to the Practice Act the courts had held, both in Indiana and elsewhere,[18] that an action brought to review a judgment by filing an original complaint was not to be considered as

---

such bill may be filed and maintained within five years after the removal of such disability; but no such bill of review shall be to a decree of divorce."

Sec. 122. "If the bill for a review be brought upon error of law, appearing in the body of the decree, or in the proceedings themselves, it may be filed as an original bill as a matter of course.

Sec. 124. "If the bill for review be brought upon the discovery of new matter since the hearing of the former decree, such bill shall not be filed except with leave of the court."

12 The Common Law of England (with some exceptions not material here) was adopted in Indiana January 2, 1818 (R. S. 1843, p. 1030) and was again re-adopted as of May 1853 (1 R. S. 1852, Ch. 61, Sec. 1, p. 351); Burns Ind. Stat. Ann. 1933, Sec. 1-101.

13 See notes 11 and 12, *supra.*

14 Nealis, Admr. et al. v. Dicks et al. (1880), 72 Ind. 374, 379; Ross et al. v. Banta (1894), 140 Ind. 120, 136, 34 N. E. 865, 39 N. E. 732.

15 Nealis, Admr. et al. v. Dicks et al. (1880), 72 Ind. 374, 379; Ross et al. v. Banta (1894), 140 Ind. 120, 136, 34 N. E. 865, 39 N. E. 732.

16 Burns Indiana Revised Statute 1852.

17 Fesler v. Bosson (1920), 189 Ind. 484, 128 N. E. 145; Anderson v. Bill (1894), 140 Ind. 375, 39 N. E. 735; In State v. Swope (1855), 7 Ind. 91, the court held "the decisions on the former act furnish the rule of construction for the latter"; State ex rel. v. Miller (1923), 193 Ind. 492, 141 N. E. 60; Worth v. Wheatley (1915), 183 Ind. 598, 604, 108 N. E. 958; State v. Kates (1897), 149 Ind. 46, 48, 48 N. E. 365; Holle v. Drudge (1920), 190 Ind. 520, 129 N. E. 229. This list is not intended to be complete.

18 McCormick v. McClure (1843), 6 Blackf. 466; Heirs of Ludlow v. Kidd (1828), 3 Ohio 541; Lessee of Taylor v. Boyd (1828), 3 Ohio 337. In Doe, etc. v. Brown (1846), 8 Blackf. 443, the court held "after a guardian *ad litem* has been appointed for infant defendants they will be regarded as properly in court; . . . We can not perceive that the fact of some of these defendants being infants can make any essential difference. After the appointment of a guardian by the court, an attorney bears the same relation to an infant client as in the case of an adult."

a direct continuation of the prior action. And certainly not to the extent of allowing the doctrine of *lis pendens* to apply.[19]

Conclusion of Part I. The legislature by adopting the 1843 statute with only immaterial changes intended to codify the law existing at that time as it had already been interpreted by the courts, and therefore intended that the action to review a judgment for errors should be a separate and original action; not a direct continuation such as would permit the operation of the doctrine of *lis pendens.*

Part II

Infants-Guardian Ad Litem. Aside from the issue of whether the statutory action for review is an independent action or not, the principal case presents another interesting question. Did the legislature intend to give the infant an *additional day* in court after attaining majority, or did it merely mean to allow those infants not theretofore properly in court an opportunity to appear? According to some authorities (including the principal case) an infant has an *absolute right* to re-open the case disregarding the propriety of former litigation.[20] But the better opinion is that an absolute decree made against an infant defendant properly in court is as binding upon him as it would have been had he been of full age.[21] The issue presented is clear. Is an infant who has been properly served with summons and properly represented by a duly appointed guardian *ad litem* bound by the judgment of the court, or may he re-open the case upon arriving at his majority? It is submitted that he is bound.

Statutes. The legislative enactments upon this point are indefinite. In one provision the legislature provided for the removing of the infant's procedural disabilities[22] and then in another provision it allowed a review to "any person under legal disabilities" within one year after

---

19 A bill of review cannot, by relation, be so connected with the original suit as to effect intermediate acts done in good faith. Kettleby v. Lamb (1686), 2 Chan. R. 404, 21 Eng. Rep. 700.

20 Attica Building and Loan Association et al. v. Colvert et al. (Ind. 1939), 23 N. E. (2d) 483, 490. In Tulsa Pfister v. Ida Johnson (1935), 173 Okla. 541, 49 P. (2d) 174, 102 A. L. R. 31, two judges presented a strong dissent. See Anno. 102 A. L. R. 44; Loyd v. Malene (1895), 23 Ill. 43, 74 Am. Dec. 179.

21 Thompson v. Maxwell Land Grant Co. (1897), 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539; Burk et al. v. Northern Pac. Ry. Co. (1916), 86 Wash. 37, 149 P. 335, Ann. Cas. 1917B, 919. In McComb v. Gilkerson (1909), 110 Va. 406, 66 N. E. 77, 135 Am. St. Rep. 944, the court said "no reason is perceived why a court of equity should allow infants to profit by a mistake the court has made . . . any more than it would permit adults to take advantage of their mistakes . . ."; Kistler v. Fitzpatrick Mortgage Co. (1937), 146 Kan. 467, 71 P. (2d) 882.

22 Burns Ind. Stat. Ann. 1933, Sec. 2-209 (266); Sec. 8-144 (3423).

such disability is removed.[23] At first glance this would seem to defeat the above contention but both of these provisions were passed as a part of the same act entitled "An Act Concerning Proceedings in Civil Cases."[24] By an established rule of interpretation different and apparently inconsistent provisions of the same act are to be harmonized and construed together if possible.[25] Therefore this review provision must be read in the light of the provisions removing an infant's procedural disabilities and allowing him the full and immediate protection of the courts. Following this line of reasoning we attain the result reached by the United States Supreme Court[26] in affirming an appeal from the Indiana Supreme Court.[27] The United States Supreme Court held that as long as the record showed compliance with the procedural laws of the state, the requirement of due process was satisfied. They further said that "were the law otherwise titles might be attacked many years after they were acquired."[28] Have we not protected the infant defendant adequately when we insure him due process of law? This question had always been answered in the affirmative by the Supreme[29] and Appellate[30] Courts in Indiana until the principal case was decided. It is well to indulge liberally in presumptions in favor of infancy; but the courts should not extend this presumption so far as to place in the infant's hand a sword instead of a shield.[31]

Another reason for maintaining that the provisions, allowing infants the full and immediate use of the courts, were intended to remove the procedural disabilities, may be found in the expressed terms of the Statute on Decedent's Estates.[32] The legislature set out in specific terms that in suits against infants "such infants shall appear by their guardian in law or guardian *ad litem,* appointed by the court; and such suits or proceedings, if conducted in good faith, *shall not be liable to be opened by such infants upon arriving at full age.*"[33] The courts

23 Burns Ind. Stat. Ann. 1933, Sec. 2-2604 (669).

24 Acts of 1881 (Spec. Sess.), Ch. 38.

25 2 LEWIS' SUTHERLAND STATUTORY CONSTRUCTION (2 ed. 1904), Ch. VII.

26 Miedreich v. Lauenstein (1913), 232 U. S. 236, 34 S. Ct. 309, 58 L. Ed. 584.

27 Miedreich v. Lauenstein (1909), 172 Ind. 140, 86 N. E. 963.

28 Miedreich v. Lauenstein (1913), 232 U. S. 236, 241, 34 S. Ct. 309, 312, 58 L. Ed. 584, 588.

29 Doe v. Brown (1847), 8 Blackf. 433; Alexander v. Frary (1857), 9 Ind. 481. In Young v. Wiley (1915), 183 Ind. 449, 107 N. E. 278, the court said "rights may be grounded on mistakes of law and titles founded on such mistakes unless they are timely and properly corrected."

30 Colvert v. Colvert (1931), 95 Ind. App. 325, 178 N. E. 692, 180 N. E. 192; Kern v. Beck (1920), 73 Ind. App. 92, 126 N. E. 641.

31 Alexander v. Frary (1857), 9 Ind. 481.

32 Decedent's Estates, Burns Indiana Statutes Annotated 1933, Vol. 3, Ch. 18.

33 Burns Ind. Stat. Ann. 1933, Secs. 6-1909, 6-1910.

have so held in such cases.[34] This act was passed in the same year in which the law for appointing guardians *ad litem* in civil actions was passed. There seems no reason to assume that the legislature intended to protect property rights arising out of litigation concerning a decedent's estate and not those rights arising out of other litigation carried on in good faith.

Waiver. The infants in the principal case were held to be properly in court.[35] It has been consistently held in Indiana since 1853 that the plea of infancy is a personal privilege which may be waived and if the infant fails to avail himself of it at the proper time it will be deemed to have been waived.[36] There seems no possible conciliation between this well established law and the principal case. How is it that the court will hold an infant has waived his defense of infancy by not pleading it in the trial proceedings and then seventeen years later hold that the infant has a right to review the judgment because of the very privilege which he has waived?

Inconsistencies. In holding that the infant defendant properly in court is not bound by the judgment the court in the principal case has split the law on representative litigation in half. A five year old infant plaintiff bringing an action by his next friend will be absolutely bound by the outcome of the litigation, whereas an infant defendant represented by a guardian *ad litem* will be allowed a review of the case upon attaining his majority. Is the infant plaintiff any more competent than an infant defendant? It is submitted that the problem is not one of competency or incompetency but a problem of representation. Both plaintiff and defendant infants are represented by an officer of the court and therefore if one is bound the other also should be bound to the same degree. The absurdity of allowing every infant plaintiff who was dissatisfied with his recovery to review the action after attaining his majority is an obvious example of the evil which could result from following the principal case to its logical conclusion.

Comparative Legislation. There have been innumerable cases both in Indiana and elsewhere which held that an infant who has been served with summons and represented by a guardian *ad litem* is bound by the judgment to the same extent as he would have been had he been

---

34 Bundy, Guardian v. Hall (1877), 60 Ind. 177; Seward v. Clark, Admr. (1879), 67 Ind. 289.

35 Attica Building and Loan Association et al. v. Colvert et al. (Ind. 1939), 23 N. E. (2d) 483, 492; Colvert v. Colvert (1931), 95 Ind. App. 325, 178 N. E. 692, 180 N. E. 192.

36 Wortman v. Ash (1853), 4 Ind. 74; Hollingsworth v. State (1856), 8 Ind. 257; Blake v. Douglas (1866), 27 Ind. 416; Cohee v. Bear (1892), 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; Daughterty v. Reveal (1913), 54 Ind. App. 71, 102 N. E. 381.

an adult.[37] But this statement is far too general to be controlling. Does "being bound as an adult" mean the infant is bound to the same procedural limitations for review, and appeal, or must we say that these holdings only mean to bind the infant until he becomes of age, whereupon he may have the judgment set aside? It is submitted that the infant is bound "precisely as an adult is bound," including the procedural rules applicable to an adult. Cases on this precise point are surprisingly few because most states have definite statutes on the subject. [38] The recent Kansas case of *Kistler v. Fitzpatrick Mortgage Company*[39] deserves notice here because of its phenomenal similarity to the principal case both as to factual circumstances and the statutory provision invoked.[40] The Kansas Supreme Court, in reaching a directly opposite result from that of the Indiana Supreme Court, maintained that an infant who is properly served with summons, and properly represented by guardian *ad litem* will have only such remedies as an adult would have in attacking the judgment. Then the Kansas Court directly answered the question under discussion by saying that "being bound as an adult" includes being bound to the time allowed an adult for a review of the actions. And in speaking of the Kansas statute to review a judgment, which is the same as Indiana's, the court held that: "Evidently this statute is designed to afford an infant such equitable relief as he would have been entitled to under the equity practice prevailing at the time the statute was first adopted." This is in exact accord with the contention set out in Part I herein. Although the result of this Kansas case is directly contra to the principal case, it provides the infant adequate judicial protection and at the same time makes a judicial determination binding upon him. It seems that this result is not only desirable but also necessary if there is to be any

---

[37] Miedreich v. Lauenstein (1909), 172 Ind. 140, 86 N. E. 963, affirmed 232 U. S. 236, 34 S. Ct. 309, 58 L. Ed. 584; Colvert v. Colvert (1931), 95 Ind. App. 325, 178 N. E. 692, 180 N. E. 192; Young v. Wiley (1915), 183 Ind. 449, 107 N. E. 278; McKern v. Beck (1920), 73 Ind. App. 92, 102, 126 N. E. 641, 643. For an extensive list of cases from thirty jurisdictions see 31 C. J. p. 1166, Sec. 355.

[38] A typical example is that of Kentucky Carroll's Kentucky Codes (1938), Sec. 391, which reads: "An infant may, within twelve months after attaining the age of twenty-one years, show cause against a judgment; *but the vacation of such judgment shall not effect the title of a bona fide purchaser under it.*" (Our italics.) See also, Compiled Statutes of Iowa (1919), Sec. 8146.

[39] (1937), 146 Kan. 467, 473, 71 P. (2d) 886.

[40] The facts in the Kansas case were identical with the principal case. Quiet title and partition suit against infant. Later a mortgage of real estate to stranger. Then infant brought suit to review the judgment for error of law appearing in proceedings and judgment. The Statute to review is the same in Kansas as in Indiana. Revised Statutes of Kansas (1923), 60-3007-8.

security for land titles based on judicial decrees where there is an infant involved.

Although it is realized that the problem of infancy is a local one, the overwhelming weight of authority, insofar as an innocent purchaser is involved, is expressed in the attitude of the Supreme Court of the United States. It has consistently held that if the infants are properly served and are before the court, they are bound by its actions even though erroneous.[41]

Conclusion. The implications of the Indiana law under the principal case are astounding. Taking the disability of infancy alone, a person who buys land in reliance upon a judgment will not know for twenty-one years if his title is valid, for there might have been an infant party involved at the time the judgment was rendered. The disability of insanity would extend the time of uncertainty for an entire lifetime because only then is the disability removed after which the heirs may bring the action to review. The fact that there must be error appearing in the proceedings and judgment is not a saving qualification because until the court holds that there is error no one can accuraely predict whether there is or not. Therefore it is necessary to find a means for remedying this situation. It has been suggested by the Indiana Judicial Council[42] that the extension of time for disabilities be repudiated in our present appellate procedure. In view of the holding in the principal case that the rules governing appeal also govern an action to review, the adoption of this suggestion would solve the problem. If the action to review is to remain in the statutes of Indiana the adoption of some such suggestion appears not only advisable but imperative if there is to be any security in the land title of this state.

P. T. M.

---

41 Colt v. Colt (1884), 111 U. S. 566, 4 S. Ct. 554; Thompson v. Maxwell Land Grant Co. (1897), 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539.

42 Third Annual Report of the Indiana Judicial Council, Part II, Rule 1-3 and note, p. 10 (1938).