ENHANCING THE MARKETABILITY OF LAND: THE SUIT TO QUIET TITLE

ALTHOUGH land today is principally a mercantile commodity, and saleability a primary incident of its ownership,[1] modes of conveyancing remain essentially those originated in this country some three hundred years ago.[2] Transfers of land depend on hoary formalities [3] and outdated legal doctrines slavishly adhered to by lawyers, courts and legislators.[4] The usual system for recording land titles fails to improve their marketability and tends, rather, to impair their value.[5] Lacking other sources of information, buyers and sellers must ordinarily rely on public records, the accumulation, loss and destruction of which makes tracing a clear chain of title to its source a labyrinthian procedure.[6] Modern conveyancing has become so complex, time-consuming and expensive that free alienability often does not exist. True, most property is

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1. For realty's role in the modern commercial community, see GAGE, LAND TITLE ASSURING AGENCIES IN THE UNITED STATES 14-15 (1937); Hendricks, *Defects in Titles to Real Estate and the Remedies*, 20 MARQ. L. REV. 115-16 (1936). See also McDougal & Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125 (1939).

2. See BASYE, CLEARING LAND TITLES §§ 1-3 (1953) [hereinafter cited as BASYE].

3. For a vivid description of the ritualism attending modern land transfer, see McDougal, *Title Registration and Land Law Reform: A Reply*, 8 U. CHI. L. REV. 63, 65-67 (1940). For a less colorful description of the steps involved, see 2 PATTON, TITLES §§ 331-65 (2d ed. 1957).

4. "It is revolting to have no better reason for a rule of law than that it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from imitation of the past." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Doctrines which might be deemed "revolting" include: the rule of *caveat emptor*, referred to as "barbarous" by McDougal & Brabner-Smith, *supra* note 1, at 1129; the concept of tenancy by the entireties, the abolition of which was advocated by Committee on Changes in Substantive Real Property Law, *Report*, in SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 82 (1944); and covenants restricting the use of land, on which see CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND ch. 8 (2d ed. 1947), and Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737 (1941).

5. Discussions of recording-system deficiencies are numerous. Some of the better ones are BASYE, §§ 1-5; GAGE, *op. cit. supra* note 1, at 24-29; Chaplin, *Record Title to Land*, 6 HARV. L. REV. 302 (1893); Haymond, *Title Insurance Risks of Which the Public Records Give No Notice*, 1 So. CAL. L. REV. 422 (1928); Hendricks, *supra* note 1; McCormick, *Possible Improvements in the Recording Acts*, 31 W. VA. L.Q. 79 (1925); McDougal & Brabner-Smith, *supra* note 1. Historical studies of the recording system include Beale, *The Origin of the System of Recording Deeds in America*, 19 GREEN BAG 335 (1907); Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U.L. REV. 281 (1941). See also BASYE § 3.

6. For a scathing analysis of the waste and inefficiency involved in title examinations under present recording systems, see Russell & Bridewell, *Systems of Land Title Examination: An Appraisal*, 14 J. LAND & P.U. ECON. 133 (1938).

saleable, but its full value frequently cannot be realized because of unremovable imperfections in title.

Were it possible to clear all defects of record, the recording system would remain an inadept vehicle for effectuating land transfers.[7] At present, many significant property interests are either inherently or legislatively excluded from coverage, so that, with few exceptions, only inter vivos transfers evidenced by writing are eligible for recordation in the files covering real property.[8] Worse, many recorded instruments contain defects (invalid acknowledgments, for example) which render the instruments invalid but which are practically undetectable.[9] These difficulties to one side, faulty indexing com-

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7. It is probable that most of the disinterested students of our system of registration of *documents* of title would agree that the best treatment of the system would be to abolish it. A system which involves the laborious following of the entire trail of title at each transfer of an interest in the land ought perhaps to be discarded in favor of another system entirely. . . .

McCormick, *supra* note 5, at 79. See generally authorities cited in note 5 *supra*. For a general disscussion of the recording acts, see 4 AMERICAN LAW OF PROPERTY §§ 17.4-17.36 (Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

8. See DUNHAM, MODERN REAL ESTATE TRANSACTIONS 646 (1952) ("In most states the objective of the statute is to require all inter vivos transactions affecting the title to real property to be recorded.") Concededly, this objective has been almost realized under the more modern recording acts liberally interpreted by the judiciary. 4 AMERICAN LAW OF PROPERTY § 17.8. Nevertheless, in many jurisdictions, so significant an interest as an executory contract for the sale of land is not recordable. See, *e.g.*, First Nat'l Bank v. Chafee, 98 Wis. 42, 73 N.W. 318 (1897); Standard Oil Co. v. Moon, 34 Ohio App. 123, 170 N.E. 368 (1930). *But see* 4 AMERICAN LAW OF PROPERTY 550 n.5 (listing 25 jurisdictions which provide for such recordation).

Although mechanics' liens are generally recordable, many statutes allow a substantial period of time to elapse after the debt accrues before filing becomes a prerequisite to *continuing* validity. See CREDIT MANUAL OF COMMERCIAL LAWS 382-445 (each state, No. 4) (1959). Title insurers consider unrecorded mechanics' liens a grave risk of loss and therefore exclude them from coverage. Johnstone, *Title Insurance*, 66 YALE L.J. 492, 497 & n.19 (1957).

All interests acquired by adverse possession or prescription are inherently excluded from recordation. See note 99 *infra*. And interests in land acquired other than by inter vivos trasfer cannot be found in local land files. Although sometimes discoverable in other records, they more often require a search outside public files. See note 11 *infra* and accompanying text. And some inter vivos transfers are not eligible for recordation. See, *e.g.*, Black v. Solano Co., 114 Cal. App. 170, 299 Pac. 843 (1931) (oil and gas lease); Phelps v. Kroll, 211 Iowa 1097, 235 N.W. 67 (1931) (assignment of future rents); Eastwood v. Hayes, 286 Mass. 508, 190 N.E. 796 (1934) (life tenant's request for termination of a trust).

9. Among the most important undiscoverable defects vitally affecting the validity of recorded instruments are clerical errors, forged or fraudulently procured instruments, inaccurate descriptions and boundaries, mistaken identification of persons, infancy, insanity and other legal disabilities, void judgments and decrees, and want of legal delivery. See PATTON, REAL ACTIONS AND PROCEEDINGS 27-28 (1936); Chaplin, *supra* note 5; McDougal & Brabner-Smith, *supra* note 1, at 1126-29. By virtue of the doctrine of *caveat emptor*, such latent defects represent claims which can divest even a bona fide purchaser of what seemed a good title. See, *e.g.*, Gould v. Wise, 97 Cal. 532, 32

monly undermines whatever value a recording system might otherwise have. Generally, no single, coordinate record exists to permit a determination of all present and past interests in a given parcel of land.[10] Instead, rights acquired in such ways as marriage, intestate succession, devise and judicial decree are either noted in separate files or not recorded at all.[11] Most states retain the outmoded grantor-grantee indexing system [12] despite the utility of a territorial system under which each jurisdiction would be divided into tracts and all in-

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Pac. 576 (1893) (good-faith purchaser acquires no rights under improperly delivered document); Hopkins v. Fresno County Abstract Co., 36 Cal. App. 699, 173 Pac. 106 (1918) (innocent purchaser obtains no rights under forged instrument); Gillespie v. Rogers, 146 Mass. 610, 16 N.E. 711 (1888) (bona fide purchaser must bear loss caused by recorder's error). Thus, until an imperfect instrument is adjudged valid or void, its legal efficacy is a matter of speculation.

10. See DUNHAM, MODERN REAL ESTATE TRANSACTIONS 638-40 (2d ed. 1958). Idaho, for example, has twenty-four different indices for documents affecting land titles. IDAHO CODE ANN. § 31-2404 (1948).

11. Chaplin, *supra* note 5, at 303-05, 309-10. Rights affected by marriage and divorce and those acquired through intestate succession are particularly difficult to ascertain. For example, although marriage is, in a strained sense, a matter of record, the files may be located at the parties' residence or the place of solemnization. Obviously, some or all grantors in a chain of title might have been married in a jurisdiction other than that of the property's situs. Even more difficult to determine is whether a divorce has occurred and, if so, where it was finalized. Nevertheless, marriage and divorce have an essential bearing on dower, curtesy and heirship. *Id.* at 304-05. Similarly, if a former owner died intestate, his heirs must be discovered. Absent some form of judicial proceeding which has conclusively determined heirship, nonrecord sources must be explored—a time-consuming, costly and, with the passage of time, extremely difficult undertaking. *Id.* at 303-04.

Rights acquired under wills may be determined with comparative facility from probate records, although the danger exists that the probate proceedings were invalid. If rights are based an judgments and decrees, the threat of later invalidity is more serious, for court records cannot possibly indicate whether proceedings will withstand collateral attack. *Id.* at 309-10.

12. See 1 PATTON, TITLES § 67 (2d ed. 1957). Under this system, documents of conveyance are classified solely by names of grantors and grantees. Normally, a purchaser first traces title backward in time through the grantee index, wherein each previous holder appears as grantee from a grantor who in turn was a grantee from his predecessor. A closer examination then proceeds forward through the grantor index, but only with reference to transfers made by each record holder during his already established period of ownership. Consequently, any recorded transfer outside the ostensible line of title may be undiscoverable, or at least beyond the required scope of examination. For this reason, most courts hold that only recorded instruments within a holder's direct chain of title provide constructive notice to subsequent parties. See *id.* § 69 (rule originated in response to limitations of the grantor-grantee index; rule in fact "wrong on principle").

The immediate consequences of this rule are startling. For example, a conveyance by a grantor before he acquired title is outside the chain of title and, even if recorded, is not a matter of constructive notice. Hence, following the grantor's acquisition of title, a conveyance to a subsequent party who records gives the second taker priority over the first, even though the party to whom title was transferred prior to its acquisition was a bona fide purchaser. See, *e.g.*, Briggs v. Sample, 43 Fed. 102 (C.C.D. Kan. 1890); Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047 (1911); 4 AMERICAN LAW OF PROPERTY

terests indexed by individual parcel.[13] Many serious priority-of-interest problems are thus created which could be easily eliminated through the installation of supplementary files for each tract.[14] Since prevailing judicial doctrine holds that a misindexed document, though virtually undiscoverable,[15] puts subsequent parties on notice of a transaction, a bona fide purchaser may be divested of a seemingly valid title.[16]

Recognizing the deficiencies of recordation, courts have formulated a purchaser-oriented doctrine of marketability designed to invalidate executory

§ 17.20. *But see* Tefft v. Munson, 57 N.Y. 97 (1874) (applying the minority "estoppel by deed" doctrine).

Another inequitable situation obtains after a grantor in the chain of title conveys to one who does not record but sells to a bona fide taker who does. The second purchaser is outside the chain of title, so that if the original grantor fraudulently sells to still a third party, the third party will prevail. See, *e.g.*, Abbott v. Parker, 103 Ark. 425, 147 S.W. 70 (1912); Turner v. Bell, 143 Miss. 782, 109 So. 794 (1926); 1 PATTON, TITLES § 69 (2d ed. 1957); McCormick, *supra* note 5, at 84-86. True, in both of the above situations, the defeated party has acquired title under suspicious circumstances. Nevertheless, he may either need the land badly enough to risk the consequences, or does not realize the significance of an unbroken chain of title. The grantor-grantee index thus may become a trap for the overzealous and unwary.

13. Were the jurisdiction subdivided territorially and all interests noted in chronological order of acquisition, indexing difficulties would largely disappear. Absent clerical errors, a tract index permits all recordable interests in a given parcel of land to be ascertained. See Fullerton Lumber Co. v. Tinker, 22 S.D. 427, 118 N.W. 700 (1908). In one instance, though, the constructive-notice doctrine will destroy interests despite the employment of a tract index. Assume that grantor *X* holds an undivided parcel of land which he subdivides into two tracts—*1* and *2*. He then conveys tract *1* to *Y* and tract *2* to *Z*, but imposes a restrictive covenant on tract *2* in the contract he consummates with *Y* for tract *1*. Both *Y* and *Z* record in the tract index. *Z* is on constructive notice of the restriction even though it will not appear anywhere in the tract index covering the parcel of land he has purchased. See Finley v. Glenn, 303 Pa. 131, 154 Atl. 299 (1931); *cf.* McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921); Note, 20 MICH. L. REV. 344 (1922). *But see* Glorieux v. Lighthipe, 88 N.J.L. 199, 96 Atl. 94 (1915).

14. For arguments favoring the universal adoption of tract indices, see Fairchild, *Improvements in Recording and Indexing Methods for Real Property Instruments*, 28 GEO. L.J. 307 (1939); McCormick, *supra* note 5, at 80-86. See also DUNHAM, MODERN REAL ESTATE TRANSACTIONS 638-45 (2d ed. 1958) (discussing and comparing various forms of indices).

15. See McCormick, *supra* note 5, at 87.

16. See, *e.g.*, Seat v. Louisville & Jefferson County Land Co., 219 Ky. 418, 293 S.W. 986 (1927). See also 1 PATTON, TITLES § 68 (2d ed. 1957); 5 TIFFANY, REAL PROPERTY § 1274 (3d ed. 1939). There is a conflict of authority as to the effect of complete failure to file a delivered document. Writing in 1925, McCormick, *supra* note 5, at 87, stated that most courts hold a document "recorded" as soon as delivered to the recording officer; McCormick relied on Sinclair v. Slawson, 44 Mich. 123, 6 N.W. 207 (1880). More recent authority indicates, however, that a majority of states now follow the view that the recording grantee is under an obligation to see that the instrument is correctly recorded; if he fails, it will not constitute constructive notice. 1 PATTON, TITLES § 64 (2d ed. 1957). On the other side, a large minority of states still follow the earlier view, either as a result of statutory language or judicial construction. *Ibid.* Adherence to the view that an unfiled, misfiled or misindexed document will constitute constructive notice—thereby

sales contracts in the event a vendor cannot tender "marketable" title.[17] This term is vaguely defined as that title acceptable to a reasonably prudent man,[18] or that free from reasonable doubt[19] or material defect,[20] or that providing assurance against loss or disturbance by subsequent litigation.[21] To give content to these abstractions, the courts would ideally rule that every vendor be able either to trace a complete chain of title to an unimpeachable source,[22] or to prove the nonexistence of any outstanding encumbrance.[23] The former is impractical and the latter impossible. Since strict adherence to this approach could therefore result in the invalidation of all titles subjected to judicial scrutiny, "marketable" title has no meaning as a positive, juridical concept. What a court actually adjudicates is the *ad hoc* question whether, as a matter of abstract logic, a given title is commercially unmarketable.[24] Although a finding of unmarketability is often necessary in order to reach equitable results between immediate litigants, the finding operates to destroy a title's value unless and until it can be cleared by some remedial device.[25] The indirect result of such a finding is to raise uncertainties which may affect land values throughout a particular jurisdiction. In sum, judicial adherence to the market-

endangering subsequent good faith purchasers—has been roundly criticized. See *ibid.*; McCormick, *supra* note 5, at 86-88. For a detailed study of the concept of constructive notice in the land-transfer context, see Philbrick, *Limits of Record Search and Therefore of Notice* (pts. 1-3), 93 U. PA. L. REV. 125, 259, 391 (1944).

17. See generally BASYE § 4; 1 PATTON, TITLES §§ 46-48 (2d ed. 1957).

18. See, *e.g.*, Bliss v. Schlund, 123 Neb. 253, 242 N.W. 436 (1932).

19. See, *e.g.*, Attebery v. Blair, 244 Ill. 363, 91 N.E. 475 (1910).

20. See, *e.g.*, Myrick v. Austin, 141 Kan. 778, 44 P.2d 266 (1935).

21. See, *e.g.*, Howe v. Coates, 97 Minn. 385, 107 N.W. 397 (1906); Collins v. Martin, 6 S.W.2d 126 (Tex. Civ. App. 1928).

22. Aigler, *Clearance of Land Titles—A Statutory Step*, 44 MICH. L. REV. 45, 48 (1948); see Ankeny v. Clark, 148 U.S. 345 (1893) (title must be traced to an undeniably valid source such as a patent from the United States Government); *cf.* Scott v. Stanley, 149 Wash. 29, 270 Pac. 110 (1928) (a marketable title presupposes one fairly deducible of record); 2 PATTON, TITLES § 602 (2d ed. 1957) (if contract expressly or impliedly calls for a record title, hiatus in chain of transfers renders title unmarketable). Compare Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315 (1907) (variance between name of grantee in one instrument and grantor in the next is a fatal "gap" in chain of title); Ewing v. Plummer, 308 Ill. 585, 140 N.E. 42 (1923) (lost deed interrupting succession of transfers vitiates title marketability); Irving v. Campbell, 121 N.Y. 353, 24 N.E. 821 (1890) (similar). *But see* Attebery v. Blair, 244 Ill. 363, 91 N.E. 475 (1910) (apparent gap in title because of death of record owner and subsequent conveyance by heirs curable by affidavits; title remains marketable); *cf.* McWilliams v. Toups, 202 Ark. 159, 150 S.W.2d 34 (1941) (title acquired by adverse possession marketable if contract does not call for good record title).

23. See, *e.g.*, Metzker v. Lowther, 69 Idaho 155, 204 P.2d 1025 (1949); Wallach v. Riverside Bank, 206 N.Y. 434, 100 N.E. 50 (1912); Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 N.W. 853 (1908). See also 92 C.J.S., *Vendor & Purchaser* § 201, at 53 n.91 (1955) (collecting cases).

24. For criticism of this negative judicial approach to marketability, see BASYE § 371.

25. *Cf.* Douglas v. Ransom, 205 Wis. 439, 237 N.W. 260 (1931); Hendricks, *supra* note 1.

ability standard is both an implicit admission that shortcomings in the law of land-transfer engender private injustice, and an explicit process which serves to accentuate and aggravate the law's inadequacies.[26]

Viewed pragmatically, "marketable" title would transcend the narrow legal definitions employed in warranty-of-title actions, and would denote the elimination both of known record defects and of others hitherto undiscovered and undiscoverable. That is, a functional doctrine of marketability would demand a consistent quantum of reasonable security against any form of attack from any source at any time. An owner could thus resell his property to everyone whose standards of acceptability were identical with his at the time he acquired the land. And, by maintaining the title at a constant "level of certainty," a purchaser, or an owner contemplating improvements, would have reasonable protection against the assertion of previously undiscovered defects.[27] In all, a uniform test rationally geared to the needs of property holders would be far superior to the present oscillating standard of marketability. The record-

26. Frequent application of the unmarketability doctrine on highly technical and tenuous grounds contributes to the unwillingness of title examiners to approve any title which is open to even slight doubt or reservation. See generally Lyman, *Distinguishing Apparent and Real Title Defects: Standardizing Opinions*, in SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 68 (1939); Williams, *The Over Meticulous Title Examiner as a Nuisance to the Public and to the Profession*, 17 NEB. L. BULL. 98 (1938). To alleviate this situation in part, state bar associations have adopted uniform title standards to guide examiners in appraising marketability. See Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 VA. L. REV. 1 (1953). See also BASYE § 7; *Table of Title Standards*, in *id.* at 669-81. This movement hardly ends the marketability dilemma:

> Title standards have only limited usefulness. The standards are not law and are not binding upon examiners. Because they require unanimity, they normally relate merely to matters of noncontroversial minutiae and have a tendency to solidify practice around that of the most timorous examiners. They cannot extend to controversial matters, nor can they alter existing law. The preservation of the present system of title examination depends upon a radical revision of positive laws of property and of the recording statutes. This is a disease for which title standards are a mere palliative.

Payne, *supra* at 31-32.

One commentator has suggested that title standards be enacted into positive law so as to bind the judiciary and provide a thoroughly reliable basis for examination decisions. See BASYE § 7, at 26. One state has in fact already adopted the entire set of standards formulated by its bar association. NEB. REV. STAT. ANN. § 76-601 (1943). This approach ignores rather than solves the marketability problem. "By accepting certain 'standards' for distinguishing between 'real' and 'apparent' defects, title examiners promise not to raise certain defects. This is, of course, mere whitewash for the cancers in the public records; it probes none of the roots of the trouble." McDougal, *supra* note 3, at 66 n.9. "There is an inherent danger that the adoption of title standards might distract the reform movement from the more important field of statutory revision. Furthermore, title standards may have the effect of shifting the risk of loss from the attorney to his client." Payne, *supra* at 32.

27. For similar but less detailed definitions of marketability, see BASYE §§ 4, 5 & § 4, at 8 & n.11 (collecting cases). Compare GAGE, *op. cit. supra* note 1, at 17.

ing systems prevent most titles from even approaching functional marketability, however. Legislators and scholars have therefore devised numerous remedial measures intended to promote the transfer of land free of those title defects which the state can cure. This Comment will discuss the efficacy of previously proposed curative devices, and will explore the suit to quiet title in especial detail.

COMMONLY PROPOSED REMEDIES FOR IMPAIRED TITLE

Those commentators who see no possibility of salvaging the recording system would scrap it entirely and substitute title registration (the Torrens system).[28] A few others, seeking substantially to preserve the status quo, urge only minor statutory reforms supplemented by private action along the lines of title insurance.[29] Most authorities view Torrens as unacceptable and title insurance as insufficient, and prefer a solution within the framework of the recording system which would enhance the legal—or, in some cases, functional—marketability of real property.[30] These observers have proposed such reforms and remedies as statutes of limitation, acts to facilitate the curing of defects, and legislation making certain titles more marketable.[31]

Torrens

Under the Torrens system, all interests in a parcel of realty are embodied in a certificate of registration. The need for an elaborate examination of records is thus eliminated.[32] To process his title, a party claiming a fee interest

28. See, *e.g.*, McDougal, *supra* note 3; McDougal & Brabner-Smith, *supra* note 1; Rood, *Registration of Land Titles*, 12 MICH. L. REV. 379, 387 (1914); *cf.* McCormick, *supra* note 5.

29. See, *e.g.*, GAGE, *op. cit. supra* note 1, at 151-55; POWELL, REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK (1938) [hereinafter cited as POWELL]; Cushman, *Torrens Titles and Title Insurance*, 85 U. PA. L. REV. 589, 605-06 (1937).

30. SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 82-85 (1948); Payne, *The Crisis in Conveyancing*, 19 MO. L. REV. 214, 217-20 (1954).

31. See generally BASYE; SECTION OF REAL PROPERTY, PROBATE AND TRUST, ABA PROCEEDINGS 87 (1948); Aigler, *Clearance of Land Titles—Statutory Steps*, in SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 19 (1946); Cribbet, *A New Concept of Marketability*, 43 ILL. B.J. 778 (1955); Payne, *supra* note 30.

32. The basic principle of this system is the registration of the title of land, instead of registering [recording], as the old system requires, the evidence of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered [recorded] . . . . In the other the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered.

State *ex rel.* Douglas v. Westfall, 85 Minn. 437, 438, 89 N.W. 175 (1902). See also Cushman, *supra* note 29, at 592. This distinction between registering the title itself and recording mere evidence of title is overconceptualized, for, in practical terms, Torrens is merely a comparatively efficient way to keep the public records. See McDougal & Brabner-Smith, *supra* note 1, at 1126 n.5.

Detailed favorable studies of the Torrens system include 4 AMERICAN LAW OF PROPERTY §§ 17.37-.48; Patton & Patton, *Registration of Titles and Conveyancing*

files an application naming all known adverse claimants and joining en masse all other potential interest-holders.[33] Before trial, a court refers the applicant's title to an official examiner for an investigation and a report on its acceptability for registration.[34] If the report is favorable, the court hears all claims and adjudicates their validity. Ordinarily, a binding decree is then rendered naming the applicant as fee owner subject to any outstanding interests confirmed by the court.[35] This judgment is then incorporated in a certificate and filed in the county registrar's office, a duplicate being issued to the fee holder.[36] After a relatively brief period during which the decree may be reopened by adverse claimants,[37] the certificate becomes the exclusive determinant of title save for a few encumbrances specifically excluded by statute.[38] All lesser interests subsequently acquired can be validated only through notation on the instrument;[39] and the fee can be transferred only by surrendering the old certificate to the registrar and obtaining a new one in the purchaser's name.[40] As a result, any interested party can rely on the certificate alone as substantial protection against undiscovered and unknown claims.[41]

Applied to Registered Titles, in MINN. STAT. ANN. following § 507.41, at 435 (1947). For the view that Torrens should be adopted, see McDougal & Brabner-Smith, *supra* note 1; McDougal, *supra* note 3. The leading works criticizing title registration are POWELL, and STATE LANDS COMMISSION OF CALIFORNIA, LAND TITLE LAW OF CALIFORNIA (1953), cited in DUNHAM, MODERN REAL ESTATE TRANSACTIONS 774 (2d ed. 1958).

33. *E.g.*, MINN. STAT. ANN. §§ 508.05-.06 (1947).

34. *E.g.*, ILL. REV. STAT. ch. 30, § 62 (1957).

35. *E.g.*, MINN. STAT. ANN. § 508.23 (1947).

36. *E.g.*, COLO. REV. STAT. ANN. §§ 118-10-38 to -41 (1954).

37. *E.g.*, COLO. REV. STAT. ANN. § 118-10-31 (1954) (reopening within ninety days of entry of the decree but not afterward; bona fide purchaser protected at all times); MINN. STAT. ANN. §§ 508.26, 508.28 (1947) (no decree shall be set aside by any action instituted more than six months after adjudication). *But see* ILL. REV. STAT. ch. 30, § 70 (Supp. 1958) (reopening allowed by unnotified persons within two years after decree rendered).

38. The ordinary exceptions to the conclusiveness of a Torrens registration decree include: (1) liens, claims or rights of the United States which do not appear of record; (2) tax liens or special assessments for which the land has not been sold as of the registration date; (3) all public highways on the land, sometimes including rights of way or easements; (4) leases for not over three years whenever the lessee is in actual occupation of the premises; and (5) the rights of persons in possession under deed, or contract for deed, from the registrant. See, *e.g.*, COLO. REV. STAT. ANN § 118-10-33 (1953); MINN. STAT. ANN. § 508.25 (1947).

39. *E.g.*, MINN. STAT. ANN. § 508.49 (1947).

40. *E.g.*, ILL. REV. STAT. ch. 30, § 91 (1959).

41. Once the statutory reopening period has elapsed, see note 37 *supra*, a Torrens registration certificate is generally conclusive as to the status of title. 4 AMERICAN LAW OF PROPERTY § 17.47; 5 TIFFANY, REAL PROPERTY § 1314 (3d ed. 1939). Nevertheless, some elements of doubt necessarily inhere in any legislative system to establish land titles. For example, express statutory language exempts certain interests from the effect of a decree. See note 38 *supra*. The major element of inconclusiveness centers around certificates procured by actual or constructive fraud. Actual fraud—the deliberate omission of known interest holders from an application—is not a particularly serious threat, as it ordinarily will not result in a bona fide purchaser being deprived of his

Registration affords greater title security and ease of transfer than any method dependent on recordation,[42] but it does so at a cost generally deemed prohibitive in this country. Those states having registration treat it as an optional alternative to recordation,[43] and wherever Torrens is accepted, dup-

interest. See N.Y. REAL PROP. LAW § 392; Baart v. Martin, 99 Minn. 197, 108 N.W. 945 (1906). Constructive fraud—failing to name an interest-holder in possession, deliberately or not—represents a more serious obstacle to a conclusive decree. Since the decree is considered totally void, innocent purchasers for value are accorded no safeguards whatever. See, *e.g.*, Follette v. Pacific Light & Power Corp., 189 Cal. 193, 208 Pac. 295 (1922); Sheaf v. Spindler, 339 Ill. 540, 171 N.E. 632 (1930). See generally Staples, *The Conclusiveness of a Torrens Certificate of Title*, 8 MINN. L. REV. 200 (1923). While fraud and, particularly, constructive fraud undermine Torrens' effectiveness, they represent the only serious threat to title security. Other judicially-created exceptions usually involve minor interests that occur infrequently. For example, an unrecorded common-law dedication by the registrant's grantor may survive the registration decree. See Hooper v. Haas, 332 Ill. 561, 164 N.E. 23 (1928). Or the decree may be ineffective against a previously registered interest. See Minnetonka State Bank v. Minnesota State Sunshine Soc'y, 189 Minn. 560, 250 N.W. 561 (1933) (easement previously registered under Torrens).

42. This view is propounded, naturally, by Torrens' advocates. See, *e.g.*, McDougal & Brabner-Smith, *supra* note 1; McDougal, *supra* note 3; Patton, *The Torrens System of Land Title Registration*, 19 MINN. L. REV. 519, 533-34 (1935). But it has also been accepted at times, although with reservation, by those who are critical of Torrens as opposed to recordation, see, *e.g.*, DUNHAM, MODERN REAL ESTATE TRANSACTIONS 777 (2d ed. 1958), and by those who are noncommittal on the merits, see, *e.g.*, Johnstone, *supra* note 8, at 513. Even impartial textwriters impliedly espouse the benefits of Torrens. See 4 AMERICAN LAW OF PROPERTY §§ 17.38-.39, 17.47; 5 TIFFANY, REAL PROPERTY §§ 1314-21 (3d ed. 1939).

43. 4 AMERICAN LAW OF PROPERTY § 17.39, at 641. This treatise does say, though, that Hawaii has a compulsory registration system for corporate lands. Were this true, the statement in text would have to be qualified, as Hawaii will shortly become the fiftieth state. The *American Law of Property* does not cite any authority for its assertion, however, and the Hawaiian statute appears to contradict it: "Application for the registration of title *may* be made by . . . a corporation by it proper officer . . . ." HAWAII REV. LAWS § 342-13 (1957). (Emphasis added.)

One possible explanation for Torrens being denominated an optional alternative to recordation is that the only two systems which embodied some features of compulsory registration were declared unconstitutional. See People *ex rel.* Kern v. Chase, 165 Ill. 527, 46 N.E. 454 (1896); State *ex rel.* Monnett v. Guilbert, 56 Ohio St. 575, 47 N.E. 551 (1897). In the *Chase* decision, an improper delegation of judicial authority to the executive was held to violate the separation-of-powers principle. *Guilbert* rested on both this ground and on the view that Torrens confiscates private property for nonpublic uses without adequate compensation. However, both holdings can be limited to their facts and are no longer regarded as binding precedent. See 5 TIFFANY, REAL PROPERTY § 1315 (3d ed. 1939); 4 AMERICAN LAW OF PROPERTY § 17.39. Indeed, both Illinois and Ohio have since re-enacted their statutes. The Illinois act, now ILL. REV. STAT. ch. 30, §§ 45-152 (1957), was promptly validated. People *ex rel.* Deneen v. Simon, 176 Ill. 165, 52 N.E. 910 (1898). Ohio passed a constitutional amendment in 1912 and repassed its Torrens Act (now OHIO REV. CODE ANN. §§ 5309.01-.98 (1954)) in 1913. Apparently, it was never challenged, and all constitutional questions have long since faded into obscurity. See Henshaw, *The Torrens System in Ohio*, 1 U. CINC. L. REV. 472 (1927). Modernly, even the arch-foe of Torrens, Professor Richard Powell, concedes that a

licate sets of local land offices are established, one for registration, the other for recordation. The Torrens system also necessitates a state-administered fund for the indemnification of legitimate interest-holders cut off through administrative negligence.[44] In addition, the registration process is frequently so costly and time-consuming as to be infeasible. A vendor anxious to consummate a sale quickly is apt to be discouraged by the length and elaborateness of the initial proceedings, particularly by the delay during referral to the public examiner. And all applicants for registration must compensate this official, contribute to the indemnification fund, and pay other miscellaneous charges in addition to the usual attorneys' fees.[45] Confronted with the alternative of recordation supplemented by title insurance or by warranties of title in the deed, a potential registrant is tempted not to expend his time and money on registration, the benefits of which will largely accrue to subsequent owners.[46]

While the cost of registration might possibly be reduced,[47] a half-century's experience shows that Torrens is not the solution to the land-transfer problem. Despite its success in other countries, Torrens has never been popular in the United States, and hopes for its ultimate acceptance have practically disappeared.[48] Resistance is partially attributable to an irrational but nonetheless powerful aversion to a "foreign" system.[49] More intense is the opposi-

compulsory system could be adopted. POWELL 74. And commentators favoring Torrens have argued for a compulsory system without mention of any constitutional issues. See Fairchild & Springer, *A Criticism of Professor Richard R. Powell's Book Entitled Registration of Title to Land in the State of New York*, 24 CORNELL L.Q. 557 (1939); McDougal & Brabner-Smith, *supra* note 1, at 1149.

44. For assurance-fund provisions, see, *e.g.*, COLO. REV. STAT. ANN. § 118-10-86 to -91 (1953); N.C. GEN. STAT. ANN. §§ 43-49 to -55 (1949). For a discussion of the view that the public expense of registration exceeds public receipts, and that Torrens is often in effect a subsidy to registrants, see generally POWELL 64, 156, 169, 193, 216, 218, 229; Cushman, *supra* note 29, at 602-03.

45. On the frequently excessive private expense of title registration, see *id.* at 602-04; Johnstone, *supra* note 8, at 513-15.

46. See SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 84 (1948); Johnstone, *supra* note 8, at 514.

47. The major proposal for reform is to convert the cumbersome judicial registration procedure into a speedier and less expensive administrative proceeding. See Johnstone, *supra* note 8, at 514-15; Comment, 48 YALE L.J. 1238 (1939) (advocating introduction of a system similar to motor-vehicle registration). For other suggested improvements, see Fairchild & Gluck, *Various Aspects of Compulsory Land Title Registration*, 15 N.Y.U.L.Q. REV. 545 (1938); Sabel, *Suggestions for Amending the Torrens Act*, 13 N.Y.U.L.Q. REV. 244 (1936).

48. See, *e.g.*, BASYE 2; DUNHAM, MODERN REAL ESTATE TRANSACTIONS 779 (2d ed. 1958); Johnstone, *supra* note 8, at 514-15. The American Bar Association has also somewhat regretfully acknowledged Torrens' demise. See SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 83-85 (1948).

49. For a classic statement of aversion to the Torrens system because of its foreign origin, see FINCK, THE TORRENS FALLACY 50 (1935). A history of Torrens operations in foreign nations may be found in POWELL 269. Many of the more severe critics of registration seek to discount favorable experience with Torrens outside of this country.

tion of vested-interest groups—notably title insurance companies, professional abstractors and some attorneys—who thrive on and would perpetuate the confusion which current recording systems create.[50] Of the nineteen states that have experimented with Torrens, only four use it extensively and but seven others occasionally.[51] Practical considerations therefore dictate its rejection as a potential solution to present problems—notwithstanding the fact that it would eliminate most of the risks which attend conveyancing under the recording acts.

Title Insurance

Title insurance is essentially an improved method of appraising the status of recorded titles, a method which neither removes defects nor protects against major losses.[52] The term insurance is an anomaly, for, as the known threat of loss increases, the coverage offered diminishes. No matter how valid a title appears, its insurer employs a standardized clause exempting from coverage undiscoverable defects which entail considerable risk of loss, unrecorded adverse claims apparent through a physical inspection of the premises, and imperfections of title known to the insured prior to obtaining the policy.[53] Moreover, except for a few flaws posing slight threat to either insured or insurer, defects discovered by the insurer before he issues a policy are usually excluded from coverage.[54] If a title is considered vulnerable to an adjudication of unmarketability, loss coverage may be confined to imperfections which the insurer failed to detect because of his negligence, fraud or deliberate restrictions on the scope of search.[55] In short, title-insurance

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See POWELL 56-60; Bordwell, *The Resurrection of Registration of Title*, 7 U. CHI. L. REV. 470 (1940). Compare McDougal & Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125, 1131-38 (1939) (foreign experience highly relevant).

50. See POWELL 37 n.128a, 162 n.156; Fairchild & Springer, *supra* note 43, at 573-74; McDougal & Brabner-Smith, *supra* note 49, at 1146-48. *But see* Bordwell, *supra* note 49, at 470-71 (minimizing vested opposition as an explanation for Torrens' failure).

51. See Johnstone, *supra* note 8, at 514 n.93.

52. It is a terrible indictment of our boasted jurisprudence if it is incapable of inventing or enduring any improvement on the system which has enabled title guaranty companies and abstract companies all over our land, and often several in the same city, to put by millions in surplus, after paying immense dividends, salaries and clerical expenses, all extorted as a tax on land titles and transfers, for what has been somewhat sarcastically put as insuring against everything but loss.

Rood, *supra* note 28, at 387. For general studies of the title-insurance process, see GAGE, LAND TITLE ASSURING AGENCIES IN THE UNITED STATES 78-132 (1937); Johnstone, *supra* note 8; Rhodes, *The Insurance of the Real Estate Title*, 10 CONN. B.J. 115 (1936).

53. See Johnstone, *supra* note 8, at 494-97.

54. *Id.* at 496.

55. *Id.* at 495-96. Professor Johnstone indicates, however, though without statistical support, that marketability is now a risk "generally" covered in mortgagee and often in owner policies. *Id.* at 496. *But see* REEVE, GUARANTEEING MARKETABILITY OF TITLES TO REAL ESTATE (1951) (study by an executive of a leading title company arguing strongly against insuring marketability).

companies ferret out, but commonly do not insure against, serious, probable deficiencies in title.

Title insurance serves, therefore, mainly to alert purchasers to the potential hazards of acquiring title to real property.[56] Examinations by attorneys and professional abstractors are of limited reliability because derived from dispersed, incomplete and poorly indexed public records.[57] Title-insurance companies, on the other hand, generally consolidate and correlate copies of all relevant land, tax, probate and judicial records.[58] The resources and specialized experience of these companies enable them to provide prompt title abstracts markedly superior to lawyers' opinions and abstractors' summaries.[59] Because of the ancillary services which insurers provide, title-insurance policies are in wide demand. Still, risk coverage is so rigidly confined that title insurance is hardly the answer to the shortcomings of land recordation.[60]

Statutes of Limitation

Statutory provisions barring actionable claims not asserted within a specified time contribute little to improving the saleability of land.[61] Traditionally, the limitations period for realty actions has been twenty years;[62] actually,

56. Walsh, Book Review, 16 N.Y.U.L.Q. REV. 510, 511 (1939) ("Lawyers know that a title policy as such is of little value as insurance; its principal value is that it represents a thorough search which is guaranteed."). That title insurance is fundamentally a means of risk dilineation rather than risk coverage is a fact often acknowledged by the insurers themselves. See Johnstone, *supra* note 8, at 494-95.

57. See notes 12-14 *supra* and accompanying text.

58. Johnstone, *supra* note 8, at 506-08.

59. Indeed, due to the speed and efficiency of their service, title companies have already dislodged the lawyer-abstractor system in most large urban areas. In rural locales or smaller cities, however, the latter remains the predominant method of title examination. See *id.* at 493, 515-16.

60. For the view that title insurance is in the same category as other methods of title examination and is not a solution to the marketability problem, see Committee on Substantive Changes in Real Property Law, *Report*, in SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 82-83 (1948).

61. The relation of statutes of limitations to the security of land titles is best explained in terms of certain legal policies concerning realty. On the one hand, the law seeks to encourage maximum utilization of land; it therefore favors the establishment of titles in persons who have long possessed real property under a claim of ownership, and looks askance upon the indefinite nonassertion of rights by a record titleholder not in possession. At the same time, the law prefers that a cause of action be litigated within a reasonable time after it accrues. These complementary policies coalesce in statutes which, first, provide for the establishment of titles held by adverse possession, and concomitantly, bar a record-owner's untimely action for ejectment or recovery of land. See, *e.g.*, CAL. CIV. PROC. CODE ANN. §§ 318-28 (1954). See also BASYE § 51.

In addition, specific enactments provide applicable periods barring ancient mortgages, claims, the rights of creditors of decedents' estates, attacks on titles derived from official conveyances, and other miscellaneous interests. See generally BASYE chs. 6-8.

62. Modern statutes of limitation derive from an act of James I, 21 Jac. 1, c. 16 (1623), providing that actions for recovery of land or the exercise of rights of entry must be maintained "within twenty years after title and cause of action first descended." See DUNHAM, MODERN REAL ESTATE TRANSACTIONS 732 (2d ed. 1958).

the period depends on the jurisdiction and property interest involved.[63] In any event, limitation statutes are impotent to remove recent title defects, which may remain unlitigated for substantial periods of time.[64] Furthermore, since a limitations act can apply only to actionable claims, it cannot affect "passive" encumbrances such as easements, burdens, servitudes, and interests acquired by prescription or adverse user.[65] Even certain actionable claims, if not actionable immediately, may persist far beyond the limitations period. Thus, the period ordinarily will not start running against infants, incompetents, or the holders of future interests until their disabilities are removed [66] or their future estates become possessory.[67]

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63. Statutes limiting the time for maintenance of ejectment or other actions to recover land from an adverse possessor are provided in all American jurisdictions. General limiting periods range from four to thirty years, the vast majority allowing ten to twenty-one years. See Taylor, *Titles to Land by Adverse Possession*, 20 IOWA L. REV. 551, 554 (1935) (compiling and discussing the statutes); BASYE 112.

64. The average limitations period is fifteen years; during this period a claim remains valid though unasserted. Additionally, the special protections afforded by these statutes to future-interest holders, infants and insane persons, see notes 66-67 *infra* and accompanying text, make it virtually impossible for a purchaser of land ever to be completely sure that all adverse claims have been barred.

65. See Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 145 (1918). *But see* the discussion of marketable-title acts at notes 86-97 *infra* and accompanying text. Though essentially statutes of limitations, these acts operate to extinguish all interests, actionable or not.

66. Usually, persons under disability are expressly protected by statute. See, *e.g.*, MICH. STAT. ANN. § 27.597 (1938). For a complete discussion of legislative indulgence afforded such persons, see BASYE § 54; Taylor, *supra* note 63, at 743-59.

There is, however, a distinct trend toward setting a maximum time limit for suits by infants and incompetents. See BASYE § 54 (almost half the states now impose statutory limits). Three basic types of statutes exist. (1) A maximum period barring all persons, including those under disability, may be established. *E.g.*, FLA. STAT. ANN. § 95.20 (1943) (thirty years), Norton v. Jones, 83 Fla. 81, 90 So. 854 (1922). (2) Persons under disability may have a fixed time beyond the normal statutory period. *E.g.*, ORE. REV. STAT. §§ 12.050, 12.150 (1957) (statutory limitations period of ten years not extended more than five years by any disability); Note, 8 ORE. L. REV. 203 (1929). (3) Both of the preceding statutory categories may be combined. *E.g.*, CAL. CIV. PROC. CODE ANN. § 328 (1954) (persons under disability exempted from normal period of five years for up to twenty years thereafter; but action must be maintained within five years after removal of disability if occurring within this twenty-five year period). For judicial utterances sympathetic to an absolute period limiting persons under disability, see Conner v. Downer, 67 Ky. 631, 634 (1868); Faris v. Moore, 256 Mo. 123, 132-33, 165 S.W. 311, 314 (1914).

67. 3 SIMES, FUTURE INTERESTS § 776 (1936); 2 RESTATEMENT, PROPERTY § 222 (1936). Presumably, exceptions are made in favor of nonpossessory future-interest holders because their right to possession is postponed until the end of the prior possessory estate so that they cannot maintain an ejectment action. See BASYE § 55.

Usually, the postponement of a statute's operation against remaindermen is achieved through judicial interpretation. See, *e.g.*, Jones v. Fowler, 171 Ark. 594, 285 S.W. 363 (1926). Occasionally, however, the statute may explicitly grant a delay. *E.g.*, MICH. STAT. ANN. § 27.595 (1938). A few enactments attempt to grant adverse possessors ab-

A more serious handicap for the title-holder is his inability to record the fact that a defect has been extinguished through the expiration of a statutory period.[68] Similarly for the title-searcher: even though a known adverse interest may appear to have been barred by the running of the period, the records will not reveal that some previous action—for example, partial payment of a mortgage debt[69]—has tolled the statute and revived the claim, or that the claimant is an infant or incompetent still protected by the period. Litigation may therefore be necessary to determine whether the limitations act has cut off the claim in question.[70] Indeed, even if it has, a purchaser who contracted for a marketable title may be relieved of his obligation, for many courts have ruled that a statute of limitations cannot establish marketability.[71] To be sure, proposed reforms would shorten the general limitations

solutely good title, purportedly by barring all actionable claims to possession regardless of the claimant. *E.g.*, ILL. REV. STAT. ch. 83, §§ 6-7 (1957). The judiciary has nevertheless carved out exceptions favoring future-interest holders. See, *e.g.*, Dunlavy v. Lowrie, 372 Ill. 622, 25 N.E.2d 67 (1939); Bechdoldt v. Bechdoldt, 217 Ill. 537, 75 N.E. 557 (1905). Atypically, the judiciary in Iowa and Nebraska has itself "legislated" against the favored treatment of remaindermen. Since remaindermen are there authorized by statute to quiet title, failure to sue an adverse possessor during the general statutory period may bar assertion of the nonpossessory remainderman's interest when it becomes possessory. See Murray v. Quigley, 119 Iowa 6, 92 N.W. 869 (1902); Holmes v. Mason, 80 Neb. 448, 114 N.W. 606 (1908).

68. See BASYE §§ 5, 52. At the same time, there is no means of giving record notice that a person has complied with statutory prerequisites for adverse possession. *Id.* at 108.

69. Statutes of limitations do not extinguish a mortgage debt but merely bar its enforcement. Thus, a new promise to pay by a previous owner, or an acknowledgment of the old debt, may revive it and start the statute running anew. See OSBORNE, MORTGAGES § 298 (1951); Notes, 49 HARV. L. REV. 639 (1936), 46 HARV. L. REV. 706 (1933). Even a conveyance of land by the mortgagor reciting that it is subject to a mortgage may have this effect. See generally 2 GLENN, MORTGAGES §§ 148.1, 287 (1943) (discussing and collecting authorities relating to statutes of limitations and their impact on ancient mortgages).

70. See, *e.g.*, Kane v. Rippey, 24 Ore. 338, 339, 33 Pac. 936, 937 (1893) ("It may be true that . . . the statute of limitations bars the uncancelled incumbrance, but these are matters which may involve litigation or judicial inquiry to determine the validity of title."); Carolan v. Yoran, 104 App. Div. 488, 93 N.Y. Supp. 935 (1905); Texas Auto Co. v. Arbetter, 1 S.W.2d 334 (Tex. Civ. App. 1927).

71. See PATTON, TITLES § 47 (2d ed. 1957) (collecting cases); BASYE 147. *But see* Pratt v. Eby, 67 Pa. 396, 402 (1871) ("A title depending upon the bar of the Statute of Limitations may be a marketable title . . . provided it clearly appears that the entry of the real owner . . . is barred."). Courts often refuse to render a title marketable on the basis of a statute of limitations because of the distinct probability that litigation will ensue. They consider marketability established only when the title conveyed gives the purchaser security against litigation and its attendant loss or disturbance. See, *e.g.*, Turner v. McDonald, 76 Cal. 177, 18 Pac. 262 (1888); Howe v. Coates, 97 Minn. 385, 107 N.W. 397 (1906). Freedom from legal attack is essential, whether or not the title conveyed would enable the purchaser to prevail. *E.g.*, Townshend v. Goodfellow, 40 Minn. 312, 316, 41 N.W. 1056, 1057 (1889). Nor will the fact of adverse possession for the statutory period necessarily establish a marketable title. Rather, the vendor must demonstrate that the purchaser will have evidence at all times to establish title against the attack of a

period [72] and apply it to all actionable interests without exception, but these reforms stand little chance of adoption.

Curative Acts

In contrast with statutes of limitations, which simply prevent the assertion of stale claims, curative acts are positively designed to validate documents of conveyance containing formal defects.[73] Common irregularities in execution or acknowledgment often render instruments ineffective to fulfill the parties' intent of passing legal title.[74] These flaws also nullify the recordation of documents containing them, and thus defeat attempts to provide constructive notice.[75] Errors of this sort ordinarily go undetected until a grantee or someone claiming through him tries to sell his land.[76] In the absence of curative legislation, if the original grantor or his successor in interest is not then willing to execute a quitclaim deed, title will remain defective unless it can be cleared by a suit in equity for a corrective conveyance.[77] Given a curative statute, on the other hand, the courts will automatically accord the original transfer its intended legal effect.[78]

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third person. See, *e.g.*, Shriver v. Shriver, 86 N.Y. 575 (1881); Messer-Johnson Realty Co. v. Security Sav. & Loan Co., 208 Ala. 541, 544-45, 94 So. 734, 737 (1922).

Regardless of the outcome of a suit over legal marketability, titles dependent on a statute of limitations are seldom functionally marketable. See text following note 26 *supra*. Because of the numerous exceptions to the limiting acts, see notes 64-67 *supra*, mere passage of the general period will rarely provide even reasonable certainty that the rights of all third persons are barred. Nor can a court determining the questions of legal marketability in any way affect the rights of third persons. See Pratt v. Eby, *supra*; *cf.* BASYE 8-19, 29, 147.

72. Ballantine, *supra* note 65, at 145 (American Association of Title Men propose that maximum period should be ten years; thereafter, neither future-interest holders nor persons under disability would be exempt); see BASYE § 54 (limitation of ten or fifteen years—extended at maximum for five more to persons under disability without a guardian—is both sufficiently long and equitable).

73. See BASYE § 206, citing Meigs v. Roberts, 162 N.Y. 371, 378, 56 N.E. 838, 840 (1900).

74. See, *e.g.*, McNichols v. McNichols, 299 Ill. 362, 132 N.E. 448 (1921); Erickson v. Conniff, 19 S.D. 41, 101 N.W. 1104 (1904). See also 1 PATTON, TITLES § 61 (2d ed. 1957).

75. Although the intended document of conveyance is ineligible for recordation, see, *e.g.*, Pearson v. Creed, 78 Cal. 144, 20 Pac. 302 (1889); Keech v. Enriquez, 28 Fla. 597, 10 So. 91 (1891), it may still be accepted by the local filing clerk. Nevertheless, it remains "unrecordable," and hence cannot constitute constructive notice. See, *e.g.*, Parsons v. Rice, 81 Mont. 509, 264 Pac. 396 (1928); Prouty v. Marshall, 225 Pa. 570, 74 Atl. 550 (1909). See also 1 PATTON, TITLES §§ 62-63 (2d ed. 1957); 4 TIFFANY, REAL PROPERTY § 1027 (3d ed. 1939); 5 *id.* §§ 1027, 1264.

76. See BASYE 294.

77. See *id.* § 203.

78. As between the parties and their successors in interest, fulfilling the original intent is only just. The grantor of the defective instrument has usually received consideration for the transfer, and, as a result of the defect, has at most a bare legal right unassertable in equity. See Ewell v. Daggs, 108 U.S. 143, 151 (1883). Indeed, curative acts

The curative act is limited, however, as to the types of defects it expunges.[79] More important, a statute of this sort frequently does not correct irregularities which arise after its enactment or which arose after a specified date preceding its enactment.[80] For example, a ten-year statute adopted in 1959 would not encompass instruments recorded after 1949; subsequent deficiencies would remain uncured pending future legislation. And, even when a curative act operates continuously to rectify errors some time after they occur, a substantial interval normally exists between an error and its statutory correction;[81] the theory behind this hiatus is that to efface all defects at their inception would be to repeal desirable formalities of conveyancing.[82]

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usually do exactly what a court of chancery would had the transferee under a defective instrument sued either to quiet title or for a corrective conveyance. See Chesnut v. Shane's Lessee, 16 Ohio 599, 609-10 (1847). Neverthless, the competency of the legislature to pass curative legislation is not limited to those situations in which chancery could grant relief. See BASYE 296-97 (collecting cases).

79. Until recently, most curative legislation was hampered by its extreme specificity as to the formality or irregularity corrected. See, *e.g.*, FLA. STAT. ANN. §§ 117.06 (acknowledgement prior to April 1, 1903 before notaries whose commission had expired), 694.05 (previous acknowledgments executed prior to 1873 before officers outside the state), 695.03 (previous acknowledgments taken before officers later authorized to take acknowledgments) (1943). True, several jurisdictions now have general statutes applying to most formal defects in the execution of documents of transfer. *E.g.*, NEB. REV. STAT. ANN. §§ 76-258 to -260 (1958) (instruments recorded for ten years); UTAH CODE ANN. § 57-4-4 (1953) (instruments recorded prior to 1943); see BASYE § 236, at 352 n.1 (Supp. 1958) (collecting citations). Elsewhere, however, only specific defects are treated by curative legislation.

80. See, *e.g.*, WYO. COMP. STAT. ANN. §§ 66-302, 66-304 (1945) (unattested instrument executed prior to 1930 validated and declared to have same force and effect as if properly attested). See generally BASYE chs. 12-21. The majority of curative acts are entirely retrospective and hence require periodic re-enactment to have continuing effect. See *id.* § 236.

81. See, *e.g.*, WYO. COMP. STAT. ANN. §§ 66-314 to -318 (unattested instrument executed after 1930 validated and declared to have same force and effect as if properly attested, but only if recorded for ten years). *But cf.* CAL. CIV. CODE ANN. § 1207 (1954) (all defects in execution cured after having been recorded one year).

82. To make them applicable to future transactions immediately upon their completion, however, would be the equivalent of authorizing in advance an alternative method for performing a legal act, *viz.*, making an effective conveyance. This would seriously tend to relax the protective requirements imposed by society upon the performance of such acts. Moreover, it would detract from the effort to provide high standards of craftsmanship in the preparation of deeds and conveyances. It would constitute, in effect, advance authority to commit errors, to relax vigilance in the every day tasks of conveyancing. Hence, a period of time must usually elapse after a transaction before the statute becomes applicable to heal the imperfection.

BASYE 338. On the highly beneficent effects of conveyancing formalities in protecting the grantor and preventing forgeries and frauds, see Chamberlain v. Sprague, 86 N.Y. 603, 607 (1881). *But see* Kan. Title Standard No. 12.1 (formerly No. 73), cited in BASYE § 231, at 339 n.5 (1953, Supp. 1958) (favoring immediate and continuing prospective effect of curative legislation).

In one situation, curative legislation may aggravate, not eradicate, uncertainties. The malaise in the statutory cure is the conflict which arises whenever the grantee of a defective instrument and a subsequent bona fide purchaser for value claim the same property from the same grantor. Under prevailing doctrine, the statutory reinstatement of an erroneous document is retroactive to the date of conveyance and perfects a transfer from the time it was made,[83] provided the rights of an innocent purchaser have not intervened.[84] Hence, the second taker does not enjoy a superior claim unless he can presently establish his former status of bona fide purchaser.[85] But a substantial amount of time may have elapsed between the purchase and the challenge, and the requisite supporting evidence may no longer be available. Consequently, the statute may operate to confirm the first conveyance *ab initio* and to divest a later good-faith purchaser of his land. In brief, curative acts are not without their unpredictabilities as well as their restrictions, and are far from a panacea for impaired marketability.

Marketable-Title Acts

By confining the need for record searches to a recent, fixed period of time, marketable-title acts, now obtaining in four states,[86] enable many otherwise defective titles to satisfy the test of legal marketability.[87] First, these statutes

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83. Smith, *Retroactive Laws and Vested Rights*, 5 TEXAS L. REV. 231-32 (1927); see Seese v. Bethlehem Steel Co., 74 F. Supp. 412, 417-18 (D. Md. 1947); BASYE 309 n.17 (collecting cases upholding the validity of curative acts which operate retroactively).

84. Since a subsequent bona fide purchaser is not charged with constructive notice of the first irregular instrument, even if recorded, see note 75 *supra*, both due process and principles of equity require that the innocent taker be protected against validation of the defective transfer. See, *e.g.*, Brannan v. Henry, 175 Ala. 454, 50 So. 967 (1912); Green v. Abraham, 43 Ark. 420 (1884); Merchants' Bank v. Ballou, 98 Va. 112, 32 S.E. 481 (1899).

A different situation obtains if the second taker was only an heir, donee or assignee of the grantor, or a purchaser with actual knowledge of the first conveyance. Then, neither payment of value nor the concept of detrimental reliance on the grantor's ability to convey good title can be invoked. Since these persons can claim no exemption to the operation of the curative act validating the first transfer, the original grantee is accorded priority. See BASYE § 217, at 320-21. See also SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND (Mich. Leg. Studies 1953); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 621, 852 (1944).

85. See, *e.g.*, Fogg v. Holcomb, 64 Iowa 621, 21 N.W. 111 (1884).

86. MICH. STAT. ANN. §§ 26.1271-.1279 (1953); NEB. REV. STAT. ANN. §§ 76-288 to -298 (1947); N.D. Laws 1951, ch. 280 §§ 1-11; S.D. CODE §§ 51.16B01-.16B14 (Supp. 1952).

In five other states—Illinois, Indiana, Iowa, Minnesota, and Wisconsin—there are statutes barring all interests of ancient origin. These statutes are analogous to but not identical with marketable-title acts. They overcome some of the inadequacies of pure limiting statutes, see notes 64-71 *supra* and accompanying text, with varying degrees of effectiveness. For a full discussion of these enactments, see BASYE §§ 171-77.

87. See, *e.g.*, MICH. STAT. ANN. §§ 26.1271-.1279 (1953). For a complete discussion of marketable-title acts and similar legislation, see BASYE ch. 9. See also Aigler, *Clear-*

automatically extinguish any post-enactment interest which is not recorded within a stated time after it arises.[88] Second, they require every pre-enactment claim to be recorded within the statutory period following its inception or within one year after the local statute's effective date, whichever event occurs later. Under an act establishing a twenty-two year period, for example, those pre-enactment interests which came into being twenty-one years or less before the statute's effective date must be recorded within twenty-two years of their inception; and those which arose more than twenty-one years before the statute's effective date must be recorded within one year after that date.[89] Interests are only extinguished, however, in favor of persons who are in possession of the property in question and who have held an unbroken chain of title during the statutory period.[90] Once this period has elapsed, then, a landowner in possession and with the requisite chain of title should be able to convey a marketable record title—unless outstanding interests originating either during or before the statutory period have been preserved. Such interests admittedly derogate from full title, but no remedial device could properly obliterate them in the absence of a hearing on their validity. Since these interests were presumably either reflected in the vendor's own purchase price or created by him in return for value received, he should expect them to influence his resale price.

Still, the statutory provision that timely recordation will preserve any interest regardless of its age or validity can perpetuate clouds on a would-be vendor's title. If (as is likely) adverse claims are recorded or acquired at any time during the post-enactment period, his title is vulnerable.[91] By definition, the record interests cloud his title. In addition, the value of his property is

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ance of Land Titles—A Statutory Step, 44 MICH. L. REV. 45 (1945); Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951); Aigler, *A Supplement to "Constitutionality of Marketable Title Acts"—1951-1957*, 56 MICH. L. REV. 225 (1957); Cribbet, *A New Concept of Merchantability*, 43 ILL. B.J. 778 (1955). A more critical approach may be found in Payne, *The Crisis in Conveyancing*, 19 MO. L. REV. 214 (1954).

88. Michigan—forty years; Nebraska—twenty-two years; North Dakota—thirty years; South Dakota—see note 89 *infra*.

89. See, *e.g.*, NEB. REV. STAT. ANN. § 76-290 (1943). One statute is an exception. The South Dakota enactment does not establish a statutory period but provides instead that anyone in possession of land with an unbroken claim of title since 1930 has a marketable record title thereto. S.D. CODE § 51.16B01 (Supp. 1952). A pre-1930 claim must have been recorded within one year after the statute's effective date. Since the South Dakota legislation does not establish a continuing statutory period, it cannot affect claims or interests arising after 1930 and therefore will require periodic re-enactment to function effectively. See BASYE 287-88.

90. See Aigler, *Clearance of Land Titles—A Statutory Step*, 44 MICH. L. REV. 45, 51-52 (1945).

All four marketable-title acts require an unbroken claim of title during the statutory period. Possession is an explicit prerequisite to the act's operation in Nebraska, North Dakota and South Dakota. The Michigan statute does not mention possession except to indicate that a person whose property is in the "hostile possession" of another does not qualify. The statutes are cited note 86 *supra*.

91. See Aigler, *supra* note 90, at 57-58.

reduced by the possibility that unknown, unfiled claims will remain outstanding and undiscoverable during the lengthy interval available for recordation. Proponents of the marketable-title acts argue that the holder of a technical or invalid claim will either be unaware of its existence or make no effort to record it.[92] This assumption is questionable. Since an invalid interest may be recorded, an equally plausible hypothesis is that the holder of a spurious or nuisance or mistaken claim will record it during the long statutory term and periodically revive his rights.[93] The marketable-title acts would then operate to preserve clouds and to make litigation a prerequisite of marketability.

The acts also do not eliminate the need for title searching outside the records and beyond the statutory term.[94] True, the acts (unlike statutes of limitations) operate against nonactionable interests such as burdens and servitudes,[95] and render invalid unrecorded future interests, unrecorded claims held by persons under legal disability, and unrecorded inheritances.[96] Nontheless, the marketable-title acts are undermined by their failure to cover the reversionary rights of a lessor, those of a remainderman which were created before the applicable statutory period, interests based on a mortgage, trust deed or contract for the sale of land, and the claims of a state or the United States.[97] As a result, the purchaser who depends exclusively on this type of act to establish the marketability of a given title does so at his peril.

Cumulative Remedies

Absent Torrens, many common title defects—ancient, unreleased mortgages, or restrictive covenants outside the vendor's chain of title, for instance—may be permanently or temporarily unaffected even by a combination of all other remedies.[98] Furthermore, rights founded on adverse pos-

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92. See, *e.g.*, BASYE § 260.

93. While proof of validity is not essential to recordation, the statutes do require that the record notice set forth the nature of the claim in a writing verified by an oath. *E.g.*, MICH. STAT. ANN. § 26.1273 (1953). If a person files a false claim only for the purpose of "slandering" another's title and the victim must sue to quiet title, the court may award both costs and damages against the defendant. *E.g.*, MICH. STAT. ANN. § 26.1278 (1953). The effect of such a deterrent seems dubious.

94. See Aigler, *Clearance of Land Titles—A Statutory Step*, 44 MICH. L. REV. 45, 54-55 (1945).

95. *Id.* at 53-54. However, subordinate interests such as easements, profits or restrictions which are part of, or recognized by, the chain of title during the statutory period will not be extinguished even absent seasonable record notice. *Ibid.*

96. See BASYE 284-85. To protect the rights of persons under disability or not *in esse*, anyone representing their interests may file a claim on their behalf. See, *e.g.*, MICH. STAT. ANN. § 26.1273 (1953).

97. See MICH. STAT. ANN. § 26.1274 (1953); NEB. REV. STAT. ANN. § 76-298 (1943); N.D. Laws 1951, ch. 280, § 11; S.D. CODE § 51.16B10 (Supp. 1952).

98. The ineffectiveness of the statutory remedies to overcome an unreleased mortgage may be illustrated by the following hypothetical. In 1959, *V* wishes to sell land to *P* in jurisdiction *X*. That state has in force a general twenty-year statute of limitations,

session, though quite valuable, are frequently unmerchantable because their validation is outside the scope of any purely statutory system.[99] Of course, the more devices available in a given jurisdiction the better the probable

a curative act applicable to defective releases made prior to 1939, and a marketable-title act with a forty-year period. *V* has an unbroken chain of title. In 1915, however, a former owner executed a mortgage to *M*, payable in 1925, and no release appears of record. Had a defectively executed release been filed in 1925, the curative act would have validated it and removed *M*'s potential claim as a title cloud. Absent a recorded defective release, however the curative act is of little value to *P*. Moreover, the act would not pick up a valid release delivered for recordation but negligently misfiled or misindexed.

If the local marketable-title act covered claims founded on a mortgage—although it probably would not, see note 97 *supra* and accompanying text—*M*'s claim was extinguished unless he gave record notice of it by 1955. Filing would preserve it, however, even if spurious, as a cloud to *V*'s title. Apparently, though, the claim was barred as of 1945 by the statute of limitations. But *P* has no way to determine from the record whether *V* tolled the statute by partial payment of the mortgage debt or a new promise to pay prior to that year. Nor can he be certain that *M* was not under a legal disability which would stop the statute from running. In short, although the statute of limitations might provide *P* with a defense to a possible suit by *M* to recover on or foreclose the mortgage, it provides him with no security whatever against the threat of such litigation. Unless *M* were willing to tender a quitclaim deed or make a corrective release, *P* would probably refuse to purchase. Or, if he had already contracted to do so, he could refuse to perform and interpose the defense of unmarketability if *V* sued for specific performance. *V*'s title is thus perpetually clouded by *M*'s outstanding adverse claim unless it can be cleared by a suit to quiet title. And even such a suit may be ineffective under present law, for *V* would probably have to tender payment of the mortgage debt although it was barred by the statute of limitations. See note 134 *infra* and accompanying text.

99. On the legal marketability of titles acquired by adverse possession, see sources cited notes 61-62 *supra*, 157 *infra*. Absent an express or implied contractual stipulation for a record title, prevailing doctrine upholds the sufficiency of titles obtained by adverse possession. 1 PATTON, TITLES 169-71 (2d ed. 1957). Nevertheless, this proposition is hedged by numerous restrictions and exceptions. For example, a title acquired by adverse possession is marketable only when no reasonable doubt can possibly exist as to its status. See *id.* at 170-71 & n.82 (collecting cases). Even if a contract does not specify the nature of the title, a number of courts still require that it be "fairly deducible of record." See *id.* at 166 & n.75 (collecting cases), 179-80.

Legal marketability aside, a title acquired by adverse possession obviously does not meet the requisites of functional marketability. See text following note 26 *supra*. Since the title derives from a nonrecord source, purchasers are loath to accept it. Authorities cited note 157 *infra*. The statutory remedies discussed in text do not provide a solution to the "second class" status of this sort of title. Since marktable title acts apply only to an unbroken chain of record title, see note 96 *supra* and accompanying text, they are of no assistance to the adverse possessor. Curative acts may be helpful in an indirect sense, for most cases of adverse possession arise not from wrongful dispossession or "squatting" but as a result of intended title transfers which later prove invalid because of failure to comply with conveyancing formalities. See BASYE § 52. If the defect is susceptible of rectification by a curative act, the original conveyance may be validated provided no bona fide purchaser for value has acquired intervening rights. See notes 84-85 *supra* and accompanying text. In these cases, though, it is not a title by adverse possession which is validated but a defective record title. Indeed, where the imperfections are so serious as to be beyond the compass of curative legislation, the transferee must rely wholly on his adverse possessor's status to establish title. True, the statute of limitations

condition of its land titles. Today, however, comprehensive statutory protection is nowhere in force; each state has some lesser combination of remedies, and no two patterns are identical.[100] Moreover, the same situation may arise in states with generically identical statutes, but positive provisions and exceptions to coverage vary so widely that radically dissimilar results are likely to obtain. Whatever the local law, should all available measures fail, as they often do, the holder of a clouded or otherwise unmarketable title will find himself remediless unless his state provides an effective suit to quiet title.

THE SUIT TO QUIET TITLE

The modern suit to quiet title is a statutorily authorized proceeding designed to establish a title's status by adjudicating the validity of adverse interests in real property.[101] The suit may be in rem or quasi-in-rem; in either case, the court obtains jurisdiction to adjudicate all interests in the land at issue through its control of that land. When the suit is in rem, unknown parties served by publication may be bound by the decree. When the suit is quasi-in-rem, on the other hand, a decree can bind only those parties named by the petitioner's complaint and served process either actually or constructively.[102]

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on ejectment or actions to recover land may run in his favor, but the nonrecordability of the statute's operation, and the similar inability to give record notice that the adverse possessor had satisfied statutory requirements, prevent such a title from ever attaining true marketability. Hence, only an effective suit to quiet title against "all the world" will convert adverse possession into conclusive record ownership. See BASYE § 52, at 108.

100. See generally BASYE.

101. 2 FREEMAN, JUDGMENTS § 874 (3d ed. 1925) [hereinafter cited as FREEMAN]; see Lortz v. Rose, 346 Mo. 1212, 145 S.W.2d 385 (1940).

102. Whether an action is in personam, in rem, or quasi-in-rem involves an unsettled area of the law which has generated incessant controversy. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Cook, *The Powers of Courts of Equity* (pts. 1-3), 15 COLUM. L. REV. 37, 106, 228 (1915); Fraser, *Actions in Rem*, 34 CORNELL L.Q. 29 (1948); Walsh, *Development in Equity of the Power To Act In Rem*, 6 N.Y.U.L.Q. REV. 1 (1928). To give the instant discussion pragmatic content, a quiet-title action will be labelled in rem or quasi-in-rem depending on the parties bound by the court's determination; and the term in personam will not be used to classify statutory quiet-title actions. Traditionally, the object of an action in personam is "to determine the personal rights and obligations of the defendants. . . ." Pennoyer v. Neff, 95 U.S. 714, 727 (1877). Since all statutory actions to quiet title operate directly on the property, they do not fall within this definition. See *id.* at 734; *cf.* Parker v. Overman, 59 U.S. (18 How.) 137, 141 (1855). True, some enactments are "personal" in that only known and named adverse claimants are bound by a decree. See Teisinger v. Hardy, 86 Mont. 180, 188, 282 Pac. 1050, 1054 (1929). Nevertheless, these acts invariably allow constructive service to nonresidents. *E.g.*, Dillon v. Heller, 39 Kan. 599, 18 Pac. 693 (1888). Conceptually, therefore, they cannot be denominated in personam. See Hart v. Sansom, 110 U.S. 151 (1884).

Although courts sometimes refer to statutory quiet-title suits as purely in rem, see, *e.g.*, Sain v. Montana Power Co., 20 F. Supp. 843 (D. Mont. 1937), the term is usually misapplied. A purely in rem action is "one taken directly against property, and [which]

Historical Background

The statutory suit to quiet title is descended from two suits in chancery —the bill of peace and the bill to remove cloud. The former was equity's substitute for a multiplicity of legal actions. If several persons claimed title through a common source or otherwise had a community of interest in realty, equity permitted one to file a bill of peace naming the others as defendants, provided this procedure would be likely to obviate a series of actions at law.[103] Once rendered, a decree was enforced by enjoining the parties from initiating any further litigation.[104] As for the bill to remove cloud, it arose not to resolve conflicts among a group of present interests but to eliminate an outstanding claim whose holder refused to enforce it at law. Since the only determinative legal action—ejectment—was unavailable to a landowner in possession,[105] his title would remain impaired so long as an adverse claimant chose not to litigate. Strategically, delay could only benefit the nonpossessory interest, for the occupant might lose evidence of his title, or his witnesses might die.[106] A landowner becalmed in

has for its object the disposition of the property, without reference to the title of individual claimants . . . ." Pennoyer v. Neff, *supra* at 734. A purely in rem decree binds "all the world" whether or not adverse claimants are made party. Hobbs v. Lennon, 191 Ark. 509, 518, 87 S.W.2d 6, 11 (1935). Typically, such a decree grows out of a suit brought by an adverse possessor against "all the world" and naming no known claimants. See CAL. CIV. PROC. CODE ANN. § 749.1 (1955); County of Los Angeles v. Winans, 13 Cal. App. 234, 109 Pac. 640 (1910). But, since most quiet-title statutes apparntly contemplate an adversary procedure they are not strictly in rem. See notes 116-17, 122 *infra* and accompanying text; see also Whitney v. Randell, 58 Idaho 49, 70 P.2d 384 (1937). Though nominally taken against the land, many statutory actions are instituted to determine the adverse claims of known persons and bind only the named defendants. They should therefore be denominated quasi-in-rem. See Park v. Powers, 2 Cal. 2d 590, 42 P.2d 75 (1935); Freeman v. Alderson, 119 U.S. 185 (1886). Even if the action is binding on nonresidents and unknown persons served constructively, courts generally eschew the in rem label in favor of quasi-in-rem. See, *e.g.*, Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 308, 88 Pac. 356, 359 (1906); McDaniel v. McElvy, 91 Fla. 770, 799, 108 So. 820, 830 (1926).

In sum, a statutory quiet-title action may be simultaneously "personal" (though not really in personam), quasi-in-rem, and thoroughly in rem. See notes 176-79 *infra* and accompanying text. To the extent that the decree binds known residents upon whom summons has been served, it is personal; because known nonresident defendants served by publication are bound, it is quasi-in-rem; and since the decree may also bind all other unknown parties by means of constructive notice, it is in rem. See Finnegan, *Problems and Procedure in Quiet Title Actions*, 26 NEB. L. REV. 485, 529 n.297 (1947).

103. See 1 POMEROY, EQUITY JURISPRUDENCE §§ 245-51¾ (5th ed. 1941) (collecting cases) [hereinafter cited as POMEROY]; 4 *id.* § 1396; Howard, *Bills To Remove Cloud From Title*, 25 W. VA. L.Q. 4, 9-10 (1917). See also Covington, *Bill To Remove Cloud on Title and Quieting Title in Arkansas*, 6 ARK. L. REV. 83 (1952); Note, 23 IOWA L. REV. 233 (1938).

104. 1 POMEROY § 248.

105. See, *e.g.*, Logan v. Ward, 58 W. Va. 366, 52 S.E. 398 (1905).

106. The bill to remove cloud thus operated on the principle *quia timet*—"because he fears"—which protected the petitioner from probable future injury to his rights. See Covington, *supra* note 103, at 84; Finnegan, *supra* note 102, at 487.

his adversary's indolence therefore sought a decree in equity which, if favorable, would cancel the outstanding claim and enjoin the defendant from asserting it at law.[107]

Hedged in as they were by court-imposed technicalities and jurisdictional limitations, the early bills could not cope with the problems attending large-scale recordation. The utility of the bill of peace was severely curtailed by the prerequisites that the litigants have related interests and that a multiplicity of legal actions be probable.[108] With respect to the suit to remove cloud, the requirement that no adequate remedy exist at law operated to restrict equity jurisdiction to those situations in which ejectment would not lie.[109] Furthemore, a bill could only be instituted when the adverse claim was supported by an apparently valid writing,[110] and even conflicting rights created by unclear instruments were deemed insufficient to invoke the chancellor's aid.[111] Most important, equity traditionally acted only in personam, not in rem, and therefore could not determine the rights of unknown parties.[112] A decree might be denominated quasi-in-rem because the court controlled the res, but the use of constructive service as provided for by statute was ordinarily limited to named nonresident defendants.[113] Essentially, then, both equitable bills were primarily concerned with narrow questions of private justice rather than broader issues of public policy underlying the marketability of real property.[114]

Legislative Action and Judicial Reaction

To date, thirty-seven jurisdictions have enacted legislation authorizing general suits to quiet title.[115] The statutory pattern ranges from comprehensive

107. *Ibid.*; see 4 POMEROY § 1399; Covington, *supra* note 103, at 84.

108. See 1 POMEROY §§ 249-51¾.

109. Lancaster v. Kathleen Oil Co., 241 U.S. 551 (1916); Webster v. Hall, 388 Ill. 401, 58 N.E.2d 575 (1944); Howard, *supra* note 103, at 19-23; Note, 23 IOWA L. REV. 233 (1938). *But cf.* 4 POMEROY § 1399.

110. *Ibid.*; Howard, *supra* note 103, at 110-11 (collecting cases).

111. *E.g.*, Wiling v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Heptinstall v. Newsome, 146 N.C. 503, 60 S.E. 416 (1908). Similarly, an oral assertion of ownership was usually not a cloud on title. See Devine v. Los Angeles, 202 U.S. 313 (1906). *But see* Homewood Realty Corp. v. Safe Deposit & Trust Co., 160 Md. 457, 154 Atl. 58 (1931) (orally asserted easement is removable cloud).

112. *Compare* Hart v. Sansom, 110 U.S. 151 (1884) (leading case on equity acting only in personam), *with* Tennant's Heirs v. Fretts, 67 W. Va. 569, 68 S.E. 387 (1910). *Hart* seems to represent the view which prevailed before the widespread adoption of quiet-title suits purporting to act in rem. See Dillon v. Heller, 39 Kan. 599, 18 Pac. 693 (1888); *cf.* Garfein v. McInnis, 248 N.Y. 261, 162 N.E. 73 (1928); 2 POMEROY §§ 428-31; 4 *id.* § 1317. See generally Cook, *supra* note 102, at 106; Walsh, *supra* note 102.

113. See Covington, *supra* note 103, at 103-04. See also Cook, *supra* note 102, at 136-38; Walsh, *supra* note 102, at 7-10.

114. See McDOUGAL & HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 182-83 (1948).

115. The classification of quiet-title enactments at notes 116-17, 120-22 *infra* is based entirely on statutory language. A possible recategorization necessitated by judicial in-

in rem procedures for establishing title marketability against "all the world" to mere restatements of the pre-existing equity rules.

Nineteen States with Rudimentary Legislation

Six state statutes provide an action similar to the ancient procedures of chancery.[116] In thirteen other jurisdictions, the scope and effect of the quiet-title decree has been somewhat enlarged by acts specifically permitting courts to adjudicate the rights of unknown persons who allegedly derive their adverse claims from known and named defendants.[117] Thus, unknown heirs, assignees and successors may be served by publication and ostensibly bound by the decree.[118] Aside from these limited exceptions, though, all nineteen statutes require an adversary, personal lawsuit. Several of these acts do ex-

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terpretation is considered in the text at notes 126-50 *infra*. The statutory sections listed in this footnote encompass all relevant provisos, within or without the statutorily denominated chapters on quiet-title actions, which pertain to the categorizations made in notes 116-17, 120-22 *infra* and accompanying text. The statutes are: ALA. CODE ANN. tit. 7, §§ 1109-32 (1941); ARIZ. REV. STAT. ANN. §§ 12-1101 to -1103 (1956), ARIZ. R. CIV. P. 5(f); ARK. STAT. ANN. §§ 34-1901 to -1912 (1947); CAL. CIV. PROC. CODE ANN. §§ 738-39 (1955); CONN. GEN. STAT. §§ 47-31 to -33, § 52-69 (1958); FLA. STAT. ANN. § 66.28 (Supp. 1958); GA. CODE ANN. §§ 37-1407 to -1410 (1936); IDAHO CODE ANN. §§ 5-326, 6-401 (1948); ILL. REV. STAT. ch. 22, § 50 (1958), ch. 110, § 29 (1956); IND. STAT. ANN. §§ 3-1401 to -1405 (1946); IOWA CODE ANN. §§ 649.1-.8 (1950), IOWA R. CIV. P. 60; KAN. GEN. STAT. ANN. §§ 60-1801 to -1805 (1949); KY. REV. STAT. § 411.120 (1953); ME. REV. STAT. ANN. ch. 172, § 52 (1954); MASS. ANN. LAWS ch. 240, §§ 1-10 (1956); MICH. STAT. ANN. §§ 27.672-.682 (1938); MINN. STAT. ANN. §§ 559.01-.02 (1947); MISS. CODE ANN. §§ 1323-24, 1855 (1957); MO. ANN. STAT. §§ 506.150 (1952); 527.150-.210 (1953); MONT. REV. CODES ANN. §§ 93-6203 to -6212 (1949); NEB. REV. STAT. ANN. §§ 25-21112 to -21120 (1948); NEV. REV. STAT. §§ 14.040-.050, 40.010-.050 (1957); N.H. REV. STAT. ANN. § 498:3 (1955); N.J. STAT. ANN. §§ 2A:62-1 to -19 (1952); N.M. STAT. ANN. §§ 22-14-1 to -9 (1954); N.Y. REAL PROP. LAW §§ 360-67; N.C. GEN. STAT. ANN. § 41-10 (1950); N.D. REV. CODE §§ 32-1701 to -1713 (1944); OHIO REV. CODE ANN. §§ 2703.24, 5303.01 (Page 1954); OKLA. STAT. ANN. tit. 12, §§ 170-71, 1141 (Supp. 1958); ORE. REV. STAT. §§ 13.070, 105.605 (1953); S.D. CODE §§ 37.1501-.1514 (1939); TENN. CODE ANN. §§ 23-2201 to -2205 (1955); UTAH CODE ANN. §§ 78-40-1 to -13 (1953); WASH. REV. CODE ANN. § 7.28.010 (1956); WIS. STAT. ANN. §§ 260.21 (1957), 281.01 (1958); WYO. COMP. STAT. ANN. §§ 3-1106, 3-7001 (1946).

116. California, Georgia, Kansas, Kentucky, New Hampshire and North Carolina essentially repeat by statute the pre-existing equity jurisdiction to quiet title and remove cloud. See note 115 *supra*.

117. Arizona, Connecticut, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Tennessee, Washington and Wyoming. See note 115 *supra*.

118. Of the quiet-title jurisdictions listed in note 117 *supra*, the statutes of Illinois, Maine, Massachusetts, Michigan, Mississippi, Tennessee and Washington expressly provide for binding unknown successors in interest. Although none of the remaining states have legislation mentioning such persons, they may nevertheless be joined and their interests concluded under independent statutes dealing with equitable actions or suits involving real property. These separate provisions exist in Arizona, Connecticut, Missouri, Ohio, Oklahoma and Wyoming, and are listed apart from the regular quiet-title provisos in note 115 *supra*.

pand the availability of equitable remedies through the express removal or simple omission of technical prerequisites.[119] But, in general, these statutes are poor instruments for curing legally unmarketable titles and establishing functional marketability.

Eighteen Comparatively Advanced Enactments

In contrast, eighteen states presently enable a petitioner to secure a relatively conclusive adjudication of the rights of all persons—known or unknown, living or dead—who either potentially or actually claim an adverse right, title or interest in property.[120] Of these, only Florida and Montana provide a purely in rem action.[121] Though the others require a suit at least formally adver-

119. The degree to which the statutes depart from chancery practice varies greatly from state to state. As to the requirement that plaintiff be in possession, the enactment may specifically abrogate this prerequisite, *e.g.*, ARIZ. REV. STAT. ANN. § 12-1101 (1956), expressly retain it, *e.g.*, KAN. GEN. STAT. ANN. § 60-1801 (Supp. 1957), or simply overlook it, *e.g.*, CAL. CIV. PROC. CODE ANN. § 738 (1955). Similar treatment is given the prerequisite of an adverse claim based on an apparently valid writing, which may be specifically abolished, *e.g.*, ME. REV. STAT. ANN. ch. 172, § 52 (1954), inferentially discarded, *e.g.*, CONN. GEN. STAT. § 47-31 (1958), or rather clearly continued, *e.g.*, GA. CODE ANN. § 37-1407 (1936). The great majority of statutes do not reveal any specific legislative intent regarding the "valid instrument" prerequisite. For a discussion of the judicial interpretations given both these statutory requirements, see note 132 *infra*.

120. Alabama, Arkansas, Florida, Idaho, Indiana, Iowa, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, South Dakota, Utah and Wisconsin. See note 115 *supra*. Additionally, Massachusetts, previously classified in note 117 *supra*, has established a suit to register title which would certainly qualify as a fully in rem proceeding, MASS. ANN. LAWS ch. 185, § 26A (1955). This procedure is entirely independent of the general quiet-title statute, however; nor does it require the ultimate registration of land under Torrens. Apparently, it has had little use. *Compare* annotations following MASS. ANN. LAWS ch. 185, § 26A (1955), *with* annotations following MASS. ANN. LAWS ch. 240, §§ 1-10 (1956).

121. The Montana statute, probably the best-drafted quiet-title enactment in existence, provides:

> If . . . there are no known claimants or possible claimants, to any of the property involved in any action contemplated by [the preceding sections] . . . the action may nevertheless be maintained against all persons unknown, claiming or who might claim any right, title, estate, or interest, in, or lien or encumbrance upon, the real property described in the complaint, or any part thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim or dower, inchoate or accrued, and such action may be prosecuted to judgment in the same manner and with like effect as though there had been known claimants or possible claimants; and in any such case, the complaint, the affidavit for service by publication, the order for service by publication, and the decree shall state the facts and the summons shall be directed to such unknown persons.

MONT. REV. CODES ANN. § 93-6212 (1949). In contrast to this all-encompassing language, the Florida statute is laconic:

> Any person who claims an estate of inheritance or for life in any real property within the state, or who has conveyed any such real property by warranty deed, whether in the actual or peaceable possession thereof or otherwise, may bring *a*

sary, in that a defendant must be named,[122] they authorize a decree which comprehends all possible claimants. Thus, eighteen legislatures have created elaborate remedial devices unknown to the courts of chancery, and have thereby sought to effectuate that certainty of land titles essential to free alienability.[123]

Judicial hostility has largely nullified these legislative attempts to mold the suit to quiet title into a workable remedy for unmarketability. Many courts seemingly regard them as unwonted and unwanted encroachments on the judicial domain. Quiet-title statutes are remedial in nature and should be liberally construed,[124] but they have been strictly interpreted, presumably on the ground that they are in derogation of the common law.[125] When an apparent conflict arises, it is ordinarily resolved in favor of traditional doctrines.[126] And an occasional diehard court, refusing to construe literally even

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proceeding in rem . . . against all the world for the purpose of establishing his title to said property and to determine all adverse claims thereto . . . .

FLA. STAT. ANN. § 66.28 (Supp. 1958) (Emphasis added.) See also FLA. STAT. ANN. § 66.30(5) (Supp. 1958). Despite the clear legislative intent, the Florida Supreme Court held that a suit by an adverse possessor against all the world, naming no known adversary defendant, presented no justiciable issue. Key v. All Persons, 160 Fla. 723, 36 So. 2d 366 (1948).

122. See, *e.g.*, Whitney v. Randall, 58 Idaho 49, 70 P.2d 384 (1937) (adversary parties must be named or no justiciable issue present); *cf.* Inglee v. Welles, 53 Minn. 197, 55 N.W. 117 (1893) ("If it is sought to bar unknown persons claiming under patent titles, the party in whose name title appears must be named as defendant though he is dead."). If petitioner in fact knows of no actual adverse claimant, "finding" a defendant may be inconvenient but necessary to preclude a *Key*-type decision. See notes 121 *supra*, 124-25, 131 *infra* and accompanying text. See also Finnegan, *supra* note 102, at 513; Foster, *Jurisdiction in Suits to Quiet Title*, Neb. L. Bull., Oct. 1922, p. 1, at 24 n.20.

123. This article shall be liberally construed to effect its purpose, which is to create a procedure by which it may be established that certain named persons have a marketable title to all of the estate in fee simple of lands defined by a judgment entered in such an action, so that there shall be no occasion for lands in this state being kept out of the market because of uncertainty as to who the owner of every interest therein may be.

N.J. STAT. ANN. § 2A:62-15 (1952). See also notes 180-83 *infra* and accompanying text.

124. See Rains v. Moulder, 338 Mo. 275, 90 S.W.2d 81 (1936).

125. Judicial actions often belie utterances sympathetic to the quiet-title statute. For example, in McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926), the court *said*: "[T]he statutes . . . are remedial and highly beneficial. They should therefore be liberally and reasonably construed and applied." 91 Fla. at 792, 108 So. at 828. The court then *held*: "[A] bill seeking only to quiet a cloud, the nature of which is wholly unknown as against defendants who are wholly unknown, does not present a justiciable matter under this statute in its present form." 91 Fla. at 797, 108 So. at 830. See 1 U. FLA. L. REV. 395, 399 (1948). A second legislative attempt was also judicially aborted in Key v. All Persons, 160 Fla. 723, 36 So. 2d 366 (1948).

126. For example, the chancery requirement of possession has been employed to defeat petitioners suing to quiet title. See Harbert, *Suits To Quiet Title*, 43 ILL. B.J. 344, 345 (1955). *Compare* ILL. REV. STAT. ch. 22, § 50 (1958) (possession not mentioned), *with* Hooper v. Traver, 336 Ill. 275, 168 N.E. 326 (1929) (possession is prerequisite to maintaining a suit to quiet title). The same treatment has been accorded the equitable

the most pristine language, has stated that the legislature could not have intended to violate the state constitution by significantly expanding the equity jurisdiction which existed when that constitution went into effect.[127]

Extreme instances of this sort to one side, the legislators themselves have invited the judiciary to mutilate their handiwork. Many statutes are poorly drafted and their purpose obscure.[128] In particular, widely-used statements, such as "except as otherwise provided, the action is to be conducted according to established principles of equity," implicitly give the courts free rein to

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rule that an apparently valid writing alone constitutes a removable cloud. See Covington, *supra* note 103, at 86-90. *Compare* ARK. STAT. ANN. § 34-1901 (1947) (no prerequisites established as to nature of defendant's claim), *with* Brizzolara v. Fort Smith, 87 Ark. 85, 112 S.W. 181 (1908) (suit not permitted to remove cloud created by an instrument void on its face). Similarly, equity traditionally acted only in personam, see Hart v. Sansom, 110 U.S. 151 (1884), and courts have therefore narrowed the effect of statutes purporting to act in rem, see, *e.g.*, Bastin v. Myers, 82 Ind. App. 325, 44 N.E. 425 (1924). Suits have occasionally been dismissed for lack of a justiciable issue because no adverse claimants were named. See, *e.g.*, Whitney v. Randall, 58 Idaho 49, 70 P.2d 384 (1937). The judiciary has also not been particularly receptive to the concept—unknown at common law—of constructive service by publication. See Priest v. Board of Trustees, 232 U.S. 604 (1914).

127. *E.g.*, Patterson v. McKay, 199 Ark. 140, 134 S.W.2d 543 (1939); Gilbert Smith, Inc. v. Cohen, 123 N.J. Eq. 419, 426, 196 Atl. 361, 364 (Ct. Err. & App. 1938); *cf.* McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926); Hudson v. Wright, 204 Mo. 412, 103 S.W. 8 (1907); Covington, *supra* note 103, at 103. See also Key v. All Persons, 160 Fla. 723, 36 So. 2d 366 (1948), 1 U. FLA. L. REV. 395, note 121 *supra*.

State constitutional provisions aside, the judiciary has also flouted rather obvious legislative intent as to jurisdictional requirements. See Lohr v. Curley, 27 Idaho 739, 152 Pac. 185 (1915). The Idaho statute then in force, though providing for constructive service on unlocatable and unknown claimants, required petitioners only to aver that they exercised due diligence in seeking such persons "without setting forth or showing what efforts have been made or what diligence has been exerted in attempting to find the defendant." Idaho Sess. Laws 1907, No. 44, § 4145, at 321. Nonetheless, the *Lohr v. Curley* court found that an affidavit reciting the precise statutory language did not demonstrate due diligence, and that a prior judgment was void and subject to collateral attack. See Address by Carl H. Swanstrom, *Quieting Title in Idaho*, June 28, 1947, in 21 IDAHO S.B. PROC. 68, 72 (1947).

128. See, *e.g.*, IDAHO CODE ANN. § 6-401 (1948), giving a one sentence description of the "action to quiet title" without mentioning its in rem features. The courts are thus left free to interpret the statute as they see fit. True, an entirely separate statute, IDAHO CODE ANN. §§ 5-325 to -326 (1948), permits adjudication of the rights of all unknown claimants in the quiet-title action, while still a third provision, IDAHO CODE ANN. § 5-508 (1948), delineates procedures for obtaining constructive service on such persons. But the latter two enactments have remained substantially unchanged in language or legal effect since Lohr v. Curley, *supra* note 127. Apparently, the Idaho legislature has surrendered to judicial insistence that the quiet-title statute be restricted, for the legislature has failed to redraft it carefully. Similarly, the Florida enactment—while intended to create a fully in rem procedure (see note 121 *supra*)—is nevertheless part of a chapter entitled Chancery Jurisdiction Over Property. See FLA. STAT. ANN. § 66.28 (Supp. 1958). This may in part explain the *Key* decision. See note 121 *supra*; 1 U. FLA. L. REV. 395, 397-98 (1948). See also Greene v. Uniacke, 46 F.2d 916 (5th Cir. 1931).

construe (or misconstrue) as they will.[129] Even those acts obviously designed to create an effective in rem proceeding often fail to specify that they are conferring a statutory jurisdiction unrelated to and independent of the ancient bills in equity. Public necessity does not clearly emerge as the touchstone of legislative action.[130] Thus, largely left to its own devices, an antagonistic judiciary has been able to undercut the quiet-title enactments.

Judicial hostility has taken the form of direct or indirect restrictions on the availability of the suit to quiet title. The Florida case of *Key v. All Persons* adopts the singular view that a complaint naming no known adverse claimant does not present a justiciable issue.[131] Petitioners have also occasionally been met with the aged technical prerequisites of possession and a sufficiently adverse claim.[132] Most often, access to a forum is denied on the theory that

129. See, *e.g.*, IOWA CODE ANN. § 649.6 (1950) ("In all other respects, the action contemplated in this chapter shall be conducted as other actions by equitable proceedings, as far as the same may be applicable, with the modifications prescribed."); ARK. STAT. ANN. § 34-1908 (1947) ("Adjudication of rights according to equity."). See generally Finnegan, *supra* note 102, at 490-91.

130. Of the eighteen statutes classified as in rem, see note 120 *supra*, only New Jersey's has an enabling provision clearly expressing legislative purpose. See note 123 *supra*.

131. 160 Fla. 723, 36 So. 2d 366 (1948); see notes 121 & 122 *supra*; 1 U. FLA. L. REV. 395 (1948).

132. Two statutes lacking the possession requirement have had it reinserted through judicial interpretation. GA. CODE ANN. § 37-1407 (1936), Northwest Atlanta Bank v. Manning, 193 Ga. 186, 17 S.E.2d 547 (1941); ILL. REV. STAT. ch. 22, § 50 (1958), Webster v. Hall, 388 Ill. 401, 58 N.E.2d 575 (1944).

Similarly, technical requirements as to a removable cloud are adhered to even under statutes which otherwise depart from chancery practice. In Arkansas, equity will not quiet title against any instruments void on their face. ARK. STAT. ANN. § 34-1901 (1947), Beardsley v. Hill, 85 Ark. 4, 106 S.W. 1169 (1907); see Covington, *supra* note 103, at 89. The Missouri courts have been somewhat more free-handed in interpreting their statute. See MO. ANN. STAT. § 527.150 (1953), Schwab v. City of St. Louis, 310 Mo. 116, 274 S.W. 1058 (1925) (removable cloud exists only if "legal acumen" is required to discover the instrument's invalidity).

Generally, however, legislators have been able to overcome these equitable prerequisites to suit by formally denominating it as one to "determine adverse claims" rather than one to quiet title and remove cloud. See, *e.g.*, N.C. GEN. STAT. § 41-10 (1950); IDAHO CODE ANN. § 6-401 (1948). Even absent statutory mention of possession or the nature of the adverse claim, the judiciary holds the common law abrogated as to both. See, *e.g.*, Daniels v. Baxter, 120 N.C. 14, 26 S.E. 635 (1897) (petitioner is not required to have possession, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy); Webster Loan & Bldg. Co. v. Bandel, 57 Idaho 101, 63 P.2d 159 (1936) (statutory provisions to be interpreted broadly to allow suit by any legal or equitable titleholder either in or out of possession); Roberts v. Harrill, 42 Idaho 555, 247 Pac. 451 (1926) (action will lie although lien seemingly void on its face). *But see* Ephraim v. Metropolitan Trust Co., 28 Cal. 2d 824, 172 P.2d 501 (1946). There, the court construed the statute as distinguishing a suit to quiet title from one to remove cloud from title; although the action was brought under the present section to determine adverse claims, CAL. CIV. PROC. CODE ANN. § 738 (1955), the petitioner, in order to cancel an instrument clouding his title, had to state facts showing its apparent validity but actual invalidity. See also note 167 *infra* (states with possession requirement).

"one seeking equity must do equity."[133] For instance, a complainant seeking to remove an old unreleased mortgage as a cloud may be forced to tender payment of the underlying debt although it is otherwise barred by the statute of limitations.[134] Legislation creating a purportedly conclusive in rem decree may encounter a more serious type of judcial subversion. Simply by finding that a petitioner has not conducted a reasonably diligent investigation into the identity and wherabouts of unnamed interest-holders, a court can open a decree to avoidance through direct or collateral attack.[135] Under many statutes, the key issue of whether a court had jurisdiction to bind constructively-served individuals is determined in subsequent proceedings involving the prior decree.[136] Though probably necessary to ensure compliance with the due-process clause of the Constitution,[137] the requirement of reasonably diligent inquiry, as presently implemented, renders virtually all quiet-title decrees vulnerable.[138]

Statutory and judicial extensions of the period available for direct attack may also prevent an in rem decree from becoming conclusive. Under prevailing doctrine, any person who was served constructively, who had no actual notice of a hearing, and who can present a meritorious defense may vacate a ruling within a stated period varying by jurisdiction from six months to five years.[139] The quiet-title statutes themselves often do not contain express provisions for reopening, but the courts then borrow such provisions from other enactments governing general civil litigation.[140] And, some-

133. See, *e.g.*, Wagner v. Stroh, 70 N.D. 323, 331, 294 N.W. 195, 198 (1940). See also Foster, *supra* note 122, at 35-48; Harbert, *supra* note 126, at 348.

134. McCabe v. Equitable Land Co., 88 Neb. 453, 129 N.W. 1018 (1911); Peterson v. Ramsey, 78 Neb. 235, 110 N.W. 728 (1907); *cf.* Martin v. Martin, 164 Ill. 640, 45 N.E. 1007 (1897). The petitioner must pay even if the defendant has attempted to defraud him. See Stoffela v. Nugent, 217 U.S. 499 (1910). Similarly, even though a fraud is involved, petitioner must remain willing to reimburse defendant for a tax deed which is obviously void. Barney v. Chamberlain, 85 Neb. 785, 124 N.W. 482 (1910).

135. See notes 259, 262-63 *infra* and accompanying text.

136. See, *e.g.*, Berry v. Howard, 33 S.D. 447, 146 N.W. 577 (1914).

137. See notes 253-55 *infra* and accompanying text.

138. See notes 256-61 *infra* and accompanying text.

139. See, *e.g.*, ALA. CODE ANN. tit. 7, §§ 1128, 1130 (1940); NEB. REV. STAT. ANN. § 25-525 (1948); OHIO REV. CODE ANN. § 2325.02 (Page 1954). The average reopening period is about two years; under many of the more effective in rem statutes, it is only one year. See MONT. REV. CODES ANN. § 93-3905 (1949).

140. See, *e.g.*, Scarborough v. Myrick, 47 Neb. 794, 66 N.W. 867 (1896), applying what is now NEB. REV. STAT. ANN. § 25-525 (1948). See also Finnegan, *supra* note 102, at 520. Failure to establish a specific quiet title period superseding all other statutory provisions undermines the effectiveness of in rem decrees. General statutory periods apply to all other civil suits which, in many cases, do not require a conclusive decree, so that they are often substantially longer than explicit quiet-title provisions. *Compare* N.D. REV. CODE § 32-1713 (1944) (quiet-title section allows reopening within one year after judgment but not otherwise), *with* NEB. REV. STAT. ANN. § 25-525 (1948) (general section; five years). *But cf.* MINN. STAT. ANN. § 548.25 (1947) (independent section specifically referring to quiet-title decrees and allowing five years for avoidance).

times, the judiciary applies laws creating a perpetual right of appeal irrespective of whether a quiet-title cut-off provision exists.[141] Any party may then attempt to reopen a decree within, usually, one year after he obtains actual notice of adjudication, provided his nonappearance at trial was the result of inadvertence or excusable neglect.[142] Though subject to judicial discretion, this kind of reopening is frequently allowed.[143]

Direct-attack provisions also accord special rights to infants,[144] incompetents[145] and (occasionally) future-interest holders,[146] and thereby eliminate

141. See, *e.g.*, MINN. STAT. ANN. § 544.32 (1947), Lord v. Hawkins, 39 Minn. 73, 38 N.W. 689 (1888); WIS. STAT. ANN. § 269.46 (1957), *cf.* Kingsley v. Steiger, 141 Wis. 447, 123 N.W. 635 (1910); Hendricks, *Defects in Titles to Real Estate and the Remedies*, 20 MARQ. L. REV. 115, 135 (1936).

142. Application of the "one year after notice" statute is particularly unfortunate in the quiet-title area, for it completely defeats the objective of conclusiveness. In Lord v. Hawkins, *supra* note 141, the court's exercise of "discretion" resulted in the divestiture of a bona fide purchaser for value long after rendition of the decree. *But see* Kingsley v. Steiger, *supra* note 141, in which the court's discretion led to the opposite result, although the court believed the "one year after notice" provision applicable.

143. *E.g.*, Pease v. City of San Diego, 74 Cal. App. 2d 929, 169 P.2d 973 (1946); see Stebbins v. Friend, Crosby & Co., 178 Minn. 549, 228 N.W. 150 (1929); cases cited note 141 *supra*.

144. *E.g.*, N.J. STAT. ANN. § 2A:62-8 (1952); MINN. STAT. ANN. § 559.02 (1947). *Contra*, N.D. REV. CODE § 32-1706 (1944).

145. *E.g.*, ARK. STAT. ANN. § 34-1909 (1947); N.J. STAT. ANN. § 2A:62-8 (1952). *Contra*, UTAH CODE ANN. § 78-40-12 (1953).

146. Two statutes deny the courts initial jurisdiction to bind "remaindermen" served by publication. ARK. STAT. ANN. § 34-1907 (1947); TENN. CODE ANN. § 23-2205 (1955). Alabama affords future-interest holders (as well as infants and mental incompetents) protection against presumptions normally favoring a petitioner. ALA. CODE ANN. tit. 7, § 1123 (1941). Statutory language does not indicate, however, whether these groups are to receive special treatment under the direct-attack provisions. See Gilliam, *Proceedings In Rem To Establish Title to Land*, 3 ALA. LAW. 418, 420, 429 (1942).

In rem enactments generally do not distinguish future-interest holders in being from other defendants served by publication. If further protection is afforded, it derives from disabilities such as infancy or mental incompetence. See, *e.g.*, Champion v. Williams, 165 Ark. 328, 264 S.W. 972 (1924). A few statutes which are in rem only to the extent of binding lineal successors of named defendants allow a petitioner to make party the "unknown heirs, legatees or assigns" of a deceased person. *E.g.*, MICH. STAT. ANN. § 27.672 (1938), Delnay v. Woodruff, 244 Mich. 456, 221 N.W. 614 (1928).

In a number of jurisdictions, the judiciary has created a significant equitable exception favoring contingent remaindermen not yet in being. See Hunt v. Lawton, 76 Cal. App. 655, 665, 245 Pac. 803, 806-07 (1926); Mennig v. Graves, 211 Iowa 758, 234 N.W. 189 (1931); Covington, *supra* note 103, at 106; Finnegan, *supra* note 102, at 530-32; Note, 23 IOWA L. REV. 233, 236-37 (1938); *cf.* Northouse v. Torstenson, 146 Neb. 187, 190, 19 N.W.2d 34, 35-36 (1945). Presumably, such persons—not being alive—cannot be bound by provisions for constructive service; hence, a quiet-title decree in these jurisdictions remains perpetually vulnerable to attack. *But see* N.Y. REAL PROP. LAW § 507. In two situations, courts have held that unborns are even concluded by the decree. First, when they are represented by a guardian *ad litem*. See, *e.g.*, Loring v. Hildreth, 170 Mass. 328, 49 N.E. 652 (1898); Mennig v. Howard, 213 Iowa 936, 240 N.W. 473 (1932) (partition); Mooneyham v. Mynatt, 222 S.W. 451 (Mo. 1920). Second, when there is virtual repre-

any possibility of obtaining a conclusive decree. Generally, the provisions postpone the commencement of the reopening period until the legal disability of infancy or insanity is removed (in the latter case, an indefinite term).[147] Moreover, these statutory safeguards have been substantially extended through judicial solicitude for the rights of the classes concerned. For example, an infant effectively represented by a guardian *ad litem* may still be allowed to relitigate an unfavorable decree upon reaching his majority.[148] Judicial gloss of this sort has served to reduce the in rem quiet-title laws to impotence.

The facility with which in rem decrees can be directly or collaterally avoided has increased the danger that subsequent bona fide purchasers for value will be divested of their land. In the absence of express statutory provisions, the innocent buyer of a quieted title is accorded only the rights that the person who obtained the decree would have had were the decree contested.[149]

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sentation, *i.e.*, members of the same class with identical or similar interests before the court. See, *e.g.*, Gunnell v. Palmer, 370 Ill. 206, 18 N.E.2d 202 (1938) (quiet title); Buchman v. German Am. Land Co., 180 Iowa 911, 164 N.W. 119 (1917) (same); Drake v. Frazer, 105 Neb. 162, 179 N.W. 393 (1920) (Torrens); 2 RESTATEMENT, PROPERTY §§ 180-86 (1936); *cf.* Fischer v. Sklenar, 101 Neb. 553, 567, 163 N.W. 861, 866 (1917) (probate proceedings; excellent discussion of virtual-representation principle).

147. *E.g.*, ARK. STAT. ANN. § 34-1910 (1947) (quiet-title statute; infants and incompetents have three years after disability is removed); N.J. STAT. ANN. § 2A:62-8 (1952) (same; two years); see MINN. STAT. ANN. § 559.02 (1947) (infants only; two years). Although the majority of quiet-title enactments do not mention infant or incompetent defendants, general statutes providing for protection of their rights apply. *E.g.*, NEB. REV. STAT. ANN. §§ 25-2001(5), 25-2008 (1948), *cf.* Manful v. Graham, 55 Neb. 645, 76 N.W. 19 (1898); see Finnegan, *supra* note 102, at 526; IND. STAT. ANN. § 2-2604 (1946). *But cf.* Gilliam, *supra* note 146, at 427-30.

In one jurisdiction, the quiet-title statute expressly precludes special treatment for infants and incompetents. UTAH CODE ANN. § 78-40-12 (1953). A few other states have no statutory provisions for protecting such parties, who are presumably confined to the remedies available to any defaulting defendant served by publication.

148. Attica Bldg. & Loan Ass'n v. Colvert, 216 Ind. 192, 23 N.E.2d 483 (1939). *Accord*, Pfister v. Johnson, 173 Okla. 541, 49 P.2d 174 (1935) (suit to quiet title); Loyd v. Malone, 23 Ill. 41 (1859) (sale of land by guardian). *But see* Colvert v. Colvert, 95 Ind. App. 325 (1932); 15 IND. L.J. 437 (1940); *cf.* Thompson v. Maxwell Land Grant & Ry. Co., 168 U.S. 451 (1897); Burke v. Northern Pac. Ry., 86 Wash. 37, 149 Pac. 335 (1915).

149. See, *e.g.*, Ewing v. Plummer, 308 Ill. 585, 592, 140 N.E. 42, 45 (1923); Attica Bldg. & Loan Ass'n v. Colvert, *supra* note 148; Lord v. Hawkins, 39 Minn. 73, 38 N.W. 689 (1888); *cf.* Hendricks, *supra* note 141, at 135. See generally Finnegan, *supra* note 102, at 531-32; 15 IND. L.J. 437 (1940).

It may be legally impossible to protect the bona fide purchaser for value against a successful collateral attack. See notes 274-81 *infra* and accompanying text. Indeed, since a collateral challenge presupposes a decree which is void *ab initio*—normally on the face of the trial record—whether any subsequent taker "relying" on such a decree can be considered bona fide is questionable. See note 276 *infra*. No quiet-title statute has been located which attempts to safeguard "innocent" purchasers against an absolutely void adjudication. Innocent takers can be insulated from direct-attack proceedings, however. See notes 221-23 *infra* and accompanying text. At present, only two statutes explicitly provide such protection. N.J. STAT. ANN. §§ 2A:62-8, -10 (1952); S.D. CODE § 37.1514

To protect purchasers investing in realty improvements, several state courts hold the decree ineffective to create a legally marketable title until the general direct-attack period has ended tranquilly.[150] But, since the indeterminate time for attack accorded mental incompetents and future-interest holders leaves the decree indefinitely open to avoidance, this approach would appear to nullify quiet-title adjudications.[151] While such an extreme result would probably be eschewed, even a period of temporary unmerchantibility can irreparably harm a petitioner who expected to consummate a resale contract immediately after obtaining a favorable decree. Time may be of the essence,[152] and the "successful" petitioner, unable to tender good title, may lose a beneficial bargain. In all events, the bona fide purchaser's title is perpetually susceptible to collateral attack by those parties over whom adequate jurisdiction was not obtained.[153] The decree available in a suit to quiet title is thus an anomaly. Designed to overcome uncertainties stemming from recordation, it has substituted instead the threat of judicial avoidance. A sweeping re-evaluation is therefore indicated if the quiet-title suit is to fulfill its intended function of promoting the alienability of land.[154]

(Supp. 1952). Ironically, in the other quiet-title jurisdictions, where the statutes are silent as to direct reopening, the rights of the innocent purchaser are more likely to be recognized because of general code provisions. See, *e.g.*, NEB. REV. STAT. ANN. § 25-525 (1948) (persons served constructively may reopen within five years after judgment; bona fide purchaser protected); ORE. REV. STAT. § 15.150 (1957) (same; one year); WIS. STAT. ANN. § 269.47 (1957) (same; three years). Even if no safeguards are afforded by general enactments, the reopening period is comparatively brief so that a post-decree purchaser assumes little risk. See, *e.g.*, NEV. R. CIV. P. 60(c) (six months). Nevertheless, protection is least often provided when the innocent buyer most needs it. Thus, general legislation allowing infants or incompetents to attack a decree after removal of their disability, see note 147 *supra*, seldom makes exceptions for those cases in which title has passed to a bona fide purchaser, see *e.g.*, NEB. REV. STAT. ANN. §§ 25-2001(5), 25-2008 (1948). See also Finnegan, *supra* note 102, at 524-33. Similarly, although general statutory sections allowing indefinite attack by all persons at the court's discretion are held applicable to quiet-title decrees, see notes 141-43 *supra* and accompanying text, they almost universally fail to protect the good-faith taker, *compare* WIS. STAT. ANN. § 269.47 (1957) (persons served constructively within three years after *decree*; bona fide purchaser protected), *with* WIS. STAT. ANN. § 269.46 (1957) (reopening at court's discretion within one year after *notice*; no protection granted).

150. Ewing v. Plummer, *supra* note 149; Wurfel v. Bockler, 106 Ore. 579, 210 Pac. 213 (1922); Middleton v. Moore, 289 S.W. 1045 (Tex. Civ. App. 1926).

151. *Cf.* Finnegan, *supra* note 102, at 526; 15 IND. L.J. 437 (1940).

152. See generally 3 CORBIN, CONTRACTS § 716 (1950).

153. See text accompanying notes 135-38 *supra*; note 276 *infra* and accompanying text. Protecting bona fide purchasers from the evils of collateral litigation is one of the primary goals of the law. Lancaster v. Wilson, 68 Va. (27 Gratt.) 624, 629 (1876).

154. An idea of the importance of the suit to quiet title, even in its present form, can be gleaned from the following statistic. In Kansas, with one of the weakest statutes in existence, see note 116 *supra*, the action comprised 15% of all civil litigation filed in that state's general courts of first instance for the years 1946-1955. KAN. JUD. COUNCIL BULL. 33 (Oct. 1955), cited in Johnstone, *Title Insurance*, 66 YALE L.J. 492, 508 n.58 (1957).

Modernizing the Quieted Title

The principal objective of the quiet-title suit should be to restore the saleability of titles impaired by known or record defects.[155] In addition, the suit should impart commercial respectability to interests acquired through adverse possession—interests which are not recognized under today's recording systems,[156] and which rarely command more than a fraction of their actual value.[157] The suit should further protect ostensibly clear titles against the multitudinous unrecordable and misrecorded claims which repeatedly emerge to destroy the peaceful use and possession of land.[158] Succinctly, then, the goal sought for the modernized suit to quiet title is a proceeding available to almost any interest-holder in which all adverse claims can be marshaled, examined and settled by a court whose decree, once rendered and docketed, is both the exclusive and conclusive determinant of title. To attain this objective, a new type of authorizing statute is needed.

Widespread Availability Essential

Initially, the suit to quiet title must be made available on the basis of the economic realities underlying modern land transfer. Many current enactments restrict the suit to persons alleging "full"—presumably fee—ownership, the interest in land of largest legal quantum and, usually, highest value.[159] Con-

155. See Covington, *supra* note 103, at 89-90; Note, 23 IOWA L. REV. 233, 245 (1938); 1 U. FLA. L. REV. 395 (1948).

156. See note 99 *supra.*

157. See, *e.g.*, Crocker Point Ass'n v. Gouraud, 224 N.Y. 343, 350, 120 N.E. 737, 738 (1918) (titles acquired by adverse possession are disfavored by prospective purchasers); Note, 27 ST. JOHNS L. REV. 121 (1952); *cf.* Escher v. Bender, 338 Mich. 1, 7-9, 61 N.W.2d 143, 147 (1953) (suit to quiet title is necessary to convert a title obtained by adverse possession into a marketable title); Zunker v. Kuehn, 113 Wis. 421, 88 N.W. 605 (1902) (title based on adverse possession did not satisfy contract calling for "good record title"). *But see* Nelson v. Jacobs, 99 Wis. 547, 75 N.W. 406 (1898) (twenty years of peaceable and uninterrupted adverse possession created a marketable title). See also notes 71 & 99 *supra.*

158. See notes 7-16 *supra* and accompanying text. Also, the cost and effort involved in record searches must be substantially alleviated. See note 6 *supra* and accompanying text.

159. Arkansas, Georgia, Kentucky, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, Tennessee. See note 115 *supra.* Generally, the statutes do not expressly demand allegation of "fee simple ownership," although, in two jurisdictions, the statutes clearly require a claim tantamount to fee ownership. KY. REV. STAT. ANN. § 411.120 (1955) ("legal title"); MASS. ANN. LAWS ch. 240, § 1 (1956) ("record title"). Nor have the courts inserted this prerequisite. See Scarborough v. Myrick, 47 Neb. 794, 66 N.W. 867 (1896); note 132 *supra.* Nevertheless, frequent use of phraseology such as "claiming to own land," *e.g.*, ARK. STAT. ANN. § 34-1901 (1947), or "claiming title," *e.g.*, MONT. REV. CODES ANN. § 93-6203 (1947), implies that an undivided claim to the whole property is necessary to institute suit. See, *e.g.*, City of Cut Bank v. Clapper Motor Co., 120 Mont. 274, 182 P.2d 474 (1947). Presumably, then, petitioner must hold legal or equitable title, see, *e.g.*, Chiles v. Gallagher, 67 Miss. 413, 7 So. 208 (1889), a "possessory" title, see, *e.g.*, Gibbs v. Bates, 215 Ark. 646, 222 S.W.2d 805 (1949), or a remainder in fee, see, *e.g.*, Criswell v. Criswell, 101 Neb. 349, 163 N.W. 302 (1917).

cededly, the word title ordinarily connotes ownership, and most discussions of its marketability are at least tacitly concerned with the fee simple.[160] Nevertheless, restricting the quiet-title suit to fee owners deprives the holders of other major realty interests (notably, mortgagees, long-term lessees, and, to a lesser extent, life tenants) of any effective protection against the actual or potential impairment of their rights. The major subordinate estates, sometimes of greater immediate pecuniary value than the fee itself, depend entirely on the certainty of the feeholder's title for security and peaceful tenure.[161] Their free alienability and functional marketability are equally important. Accordingly, many statutes expressly authorize some or all holders of less-than-fee interests to bring a suit to quiet title.[162] A few other jurisdictions achieve this same result by failing to mention any required quantum of interest.[163] Future quiet-title acts should at least make the suit available to mortgagees, life tenants and tenants for a term of twenty or more years, though suit should only be permitted with the consent and for the benefit of the appropriate feeholder.[164] As is often done, special statutes could extend the right to sue to still other parties in order to meet local needs.[165]

160. A possible explanation for the substantial number of statutes which in effect continue to require fee ownership may be found in case law dealing with the equitable bills to quiet title and remove cloud, and in decisions under early quiet-title statutes. A sizeable minority of courts then held that petitioner must allege full legal title to the property to invoke the aid of a court of equity. See, *e.g.*, Frost v. Spitley, 121 U.S. 552 (1887); Wood v. Nicolson, 43 Kan. 461, 23 Pac. 587 (1890). Presumably, therefore, even the holder of the "equitable fee" could not maintain suit, the theory being that he could obtain legal title and sue in ejectment. See, *e.g.*, Glenn v. West, 103 Va. 521, 49 S.E. 671 (1905); Howard, *Bills To Remove Cloud From Title*, 25 W. VA. L.Q. 4, 12 & n.53 (1917) (collecting cases); Covington, *Bills To Remove Cloud on Title and Quieting Title in Arkansas*, 6 ARK. L. REV. 83, 90-92 (1952). *But see* Jones v. Nixon, 102 Tenn. 95, 101-02, 50 S.E. 740, 741 (1899).

161. The better and probably prevailing view under both the chancery bills and the statutes is that anyone having a "substantial pecuniary interest" in the marketability of a title should be permitted to maintain suit. See Covington, *supra* note 160, at 92; Howard, *supra* note 160, at 11-19 (collecting cases).

162. A claim of not less than a freehold estate: Florida and Maine. No lesser interest than a term for years: New Hampshire. Any claim of title, interest or right in the property: Alabama, Arizona, California, Connecticut, Illinois, Iowa, Michigan, Missouri, Nevada, New Mexico, New York, North Carolina, North Dakota, and South Dakota. See note 115 *supra*.

163. Idaho, Kansas, Ohio, Oklahoma, Oregon, Utah, Washington and Wyoming. *Ibid.*

164. Ample case law exists to justify expansion of the quiet-title forum. See, *e.g.*, Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839 (C.C.D.W. Va. 1898) (oil and gas lessee); Love v. Bryson, 57 Ark. 589, 22 S.W. 341 (1893) (mortgagee); German-American Sav. Bank v. Gollmer, 155 Cal. 683, 102 Pac. 932 (1909) (lessee); Dudley v. Browning, 79 W. Va. 331, 90 S.E. 878 (1916) (vendor's lien); Criner v. Geary, 78 W. Va. 476, 89 S.E. 149 (1916) (life tenant).

165. *E.g.*, ARK. STAT. ANN. § 34-1918 (Supp. 1957) (titles obtained at judicial sales); MINN. STAT. ANN. § 306.22 (1947) (cemetery lots); NEV. REV. STAT. § 40.130 (1956) (mining claims).

A more essential step is to abolish the vestigial prerequisites to suit—technicalities which only impair the efficacy of the quiet-title remedy.[166] The requirement that a petitioner possess the land in question is a survivor of the cleavage between law and equity, and serves today only to penalize the holders of many valuable interests.[167] For instance, a person with a nonpossessory future interest may be barred from maintaining suit before the preceding possessory estate terminates,[168] despite the fact that this restriction may preclude him from either consummating a sale of his interest or establishing his future status as fee-simple owner. Similarly, a vendee under an executory land-sale contract which requires him to prosecute a quiet-title suit may find the remedy unavailable until he has received legal title and taken pos-

166. See McDOUGAL & HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 182-83 (1948).

167. With minor exceptions, the following states expressly require that petitioner be in possession of the property to institute suit: Alabama, Arkansas, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, Ohio, Oklahoma, Washington, and Wyoming. See note 115 *supra*. In two states, one where the statute merely reiterates pre-existent equity jurisdiction to quiet title and remove cloud, GA. CODE ANN. § 37-1407 (1938), the other where it apparently goes considerably beyond chancery practice, ILL. REV. STAT. ch. 22, § 50 (1958), the courts have interpolated the possession requirement, see, *e.g.*, Mentone Hotel & Realty Co. v. Taylor, 161 Ga. 237, 130 S.E. 527 (1925); Barger v. Slayden, 411 Ill. 237, 103 N.E.2d 645 (1952); note 132 *supra*. Occasionally, however, although a statute indicates only slight departure from equity procedure and does not mention possession, *e.g.*, TENN. CODE ANN. § 23.2201 (1955), the judiciary has abrogated this prerequisite on its own initiative, see Partee v. Thomas, 11 Fed. 769, 772 (C.C.M.D. Tenn. 1882); Jones v. Nixon, 102 Tenn. 95, 50 S.W. 740 (1899); Note, 3 VAND. L. REV. 791, 792-94 (1950).

168. See, *e.g.*, Williams v. Provident Life & Trust Co., 242 Fed. 419 (4th Cir. 1917) (applying W. Va. law). See also Moseley v. Monteaboro, 245 Ala. 475, 17 So. 2d 657 (1944). *But see* OHIO REV. CODE ANN. § 5303.01 (Page Supp. 1958) (remaindermen and reversioners allowed to sue).

When the statutes abrogate the necessity for possession, a vested future-interest holder may clearly maintain an action. See Nevelier v. Foster, 186 Iowa 1307, 173 N.W. 879 (1919) (remainder); Davis v. Davis, 107 Neb. 70, 185 N.W. 442 (1921) (same); Huntzicker v. Crocker, 135 Wis. 38, 115 N.W. 340 (1908) (widow's dower right). In fact, failure to institute action may be very costly if the statute of limitations is held to run against the future-interest holder. See Murray v. Quigley, 119 Iowa 6, 92 N.W. 869 (1902). *But see* Ashbaugh v. Wright, 152 Minn. 57, 188 N.W. 157 (1922) (statute of limitations does not run against remainderman when life tenant wrongfully attempts to convey fee). See generally Finnegan, *Problems and Procedure in Quiet Title Actions*, 26 NEB. L. REV. 485, 496 (1947).

In jurisdictions both abrogating and retaining the possession requirement, the cases are indecisive on whether a contingent remainderman may sue. *Compare* Ward v. Meredith, 186 Iowa 1108, 173 N.W. 246 (1919), *with* Eversmeyer v. McCollum, 171 Ark. 117, 283 S.W. 379 (1926).

To avoid the foregoing difficulties, prospective legislative reforms might clearly indicate that all future-interest holders—vested or contingent—with the appropriate quantum of interest, see text at note 164 *supra*, may maintain suit. With such clear statutory authority, there would be little objection to allowing the statute of limitations run against future-interest holders. See Crawford v. Meis, 123 Iowa 610, 618-19, 99 N.W. 186, 189-90 (1904); Note, 23 IOWA L. REV. 233 (1937).

session.[169] As a result, both he and the vendor will be greatly inconvenienced; in fact, he may have to accept tender only to find later that his title is materially defective. Nonetheless, the possession requirement persists, presumably as a deterrent to fraudulent petitioners on the assumption that occupancy is at least prima facie evidence of ownership. This deterrent would seem far outweighed, however, by the detriment flowing from the denial of what is, in effect, the only device which many equitable titleholders and others not in possession of their property could use.

Retention of the other major equitable requirement, that defendant's claim be based on an ostensibly valid writing, serves to reduce drastically the effective scope of a suit to quiet title.[170] The remedy is thus confined to a handful of notorious title defects; and those hidden or potential or undiscoverable flaws which constitute the worst threat to the peaceful use and enjoyment of realty are left uncured. A lawsuit which would provide security against latent defects is of obvious social utility whether the petitioner be a homeowner seeking to safeguard his primary asset, a businessman anxious about a valuable investment, or a commercial or industrial enterprise contemplating expensive improvements.[171] In short, if the suit to quiet title is to realize its potentialities as a sweeping remedy for recording-system defects, the litigability of an adverse claim should not be geared to the nature of that claim.

The Suit's Jurisdictional Basis

In practical terms, the only statute which can empower a court to adjudicate the validity of all adverse claims, known or hidden, ancient or modern,

169. Bradley v. Bell, 142 Ala. 382, 38 So. 759 (1904); see Tax Title Co. v. Dehoon, 107 Va. 201, 57 S.E. 586 (1907); Hitchcox v. Morrison, 47 W. Va. 206, 34 S.E. 993 (1899). *But see* Norman v. Pugh, 75 Ark. 52, 86 S.W. 833 (1905); Griffith v. Whittier, 37 Wash. 2d 351, 223 P.2d 1062 (1950); *cf.* Coel v. Glos, 232 Ill. 142, 83 N.E. 529 (1907).

Even conceptually, there should be no impediment to suit by any vendee—whether in or out of possession—since both he and the vendor have a common interest in removing any doubts as to title. Clearly, were the vendor-owner in possession, he could maintain suit. The illogic of inconveniencing the parties is further illustrated by the fact that most jurisdictions requiring petitioner to be in possession nevertheless permit suit by a vendor out of possession who had conveyed title by warranty deed. See, *e.g.*, Styer v. Sprague, 63 Minn. 414, 65 N.W. 659 (1896); Watts v. Russell, 137 Miss. 845, 102 So. 833 (1925); Kingkade v. Plummer, 111 Okla. 197, 239 Pac. 628 (1925). But, since the vendor neither has nor is entitled to possession, nor indeed to any legal or equitable interest in the property as those terms are traditionally employed, he should not be allowed to maintain suit. On the other hand, because the contracting purchaser is entitled to possession and a conveyance of legal title once the purchase price has been paid, no obstructions should be imposed to his suing to quiet title.

170. See McDOUGAL & HABER, *op. cit. supra* note 166, at 182-83; Covington, *supra* note 160, at 86-90; Howard, *supra* note 160, at 109-10; notes 110-11 *supra* and accompanying text.

171. *Cf.* Patton, *The Torrens System of Land Title Registration*, 19 MINN. L. REV. 519, 532-33 (1935) (itemization of the broad range of persons likely to profit from an effective procedure to establish title status).

existent or potential, is one based on in rem jurisdiction.[172] Conceptually, judicial control of the controverted property under an in rem statute makes personal service of process unnecessary,[173] for jurisdiction over all potentially interested parties is deemed to derive from the land itself.[174] And such jurisdiction over unknown interest holders is essential to an in rem action.[175] Courts have held, however, that valid jurisdiction over the subject matter does not dispense with the requirement that known, adverse interest-holders be notified of pending proceedings.[176] Absent personal service of process on residents and constructive service naming nonresidents, an in rem decree binds only those parties whose identity or residence is unknown. Whenever notification is feasible, the procedures for obtaining in personam and quasi-in-rem jurisdiction are subsumed by a statute creating in rem jurisdiction.[177] Thus, if an adverse claimant is a known resident, jurisdiction must be secured

172. A truly in rem quiet-title adjudication acts on the property itself and disposes of all interests therein which are adverse to those of the petitioner. See Pennoyer v. Neff, 95 U.S. 714, 733-34 (1877); *cf.* Van Oster v. Kansas, 272 U.S. 465 (1926); Tyler v. Judges, 185 Mass. 71, 75, 55 N.E. 812, 813-14 (1900). See also Fraser, *Actions In Rem*, 34 CORNELL L.Q. 29 (1948); 1 U. FLA. L. REV. 395, 398-99 (1948). The precise distinction between actions in rem and those in personam or quasi-in-rem remains unsettled. See note 102 *supra*.

173. "Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding *in rem* dealing with a tangible *res* may be instituted and carried to judgment without personal service upon claimants within the State or notice by name to those outside of it." Tyler v. Judges, 175 Mass. 71, 75, 55 N.E. 812, 813 (1900); see Arndt v. Griggs, 134 U.S. 316, 320-21 (1890) (leading case; constructive service of nonresidents under Nebraska quiet-title statute); Hamilton v. Brown, 161 U.S. 256, 274 (1896) (constructive service on unknown claimants used in quiet-title procedure under Texas escheat statute); *cf.* Balland v. Hunter, 204 U.S. 241, 254-55 (1907) (constructive service on nonresidents in tax-lien foreclosure).

174. Tyler v. Judges, *supra* note 173.

175. Tyler v. Judges, *supra* note 173, at 73, 55 N.E. at 813 (Massachusetts Torrens Act) ("[T]he very meaning of such a proceeding [to clear titles against all the world] is to get rid of unknown as well as known claims,—indeed, certainty against the unknown may be said to be its chief end,—and unknown claims cannot be dealt with by personal service on the claimant."); *cf.* American Land Co. v. Zeiss, 219 U.S. 47, 61-62 (1911) (California quiet-title act) ("Undisclosed and unknown claimants are, to say, the least, as dangerous to the stability of titles as other classes.").

176. Priest v. Board of Trustees, 232 U.S. 604 (1914) (quiet title); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 311, 88 Pac. 356, 360-61 (1906) (same); Fraser, *supra* note 172, at 37.

177. The suit to quiet title is conceptually in rem since it is directed at property—rather than persons—for the purpose of resolving all claims to land. Nevertheless, from the viewpoint of the adverse interests to be extinguished, an action may be simultaneously in personam and quasi-in-rem. See, *e.g.*, Riley v. New York Trust Co., 315 U.S. 343, 353 & 353-54 n.13 (1942) (collecting cases). Insofar as a party defendant is a known resident amenable to the state's process, an adjudication is personal. See note 102 *supra*. If a claimant is known but nonresident, the decree operates quasi-in-rem to cut off the property interest of the named adversary. See Day v. Micou, 85 U.S. (18 Wall.) 156 (1873); Cook, *The Powers of Courts of Equity*, 15 COLUM. L. REV. 37, 47 (1915). Thus, the court simultaneously acquires a threefold jurisdiction to determine strictly personal

by personal service of process.[178] And if a known nonresident of known address, by specifically joining him as a party defendant.[179] Purely in rem jurisdiction can therefore be obtained through publication alone only when all other means of serving process have been exhausted or are infeasible.

The federal constitution presumably recognizes the inherent attributes of sovereignty as sufficient to confer upon the states the right to settle by any reasonable method the status of title to real property within their respective territorial boundaries.[180] Looking to certain state constitutions, on the other hand, a few courts have ruled that a given legislature lacks the authority to expand the equitable remedies which existed at the time the relevant state constitution was adopted.[181] This argument completely misconceives the nature of an in rem quiet-title statute, which does not modify the court's jurisdiction over suits grounded on pre-existing equitable remedies, but creates an independent cause of action unknown to chancery.[182] Since the bill of peace

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rights, rights of particular persons in the property, and the status of title to the property itself as against all others. See Finnegan, *supra* note 168, at 529 n.297; Fraser, *supra* note 172, at 30, 36.

178. See, *e.g.*, Jacob v. Roberts, 223 U.S. 261, 264 (1912); Hamilton v. Brown, 161 U.S. 256, 274-75 (1896); State *ex rel.* Douglas v. Westfall, 85 Minn. 437, 443-44, 89 N.W. 175, 177-78 (1902); *cf.* Walker v. City of Hutchinson, 352 U.S. 112 (1956) (condemnation). *But cf.* Tyler v. Judges, 175 Mass. 71, 75, 55 N.E. 812, 813 (1900).

179. See, *e.g.*, Priest v. Board of Trustees, 232 U.S. 604 (1914); Meyer v. Kuhn, 65 Fed. 705 (4th Cir. 1895); Hill v. Henry, 66 N.J. Eq. 150, 57 Atl. 554 (Ch. 1904).

180. [T]he sovereignty of the State . . . [gives it] control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and modes of establishing titles thereto . . . . The well-being of every community requires that the title of real estate therein be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in nature . . . and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution or against natural justice.

Arndt v. Griggs, 134 U.S. 316, 320-21 (1890) (Nebraska quiet-title statute). See also American Land Co. v. Zeiss, 219 U.S. 47, 60 (1911) (California quiet-title statute); People *ex rel.* Deneen v. Simon, 176 Ill. 165, 175-77, 52 N.E. 910, 914-15 (1898) (Illinois Torrens Act); Drake v. Frazer, 105 Neb. 162, 165, 179 N.W. 393, 395 (1920) (Nebraska Torrens Act).

181. See note 127 *supra*.

182. *E.g.*, Hoadley v. Wheelwright, 130 Me. 395, 156 Atl. 692 (1931); Gilbert Smith, Inc. v. Cohen, 123 N.J. Eq. 419, 426, 196 Atl. 361, 364 (Ct. Err. & App. 1938).

The ineffectiveness of most current quiet-title statutes arises from the fact that when they were enacted courts and legislators alike mistakenly viewed them as mere extensions of chancery jurisdiction. See Harrison v. Denver, 102 Colo. 98, 76 P.2d 1110 (1938); Wagner v. Stroh, 70 N.D. 323, 294 N.W. 195 (1940); notes 127-29 *supra* and accompanying text. Many of the conceptual difficulties thereby created were overcome under Torrens acts, which clearly established a new and independent system governing land

and the suit to remove cloud would not be affected in any way,[183] state legislators contemplating the adoption of an in rem statute should ignore the equitable-limitations doctrine.[184]

The basic problem, then, is convincing lawmakers not of their authority to adopt in rem legislation but of the need therefor. Almost half the present quiet-title statutes are essentially adversary—requiring personal jurisdiction or the joinder of known nonresident claimants—and are not founded solely on judicial control over the res.[185] Underlying these statutes is a marked legislative disinclination to authorize a decree which would conclusively settle the rights of unjoined, unnotified and unrepresented parties.[186] But obtaining personal jurisdiction over or joining unknown interest-holders is patently impossible. Their claims must accordingly be expunged *ex parte* or allowed to emerge at any time to subvert a previously rendered judgment. The choice is between an in personam or quasi-in-rem decree, which is worth little as a title determinant, and an in rem proceeding, which binds all adverse claimants despite possible inequities.

Demanding legislative action is one thing, justifying it another. Of obvious social utility, the in rem statute may nonetheless operate harshly on private rights and interests. It therefore can be justified only by a "pressing pub-

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transfers and which were thus patently unaffected by doctrines governing earlier equitable remedies. See cases cited note 180 *supra*. *But see* Prassas v. Jana, 4 Ill. App. 2d 385, 124 N.E.2d 643 (1955). Many of the flaws in present quiet-title enactments could be overcome by a definite statement that the legislature is exercising its undoubted power to create a new type of in rem procedure for determining title status. See 1 U. FLA. L. REV. 395, 408-11 (1948).

183. See Remer v. Mackay, 35 Fed. 86 (C.C.N.D. Ill. 1888); Knauff v. National Cooperage Co., 87 Ark. 494, 113 S.W. 28 (1908); Buena Vista v. Illinois F. & S.C.R.R., 49 Iowa 657 (1878).

184. If any vestiges of equity jurisdiction are left in the redrafted statute, courts may again interpose the slogan that "one seeking equity must do equity." Then, ancient mortgages barred by the statute of limitations, void tax deeds and similar nugatory instruments may have to be honored. See note 134 *supra* and accompanying text. That such results should not obtain seems self-evident; legislation should therefore make it clear that nonactionable claims are not to be revived through any theories of equity jurisdiction.

185. See notes 116-18 *supra* and accompanying text.

186. See *ibid.* Thus, even under the statutes which are purely in rem and comprehend quieting title against "all the world," the formalisms of alleging adverse claims and naming an adverse claimant in the complaint are retained. See Finnegan, *supra* note 168, at 501-02 (collecting cases); Foster, *Jurisdiction in Suits To Quiet Title*, Neb. L. Bull., Oct. 1922, p. 1, at 5, 21-33, 24 n.20 (1922). Only Montana unequivocally allows a suit against "all the world"; a similar but less decisive Florida statute proved ineffective against judicial antagonism toward a purely in rem proceeding. See note 121 *supra*. Curiously, a few jurisdictions whose general quiet-title enactments are either essentially personal, see CAL. CIV. PROC. CODE ANN. § 738 (1955), or of only limited in rem scope, see MO. ANN. STAT. § 527.150 (1953), nevertheless allow adverse possessors to maintain a thoroughly nonadversary action, CAL. CIV. PROC. CODE ANN. § 749.1 (1955); MO. ANN. STAT. § 527.180 (1953).

lic necessity"[187] which somehow transcends mere desirability. So justified are the summary procedures for condemning property [188] and executing foreclosures on account of tax delinquencies.[189] And public necessity has twice been found to warrant emergency quiet-title enactments designed to re-establish through summary in rem proceedings recording systems destroyed by fire and earthquake.[190]

187. The cases are replete with statements that statutory provisions for constructive service on adverse claimants—the very heart of most in rem enactments—are justified only by "necessity." See, *e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315-18 (1950) (judicial settlement of accounts of common trust fund under New York Banking Law); Shepherd v. Ware, 46 Minn. 174, 48 N.W. 773 (1891) (Minnesota quiet-title statute); Stanton v. Thompson, 234 Mo. 7, 11, 136 S.W. 698, 699 (1911) (municipal condemnation).

188. State condemnation statutes providing for the mere publication of notice to any and all interested parties have been upheld in a long series of Supreme Court decisions. See, *e.g.*, Wick v. Chelan Elec. Co., 280 U.S. 108 (1929); North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925). Invariably, these nominally constitutional measures are found to rest on a public necessity which is too well established to be questioned. See, *e.g.*, Pierce v. City of Huntsville, 185 Ala. 490, 64 So. 301 (1913). For a full discussion of the nature of eminent domain procedures regarding notification to interested parties, see 43 IOWA L. REV. 295 (1958). The Supreme Court has, however, recently begun to question the use of publication absent proof that other, more equitable methods of notice could not have been feasibly employed. In Walker v. City of Hutchinson, 352 U.S. 112 (1956), the petitioner-owner was served by publication in a municipal condemnation proceeding although he was known to be a resident of the city. Finding that the failure to give petitioner some form of direct notice was completely unwarranted, the Court held the procedure invalid under the due-process clause of the Constitution. For discussion of the potential impact that *Walker* and similar decisions may have on the quiet-title field, see notes 243-52 *infra* and accompanying text.

189. Recent statutes dealing with tax-lien foreclosures and the establishment of titles obtained at sales after such foreclosures run roughshod over the rights and interests of delinquent property owners. For instance, under the Missouri Land Tax Collection Act, MO. ANN. STAT. § 141.210 (1952), property with long-standing delinquencies may be summarily foreclosed and a judicial decree rendered, the effect of which is to establish a marketable title in the execution purchaser with no right of redemption in the former owner. Service by publication naming no personal defendants is allowable as to known resident owners and others. MO. ANN. STAT. §§ 141.410-.570 (1952). The Missouri Supreme Court upheld these harsh procedures in all respects. Spitcaufsky v. Hatten, 353 Mo. 94, 182 S.W.2d 86 (1944). A similar but less stringent Florida enactment, FLA. STAT. ANN. § 173.04 (1943), was upheld in Reina v. Hope, 158 Fla. 771, 30 So. 2d 172 (1947). Both cases cite as authority the leading Supreme Court decision in this area, Leigh v. Green, 193 U.S. 79, 92 (1904). There, the Court indicated that, from a constitutional viewpoint, statutes providing for personal notice to landowners do so only out of "tenderness to their interests." Despite the *Walker* decision in the somewhat analogous field of condemnation, see note 188 *supra*, the Supreme Court has evinced no change of heart as to the constitutionality of the tax-lien statutes.

Concededly, tax foreclosures and condemnation proceedings are more patently "public" in nature than a quiet-title suit. But the question remains whether the continued dichotomy between the constitutional treatment accorded in rem statutes providing "public" as opposed to mere "private" remedies is valid. See Fraser, *supra* note 172, at 41-44 (criticising the distinction).

190. Following the great Chicago fire of 1871, Illinois adopted the Burnt Records Act of 1872 (now ILL. REV. STAT. ch. 116, § 1 (1954)) permitting any person claiming

The current national chaos in title records has not been highlighted by such dramatic events. But present conveyancing procedures comprise a day-to-day disaster with even more far-reaching consequences. The state legislatures themselves are responsible for creating this situation, the improvement of which is a pressing public need, inasmuch as the recording system

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title to maintain an in rem suit against all the world. The act is in many respects analogous to a number of in rem enactments presently in force. Suit could be instituted by any person whether or not in possession; any and all persons claiming or who might claim adversely were joined as defendants; service by publication was authorized as to all unknown claimants; and the court decree was conclusive of title status, except that parties served constructively might vacate it within one year after rendition, and those under disability were accorded further protection. Moreover, the courts were empowered to determine title according to the best evidence presented, regardless of source. See Gormley v. Clark, 134 U.S. 338 (1890). In upholding the act, the Illinois Supreme Court declared: "It is, in effect, a statute of limitations, and, under the circumstances, was not unreasonable. It was demanded as a matter of safety in a great emergency." Bertrand v. Taylor, 87 Ill. 235, 238 (1877).

The San Francisco fire, flood and earthquake of 1906 spurred the passage of still more sweeping in rem legislation. Under the McEnerney Act (now CAL. CIV. PROC. CODE ANN. § 1855a (1955)), a person in possession was entitled to bring "an action in rem against all the world . . . to establish his title to such property and to determine all adverse claims thereto." Two significant features distinguish the McEnerney Act from both the Burnt Records Act and the great majority of present in rem quiet-title enactments. Most conspicuous was the absence of a requirement that petitioner allege and prove due diligence in attempting to notify unknown and unlocatable claimants personally before service by publication would issue against them. Also, there was no provision for reopening by unnotified parties served constructively, nor any special protection afforded persons under disability. In Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906), the state supreme court upheld the statute against a constitutional challenge alleging lack of due process. The court did feel that serious constitutional questions were raised, however. Attempting to avoid them in part, it interpolated an implied requirement that petitioners aver due diligence in searching for adverse claimants before constructive service could be utilized. 150 Cal. at 317, 88 Pac. at 363. Moreover, in a subsequent case, Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939 (1907), the court also found applicable a general statutory provision (now CAL. CIV. PROC. CODE ANN. § 473a (1955)), which allows the reopening of a decree by unnotified parties within one year after its rendition. Statutory constitutionality was authoritatively determined by the United States Supreme Court in American Land Co. v. Zeiss, 219 U.S. 47 (1911). The high court went to even greater lengths than had the state supreme court in equating the urgent necessity which produced the act with its validity:

> As it is indisputable that the general welfare of society is involved in the security of titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below.

Id. at 60. While the Court felt itself bound by state judicial construction on due diligence and reopening, it apparently felt that neither additional safeguard was essential to constitutionality. See *id.* at 64-70. For analyses comparing the McEnerney Act, and to some extent the Burnt Records Act, to the more "modern" in rem statutes of Alabama and Florida, see Gilliam, *supra* note 146, at 421-23; 1 U. FLA. L. REV. 395,

that they designed to maximize security of ownership has instead all but demolished it. The legislatures should therefore rectify their past mistakes and adopt the in rem action (the only comprehensive device outside Torrens) as fulfilling a public need which would appear to outweigh the occasional unfair treatment of persons with undiscoverable interests.

Conclusiveness

Were a statute to confer jurisdiction over the subject matter [191] and judicial control of the res to impart jurisdiction over all persons,[192] a court's power to bind unnotified adverse interest-holders would remain critical to a conclusive adjudication.[193] A decree can be avoided either by utilizing statutory provisions for direct reopening,[194] or by collaterally assailing it on the ground that the court lacked jurisdiction to bind the attacking party.[195] In theory, when the attack is direct it is a procedural challenge sanctioned by legislation which merely renders decrees voidable;[196] when collateral, it is

405-06 (1948). See also IOWA CODE ANN. §§ 647.1-.5 (1950) (statute anticipating loss or destruction of public records provides for in rem action to restore them).

While the McEnerney Act and to a lesser degree the Burnt Records Act provide substantial authority for an effective in rem quiet title statute, both were the product of extraordinary circumstance rather than a reflection of legislative and judicial awareness of the continuing value of such statutes. The current California quiet-title suit is almost entirely a personal, adversary proceeding. See CAL. CIV. PROC. CODE ANN. §§ 738-39 (1955). The present Illinois statute is in rem only to the extent that lineal successors of named and known defendants may be constructively served and bound by a decree. See notes 115-16 *supra* and accompanying text. The McEnerney Act was accepted by the judiciary as an inescapable necessity, but subsequent litigation indicated an underlying judicial distaste for extending the effect and effectiveness of essentially "private" legislation. In Berton v. All Persons, 176 Cal. 610, 617-18, 170 Pac. 151, 154 (1917), the court engrafted an exception to the statute's apparently full in rem scope: state and public agencies were held not bound by constructive service of process. *But cf.* United States v. Ryan, 124 F. Supp. 1 (D. Minn. 1954) (Minnesota Torrens Act; U.S. had failed to file its tax-lien notice propertly and was estopped to contest registration decree despite statutory exception in favor of federal government).

191. "Jurisdiction over the subject matter" is both a generic legal concept and a specific prerequisite to a valid judgment or decree in a given case. Thus, the phrase implies a court's abstract power to adjudicate a certain class of cases. In a general sense, therefore, an in rem quiet-title enactment will authorize courts in counties where property is situated to hear these actions. See, *e.g.*, ALA. CODE ANN. tit. 7, § 1116 (1941). But a court cannot initiate suit *sua sponte*; its power to adjudicate any particular in rem cause of action depends on its control over the res in controversy. And this power is specifically acquired only when a petitioner institutes suit by filing a complaint. See Lovett v. Lovett, 93 Fla. 611, 629-31, 112 So. 768, 776 (1927).

192. See note 173 *supra* and accompanying text.

193. See notes 231-37 *infra* and accompanying text.

194. See notes 139-48 *supra* and accompanying text.

195. See notes 135-38 *supra* and accompanying text. For a discussion of the interplay of direct and collateral attack concepts under the Nebraska statute, see Finnegan, *supra* note 168, at 514-24.

196. See, *e.g.*, Nauer v. Benham, 45 Minn. 252, 47 N.W. 796 (1891) (quiet title); White v. Ainsworth, 62 Colo. 513, 163 Pac. 959 (1917) (Torrens); 1 BLACK, JUDG-

extra-statutory, is aimed at the jurisdiction of the rendering court, and, if successful, completely voids the contested decree.[197] This distinction is conceptual but vital, for, if a decree is deemed void *ab initio*, legislation probably cannot protect even bona fide purchasers for value against the decree's annulment.[198] Thus, the problem of collateral attack, though partially susceptible of statutory solution,[199] will require judicial cooperation as well if it is to be resolved completely.[200] A similar problem arises from a fraudulent failure to join known adverse persons as party defendants. Here, however, as with direct reopening, a legislative solution can be found.[201] In summary, three basic questions must be answered: how impose statutory limits on the direct reopening of decrees; how prevent a decree from becoming perpetually open to collateral avoidance for want of jurisdiction; and how formulate a workable doctrine for alleviating the effects of fraud.

Direct Attack

Statutory provisions allowing unnotified, constructively-served claimants to attack a decree[202] are apparently a modern reflection of the quiet-title suit's equitable origins.[203] Chancery preferred a personal action in which adverse claims could be carefully scrutinized.[204] But a purely equitable suit could not establish a functionally marketable record title, for the petitioner would have to discover and join or notify every potentially adverse claimant.[205] A rigid

MENTS § 195 (1891); 1 FREEMAN 357-72; RESTATEMENT, JUDGMENTS § 4, comment *a* at 20-21 (1942). See generally Comment, 66 YALE L.J. 526, 536 (1957).

197. See, *e.g.*, Westbrook v. Dierks, 292 P.2d 172 (Okla. 1955) (quiet title); County of Douglas v. Feenan, 146 Neb. 156, 18 N.W.2d 740 (1945) (tax foreclosure and sale); 7 MOORE, FEDERAL PRACTICE ¶¶ 60.25, at 257-64, 60.41, at 801-03 (2d ed. 1955); RESTATEMENT, JUDGMENTS § 4, comment *b* at 21-22 (1942); Haymond, *Title Insurance Risks of Which the Public Records Give No Notice*, 1 So. CAL. L. REV. 422 (1928).

198. See, *e.g.*, Hassett v. Durbin, 132 Neb. 315, 271 N.W. 867 (1937) (foreclosure). *But see* Henry v. White, 123 Minn. 182, 143 N.W. 324 (1913) (dictum) (Minnesota Torrens Act; bona fide purchaser protected even though grantor's decree subject to collateral attack). See also 1 FREEMAN § 322, at 642-43; Comment, 66 YALE L.J. 526, 543-44 n.86 (1957).

199. See notes 270-73 *infra* and accompanying text.

200. See notes 274-81 *infra* and accompanying text.

201. Reopening a decree because of fraud has traditionally been treated as conceptually identical with a direct attack for jurisdictional defects. See note 291 *infra*. Hence, no constitutional barrier exists to a statute granting absolute protection to bona fide purchasers, or establishing a reasonably restricted period for attack on the fraudulent petitioner or his successors in interest. See notes 221-23 *infra* and accompanying text; notes 290, 294 *infra*. *But see* note 296 *infra* (collateral attack allowable in case of "constructive" fraud).

202. For a discussion of the effect of direct-attack provisions under existent quiet-title legislation, see notes 139-48 *supra* and accompanying text.

203. See notes 103-13 *supra* and accompanying text.

204. See note 112 *supra* and accompanying text.

205. See 13 IDAHO S.B. PROC. 29 (1937) (intensive research revealed hundreds of possible claimants whom petitioner would have to discover and make party if such a requirement were imposed). See also 48 HARV. L. REV. 1001 (1935).

in rem suit, on the other hand, could, once judgment was rendered, cut off all rights except that of appeal.[206] To compromise these divergent approaches, the statutes grant unnotified persons a specified time to reopen a decree and present meritorious defenses.[207] The parties are reversed, but the personal form of suit is retained. Because the quiet-title suit is strictly a statutory creation which, supposedly, may be hedged with whatever limitations the legis-

206. See, *e.g.*, Fischer v. Sklenar, 101 Neb. 553, 163 N.W. 861 (1917) (in rem probate proceeding; court judgment is final and conclusive on all interested parties actually or constructively present unless appealed from). See also Finnegan, *supra* note 168, at 529.

207. Although the attacking party must generally allege both lack of notice and a full defense on the merits, *e.g.*, NEB. REV. STAT. ANN. § 25-525 (1948), see Oakes v. Ziemer, 61 Neb. 6, 84 N.W. 409 (1900), lack of notice is not an invariable prerequisite, see 1 FREEMAN § 230. For example, ARK. STAT. ANN. § 34-1910 (1947) permits a quiet-title decree to be set aside by *any person* filing a "meritorious defense" within three years after its rendition. Granting a lengthy reopening period to persons whose nonappearance and default were occasioned by their own neglect impairs the value of the original decree unnecessarily and inequitably. Defaulting parties personally served with process or receiving actual notice should at most be allowed to reopen at the court's discretion upon a showing of mistake, inadvertance, surprise or excusable negligence; and these terms ought to be strictly construed. See MONT. REV. CODES ANN. § 93-3905 (1949). See generally 1 FREEMAN §§ 237-51. Moreover, the time limit accorded these parties should certainly be no longer than the period available to those served by publication. *Compare* MONT. REV. CODES ANN. § 93-3905 (1949) (defaulting petitioners served by publication have one year after *judgment* at court's discretion; those served with process have six months at the court's discretion), *with* WIS. STAT. ANN. §§ 269.46-.47 (1957) (all persons may seek discretionary relief for nonappearance due to inadvertance, mistake, etc. within one year after *notice* of decree; persons served by publication must reopen within three years of rendition). See Kingsley v. Steiger, 141 Wis. 447, 123 N.W. 635 (1910); Hendricks, *Defects in Titles to Real Estate and the Remedies*, 20 MARQ. L. REV. 115, 135 (1936).

As a rule, the courts have strictly adhered to the time limits for reopening prescribed by statute, and have denied challenging parties further relief once the statutory period has run. *E.g.*, Knudson v. Litchfield, 87 Iowa 111, 54 N.W. 199 (1893); Delnay v. Woodruff, 244 Mich. 456, 221 N.W. 614 (1928); Burnham Bros. Brick Co. v. Riesen, 186 Wis. 523, 203 N.W. 332 (1925); *cf.* Nauer v. Benham, 45 Minn. 252, 47 N.W. 796 (1891). *But cf.* Lord v. Hawkins, 39 Minn. 73, 38 N.W. 689 (1888).

If, however, the legislature has not established a statutory period, either within the quiet-title enactment or independent of it, any party may still sue by bringing a plenary action in equity to vacate the judgment. See 1 U. FLA. L. REV. 395, 406 (1948). Traditionally regarded as an alternative method of post-judgment direct attack, the plenary suit will lie in favor of any party and may be entertained at the discretion of any court with equitable powers. See Comment, 66 YALE L.J. 526, 530-33 (1957). Since only the equitable doctrine of laches limits the time allowed for such actions, see, *e.g.*, Lamar v. Houston, 183 Miss. 260, 184 So. 293 (1938), the plenary suit is particularly inapposite in the quiet-title context, where conclusiveness of the decree is essential. To avoid equitable invocation of the remedy, a well-drafted quiet-title statute should specifically provide an applicable period for direct attack, and clearly bar recourse to any other procedure after the specified time has elapsed. *E.g.*, N.D. REV. CODE § 32-1713 (1944) (reopening by any person presenting a meritorious defense within one year "but not otherwise").

lature chooses to impose,[208] the original petitioner or his successors presumably may not prevent a decree from being reopened.[209] Realistically viewed, however, the in rem action should be reopenable for only a limited period of time. Once a petitioner and his successors in interest have relied on a decree to establish a functionally marketable record title, they have in effect obtained an "equitable defense" to an attempted reopening.[210]

Equitably-oriented reopening provisions would balance the interests of unnotified claimants against those of all other persons affected by a decree. Two variables would be involved: the extent to which an unnotified interest-holder could reasonably have been expected to provide anticipatory safeguards against his not being notified of an action;[211] and his equitable standing vis-à-vis that

208. See White v. Ainsworth, 62 Colo. 513, 163 Pac. 959 (1917) (Colorado Torrens Act).

209. See American Land Co. v. Zeiss, 219 U.S. 47, 70 (1911) (California reopening provision "an absolute right"); 1 FREEMAN § 229.

210. *Cf.* United States v. Ryan, 124 F. Supp. 1 (D. Minn. 1954). The United States was estopped from asserting an "absolute" exception to the conclusiveness of a Torrens decree running in favor of the federal government in any action in which it was not actually made party and personally summoned. The court was influenced by the fact that "the people of Minnesota have been buying and selling Torrens properties with full reliance on the certificate of title." *Id.* at 12. Also *cf.* 1 FREEMAN § 303; Comment, 66 YALE L.J. 526, 532 & n.35, 541, 543 (1957).

211. Presumably, the use of constructive service against nonresident and unknown claimants may be justified on the theory that landowners must exercise reasonable vigilance to protect their rights. See, *e.g.*, Ballard v. Hunter, 204 U.S. 241, 261 (1907) (tax foreclosure) ("The law cannot give personal notice of its provisions or proceedings to every one. . . . Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings."); Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559, 564 (1889) ("It is . . . the duty of the owner of real estate . . . to take measures that in some way he shall be represented when his property is called into requisition.").

These rather harsh pronouncements, though conceptually sound, do not comport with the realities of absentee ownership. Nevertheless, in the direct-action context, the validity of the unnotified party's right to reopen is legitimately subject to scrutiny. But this right should not depend on the fact that published notice is virtually no notice at all, nor on the presumption that constructive service is a necessary and valid adjunct of a state's power and obligation to establish the status of land titles. Rather, the crucial factor should be the ability of an interest holder to provide safeguards increasing the likelihood of notice. For example, there are stronger equities favoring liberal reopening by unrepresented and unborn future-interest holders—definitionally incapable of receiving notice or protecting against its absence—than by persons under the disabilities of infancy or insanity—who may usually rely on the vigilance of a guardian. See Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 145-46 (1918); *cf.* BASYE § 8, at 29. Similarly, individuals under disability are in a stronger reopening position than those who are not, for even the absentee landowner may be reasonably expected to empower a resident agent to inform him of judicial proceedings affecting his rights. Moreover, if the nonresident claimant holds an interest undiscoverable of record, there is no reason why he cannot provide some form of "record notice," however unofficial, to persons subsequently dealing with the property. For instance, little basis exists for according protection to the absentee holder of a restrictive covenant—frequently not recorded—who has made no

of the ultimate beneficiary of the decree, be he the petitioner himself, a successor in interest, or a subsequent bona fide purchaser.[212] These criteria permit of such kaleidoscopic variations that they can only be applied by the courts; as a statutory base, they have the solidity of quicksand.[213] Nonetheless, legislatures have attempted to codify them in part, and have granted persons incapable of ensuring against lack of notice at time of suit an almost indefinite period during which to reopen a decree.[214] Also, in many cases

efforts to prevent lack of notice, especially since such interests are generally disfavored. See Shaddock v. Walters, 55 N.Y.S.2d 635 (Sup. Ct. 1945).

Concededly, under statutes which allow reopening as of right, the courts have been precluded from inquiring into the bona fides of attacking parties. See 1 FREEMAN § 229. *But cf.* Gray v. Lawlor, 151 Cal. 352, 90 Pac. 691 (1907). When reopening is sought through a plenary suit in equity, however, equitable doctrines such as laches have been frequently invoked to deny the requested relief. See Comment, 66 YALE L.J. 526, 532-33 (1957).

212. Under present law, the subsequent bona fide purchaser relying on a decree is frequently, although not always, protected. See note 149 *supra*; 1 FREEMAN § 230, at 455, § 303, at 596 n.19. But if the petitioner or a successor in interest has retained title, he is afforded no protection against an unnotified claimant's right to reopen. See, *e.g.*, Knotts v. Tuxbury, 69 Ind. App. 248, 117 N.E. 282 (1917); Whiteman v. Cornwall, 100 Kan. 234, 164 Pac. 280 (1917); Hill v. Miller, 84 Kan. 196, 113 Pac. 1043 (1911); 1 FREEMAN § 298. This is true despite statutory language that the court may grant relief on "such terms as may be just." *E.g.*, CAL. CIV. PROC. CODE ANN. § 473a (1954); see Gray v. Lawlor, 151 Cal. 352, 90 Pac. 691 (1907). Upon presenting a meritorious defense, the attacking party presumably will be entitled to restitution of the property, or whatever interest was purportedly extinguished by the decree. See 1 FREEMAN 589 n.19. See generally Tainter, *Restitution of Property Transferred Under Void or Later Reversed Judgments*, 9 MISS. L.J. 157 (1936); Carl v. DeToffol, 223 Minn. 24, 25 N.W.2d 479 (1946) (Torrens). Some authority exists, however, that if the attacker is entitled to a "reconveyance" of title, good-faith improvements made by the original petitioner or his successors in interest will be reimbursed. See, *e.g.*, Gray v. Lawlor, *supra* at 356, 90 Pac. at 692; 1 FREEMAN § 303.

213. Under several statutes, reopening by unnotified claimants is not granted as a matter of right but is discretionary. *E.g.*, MICH. STAT. ANN. § 27.677 (1938) (within three years after entry of final decree); MONT. REV. CODES ANN. § 93-3905 (1949) (the court "may allow" defendants served by publication to answer within one year after judgment "on such terms as may be just"); N.Y. REAL PROP. LAW § 507 (the court may "in its discretion in the interest of justice grant a new trial upon an application made by any party . . . within one year after judgment."); S.D. CODE § 37.1514 (1939) (in the court's "discretion and upon such terms as may be just" within two years after entry of judgment).

214. For a discussion of the special rights afforded claimants under the disabilities of infancy or insanity, and to a lesser extent future-interest holders, see notes 144-51 *supra* and accompanying text. Favored treatment of persons under disability has been sharply criticized as being incompatible with the basic objectives of an in rem quiet-title action. See Gilliam, *Proceedings In Rem To Establish Title to Land*, 3 ALA. LAW. 418, 427-29 (1942); Finnegan, *supra* note 168, at 530-31; 15 IND. L.J. 437 (1940). Such criticism is especially justifiable in view of the fact that statutory provisions allowing persons to reopen within a stated period after removal of the disability generally fail to protect even bona fide purchasers. See note 150 *supra*; Attica Bldg. & Loan Ass'n v. Colvert,

lengthy reopening provisions embrace all other parties served only by publication.[215] On the other hand, the statutes clearly fail to acknowledge any equity in the beneficiary of a judgment which would permit him to contest the right to reopen. In thus precluding the assertion of interests acquired through reliance on an earlier decree, the statutes unduly favor the unnotified claimant and needlessly debase the legal policies of certainty and functional marketability. True, the unnotified claimant carries the burden of initiating subsequent adversary proceedings; and granting him an extended period for launching a direct attack does not necessarily increase the likelihood that he will learn of an outstanding decree. But these arguments simply suggest that legislative solicitude for the unlocated claimant might better be directed toward improving the procedures for initial notification.[216] Furthermore, although many present statutes no longer burden the petitioner with equity's impossible notification requirements, he is still left in a highly insecure position. The statistical possibility that a decree will be directly attacked may be slight, but the mere possibility of attack disproportionately undermines the functional marketability of a quieted title.

Amendatory quiet-title legislation should therefore curtail the direct attack period, sharply and absolutely. The term for reopening might vary, being longer if the original petitioner has retained title than if the land has been transferred to a bona fide purchaser for value.[217] In the latter situation, a minimal period is essential to promoting alienability, which is inhibited when-

216 Ind. 192, 23 N.E.2d 483 (1939). To overcome this latent threat to the certainty of a quiet-title decree, one statute specifically allows the appointment of a guardian *ad litem* to represent the interests of all unknown parties not before the court. MASS. ANN. LAWS ch. 240, § 320.8 (1956). In Loring v. Hildreth, 170 Mass. 328, 49 N.E. 652 (1898), this provision was construed to make the decree conclusive against remaindermen who were unascertained and unborn following "service" by publication. *A fortiori*, it would apply to unknown claimants under disability, and presumably confine their remedies on direct attack to those granted others receiving notice by publication. See MASS. ANN. LAWS ch. 240, § 240.214 (1956) (reopening within five years).

215. *E.g.*, NEB. REV. STAT. ANN. § 25-525 (1948); WIS. STAT. ANN. § 269.47 (1957).

216. For a discussion of notification procedures under present quiet-title enactments and a suggested revision, see notes 238-39, 249-52 *infra* and accompanying text.

217. See, *e.g.*, MINN. STAT. ANN. § 544.32 (1947), which partially codifies this principle. The court may, at its discretion, grant relief from judgments taken through mistake, inadvertance or excusable neglect within one year after notice of the decree. But once three years have elapsed after recording of the judgment, relief which will affect the title of a bona fide purchaser or encumbrancer cannot be granted. *Cf.* 24 MINN. L. REV. 806 (1940). Presumably, since the petitioner will immediately record the decree, a bona fide purchaser will be protected three years after rendition. *But see* Lord v. Hawkins, 39 Minn. 73, 38 N.W. 689 (1888), holding in effect that a purchaser from the petitioner, though bona fide in all other respects, could receive no protection against subsequent avoidance of the decree. In view of this subsequently enacted code provision, it would appear that the effect of the *Lord* decision is partially overcome. Curiously, though, under the general statutory provision allowing reopening by those served by publication in quiet-title suits, MINN. STAT. ANN. § 548.25 (1947), the decree may be avoided within five years after rendition with no concomitant protection accorded the bona fide purchaser.

ever innocent purchasers cannot take free of all prior defects.[218] The equities of a petitioner who obtained a decree and who still has title are admittedly less compelling. On balance, such a petitioner, having expended time, money and effort to secure a decree, would seem to merit preferred treatment over unknown persons who have not seasonably attempted to safeguard their rights, and who, in most cases, will not have used their property interests productively. A uniformly brief reopening period finds further support in the facts that existing provisions do not protect unnotified claimants, and that these provisions are fundamentally irreconcilable with the purpose of the quiet-title remedy. Accordingly, every decree should become in all respects conclusive, say, ninety days after its rendition.[219] Within this limited interval, a direct attack should be allowed on behalf of any adverse party who did not receive actual notice and, at the court's discretion, of anyone who did not appear because of inadvertence or excusable neglect. Thereafter, no one should be permitted to avoid the decree directly for any reason, irrespective of who holds the quieted title.[220]

The foregoing proposal would be constitutional, since the privilege of re-

218. Since most quiet title actions are instituted directly prior to a land sale, the rights of a bona fide purchaser are usually involved. See Address by Carl H. Swanstrom, *Quieting Title in Idaho*, June 28, 1947, in 21 IDAHO S.B. PROC. 68, 72 (1943) (nine out of ten actions are in connection with a land transfer). If the in rem remedy is to be of any worth at all, then the innocent buyer must be protected insofar as legally possible. See Finnegan, *supra* note 168, at 531-32; 15 IND. L.J. 437 (1940); *cf.* Covington, *Bills To Remove Cloud on Title and Quieting Title in Arkansas*, 6 ARK. L. REV. 83, 89-90 (1952); Comment, 66 YALE L.J. 526, 541-44 (1957).

While the necessity of protecting innocent purchasers from the petitioner has been only partially recognized in the quiet-title area, it is almost universally acknowledged under Torrens. *E.g.*, N.Y. REAL PROP. LAW § 392; OHIO REV. CODE ANN. § 5309.23 (Page 1954). Under one Torrens enactment, no form of direct attack may be maintained by unnotified claimants once ninety days have elapsed following rendition of the decree; and even within this extremely limited period, good-faith purchasers are protected. COLO. REV. STAT. ANN. § 118-10-31 (1954).

219. Establishment of a direct-attack period is ultimately an arbitrary decision presumably dictated by local preference. Thus, the applicable time span under existent quiet-title statutes varies widely from a few months to many years. See note 139 *supra* and accompanying text. Under the Torrens acts, reopening has been restricted to a thirty-day interval, N.Y. REAL PROP. LAW § 392, and extended for two years, ILL. REV. STAT. ch. 30, § 70 (1957). See generally POWELL.

A ninety-day period is suggested in the text because it is short enough to preclude substantial inconvenience through reopening. Even in the land-sale context, parties could delay title passage during this interval without inconvenience. And should a sale have to be consummated immediately, the possibility of the purchaser being divested of title would be kept at a minimum. If local needs demand a much lengthier period than ninety days, express protection of the innocent purchaser's rights is essential. See OHIO REV. CODE ANN. § 5309.23 (Page 1954) (Torrens).

220. Statutory language abrogating reopening must be precise, for vague wording is likely to result in the judicial attrition of provisions for conclusive quiet-title decrees. See Lohr v. Curley, 27 Idaho 739, 152 Pac. 185 (1915); Lord v. Hawkins, 39 Minn. 73,

opening a decree is strictly a matter of legislative grace.[221] Direct-attack provisions are analogous to statutes of limitations; they assume that jurisdiction was properly acquired initially, and they make a statutory remedy available to persons whose rights have already been adjudicated.[222] Resting on purely equitable rather than on constitutional principles, they may be extended or abridged at the legislature's discretion.[223]

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38 N.W. 689 (1888); Mirick v. Unknown Heirs of Booten, 304 Mo. 1, 262 S.W. 1038 (1924); notes 128-30 *supra* and accompanying text.

A well-drafted in rem enactment must clearly indicate that persons under disability as well as those not yet *in esse* are to be encompassed by both a decree and the time limit established for direct attack. Otherwise, such persons may be allowed to challenge a decree long after its rendition. See notes 145-48 *supra* and accompanying text. Legal or constitutional difficulties can be overcome by allowing the appointment of a guardian *ad litem* to represent unborns and persons under disability, whether their interests are known or unknown. See N.Y. REAL PROP. LAW §§ 503, 507; MASS. ANN. LAWS ch. 240, § 8 (1956); Loring v. Hildreth, 170 Mass. 328, 49 N.E. 652 (1898); RESTATEMENT, PROPERTY § 182(b) and comment *e* (1936). Torrens statutes frequently employ a guardian *ad litem* to ensure the conclusiveness of a registration decree. *E.g.*, MINN. STAT. ANN. §§ 508.18, 508.22 (1947).

In addition, a model in rem statute would make its reopening provisions the exclusive available remedy for persons whose rights have been adjudicated. Future legislation should therefore specifically bar recourse to any other statutory provision for post-judgment relief, or to any proceeding in law or equity for setting aside, vacating or otherwise reopening a final adjudication. A few present enactments express such legislative intent, but they do so in language which is far from explicit. *E.g.*, N.D. REV. CODE § 32-1713 (1944) (reopening within one year after judgment "but not otherwise"). See generally notes 141-42 *supra* and accompanying text.

Whether or not courts will accept an absolute imposition of the legislative will is unclear. Even under Torrens, the judiciary has carved out extrastatutory exceptions to the conclusiveness of a decree. *E.g.*, Prassas v. Jana, 4 Ill. App. 2d 385, 124 N.E.2d 643 (1954) (proceedings under Torrens act governed by rules of equity except as statute otherwise provides); Baart v. Martin, 99 Minn. 197, 108 N.W. 945 (1906) (although statute purports to provide an absolutely conclusive decree, equity may protect against fraud). *But see* Murphy v. Borgen, 148 Minn. 375, 377, 182 N.W. 449, 450 (1921) (Torrens):

> If the statute were construed to grant authority to the courts to vacate judgments under their equity powers . . . , the finality of the decree, the fundamental basis . . . of the Torrens system . . . would disappear, for just what a court may do to the Torrens judgment on application addressed to its equitable powers will find a limit only in the ingenuity of counsel in . . . devising methods of attack.

221. See, *e.g.*, White v. Ainsworth, 62 Colo. 513, 163 Pac. 959 (1917) (Torrens).

222. See, *e.g.*, People *ex rel.* Deneen v. Simon, 176 Ill. 165, 52 N.E. 910 (1898) (Torrens); State *ex rel.* Douglas v. Westfall, 85 Minn. 437, 89 N.W. 175 (1902) (Torrens).

223. That failing to accord special treatment to those under disability is not unconstitutional is evident from the leading Supreme Court case of Vance v. Vance, 108 U.S. 514, 521 (1882), which sustained code provisions, analogous to statutes of limitations, against contention that they violated due process of law:

> [T]he constitution of the United States . . . gives to minors no special rights beyond others, and it was within the legislative competency of the state . . . to make exceptions in their favor or not. The exemptions from the operation of

Nevertheless, because this proposal contemplates the summary divestment of valuable rights—a solution which has not heretofore commended itself to state legislatures—the creation of an indemnification fund is also indicated.[224] The availability of such a fund would protect the holders of unasserted interests against irrevocable loss. Once the direct-attack period had run, these interests would be converted into claims for their monetary equivalent at time of suit.[225] To be sure, this conversion is tantamount to a forced sale, but it seems justified by the overriding policies favoring the free alienability and maximum utilization of land. In any event, given a fund, a payment order would issue whenever a petition for compensation was submitted together with adequate proof that a valid, prior and legally assertable interest had been cut off.[226]

> statutes of limitations, usually accorded to infants . . . do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance on express language in those statutes giving them time, after majority . . . to assert their rights.

Compare Fischer v. Sklenar, 101 Neb. 553, 567, 163 N.W. 861, 866 (1917) (probate proceedings).

224. Torrens statutes usually establish quasi-public funds to recompense persons divested of legitimate claims through registration proceedings. *E.g.*, COLO. REV. STAT. ANN. §§ 118-10-86 to -91 (1954); ILL. REV. STAT. ch. 30, §§ 136-40 (1957); MINN. STAT. ANN. §§ 508.74-.79 (1947).

225. Besides the Torrens analogy, present quiet-title legislation affords precedent for the principle of converting an adverse claim into money's worth. Two jurisdictions—Massachusetts and South Dakota—require that petitioners tender an indemnity bond prior to judgment, and have repealed the judicial rule that petitioner or his successor must turn over the property to a party maintaining a successful direct attack on the initial decree. MASS. ANN. LAWS ch. 240, §§ 2-4 (1956); S.D. CODE § 37-1514 (1939). Innocent post-decree purchasers are expressly protected under the South Dakota proviso, which gives them superior rights to the property and relegates the attackers to a monetary claim against the bond. The Massachusetts section implicitly accomplishes the same result by extending liability on the bond to petitioner and his lineal successors in interest, a phrase which would not include a bona fide purchaser. While use of the bond has some merit, requiring it as a condition precedent to a decree quieting title places a heavy financial burden on the petitioner, and subjects him and his successors to a grave financial risk of loss should eventual collection on the bond occur. The risk-distribution features of an indemnification fund are therefore far preferable from the viewpoint of quiet-title petitioners, yet equally equitable from that of the divested adverse claimant.

226. Statutory language must be precise in denominating who will be allowed to claim against the fund. Otherwise the difficulties encountered under Torrens statutes—usually quite vague—will be repeated. True, Torrens statutes occassionally are express in conferring a right of action on victims of fraud after the property has been transferred to an innocent purchaser, *e.g.*, COLO. REV. STAT. ANN. § 118-10-31 (1954), or on persons under disability who did not appear in the registration proceedings, *e.g.*, ILL. REV. STAT. ch. 30, § 70 (Supp. 1958). But most general assurance-fund provisions refer only to persons "wrongfully deprived" of any land or interest therein by the registration proceeding. *E.g.*, COLO. REV. STAT. ANN. § 118-10-88 (1954). Because few claims have been made against most Torrens assurance funds, see POWELL supp. A (each state), § D (collecting cases), there is little judicial authority interpreting the meaning of "wrongfully

The creation of an indemnification fund would require a state to establish

deprived." Used in a generic sense, these words might well include claimants served by publication who did not receive notice of the adjudication until after the direct reopening period had elapsed. The only discovered case dealing even tangentially with this problem takes a contrary position. Jones v. York County, 26 F.2d 623, 624, 630-31 (8th Cir. 1928), indicates that persons served with process—actual or constructive—are not "wrongfully deprived" of their claims by a decree of registration, and so may not maintain an action against the assurance fund. With seeming approval, the court cites to the following language:

> If this proceeding [registration suit] is not conducted with due process of law against a person interested in the land, the decree . . . does not deprive him of his interest; if it is so conducted, he is bound by the finding and decree of the court. In a technical and legal sense it is impossible for anyone to be wrongfully deprived of any interest in land by a decree of court.

Id. at 630 (quoting NIBLACK, THE TORRENS SYSTEM § 194 (1903)). It would seem, then, that the general right to recover against a Torrens fund is restricted entirely to persons who sustain loss or damage due to the "omission," "mistake" or "misfeasance" of the title examiner or the registrar of titles, either during initial registration or upon subsequent transfer of registered land. See, *e.g.*, MINN. STAT. ANN. § 508.76 (1947).

If proposals for drastically limiting the quiet-title reopening period are accepted, however, then transposition of the assurance fund concept into this context would require expanding the limited coverage obtaining under Torrens. Claimants with no actual notice of a quiet-title proceeding should not be absolutely divested of legitimate interests after only a ninety day period. Undoubtedly, the state has power to establish so brief a period and thereafter bind persons served constructively without granting them further recourse. See note 223 *supra*. But, in a pragmatic sense, protecting unnotified claimants through an indemnification fund would help stifle frequent judicial and academic criticism directed at the harshness and inequity of in rem procedures. In fact, the propriety of such a provision was once recognized by the National Conference of Commissioners on Uniform State Laws. The UNIFORM LAND REGISTRATION ACT § 83 (1917) allowed suit against the fund within two years after accrual of a cause of action by "any person who had no actual notice of any registration . . . by which he may be deprived of any estate or interest in land, and who is without remedy hereunder. . . ." Additionally, the same section extended the reopening period for infants and incompetents until two years after removal of their disability. While the principle espoused by this section should certainly be adopted in quiet-title enactments, the time limit established could be appreciably lengthened. Under present Torrens statutes, actions may be brought against the fund for periods varying from six years, *e.g.*, MINN. STAT. ANN. § 508.79 (1947), to ten years, *e.g.*, ILL. REV. STAT. ch. 30, § 140 (1957), after the title is registered. Also, both of the cited provisions allow persons under disability to sue within two years after the disability is removed. A similar proviso should be incorporated into the quiet-title indemnification-fund legislation.

Extending a right of action against the fund to unnotified claimants might increase the number of claims substantially and tax its resources. This danger is not serious, however. Initially, present Torrens funds are liable to suit by persons suffering loss or damage during subsequent transfers of previously registered land, *e.g.*, MASS. ANN. LAWS ch. 185, § 101 (1956); see POWELL supp. A (each state), § D, as well as by those who are injured by the initial proceedings. Nevertheless, the funds are more than adequate. See 4 AMERICAN LAW OF PROPERTY § 17.48, at 648 n.6; Johnstone, *Title Insurance*, 66 YALE L.J. 492, 499 n.30 (1957). In the instant context, the expense of affording protection to unnotified claimants would be at least partially counterbalanced by the absence of the Torrens subsequent transfer claims. Moreover, present Torrens assurance fund

appropriate administrative machinery.[227] But the fund could be run on a self-supporting basis both as to operating expenses and reserves by exacting nominal contributions from petitioners as a condition precedent to their instituting suit.[228] The charge imposed would be insignificant in relation to the value of the conclusive determination of title thus made possible. Financially, then, the state's role would be confined to temporarily underwriting any deficiencies whenever a sufficient reserve had not been accumulated through contributions and earnings on investments.[229] And, of course, the state would be reimbursed

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fees are so nominal that, if necessary, they could be substantially increased under the quiet-title statutes without working material hardship on petitioners. See notes 228, 304 *infra*.

227. Torrens assurance funds are either state-wide or county-wide. POWELL 72. In either case, monies are received by the county registrar of titles and then paid over to the county treasurer, *e.g.*, MINN. STAT. ANN. § 508.75 (1947), or the state treasury, *e.g.*, MASS. ANN. LAWS ch. 185, § 100 (1956). The funds are invested and an annual report of receipts, disbursements and investments is made to a "supervisor," usually a local court or administrative agency. Suits to recover against the fund may be brought directly in the district court, MINN. STAT. ANN. § 508.76 (1947), or may first be heard by the administrative agency subject to appeal to the district court if the determination is unfavorable, ILL. REV. STAT. ch. 30, § 139 (1957). Presumably, either the county treasurer's office, see, *e.g.*, MINN. STAT. ANN. § 508.77 (1947), or the state attorney general, see OHIO REV. CODE ANN. § 5310.10 (Page 1954), defends for the state in suits against the fund.

228. Torrens acts require a contribution of 0.1% of the land's "value." Valuation is usually stated in terms of real-property assessment, and may or may not include the value of improvements. *E.g.*, MASS. ANN. LAWS ch. 185, § 99 (1956) (last assessment for municipal taxation); MINN. STAT. ANN. § 508.74 (1947) (last official assessment for general taxes exclusive of improvements); OHIO REV. CODE ANN. § 5310.05 (Page 1954) (assessed value). One Torrens statute, ILL. REV. STAT. ch. 30, § 136 (1957), departs from assessed valuation and allows ascertainment of value by the registrar. Actually, his function is only ministerial, since value is initially declared in the registrant's application with adjustments made pursuant to an "appraisal" by a "real estate inspector." See POWELL 148-50. Such value clearly includes improvements and is presumably "actual" rather than assessed value. *Id.* at 150. Since assessed value is normally but a fraction of "true value," see Comment, 68 YALE L.J. 335, 339 (1958), the latter standard results in considerably higher payments to the fund. This is the most likely explanation for the fact that the Cook County, Illinois, fund has amassed the huge total of $1,200,000 in reserves. 4 AMERICAN LAW OF PROPERTY § 17.48, at 648 n.6.

Both the regular and Illinois systems contain major imperfections. Under the former, inequality of assessment from county to county as well as discriminatory treatment accorded certain forms of property within taxing districts, see Comment, 68 YALE L.J. 335 (1958), make assessed value a somewhat inequitable basis for determining assurance-fund charges. The Illinois practice has the disadvantage of time-consuming administrative procedures which entail additional public expense. It may therefore be advisable to retain the assessment standard under a quiet-title statute, although the rate would be finally fixed on the basis of actual need. Should the 0.1% rate provide funds insufficient to meet claims, it could easily be doubled.

229. The Torrens acts are split over the state or county's obligation to satisfy deficiencies out of general funds. *Compare* N.C. GEN. STAT. ANN. § 43-52 (1950) (payment if necessary from the state treasury), *with* MINN. STAT. ANN. § 508.77 (1947) (if fund

as soon as the fund was replenished.[230] In short, the otherwise harsh consequences of an indefeasible in rem decree can be substantially averted with only slight inconvenience and expense to the state and to litigants.

Collateral Attack

Designed to prevent the arbitrary divestiture of valuable rights, equitable and constitutional principles of due process require a petitioner to do more than submit the land at issue to a court's control. Binding jurisdiction over all potential claimants obtains only when all are given an opportunity to be heard.[231] This concept embraces both sufficient time to present a defense before an accessible forum [232] and adequate notice of pending proceedings.[233] The former, though vital, generates few practical difficulties;[234] it is the due-process requirement of adequate notice that raises significant constitutional issues. The ideal method of notification would be, of course, to serve or inform all possible claimants personally.[235] A title cannot be quieted against all the world, however, without joining unknown parties.[236] Pragmatic considerations therefore compel the use of procedures which may not actually make all adverse claimants aware of a forthcoming suit.[237] And unserved, unnotified interest-holders must be bound if a decree, once rendered, is to be absolutely conclusive.

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insufficient to pay any judgment in full, unpaid balance bears interest at the legal rate and is paid out of first incoming monies). While either method is acceptable, the former seems preferable as it ensures prompt payment of legitimate claims. See note 297 *infra*.

230. See, *e.g.*, N.C. GEN. STAT. ANN. § 43-52 (1950) (advances from state treasury to make up Torrens assurance-fund deficits shall be repaid from subsequent income of the fund).

231. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *cf.* Priest v. Board of Trustees, 16 N.M. 692, 120 Pac. 894 (1911), *aff'd*, 232 U.S. 604 (1914). See generally Fraser, *Actions In Rem*, 34 CORNELL L.Q. 29, 41-45 (1948).

232. Due process requires sufficient time, between the day on which notice is given and the day when the hearing is held, to afford the defendant an opportunity to appear and answer. Roller v. Holly, 176 U.S. 398 (1900) (process served upon defendant in Virginia to answer quiet-title suit in Texas within five days lacking in due process).

233. Jacob v. Roberts, 223 U.S. 261, 265 (1912); *cf.* Arndt v. Griggs, 134 U.S. 316 (1890). See generally Fraser, *supra* note 231.

234. See Wick v. Chelan Elec. Co., 280 U.S. 108 (1929) (eighteen days between date of published notice and required day of return sufficient for nonresident defendants).

235. See, *e.g.*, Walker v. City of Hutchinson, 352 U.S. 112, 115, 116 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-16 (1950).

236. Undisclosed and unknown defendants represent the worst threat to the stability of land titles. American Land Co. v. Zeiss, 219 U.S. 47, 61-62 (1911); *cf.* Gill v. More, 200 Ala. 511, 76 So. 453 (1917); Tyler v. Judges, 175 Mass. 71, 55 N.E. 812 (1900).

237. Since a state's process is necessarily circumscribed by its borders, Pennoyer v. Neff, 95 U.S. 714, 722 (1877), determination of issues involving persons resident outside the jurisdiction may require constructive service by publication, see, *e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 314 (1950); Arndt v. Griggs, 134 U.S. 316 (1890); Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889).

For this reason, a provision authorizing constructive service by publication is essential to an effective in rem statute.[238] To date, this form of service has universally been denominated constitutional whenever necessary for the conclusive adjudication of title status.[239] Nevertheless, because a decree based on publication sometimes results in a summary deprivation of interests, in rem jurisdiction so obtained has been repeatedly challenged in collateral proceedings.[240] Generally, the ground of attack is either that the quiet-title petitioner's attempts to furnish adequate notice did not satisfy statutory prerequisites,[241] or that the statute itself contravened the due-process requirements of the Constitution.[242] If either the petitioner's diligence or the statute is found wanting, the court which quieted title will be deemed to have lacked jurisdiction over the person, and a basis will exist for validating the attacker's claim.

A state legislature's initial concern must therefore be to frame a reasonable notice provision that conforms with existing concepts of due process. At present, these concepts are in flux. Courts have heretofore countenanced in rem jurisdiction obtained through the barest minimum of notice, the theory being that holders of interests in real estate can be expected to remain ever-vigilant with respect to their rights.[243] The increasing geographic diversification and mobility of present-day society and the resulting multiplicity of absentee interest-holders has, however, rendered this theory archaic.[244] And recent Supreme Court decisions have evinced a growing dissatisfaction with mere publication in situations in which more adequate means of providing notice are readily available. *Mullane v. Central Hanover Bank & Trust Co.* indicates that published notice to known nonresidents with acknowledged adverse interests must be supplemented by written communications to their last known

238. For an example of a quiet-title statute directly incorporating publication provisions, see FLA. STAT. ANN. § 66.32 (1943). In some states, the quiet-title statutes derive their constructive-service power from general provisions allowing publication in real property actions in which defendant cannot be reached by process. *E.g.*, ILL. REV. STAT. ch. 22, § 50, ch. 110, § 14 (1957).

239. Arndt v. Griggs, 134 U.S. 316 (1890) (statutorily authorized published notice held sufficient to confer jurisdiction over realty interests of nonresidents); see United States v. Winn, 83 F. Supp. 172 (W.D.S.C. 1949); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906); Fraser, *supra* note 231, at 42.

240. See, *e.g.*, Walker v. City of Hutchinson, 352 U.S. 112 (1956) (condemnation proceedings); Bentley v. Rosebud County, 230 F.2d 1 (9th Cir.), *cert. denied*, 351 U.S. 984 (1956) (quiet-title decree based upon tax deed). See generally Fraser, *supra* note 231, at 40-45.

241. See Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942); Gill v. More, 200 Ala. 511, 76 So. 453 (1917); Denser v. Gunn, 74 Kan. 748, 87 Pac. 1132 (1906).

242. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (notification provisions alleged not to constitute due process); American Land Co. v. Zeiss, 219 U.S. 47 (1911) (similar); *cf.* Key v. All Persons, 160 Fla. 723, 36 So. 2d 366 (1948).

243. North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925) (duty of landholder to be reasonably vigilant presumed); *cf.* Ballard v. Hunter, 204 U.S. 241 (1907); McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926).

244. See Fraser, *supra* note 231, at 40-45.

addresses.[245] *Mullane* admittedly did not involve realty [246] and dealt with valid claims;[247] whereas the invalidity of adverse claims is always assumed by a petitioner seeking a quieted title.[248] Nonetheless, that case's approach to due process almost certainly presages a general judicial re-evaluation of the constitutional requirements for notice.

To align quiet-title enactments with the equitable principles expounded in *Mullane,* provisions for publication should be reinforced with other procedures more likely to provide actual notice. A registered letter guaranteeing forwarding postage and requiring a return receipt should be sent every nonresident who is known to have a probable adverse interest and whose address appears of record or is otherwise known.[249] The danger of a chance error avoiding jurisdiction could be averted were such mailings denominated procedural rather than jurisdictional prerequisites.[250] To increase still further the probability that potential claimants will learn of a suit, two other steps could be required. A petitioner might be directed to file notice of *lis pendens* in the county recorder's office and to post it on the land in issue.[251] And the rather

245. 339 U.S. 306 (1950). See also Walker v. City of Hutchinson, 352 U.S. 112 (1956) (published notice generally criticized and specifically held inadequate in condemnation proceedings when local residents not personally served); City of New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953) (published notice insufficient in reorganization proceeding in which creditor's name known).

246. *Mullane* involved a suit to settle accounts in a common investment trust. Authority to secure jurisdiction over the beneficiaries by publication was obtained from a New York banking statute. 339 U.S. at 307.

247. In *Mullane,* the trustees could not deny the merits of defendants' interests. Although both names and addresses were known, the trustees made no attempt to serve beneficiaries other than by publication. *Id.* at 309, 318.

248. See Covington, *Bills To Remove Cloud on Title and Quieting Title in Arkansas,* 6 ARK. L. REV. 83 (1952).

249. See, *e.g.,* MO. SUP. CT. R. 3.111, 3.12. See generally Fraser, *supra* note 231, at 40-49.

250. See Comment, 66 YALE L.J. 526 (1957) (failure to comply with procedural requirements not subject to collateral attack). See also MO. STAT. ANN. § 506.160(1) (1952) (service by mail *or* publication may be had in quiet-title actions) (construed as separate and permissive methods of obtaining service under MO. SUP. CT. R. 3.111; hence, failure to mail notice will not of itself open the decree to collateral avoidance). Denominating mailing as procedural comports with the goals of a modern quiet-title enactment. Requiring service by this method is intended to improve the likelihood of notice. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). But this desirable step must be implemented carefully so as not to debase the decree's conclusiveness by increasing the chances of collateral attack for inadvertent failure to comply with the statutory requirements. Thus, the court at its discretion could and should refuse to order publication against known nonresidents unless sufficient evidence of attempted mailing to the last known address was first submitted. See MO. SUP. CT. R. 3.12. Indeed, adept judicial administration may well negate most collateral-attack problems by emphasizing that all possibilities for imparting more direct notice had been exhausted.

251. See, *e.g.,* ALA. CODE ANN. tit. 7, § 1120 (1941) (lis pendens recorded in county files); FLA. STAT. ANN. § 66.32(2) (Supp. 1958) (lis pendens posted on the land). See generally 3 MERRILL, NOTICE §§ 1141-92 (1952).

useless device of newspaper advertising[252] could be extended into a more meaningful medium were announcements inserted in state bar journals or similar publications. Attorneys representing adverse interest-holders would then be more likely to discover pending proceedings.

Nevertheless, constructive notice, however comprehensive, usually implements due process more in form than substance;[253] and prevailing doctrine states that a quiet-title statute must compel petitioners to demonstrate the need for resorting to such notice.[254] Typically, an essential prerequisite to obtaining an order for service by publication is the submission of an affidavit indicating that the petitioner has made diligent but unsuccessful efforts to locate all adverse parties not already joined.[255]

In a number of states, a repetition of statutory language—essentially the averment of a conclusion of law—will suffice as an allegation of due diligence.[256] Because a fatal variance must appear on the face of the record and usually may not be proved in a later proceeding by extrinsic evidence, little danger exists of a successful collateral attack in these jurisdictions.[257] Occasionally, when an unjoined and unnotified attacker is a resident of the forum

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252. "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property." Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956).

253. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950); Fraser, *supra* note 231, at 44.

254. See Key v. All Persons, 160 Fla. 723, 36 So. 2d 366 (1948) (indicating that quiet-title statute not explicitly requiring plaintiffs to search diligently for potential party defendants will be invalidated). Compare Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356 (1906) (due diligence requirement read into California quiet-title statute); Tyler v. Judges, 175 Mass. 71, 55 N.E. 812 (1900); *cf.* Jacob v. Roberts, 223 U.S. 261 (1912).

255. *E.g.*, MONT. REV. CODES ANN. §§ 93-6206 to -6207 (Supp. 1957); NEB. REV. STAT. ANN. § 25-21118 (1948). See also Aronow v. Anderson, 110 Mont. 484, 104 P.2d 2 (1940); Parker v. Ross, 117 Utah 417, 217 P.2d 373 (1940). See generally Foster, *Jurisdiction in Suits To Quiet Title*, Neb. L. Bull., Jan. 1923, p. 65.

256. See, *e.g.*, McDaniel v. McElvy, 97 Fla. 770, 108 So. 820 (1926). See generally Annot., 21 A.L.R.2d 929, 938 (1952).

257. The general rule is that, unless the tribunal hearing the collateral attack is in a state other than the one handing down the initial judgment, evidence extrinsic to the record is inadmissible. See, *e.g.*, Champion v. Williams, 165 Ark. 328, 264 S.W. 972 (1924); County of Douglas v. Feenan, 146 Neb. 156, 18 N.W.2d 740 (1945). See also 1 FREEMAN §§ 375-82; Finnegan, *Problems and Procedure in Quiet Title Actions*, 26 NEB. L. REV. 485, 521 (1947); Comment, 66 YALE L.J. 526, 528 (1957). Since almost all collateral attacks upon quiet-title judgments are brought in the state in which the land is situate—that being the only place where proceedings against the land can be taken—the general rule will almost always apply to quiet-title decrees. A few jurisdictions do allow extrinsic evidence on collateral attack, however. See, *e.g.*, Janove v. Bacon, 6 Ill. 2d 245, 128 N.E.2d 706 (1955); 1 FREEMAN § 375. Hence, in these states judgments based on affidavits reciting only conclusions of law will nevertheless be susceptible to collateral avoidance.

state, a collateral challenge will be sustained;[258] generally, a direct reopening alone can be successful in a conclusion-of-law jurisdiction.[259]

Most states require, however, that an affidavit assert "probative facts" to support an allegation of diligent search.[260] On the basis of these assertions, a trial court determines if it has jurisdiction to quiet a petitioner's title against all the world.[261] A court's power to bind persons of undiscoverable identity and residence thus rests on specific averments of diligent inquiry; and the court's decree is for this reason exceptionally vulnerable to collateral attack. That quantum of effort constituting due diligence is not susceptible of precise definition.[262] And, even though a trial court may rule that sufficient effort has been expended to accord it jurisdiction, this determination is *ex parte*, is therefore not res judicata, and may be overturned when the reasonableness of petitioner's attempts at notification are subsequently challenged by unnotified claimants.[263]

The due-diligence problem may become more acute if the now-prolonged periods for direct reopening are curtailed. Many courts have exhibited an-

258. See, *e.g.*, Oziah v. Howard, 149 Iowa 199, 128 N.W. 364 (1910); *cf.* Walker v. City of Hutchinson, 352 U.S. 112 (1956); Note, 43 IOWA L. REV. 295 (1958). In some conclusion-of-law states, the statute may also require an allegation of jurisdiction stating that unknown parties or known but unlocatable parties are not residents and hence cannot be personally served. Unlocatable residents are therefore able to attack a judgment collaterally in these jurisdictions. See, *e.g.*, Denser v. Gunn, 74 Kan. 748, 87 Pac. 1132 (1906); Hassett v. Durbin, 132 Neb. 315, 271 N.W. 867 (1937) (foreclosure). There is little merit to this rule. The statutes should not allow collateral attack merely because unknown persons prove themselves residents, for, in the case of unknowns, extensive search is impracticable and the requirement of a positive statement of nonresidency unrealistic. See Foster, *supra* note 255, at 82-86. Rather, an allegation to the effect that "after the exercise of due diligence, the petitioner is unable to ascertain the identity and whereabouts of such person, whether or not a resident of the state, etc." should be jurisdictionally sufficient. Thus, the allegations will be immune from collateral attack. See Finnegan, *supra* note 257, at 518, 532.

259. See County of Douglas v. Feenan, 146 Neb. 156, 18 N.W.2d 740 (1945); *cf.* Gallun v. Weil, 116 Wis. 236, 92 N.W. 1091 (1903). See generally Finnegan, *supra* note 257, at 520, 521.

260. See, *e.g.*, Bentley v. Rosebud County, 230 F.2d 1 (9th Cir.), *cert. denied*, 351 U.S. 984 (1956); Aronow v. Anderson, 110 Mont. 484, 104 P.2d 2 (1940); Annot., 21 A.L.R.2d 929, 940 (1952).

261. Leigh v. Green, 62 Neb. 344, 351, 86 N.W. 1093, 1096 (1901) ("The sole purpose of [the] affidavit is to enable the court upon inspection to determine whether the action is one in which jurisdiction may be obtained by service by publication."); see Foster, *supra* note 255, at 73.

262. *Cf.* Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942); Rue v. Quinn, 137 Cal. 651, 66 Pac. 216 (1901), *aff'd on rehearing*, 137 Cal. 651, 70 Pac. 732 (1902); Campbell v. Doherty, 53 N.M. 280, 206 P.2d 1145 (1949).

263. See, *e.g.*, Oziah v. Howard, 149 Iowa 199, 128 N.W. 364 (1910); Denser v. Gunn, 74 Kan. 748, 87 Pac. 1132 (1906); Berry v. Howard, 33 S.D. 447, 146 N.W. 577 (1914); Foster, *supra* note 255, at 91-92 (collecting cases).

tagonism toward an in rem action;[264] but those applying the minority ("conclusion of law") rule presumably have limited the opportunity for collateral avoidance because most adverse parties can usually come within the generous compass of a direct-attack statute.[265] Faced with a short-term period for reopening, these courts might well reverse their present conclusion-of-law approach and, by requiring "probative facts" to support an allegation of due diligence, invite collateral attacks which would destroy the effectiveness of a quiet-title decree. A court sympathetic to an individual launching a collateral attack can easily find an absence of jurisdiction in the court which rendered a contested decree: the steps previously alleged in the quiet-title petitioner's affidavit to constitute diligent inquiry need only be termed unduly remiss.[266] Adoption of the probative-facts rule would not be unreasonable, however. Indeed, the rule is eminently desirable from the standpoint of improving notification procedures, for it forces a trial judge to scrutinize factual allegations carefully before ordering constructive service, and increases the likelihood that omissions and errors in petitioner's method of notification will be discovered. On the other hand, the conclusion-of-law doctrine is so effective in foreclosing collateral attack that its use is immensely appealing as a means of obtaining a conclusive decree.[267]

264. See Lohr v. Curley, 27 Idaho 739, 152 Pac. 185 (1915) (statute specifically relieved plaintiff from enumerating facts in the affidavit; nevertheless, affidavit held to be factually insufficient); 13 IDAHO S.B. PROC. 34 (1937); *cf.* Ricketson v. Richardson, 26 Cal. 149, 153 (1864). Judicial antagonism is further evidenced by overzealous scrutiny of the affidavit. Mere formal deficiencies have been the bases for collateral avoidance. See, *e.g.*, Aronow v. Bishop, 112 Mont. 611, 120 P.2d 423 (1941) (deviation from statutory language). Such has been held even when supplemental pleadings corrected the affidavit. See, *e.g.*, Albers v. Kozeluh, 68 Neb. 522, 97 N.W. 646 (1903) (affidavit lacking venue held insufficient despite allegations of venue in the complaint). The more enlightened view—that the formal affidavit is not necessary when the essentials of the affidavit are presented in the complaint—is taken by the federal courts. See, *e.g.*, Ballard v. Hunter, 204 U.S. 241, 261 (1907). The affidavit is only the initial and tentative jurisdictional determinant, see Armstrong v. Bates, 94 Neb. 462, 143 N.W. 477 (1913), and jurisdiction, if it exists, is based on the complete record, see Foster, *supra* note 255, at 65-72. The courts recognize this fact when convenient by using the record to invalidate an affidavit. See, *e.g.*, Myers v. Purdy, 108 Okla. 147, 234 Pac. 638 (1925); Morse v. Pickler, 28 S.D. 612, 134 N.W. 809 (1912).

As has been suggested, procedural defects in the affidavit should be limited to appeal or direct attack rather than allowed in collateral attack. Pennoyer v. Neff, 95 U.S. 714, 721 (1877). See generally Foster, *supra* note 255, at 72; Comment, 66 YALE L.J. 526 (1957).

265. See notes 256-59 *supra* and accompanying text.

266. See, *e.g.*, Lohr v. Curley, 27 Idaho 739, 152 Pac. 185 (1915); Oziah v. Howard, 149 Iowa 199, 128 N.W. 364 (1910); Berry v. Howard, 33 S.D. 447, 146 N.W. 577 (1914).

267. The benefits to be gained by a conclusion-of-law approach are illustrated by the 1953 amendments to the Montana statute, probably the most efficacious of the enactments now in force. See note 121 *supra*. Under the pre-1953 act, Mont. Laws 1915, ch. 113, § 9482 (formerly MONT. REV. CODES ANN. § 93-6206 (1949)), the Montana Supreme Court had been able to apply the "probative facts" doctrine to avoid supposedly conclu-

In the majority of jurisdictions, where the probative-facts rule obtains, conclusive decrees might be achieved if constructive service were authorized in adversary rather than *ex parte* proceedings.[268] A trial court's determination that a petitioner had in fact made a diligent inquiry might then be given res judicata effect, and collateral attack precluded.[269] To implement this approach,

sive in rem decrees collaterally. See, *e.g.*, West v. Capital Trust & Sav. Bank, 113 Mont. 130, 124 P.2d 572 (1942); Aronow v. Anderson, 110 Mont. 484, 104 P.2d 2 (1940). The legislature apparently sought to bypass the threat of collateral attack by imposing a conclusion-of-law approach. Mont. Laws 1953, ch. 103, § 1, ch. 229, § 1. The section providing for constructive service on known but unlocatable persons now reads: "Such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry." MONT. REV. CODES ANN. § 93-6206 (Supp. 1957). And the proviso dealing with completely unknown adverse claimants states even more decisively that the affidavit "need not detail, in any respect the acts constituting such diligent search and inquiry." MONT. REV. CODES ANN. § 93-6207 (Supp. 1957).

Whether the judiciary will in fact accept the legislature's will in this area remains unanswered. To date, there seem to be no cases involving collateral challenges of decrees subject to the 1953 amendments. In view of the stronger stand taken by the legislators in amending § 93-6207 (totally unknown persons), this section will probably withstand judicial challenge. But the future of § 93-6206 (known but unlocatable persons) may be less auspicious because of its attempt to allow constructive service on unknown resident as well as nonresident defendants. See note 258 *supra* and accompanying text. Indirect evidence exists that the courts will brook no statutory interference with their traditional prerogative to allow collateral attacks, especially when initiated by "known persons of undiscovered whereabouts." See Bentley v. Rosebud County, 230 F.2d 1 (9th Cir.), *cert. denied*, 351 U.S. 984 (1956) (applying Montana law). Although this case was decided after the Montana statutory revision, it arose under the pre-amendment statute. In 1949, the defendant county had sold certain land pursuant to statute for nonpayment of taxes. The purchaser and co-defendant, one King, sued to quiet title, naming the present plaintiff, but served her only by publication since she was unlocatable and, in fact, a nonresident. In the instant suit to quiet title, instituted long after the one-year statutory period for direct reopening had passed, see MONT. REV. CODES ANN. § 93-3905 (1949), plaintiff collaterally assailed both the tax-sale proceedings and the initial quiet-title decree. The latter was attacked on the ground that the then petitioner—King—had not complied with the statute's jurisdictional prerequisites for constructive service. MONT. REV. CODES ANN. § 93-6210 (1949). Following decision for defendants in the district court, the Ninth Circuit reversed, holding that defendant King's failure to set out evidentiary facts supporting the affidavit's allegation of due diligence rendered the decree void and subject to collateral attack even though Bentley in fact proved to have been a nonresident. See 230 F.2d at 5-6. The court rejected defendant's contention—that plaintiff was bound by such service because the action in rem was against all the world—and decided the case on highly technical grounds of statutory construction. The court's failure to be guided, if not ruled, by the 1953 amendments in force before decision of the action bodes ill for future legislative attempts to solve the collateral-attack dilemma.

268. See text at note 263 *supra*.

269. Courts have applied the principles of res judicata with increasing frequency to prevent collateral attacks on jurisdictional grounds. See generally Boskey & Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 850-55 (1952); Comment, 66 YALE L.J. 526, 527-28 (1957). For discussion of the possible availability of res judicata in the instant context, see note 272 *infra*.

a statute could authorize the appointment of a court officer similar to a guardian *ad litem* who would represent the interests of unknown interest-holders or others to be served by publication.[270] In a given case, the officer would challenge the petitioner's affidavit and interrogate the petitioner on the legal sufficiency of his allegedly diligent search.[271] Proof thus adduced would provide the trial judge with an evidentiary basis for determining the propriety of ordering service by publication. Were such service allowed, the adversary nature of the proceeding might stay the hand of any subsequent court collaterally scrutinizing original jurisdiction over constructively served individuals.[272] If so, they would be relegated either to their direct-reopening remedies,

270. Both Torrens and quiet-title statutes frequently provide for the appointment of a guardian *ad litem*. The guardian may represent the interests of persons under disability or not in being, *e.g.*, MICH. STAT. ANN. § 27.682 (1938) (quiet title); MINN. STAT. ANN. § 508.18 (1947) (Torrens), or may generally represent all persons not actually served with process, *e.g.*, MASS. ANN. LAWS ch. 240, § 8 (1956) (quiet title). His functions are usually restricted to defending against the merits of the petition, and, indeed, appointment is usually made after constructive service of process. *E.g.*, MASS. ANN. LAWS ch. 240, § 8 (1956). To the extent that the guardian contests the merits of claims on behalf of unknown persons with interests of which he is not aware, the device appears a mere formality with little substantive merit. *Cf.* Patton & Patton, *Registration of Titles and Conveyancing Applied to Registered Titles*, in MINN. STAT. ANN. following § 507.41, at 454-55 (1947). Such representation may nevertheless be necessary to secure a decree which binds constructively served persons like unknown unborns, see, *e.g.*, Loring v. Hildreth, 170 Mass. 328, 49 N.E. 652 (1898) (quiet title), or infant heirs, see, *e.g.*, White v. Ainsworth, 62 Colo. 513, 523, 163 Pac. 959, 963 (1917). See also notes 146-47 *supra*.

271. Requiring the guardian *ad litem* to play the role of "devil's advocate" would make his function far more meaningful than it is under present law. See note 270 *supra*. Since the representation of unknown persons with undiscernable interests is virtually a *non sequitur*, primary emphasis should be placed on the initial discovery and notification of such persons. The guardian *ad litem* would therefore put petitioner to his proof of truly diligent efforts to locate adverse claimants. Being familiar with the local case law bearing on "due diligence," he would know what investigatory steps have previously been held essential to valid jurisdiction over persons served by publication. On this basis, intelligent examination of the petitioner on the legal sufficiency of his efforts might disclose areas of search which have been omitted. Then, a court might well deny a request for constructive service until all reasonable methods of inquiry have been exhausted. In any event, the record should demonstrate that a form of "adversary" hearing on jurisdictional questions had been held, and that strict compliance with the jurisdictional prerequisite of due diligence obtained insofar as was possible and practicable.

272. The law of res judicata as applied to a court's determination of its own jurisdiction is presently in a state of flux. Concededly, absent some form of appearance by defendant, only a few states will apply the principle to preclude subsequent collateral attack for want of jurisdiction. See *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 850-55 & 855 n.268 (1952) (collecting cases). It is therefore questionable whether the jurisdictional "hearing" contemplated in the text at notes 268-71 *supra* will be sufficiently adversary to avoid the dangers of collateral challenge in all cases. Even when no contest on the merits has occurred, however, a special appearance has been deemed sufficient to prevent collateral relitigation of the jurisdictional issue though it be wrongfully decided by the trial court. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931). By analogy, then, a formal and complete hearing as to the suffi-

if any, or to a claim against an indemnification fund, if one was available.[273]

Should the courts refuse to recognize the adequacy of the suggested adversary representation, satisfactory resolution of the due-diligence dilemma would hinge entirely on wise and sympathetic judicial administration.[274] Collateral challenges alleging negligent search could not then be precluded by statutes consigning the attackers to an indemnification fund. Even when title has passed to a bona fide purchaser for value, an initial want of binding jurisdiction probably puts collateral challengers beyond the quiet-title court's decree.[275] Original jurisdiction to dispose of their interests never existed, and no statute can later prevent them from demanding that their rights be recognized.[276] Moreover, since each case presents unique difficulties, any attempt

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ciency of petitioners' efforts to locate adversaries might be equally binding although these parties are entirely absent. At such a hearing, only one jurisdictional issue is present: whether or not petitioner has demonstrated facts proving the due diligence statutorily prerequisite to constructive service. Presumably, the practical if not conceptual basis for allowing an unnotified claimant to attack collaterally the sufficiency of constructive service is that the use of greater diligence—within the realm of feasibility under the circumstances—might have resulted in a more direct form of notification. But, if due diligence was in fact exercised, the unnotified party may not legally contest the valid acquisition of in rem jurisdiction to determine his rights in the res. See McDaniel v. McElvy, 91 Fla. 770, 800, 108 So. 820, 830 (1926). In this sense, therefore, a thorough airing of the due-diligence issue protects his rights *to the full extent contemplated by statute*, and the hearing is one involving "adversary representation."

Should the concept of res judicata prove inapposite in such situations, use of the guardian *ad litem* may preclude collateral attack. Even in jurisdictions adhering to the "probative facts" doctrine, see notes 260-63 *supra* and accompanying text, the extrinsic-evidence rule normally confines collateral invalidity to the face of the record, see note 257 *supra* and accompanying text. If the record shows that petitioner has been examined as to all investigatory procedures previously held by the state's court as requisite to due diligence, it would require a strained reading of the record indeed to find a fatal lack of diligence. In fact, even if petitioner testifies falsely as to his efforts, thus deceiving the court into accepting in rem jurisdiction, such fraud or perjury would ordinarily be extrinsic and subject only to direct attack. See note 291 *infra* and accompanying text.

273. See notes 217-30 *supra*, 297-98 *infra* and accompanying text.

274. See, *e.g.*, Jacob v. Roberts, 223 U.S. 261 (1912); Campbell v. Doherty, 53 N.M. 280, 206 P.2d 1145 (1949); Belmont v. Cornen, 82 N.Y. 256 (1880); Parker v. Ross, 117 Utah 417, 423, 217 P.2d 373, 378 (1950) (concurring opinion).

275. See Comment, 66 YALE L.J. 526, 526-57 (1957).

276. "Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless . . . and all claims flowing out of it, are void." Frankel v. Satterfield, 14 Del. (9 Houst.) 201, 206-07, 19 Atl. 898, 900 (Super. Ct. 1890). See generally 7 MOORE, FEDERAL PRACTICE ¶ 60.25[2], at 263-65 (2d ed. 1955). A petitioner's noncompliance with the statutory jurisdictional prerequisites for due diligence renders a decree totally ineffective to bind the attacking party. See, *e.g.*, Berry v. Howard, 33 S.D. 447, 146 N.W. 577 (1914). Conceptually, therefore, even a subsequent good-faith purchaser can secure no protection under such a decree, for he is perpetually vulnerable to collateral divestiture by the unbound party. See, *e.g.*, Crump v. Knight, 256 Ala. 601, 56

to codify the scope of diligent inquiry in a probative-facts jurisdiction is clearly predestined to failure. Of course, certain steps are basic:[277] searching the land for adverse possessors or clues to adverse claimants,[278] consulting public officials and records,[279] questioning neighboring landowners,[280] and seeking possible heirs.[281] But, beyond specifying these minimal procedures, statutory detail would do more to confuse than clarify. Accordingly, courts should exercise restraint in collaterally adjudicating questions of jurisdiction and, in so far as possible, should approach these issues from the petitioner's viewpoint at the time of search. If his attempts were then reasonable relative to both the cost involved and the availability of information, a collateral challenge should be dismissed.

Fraud

In an in rem action, to omit the names of one or more known adverse claimants from the complaint is to render the judgment ineffective to bind

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So. 2d 625 (1952); Townsend v. Tipton, 289 Ky. 766, 160 S.W.2d 161 (1942); Hayes County v. Wileman, 82 Neb. 669, 118 N.W. 478 (1908). Courts have been understandably reluctant to find a decree void on collateral attack when interested, innocent third persons have intervened. Lancaster v. Wilson, 68 Va. (27 Gratt.) 624, 629 (1876). Thus, even if the decree is held a nullity on attack against the original petitioner, a court may refuse to determine the status of purchasers when no such third-party rights are before them. See, *e.g.*, Wilson v. Birt, 77 Colo. 206, 235 Pac. 563 (1925); Eayrs v. Nason, 54 Neb. 143, 74 N.W. 408 (1898). Nevertheless, in jurisdictions adopting the probative-facts approach to the due-diligence affidavit, see notes 260-63 *supra* and accompanying text, petitioner's averments of sufficient inquiry are perpetually subject to subsequent re-examination; hence, a purchaser's security rests entirely on judicial self-restraint. The due diligence problem might be overcome in probative-facts states, however, by carefully rewording quiet-title statutes to impose a conclusion-of-law approach on the judiciary. See note 267 *supra* (quoting Montana statutory amendment intended to accomplish this result). Prevailing judicial doctrine upholds mere reiteration of the statutory language unless probative facts are expressly or implicitly demanded. See, *e.g.*, Jackman v. Miller, 119 Neb. 463, 229 N.W. 778 (1930); Gallun v. Weil, 116 Wis. 236, 92 N.W. 1091 (1903); *cf.* Morrison v. Morrison, 64 Mich. 53, 30 N.W. 903 (1887). *But see* Lohr v. Curley, 27 Idaho 739, 152 Pac. 185 (1915).

277. See generally 1 MERRILL, NOTICE §§ 621-44 (1952); 2 *id.* §§ 645-52, 664.

278. Kirby v. Michigan Cent. R.R., 236 Mich. 286, 210 N.W. 254 (1926); Christmas v. Cowden, 44 N.M. 517, 105 P.2d 484 (1940); Killian v. Hubbard, 69 S.D. 289, 9 N.W. 2d 700 (1943).

279. Lohr v. Curley, 27 Idaho 739, 152 Pac. 185 (1915) (public officials not questioned); Berry v. Howard, 33 S.D. 447, 146 N.W. 577 (1914); Coughran v. Markley, 15 S.D. 37, 87 N.W. 2 (1901) (consulting sheriff); Parker v. Ross, 117 Utah 417, 217 P.2d 373 (1950) (search of official records aided plaintiff in his showing of due diligence); *cf.* Jacob v. Roberts, 223 U.S. 261 (1912); American Land Co. v. Zeiss, 219 U.S. 47 (1911).

280. See, *e.g.*, Cone v. Ballard, 68 S.D. 593, 5 N.W.2d 46 (1942); Grigsby v. Wopschall, 25 S.D. 564, 127 N.W. 605 (1910).

281. See, *e.g.*, Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942) (defective publication as to heirs); Oziah v. Howard, 149 Iowa 199, 128 N.W. 364 (1910).

their interests.[282] At present, this type of fraud is of minor significance in quiet-title cases, probably because a quiet-title judgment is so vulnerable to subsequent avoidance.[283] Adoption of the major revisions suggested above may, however, necessitate prophylactic measures for handling fraudulent petitioners.[284] The best time to prevent fraud is, of course, at its inception as is attempted under Torrens, primarily through pre-trial investigation by an examiner.[285] But this procedure is much too costly and time-consuming for the average litigant.[286] Under Torrens, a would-be registrant also may have to submit a title abstract—an inexpensive device of some utility in detecting frauds.[287] The device could be employed in quiet-title litigation by requiring a petitioner to produce a lawyer's opinion or title company's report on the marketability of the title at bar.[288] This measure is at best a stopgap, however; the better solution is not detection but deterrence in the form of penalties for fraudulent petitioners.

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282. With the exception of proceedings to foreclose tax liens and possibly condemnation procedures, see notes 188-89 *supra,* in rem statutes generally require that known resident claimants be made party defendants through personal service of process. *E.g.,* ALA. CODE ANN. tit. 7, §§ 1117-18 (1941). Known nonresidents must be named in the bill of complaint and notice of the proceedings forwarded to their last known addresses. Even when a quiet-title enactment does not explicitly so provide, this requirement arises by necessary implication from sections authorizing constructive service, for publication will issue against unknown or unlocatable claimants only after the petitioner submits an affidavit alleging diligent but unsuccessful efforts to identify, locate, and personally serve all potentially adverse persons. See, *e.g.,* MINN. STAT. ANN. § 559.02 (1947); N.D. REV. CODE § 32-1707 (1943). The failure of a petitioner to notify a known adverse interest holder and make him a party, resulting in service only by publication, is a "fraud on the court." Gilbreath v. Teufel, 15 N.D. 152, 107 N.W. 49 (1906). The victim of the fraud may then avoid the effect of an in rem decree. Yennie v. Slingerland, 161 Minn. 372, 201 N.W. 605 (1925); see Baart v. Martin, 99 Minn. 197, 108 N.W. 945 (1906) (fraud relied on to void Torrens registration); Kirk v. Mullen, 100 Ore. 563, 197 Pac. 300 (1921) (same).

283. Generally, direct and collateral avoidance on jurisdictional grounds has resulted not from fraud but from a petitioner's failure to allege sufficiently diligent efforts to locate adverse claimants.

284. This conclusion can be indirectly supported by citing to experience under Torrens. The far more conclusive decree there provided has resulted in fraud becoming a major threat to a good decree. See generally POWELL 30, 32, 93, 118, 119, 250 (citing and discussing cases).

285. See note 34 *supra.*

286. Hearings before the title examiner as well as judicial consideration of his report apparently are major deterrents to a speedier registration proceeding. See Cushman, *Torrens Titles and Title Insurance,* 85 U. PA. L. REV. 589, 603-04 (1937); POWELL 70, 149-50.

287. *E.g.,* COLO. REV. STAT. ANN. § 118-10-16 (1953); MINN. STAT. ANN. § 508.11 (1947).

288. Since discoverable outstanding claims, whether potentially or actually adverse to petitioner, would usually be listed in such a report, it might assist the court in determining whether petitioner has in fact named all adverse claimants, and provide an additional basis for ordering constructive service on unknown persons. See Gilliam, *Proceedings In Rem To Establish Title to Land,* 3 ALA. LAW. 418, 430 (1942).

Whether a decree should be totally avoided because of deception in its procurement or alternative sanctions ought to be imposed should depend on the status of fee ownership when the fraud is challenged. Except when barred by laches [289] or a statute of limitations,[290] a defrauded party has traditionally been allowed to avoid a decree by direct attack,[291] irrespective of who holds

289. Since fraudulent procurement of a decree by failure properly to name and serve a party usually constitutes extrinsic fraud— *i.e.*, extrinsic to the record—courts of equity are usually loath to apply the doctrine of laches. See, *e.g.*, Wasem v. Ellens, 68 S.D. 524, 4 N.W.2d 850 (1942). Indeed, if the fraud is so flagrant as to constitute a "fraud on the court," laches may be entirely inapposite. 7 MOORE, FEDERAL PRACTICE ¶ 60.33 (2d ed. 1955). Nevertheless, this form of fraud is unlikely in the case of an in rem quiet-title decree, see note 291 *infra*, so laches are likely to apply, see Campau v. Van Dyke, 15 Mich. 371 (1867) (equitable relief must be sought within a reasonable time); *cf.* French v. Thomas, 252 Ill. 65, 96 N.E. 564 (1911) (six-year delay after rendition of decree constituted laches). In determining the propriety of applying laches, the court may be influenced by the acquisition of rights by third persons who have relied on the decree. 1 FREEMAN § 272, at 541.

290. A number of jurisdictions have enacted specific fraud statutes setting a time limit for attack. *E.g.*, MINN. STAT. ANN. § 548.14 (1947) (within three years of discovery of fraud). These acts protect, among others, good-faith purchasers without notice of the fraud. Presumably, if an innocent purchaser has acquired title, the victim has recourse to a damage action against the fraudulent petitioner or his heirs. See, *e.g.*, Berkman v. Weckerling, 247 Minn. 277, 77 N.W.2d 291 (1956) (quiet title). See also NEB. REV. STAT. ANN. §§ 25-2001, 25-2008 (1948) (action can be maintained to set aside a decree procured by fraud within two years after judgment; person under disability has two years after removal thereof). No protection is accorded bona fide purchasers, presumably because the general two-year period is short relative to the indefinite period allowed for an equitable suit. Nevertheless, the Nebraska Supreme Court has held that an action may be initiated beyond the statutory period if the attacker demonstrates lack of notice during such time and special equities justifying equitable relief. Krause v. Long, 109 Neb. 846, 192 N.W. 729 (1923). Generally, fraud statutes are ineffective in establishing an absolute time limit on attack, for they do not entirely supersede pre-existent equitable remedies. See 3 FREEMAN §§ 1180, 1200.

291. A petitioner's "fraud on the court"—for example, a known adverse party is not served with process or notice of the proceeding—is said to deny jurisdiction over him and render the decree null and void on collateral attack. 2 FREEMAN § 331; see Comment, 66 YALE L.J. 525, 530 n.23 (1957) (collecting cases). In the usual in rem case, however, the fraud will not prevent an initial assertion of jurisdiction; rather, it may deceive the court into acquiring in rem jurisdiction over an adverse party through constructive service of process. See 2 FREEMAN § 308; 3 *id.* § 1236. Since a defrauder can be expected to comply meticulously with all statutory prerequisities for averring diligent inquiry, the assumption of in rem jurisdiction will normally appear valid on the face of the record. *Cf.* Lucy v. Deas, 59 Fla. 552, 52 So. 515 (1910). Hence, the rule preventing the introduction of extrinsic evidence to impeach an apparently valid decree will preclude a collateral challenge. See, *e.g.*, Champion v. Williams, 165 Ark. 328, 264 S.W. 972 (1924); note 257 *supra* and accompanying text. In the quiet-title context, therefore, the victim of such fraud is limited to his direct-attack remedies. Kulbeth v. Drew County Timber Co., 125 Ark. 291, 301-02, 188 S.W. 810, 813-14 (1916) (failure to name heirs known to petitioner at the institution of suit will not justify collateral attack and gives rise only to direct attack through bill in equity); Parsons v. Weis, 144 Cal. 410, 415, 77 Pac. 1007, 1010 (1904) (similar); Gilbreath v. Teufel, 15 N.D. 152, 157, 107 N.W. 49, 51 (1906)

title at the time of attack.[292] This rule seems sound whenever the petitioner or his successor in interest has not transferred the quieted title to an innocent grantee. Thus, a defrauded party could not be harmed if the period for direct reopening were curtailed,[293] and, subject to general time limits on bringing suit, he would still be able to avoid an adjudication.[294]

("fraud on the court" gives rise only to timely direct attack; formal compliance with statutory requirements constitutes "due process" and is valid against collateral attack); see Reimers v. McElree, 238 Iowa 791, 798, 28 N.W.2d 569, 572 (1947) (same; proof of petitioner's secret intent to prevent defendants from obtaining actual notice not "fraud" authorizing collateral attack); Finnegan, *supra* note 257, at 519-20; *cf.* Katz v. Swanson, 147 Neb. 791, 24 N.W.2d 923 (1946) (judicial sale). *But see* Wilson v. Birt, 77 Colo. 206, 235 Pac. 563 (1925) (misrepresentations by quiet-title petitioner would constitute "fraud on the court" giving rise to collateral attack). It appears that the *Wilson* case represents a narrow minority view, and should not be followed since the result of holding the decree absolutely void is to impair the rights of bona fide purchasers relying on an ostensibly valid adjudication. Even the *Wilson* court expressly refused to indicate whether the rights of innocent third persons would be affected under its decision. *Id.* at 211, 235 Pac. at 565.

292. Setting aside a judgment procured by fraud will result in divesting the title of the petitioner or any successor in interest who has acquired the property without paying value, as well as the title of purchasers with notice of the defective proceedings. See, *e.g.*, Evans v. Spurgin, 52 Va. (11 Gratt.) 615 (1854) (heirs); *cf.* Morris v. Soble, 61 S.W.2d 139 (Tex. Civ. App. 1933); 1 FREEMAN § 298; 7 MOORE, FEDERAL PRACTICE ¶ 60.33, at 507 & n.30 (2d ed. 1955).

Whether equity will protect even a subsequent good-faith purchaser relying on an apparently valid decree is debatable. The better and probably prevailing view holds him entitled to safeguards. See, *e.g.*, Kistler v. Fitzpatrick Mortgage Co., 146 Kan. 467, 71 P.2d 882 (1937); Williams v. Johnson, 112 N.C. 424, 17 S.E. 496 (1893). Since a bill in equity is a direct attack on a decree considered voidable, rather than absolutely void, conceptually the good-faith purchaser should prevail. See Crow v. Van Ness, 232 S.W. 539 (Tex. Civ. App. 1921). See generally 3 FREEMAN §§ 1211-12 (collecting cases *pro* and *contra*).

293. See notes 217-20 *supra* and accompanying text.

294. Once defrauded parties are exempted from the foreshortened reopening period, it must be decided whether their right to relief against petitioners and their successors (except for bona fide purchasers) should be subject to any time limitation whatever. Absent a time limit, the victim would presumably be allowed to seek relief by a bill in equity which may be entertained at any time, subject only to laches and, perhaps, general statutes of limitations dealing with fraud. See notes 289-90 *supra*. While the fraudulent petitioner deserves no solicitude at all, allowing indefinite divestment of his innocent heirs, donees, assignees and the like may work great injustice. Although such persons have not paid value, neither are they usually in privity with the defrauder, except in a highly conceptualized sense. Moreover, policies favoring the maximum utilization of land demand recognition of the rights of such persons to improve the property without fear of a subsequent loss for a fraud which they did not perpetrate. Although equity may in its discretion afford relief even to them, prevailing doctrine indicates that adequate protection will seldom be forthcoming. See note 290 *supra*. These factors therefore militate strongly in favor of an express quiet-title limiting period for the recovery of land or interests fraudulently divested. For an analogous Torrens provision limiting attack to ten years after judgment, see N.Y. REAL PROP. LAW § 392. In view of the proposed right to seek compensation from the indemnification fund, this direct attack period could be even further foreshortened.

Since a quiet-title action usually precedes a sale of the land involved, a post-decree title-holder will often be a bona fide purchaser for value.[295] Arguably, the equities favoring the defrauded adverse interest-holder should outweigh those of a party who innocently purchased land in reliance on a quiet-title decree. But, if the basic policy of the in rem quiet-title action—creating a functionally marketable record title—is not to be utterly negated, bona fide purchasers for value must receive absolute protection.[296]

295. See note 218 *supra*.

296. See Lancaster v. Wilson, 68 Va. (27 Gratt.) 624, 629 (1876). Protection of the rights of bona fide purchasers is almost universal under Torrens laws. *E.g.*, N.Y. REAL PROP. LAW § 392, under which the innocent purchaser is secure, after a thirty-day reopening period, against an attack for fraud, although the reopening period is ten years when a bona fide purchaser's rights have not intervened. Even absent explicit statutory protection, the good-faith taker will invariably be judicially protected in suits instituted after the statutory attack period has elapsed. See Baart v. Martin, 99 Minn. 197, 108 N.W. 945 (1906) (construing what is now MINN. STAT. ANN. § 508.28 (1947)). A fraud action during the attack period, however, precludes protection of the purchaser who cannot then be viewed as bona fide. See Carl v. DeToffol, 223 Minn. 24, 25 N.W. 2d 479 (1946). *But see* COLO. REV. STAT. ANN. § 118-10-31 (1954) (bona fide purchaser protected against attack during the ninety-day reopening period).

In one situation, however, the bona fide purchaser has universally remained vulnerable to attack. If the petitioner has failed to name and properly serve a party in possession, such failure constitutes "constructive fraud" even absent a showing of scienter. Moreover, since the fact of possession imparts constructive notice to a subsequent taker, he will not be considered bona fide and so is not entitled to the absolute statutory protection usually accorded an innocent purchaser of registered land. See, *e.g.*, Follette v. Pacific Light & Power Corp., 189 Cal. 193, 208 Pac. 295 (1922); Chicago Title & Trust Co. v. Darley, 363 Ill. 197, 1 N.E.2d 846 (1936). In such cases, the decree will be held absolutely void and subject to collateral attack. Riley v. Pearson, 120 Minn. 210, 139 N.W. 361 (1913). What effect these decisions will have on a quiet-title statute embodying the proposed revisions is unpredictable. Admittedly, the holdings that evidence of possession is constructive notice to all the world are conceptually sound and in accord with prevailing property doctrine. See 5 TIFFANY, REAL PROPERTY § 1287 (3d ed. 1939). Thus, a purchaser relying on a conclusive quiet-title decree who fails to check the land for signs of adverse possession can be justifiably denied bona fide status. Yet the *Follette, Darley* and *Riley* decisions, *supra*, involved evidence of possession which was somewhat less than open or notorious. In the *Follette* case, the attacking party held a recorded right-of-way evidenced by power lines; in *Darley*, the only sign of possession was simply a fence on otherwise vacant land; and in *Riley*, the interest was a recorded easement. Clearly, these signs of ownership represent rather flimsy bases for applying doctrines permitting the impairment of an otherwise innocent purchaser's title. Moreover, the *Follette* and *Riley* decisions rest partially on grounds which gravely endanger the rights of persons buying in reliance on a decree. In both cases, the courts laid strong emphasis on the point that the improperly divested interest was discoverable of record. But a major objective of the Torrens enactments, as well as the in rem suit to quiet title herein proposed, is to eliminate in part the need for costly and burdensome record searches. See text at note 313 *infra*. If every purchaser of land whose title has been recently quieted must nevertheless search the records covering many years before a decree, this objective will be completely frustrated. Accordingly, fraudulent failure of the quiet-title petitioner to name and properly serve a possessory interest-holder whose claim is pragmatically discoverable only in the records should not defeat the bona fides of a subsequent taker. *Cf.* Baart v. Martin, *supra* at 212-13, 108 N.W. at 951 (1906) (dictum).

Assuming, then, that title has been transferred to a bona fide purchaser and that the period for reopening has elapsed, the fraudulently excluded adverse party must be given a remedy which does not affect the status of title. Preferably, he should be awarded a claim against an indemnification fund for the value of his interest at the time either of suit or of the fraud's discovery.[297] In turn, the fund would be subrogated to his claim against the fraudulent petitioner.[298] Absent the latter's insolvency, the fund would presumably be reimbursed for both its outlay and the cost of prosecuting the suit. And if collection proved impossible, the loss would be borne by all petitioners, since their contributions to the fund would reflect its function of risk distribution.

The Cost of an Effective Decree

Cost alone would appear to be the only serious practical obstacle to implementing an effective quiet-title statute. The establishment of an expeditious judicial procedure which is neither summary nor *ex parte* should present little difficulty.[299] The opposition of title insurers, professional abstractors, and

297. The defrauded party should not bear the burden of fluctuations in land value. He should be allowed to recover the value at the time of the fraud or of its discovery, whichever is higher. *But see* WASH. REV. CODE ANN. § 65.12.700 (1951) (Torrens statute limiting recovery against assurance fund to fair market value of property or interest at time of petitioner's last contribution thereto). A provision allowing the defrauded party to recover land value at the time he discovers the fraud might, of course, be susceptible to abuse, especially in a rising land market. One method of overcoming this danger is a period of limitations in actions for any recovery against the fund. Many of the Torrens enactments establish such a time limit for any recovery of any nature. *E.g.*, COLO. REV. STAT. ANN. § 118-10-91 (1954) (no recovery against the fund more than six years after cause of action accrued; persons under disability may sue within two years after disability removed); ILL. REV. STAT. ch. 30, § 140 (1957) (ten years or two years after removal of disability). Presumably, persons not instituting a timely suit are left to their equitable remedies against the fraudulent petitioner. See notes 289-90 *supra*.

Alternatively, the victim could be required to exhaust his remedies against the defrauder before applying to the fund, but this seems an unduly harsh burden to impose on an innocent party. True, the Torrens acts almost universally provide that a defrauded party show an unsatisfied execution against the fraudulent petitioner as a prerequisite to collection from the fund. *E.g.*, COLO. REV. STAT. ANN. § 118-10-89 (1954); MINN. STAT. ANN. § 508.77 (1947); N.C. GEN. STAT. ANN. §§ 43-50 to -51 (1950). But in view of the equities favoring a defrauded party—which make fraud an exception to the general conclusiveness of the Torrens registration decree—the burden of collecting from the guilty party ought to be on the party best able to bear it. Forcing the victim to expend time and money pursuing his remedies against the defrauder is far more onerous than affixing this obligation on public officials administering the fund. *Cf.* ILL. REV. STAT. ch. 30, § 138 (1957) (apparently imposing no "unsatisfied execution" prerequisite).

298. Subrogation to the victim's claim against a defrauding petitioner is usually provided under Torrens. *E.g.*, N.C. GEN. STAT. ANN. § 43-53 (1950); OHIO REV. CODE ANN. § 5310.13 (Page 1954).

299. The statute should provide against default judgments entered upon appearance of plaintiff's attorney. Instead, the presentation of evidence should be required whether or not adverse parties appear and defend. Only when the court is convinced by plaintiff's evidence and testimony that his claim is superior to all others should his title be

some elements of the bar could be overcome.[300] And the landholding public and attorneys generally could be made aware of a new quiet-title suit's availability and value, so that it will not join Torrens as a neglected curiosity on the statute books.[301] Regardless of the legal efficacy and utility of the proposed suit, however, it is of scant worth as even a partial solution to the ills of the conveyancing system if it is beyond the financial reach of most landowners.

The cost of an in rem proceeding of the type recommended above would consist principally of miscellaneous court and recording charges, a contribution to the indemnification fund, payment for a lawyer's opinion or title insurance report on marketability, and an attorney's litigation fee.[302] Court and recording charges would remain substantially at present levels, varying some-

quieted. In this manner, some of the more objectionable features of present in rem suits could be avoided.

300. Any remedy which acts to simplify the conveyancing process will inevitably encounter some vested opposition. See note 50 *supra* and accompanying text (opposition of lawyers, professional abstracters and title insurance companies to Torrens). Several factors should tend to mitigate this antagonism, however. The proposed solution would operate within rather than replace the recording system. Also it would involve utilizing the services of lawyers, abstracters and title companies. See note 288 *supra* and accompanying text (advocating use of lawyer's opinion—often based on an abstracter's report —or title company's report on marketability as prerequisite to suit). See also note 313 *infra* (indicating need for limited record searches in transfers subsequent to initial quiet-title adjudication). Moreover, unlike Torrens, use of a suit to quiet title does not preclude resort to title insurance, particularly in transfers following the initial suit. Hence, none of the groups opposing Torrens would suffer the economic detriment attending that remedy were the suggestions propounded herein enacted into law.

301. See notes 48-51 *supra* and accompanying text.

302. The *Yale Law Journal* sent a letter requesting data on costs in quiet-title actions to the state (or where necessary, the county) bar associations of fifteen states. Information was received from nine: Alabama, California, Kansas, Minnesota, Montana, Nebraska, New Jersey, Oregon and Wisconsin. Besides geographical diversification, the sampling is also representative of states with different types of statutes. See notes 116-18, 120 *supra* and accompanying text. Primary emphasis, however, was placed on jurisdictions whose statutes are substantially in rem. The material received is as follows: Alabama, BIRMINGHAM BAR ASS'N, SCHEDULE OF MINIMUM FEES (1955); California, SAN FRANCISCO LAWYERS CLUB, SCHEDULE OF MINIMUM FEES AND CHARGES (1957); Kansas, KANSAS STATE BAR ASS'N, SURVEY OF COMPILED MINIMUM FEE SCHEDULES (1958); Minnesota, Letter From Samuel H. Morgan, Chairman, Committee of Fees and Law Office Organization, Minnesota State Bar Ass'n, to the *Yale Law Journal*, Dec. 12, 1958; Montana, Letter From John D. Weaver, Chairman, Committee on Minimum Fees and Schedules, Montana Bar Ass'n, to the *Yale Law Journal*, Dec. 22, 1958; Nebraska, *Advisory Fee Schedule*, 7 NEB. S.B.J. 126, 129 (1958); New Jersey, Letter From Harrison B. Johnson, Secretary, Union County Bar Ass'n, to the *Yale Law Journal*, Dec. 15, 1958; Oregon, OREGON STATE BAR PROCEEDINGS, COMMITTEE REPORTS 24, 25 (1951); Wisconsin, STATE BAR OF WISCONSIN, SCHEDULE OF MINIMUM FEES FOR ATTORNEYS (1958), and Letter From John B. McCarthy, Special Investigator, State Bar of Wisconsin, to the *Yale Law Journal*, Dec. 11, 1958. All letters are on file in Yale Law Library. This material is hereinafter cited collectively as DATA. Certain cost figures vary with the value of the property in question. All calculations in subsequent footnotes are based on the assumption that the property in suit is worth $25,000.

what from state to state.[303] As under the Torrens assurance system, a contribution to the indemnification fund could be a nominal percentage of the assessed valuation of the petitioner's property or interest.[304] The expense of a title examination would be a fixed charge if a title company provided the service.[305] If a lawyer's opinion were obtained, his fee would be computed at a flat rate recommended by the local bar association, or, in some states, would be geared to the value of the property in suit.[306] These methods of calculating fees are also utilized to determine costs of counsel for litigation.[307] In a simple,

303. In the several states sampled, miscellaneous charges ranged from estimated totals of $35 to $160. Possibly, the lowest amount may not include all component charges of the highest. The $160 figure breaks down as follows:

(1)	Filing fee	$13
(2)	Notice of *lis pendens*	3
(3)	Publication fee (three consecutive weeks)	50
(4)	Sheriff's fee (process and subpoenas) @ $2 per person with additional mileage allowance	15 (approx.)
(5)	Guardian *ad litem*	69
(6)	Two witnesses @ $5 per diem for one day	10
	Total	$160

DATA. A correlation of all information received yields an aggregate average of approximately $100 in most states. *Ibid.*

304. The present charge for a Torrens assurance fund is 0.1% of the assessed valuation of the property in suit. Note 228 *supra*. Assessed valuation, however, is normally only a fraction of true value. Comment, 68 YALE L.J. 335, 339 (1958). Based on the assumed value of $25,000 and an assessment rate of 80% of true value, the charge would be $20. But if indemnification-fund coverage were expanded, see notes 218-20, 297 *supra* and accompanying text, a rate increase would be indicated. Doubling the fund contribution would put it at $40.

305. No explicit information is available on the cost of title-company services when they comprehend marketability reports but not insurance coverage. But a calculation of title company examination fees can be obtained by extrapolating data from Johnstone, *Title Insurance*, 66 YALE L.J. 492 (1957). In app. IV, *id.* at 520-21, the author lists the cost of a $10,000 owner's policy, as charged by four companies, for a policy which includes search and examination: Company A, $107; B, $115; C, $84; F, $60.25. In *id.* at 500, he notes that the basic rates for policies is $3.50 per $1,000 (or $35 for a $10,000 policy). That a straight policy would cost $35 is borne out by the fact that Company D, app. IV, *id.* at 521, charges that amount for a $10,000 owner's policy which excludes search and examination costs. Therefore, the remaining cost—almost certainly attributable to search and examination—would be: (A) $72; (B) $80; (C) $49; (F) $25.25, or an average of $56. These figures might be slightly higher if search and examination were made without the issuance of a policy.

306. The cost of a lawyer's opinion varies sharply from state to state. In those jurisdictions which supplied the *Journal* with information, it is as follows: Alabama, $102.50 (based on $25,000 property value); Kansas, $35 (fixed fee; average); Nebraska, $62.50 (based on $25,000 property value); New Jersey, $200 to $400; Oregon, $15 minimum; Wisconsin, $20 minimum. DATA. An average would be unrealistic because of the extremes presented. An estimate of $50 to $100 seems reasonable.

307. The *Journal* survey indicates that attorney's fees for an uncontested action range from an absolute minimum of $100 to a maximum of $800. Among bar associations sug-

uncontested suit involving land with a fair market value of $25,000, all of the foregoing expenses would probably total from about $350 to over $1,000, with the average somewhere around $575.[308]

As a general proposition, an attorney's litigation fee—by far the largest element of expense—rises as the decree provided becomes more and more conclusive.[309] For this reason, the enactment of legislation creating an in rem judgment far more determinative than any now in force might simultaneously render the quiet-title suit prohibitively expensive for the majority of landowners.[310] Hopefully, though, reasonable fees would become possible through the economies of scale resulting from the increase in quiet-title litigation which is almost certain to attend adoption of the revised suit. As more lawyers become adept in prosecuting this kind of suit and as it assumes a more significant role in the average attorney's civil practice, fees should decrease. And state bar associations sympathetic to the objectives and benefits of the suit could advocate reduced charges or adherence to present fee schedules. Withal, the cost of quieting title will remain substantial, and other methods of reducing expenses should be considered.

Since most quiet-title suits would be instituted prior to a sale of realty, the expenses of suit could be prorated between vendor and purchaser in order to lessen the former's costs. At present, the entire charge usually must be assumed by the petitioning vendor, who is thus discouraged from paying for a

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gesting a flat minimum fee, a figure of $150 to $250 is most common. A minority of the states surveyed provide a fee schedule increasing proportionately with the value of the property. Assuming a $25,000 value, fees in these states range from $350 to $800. In states with a fixed charge, the average total attorney's fee was $220; where geared to land value, the average was $570. The nine-state average, subsuming both categories, was $370. DATA.

308.

Court and Recording Charges		$100
Title Company Examination	$56	
Lawyer's Opinion	75	
Average		65
Indemnification Fund Contribution		40
Attorney's Litigation Fee		370
	Total	$575

Minimum fee schedules and letters received all indicate that cost statistics are for an uncontested action. Complications encountered during the course of litigation could be expected to increase court charges slightly, and to substantially raise the attorney's litigation fee. The overall outlay would therefore be considerably higher than for an uncontested action.

309. Three of the surveyed jurisdictions have truly effective in rem enactments. Lawyers in Montana charge $250, in Nebraska $600, and in New Jersey $425 to $625 DATA.

310. Attorneys' fees tended to be substantially higher than the $370 average in metropolitan centers. DATA. In these areas, it seems reasonable to assume that, although the suit will be financially within reach of corporations and other large holders of real estate, it may well prove beyond the means of the average homeowner or small businessman seeking a good title to his property.

decree which will primarily benefit subsequent title-holders.[311] Required to shoulder his portion of the expense, the original purchaser might pass on a large part of it to subsequent vendees who would also profit from the initial adjudication. Voluntary proration is unlikely, however, for the party in a better bargaining position can dictate terms favorable to himself. Hence, absent some form of statutory regulation, possibly precluded by constitutional considerations, proration does not represent a comprehensive solution to the problems posed by the high expense of litigation.[312] Landowners may nevertheless recognize the revised quiet-title suit as an unparalleled device for clearing a defective title, and accept the attendant expense as a worthwhile investment. Cheaper and less effective than Torrens registration, dearer and more effective than title insurance, the suit may commend itself as the best method of curing title defects in a recordation-oriented society.

CONCLUSION

In effect, this Comment has suggested that the objectives of the Torrens system be implemented within the framework of recordation. Like Torrens, the proposed suit to quiet title would provide a virtually conclusive determination of title on which all parties could rely, would largely eliminate the need for laborious and wasteful record searches,[313] and by shifting the primary

311. For a discussion of an analogous situation under Torrens, see SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, ABA PROCEEDINGS 84 (1948); Johnstone, *Title Insurance*, 66 YALE L.J. 492, 514 (1957). Of course, a petitioner receives benefit from a quiet-title decree, even when obtained directly prior to a land sale, for the removal of all defects, both known and unknown, should increase the value of his property and thus either increase the sales price or, more likely, prevent its depression.

312. A form of prorating expense has been suggested in connection with Torrens. Basically, the idea advanced is to lower or eliminate court and administrative charges during the initial registration, and increase the tax on later transfers of registered property. Costs of the system would thus be passed on to post-registration beneficiaries. See Johnstone, *supra* note 311, at 514-15. Unfortunately, basic differences between the Torrens and recording systems make this suggestion inappropriate in the quiet-title field. Under Torrens, every transfer of registered land presupposes that the transferee has received the benefits of an initial registration suit. This is not true with every recorded land transfer, for most transferred titles will not have been quieted. Arguably, the additional levy could be imposed only on titles which have previously been subject to a quiet-title adjudication. But it would be administratively infeasible to decide at what point the benefits of an earlier quiet-title suit no longer accrue to a transferee. See text following note 313 *infra*. Of course, an arbitrary cut-off point could be established, but this would undoubtedly produce inequitable and unsatisfactory results. In addition, a constitutional argument can be raised to the effect that distinguishing between quieted and unquieted titles for taxation purposes is arbitrary and violative of the equal-protection clause of the fourteenth amendment. This argument might be overcome, but only after definitive court decisions were rendered.

313. Limited record search will still be necessary to ensure that the title in question is not subject to any exempted claim. See note 39 *supra* for listing of interests not concluded by a Torrens decree. Similarly, state legislatures adopting a quiet-title enactment along

focus of search to transfers after adjudication, would permit speedy and efficient title appraisals. On the other hand, a quiet-title suit would produce a less durable decree than would a Torrens adjudication. And inevitably so, for the former suit is tied to a recording system which constantly generates title imperfections, while the latter provides the perpetual security of a title certificate designed as the sole determinant of all after-acquired rights and interests. If any quieted title is to retain the continuously high level of certainty essential to functional marketability, occasional relitigation—perhaps on every fourth or fifth transfer—will be necessary. True, the total cost of maintaining a quieted title would therefore exceed the comparable figure under Torrens. But the cost of obtaining a Torrens certificate is greater than that involved in a single quiet-title suit; Torrens thrusts the full expense of litigation on one party, while the expense of periodic quiet-title suits, though higher overall, is so distributed among a number of individuals as to yield a lower cost per suit. The quiet-title remedy is also preferable because it eliminates the official title examination, a major element of delay which renders Torrens singularly unattractive in land-sale situations.[314] Finally, falling as it does within the recording system, the suit to quiet title is politically more palatable than Torrens,[315] and, unlike Torrens, does not require the maintenance of duplicate sets of records.[316]

Though effective, the proposed suit to quiet title would not be a foolproof guarantee of title marketability. Rather, it would help cure disorders originating in the recording system. Legislative energies should accordingly still be

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the lines proposed can be expected to exclude certain interests from the effect of a decree. A careful attorney will therefore make certain that no such interests exist before a title transfer is consummated. Also, to preclude imposition of the doctrine of constructive fraud, it may be necessary to check the records for recorded easements and other possessory interests not immediately discernable from a mere physical inspection of the premises. See note 296 *supra*.

314. See text following note 44 *supra*.

315. The futility of an attempt to jettison the recording system is strikingly illustrated by the Massachusetts experience in enacting the Uniform Commercial Code. Under § 9-401, the draftsmen were attempting to provide for centralized state recordation of all chattel liens. The county and town recording clerks, apparently a powerful political lobby, appeared *en masse* during the hearings on the Code and almost succeeded in defeating passage of the entire statute because of this provision. Eventually, the Massachusetts legislature compromised and provided for both state and local filing. MASS. ANN. LAWS. ch. 106, § 9-401(1)(c) (Supp. 1958). Transcript of Lecture by Professor Grant Gilmore, Yale Law School, April 15, 1958, pp. 60-61.

316. Indeed, because of the comparative "acceptability" of the suit to quiet title, proponents of the Torrens system would do well to lend support to the proposals advanced herein, for they must know by now that their noble experiment is virtually defunct. Rather backhanded support for this view can be found in an article by one of the leading critics of Torrens, Percy Bordwell, who advocates widespread use of the quiet-title action in its stead. Of course, Bordwell's reference is to the suit to quiet title as it now exists, which no more qualifies as a substitute for Torrens than does title insurance. See Bordwell, *The Resurrection of Registration of Title*, 7 U. CHI. L. REV. 470, 488 (1940).

channeled toward adopting every practical means of improving the system itself. Expanding the number and types of recordable interests; consolidating all records bearing on title into a single file; adopting a tract index—all would help eliminate burdensome record searches and the threat of title defects. Imperfections mark the very nature of a recording system, however. Being derivative evidence of title and but a poor substitute for original documents, recordation will inevitably produce errors, irregularities and omissions, many of which are undetectable under the most meticulous scrutiny.[317] Thus, any remedial device, be it a statute of limitations, a curative act, or, particularly, a marketable-title act, serves a valuable function. And, since these devices operate automatically and without cost to their beneficiaries, they are far more desirable than expensive and time-consuming litigation. But, like the recording system, statutory measures designed to correct it have their limitations, for title defects will frequently escape their individual or combined operation.[318] When all other measures fail, only an in rem suit to quiet title can conclusively establish the status of record titles. So long, then, as legislators insist on retaining an imperfect recording system, they should provide an effective lawsuit as that system's natural and necessary companion.

317. See note 9 *supra* and accompanying text.
318. See note 98 *supra* and accompanying text.