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Increasing Land Alienability Through Re-Recording Acts-The Indiana Statute

INCREASING LAND ALIENABILITY THROUGH RE-RECORDING ACTS—THE INDIANA STATUTE

The usefulness of land as a commercial commodity depends upon the degree of title alienability which can be assured landowners. Impediments to ease of conveyance arise largely from the fact that there may exist in the same parcel of land various interests, both possessory and non-possessory, present and future. This multiple ownership creates complexity of land titles and the possibility of conflicting claims, with resulting deterrents to alienability. The risks, perhaps, are unsubstantial while the parties originally involved are still alive. However, the passage of time eliminates witnesses, dims recollections, and destroys useful records, rendering the deterrents more serious by aggravating the task of resolving conflicts. Moreover, interests originally substantial may themselves become nominal. Yet, if their unimportance cannot readily be determined, alienability of valid claims will effectually be deterred.

Largely within the last decade eight states have undertaken to eliminate much of the needless complexity surrounding land titles, and thus to encourage their free alienability, by enacting legislation requiring periodic re-recording of interests in land. Indiana's statute, dating from 1947, was the sixth to be enacted. These statutes may descriptively be termed "re-recording acts," although *re*-recording is a misnomer since their compass extends to interests not within the purview of the traditional recording system. The impact of this legislation on the problem of title alienability can be extensive and salutary. In order to assess its full significance, however, it is desirable to examine the limited effectiveness of orthodox methods previously available to eliminate deterrents to alienability, and then to observe the manner in which the re-recording acts supplement these devices.

Several traditional methods exist by which clouds on title may be defeated. Three of these—recitals in deeds, affidavits, and curative acts—correct formalistic defects in land records. Recitals and affidavits are mainly evidentiary devices to shift the burden of proof to the challenging party. For example, recitals in a deed that it was signed and sealed

in the presence of a New York magistrate was prima facie evidence of delivery in New York;[1] and of course recitals can establish an estoppel-by-deed situation.[2] Affidavits, while acceptable by attorneys to explain or verify the contents of a deed, will not make a title marketable where the attempt is to supply a deficiency in the record title.[3] Curative acts are designed to carry out the intention of parties to an instrument;[4] and being retrospective in nature, they are subject to the rule that a vested right cannot be destroyed by a retrospective act.[5]

Statutes of Limitations provide the most common means of removing deterrents to alienability. Examples of their usual operation to bar claims which form a cloud on title are: an action by an execution-debtor to recover realty sold by executors or guardians; an action based upon an inheritance tax lien; an action on a contract to convey land; an action on a mortgage after the due date of the debt; and an action on an unrevived judgment. While the avowed purpose of such statutes is the nullification of stale claims, a corollary is the removal of deterrents to alienability.

More important are adverse possession statutes, which provide that no action can be commenced for the recovery of possession of realty after the lapse of a certain period. In a sense these too are statutes of limitations. But in addition they provide a method of land title acquisition, upon a showing of compliance with the requirements of adverse possession for the statutory period. Necessarily, claims conflicting with the rights of the adverse possessor are defeated. Use of the terminology "adverse possession statutes" emphasizes their title acquisition-deterrent removal nature.

The usual operation of adverse possession statutes is to defeat an unexercised action of ejectment available against the adverse claimant for the statutory period. But it is possible that their impact may extend further. Of course, the interest of one ignorant of the accrual of his cause of action may be defeated.[6] Moreover, equitable estoppel could cause the statute to defeat the interest of a remainderman, even though no right of possession has accrued to him.[7] Adverse possession of land, good against a trustee, also will bar the equitable present and future interests in the land. And if an estate is transferred in accordance with

1. New Haven Trust Co. v. Campbell, 81 Conn. 539, 71 A. 788 (1909).
2. German Mutual Insurance Co. of Indianapolis v. Grim, 32 Ind. 249 (1869).
3. McClain v. Roberts, 194 Iowa 1026, 187 N.W. 444 (1922); Beeler v. Sims, 91 Kan. 571, 139 P. 371 (1914); Howe v. Coates, 97 Minn. 385, 107 N.W. 397 (1906).
4. Where a notary failed to attach his seal to a deed, a curative act effectively cured the defect. Maxey v. Wise, 25 Ind. 1 (1865).
5. Lewis v. Brackanridge, 1 Blackf. 220 (Ind. 1822).
6. Craven v. Craven, 181 Ind. 553, 105 N.E. 41 (1914).

the terms of the trust, the transferee takes subject to any adverse possession that has run against the trustee.[8] Adverse possession will run against future interests created after the statute has commenced to run against the grantor.[9] If the owner of a possessory estate surrenders his interest, the holding of an adverse claimant runs against the future estate from the date of merger.[10] Finally, statutes sometimes provide that adverse possession will commence to run against the future estate where a power of termination exists and a breach of the operative condition occurs.[11] In all such situations the adverse possession statutes operate effectually to increase title alienability.

Contraposed are the situations where deterrents to alienability will be unaffected. All the defenses available against ordinary statutes of limitations likewise are available against an adverse claimant.[12] Moreover, since a cause of action in ejectment must have been available for the statutory period, and since such an action is available only to one who has the right to possession,[13] adverse possession is inoperative against future legal interests.[14] And even though the particular estate is sold or adverse possession has fully run against it, no adverse holding will commence against a future interest until the *natural* termination of the particular estate causes the future interest to vest in possession.[15] The necessity that an interest vest in possession before adverse possession statutes can be operative against it applies to contingent as well as vested remainders; for today, even in Indiana, the careful title examiner will assume that the classical contingent remainder can take effect as an

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7. Ansonia v. Cooper, 66 Conn. 184, 33 Atl. 905 (1895); Knutson v. Vidders, 126 Iowa 511, 102 N.W. 433 (1905); Bohrer v. Davis, 94 Neb. 367, 143 N.W. 209 (1913). Distinguish this from the situation of estoppel by deed: Dibble v. Lloyd, 73 Ind. App. 320, 127 N.E. 453 (1920).

8. Meeks v. Olpherts, 100 U.S. 564 (1879); Waterman Hall v. Waterman, 220 Ill. 569, 77 N.E. 142 (1906); RESTATEMENT, PROPERTY § 225 (1936).

9. Sutton v. Clark, 59 S.C. 440, 38 S.E. 150 (1900); Hubbard v. Swafford, 209 Mo. 495, 108 S.W. 15 (1908); RESTATEMENT, PROPERTY § 226 (1936).

10. RESTATEMENT, PROPERTY § 222, comment h (1936).

11. ILL. STAT. ANN. § 107.261 (Jones 1936); MICH. COMP. LAWS § 609.3 (1948).

12. For a competent, brief survey of Statutes of Limitations see Note, 21 IND. L.J. 23 (1945).

13. IND. ANN. STAT. § 3-1301 (Burns' Repl. 1946).

14. Lewis v. Barnhart, 145 U.S. 56 (1891); Thompson v. McCorkle, 136 Ind. 484, 34 N.E. 813 (1893); Cross v. Janes, 327 Ill. 538, 158 N.E. 694 (1927); Lowry v. Lyle, 226 Mich. 676, 198 N.W. 245 (1924); Maxwell v. Hamel, 138 Neb. 49, 292 N.W. 38 (1940); RESTATEMENT, PROPERTY § 222, ¶ f (1936). *Contra:* Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 6 So. 197 (1888); Murray v. Quigley, 119 Iowa 6, 92 N.W. 869 (1902); Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 112 So. 378 (1927).

15. For example, even though an adverse possessor has successfully ousted the particular tenant, his possession will not be adverse as to remaindermen until their interests vest in possession in accordance with the original measurement of the par-

executory limitation.[16] Finally, there is some authority that if a person simultaneously holds an undivided present interest and an undivided future interest in the same portion of land, adverse possession will be inoperative against the future interest.[17] It is thus illustrated that adverse possession statutes fall far short of a solution to the alienability problem. Indeed, they are most ineffective against future interests, the source of much of the complexity surrounding land titles.

Similarly limited in removing deterrents to alienability is the traditional recording system. Certainly, the recording acts tend to clear land titles by protecting bona fide purchasers for value against conflicting unrecorded interests. However, recordation of all interests in land is not required. Moreover, purchasers are put on notice of all those which are recorded, regardless of their antiquity and possible unimportance. This device then may be seriously ineffective, even within its somewhat limited sphere of operation.

In the final analysis, alienability is a term synonymous with marketability. And in general the latter is a concept formulated by the conveyancing customs of attorneys in a particular locality. Probably the limited extent to which title alienability is enhanced by the traditional methods would not pose a serious problem to most attorneys, since many of the deterrents ordinarily would be dismissed as nominal. But certain attorneys, known colloquially as flyspeckers, refuse to pass anything less than what they consider to be a perfect record title. Since no attorney wishes to pass a title which might thus be rejected when his client desires to sell, the flyspeckers establish the practical standards of title alienability. This results in many needless demands for quiet title actions, the final remedy for clearing land titles. As a result, the deficiencies of the orthodox devices continue to pose serious conveyancing problems.

Capable of dispelling much of the confusion surrounding land titles and aiding tremendously the struggle for alienability are the recently

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ticular estate. Dawson v. Edwards, 189 Ill. 60, 59 N.E. 590 (1901); Tilson v. Thompson, 10 Pick. 359, 27 Mass. 365 (1830); Foster v. Marshall. 22 N.H. 491 (1851).

16. Though the majority of states allow a contingent remainder to take effect as an executory limitation, Indiana still technically follows the rule of *Purefoy v. Rogers*. Aldred v. Sylvester, 184 Ind. 542, 111 N.E. 914 (1916). But a recent Indiana case held that the related doctrine of merger was no longer in force in Indiana. Rouse v. Paidrick, 221 Ind. 517, 49 N.E.2d 528 (1943). Since the passage of the 1945 Indiana Statute Against Perpetuities, the advantage of preserving the *Purefoy* rule is nullified since an interest to be valid need no longer vest at the end of a life in being, but rather at the end of a life in being plus twenty-one years. It seems very probable that the courts will carry out the spirit of *Rouse* by renouncing the rule of *Purefoy v. Rogers* when faced directly with the executory limitation question.

17. RESTATEMENT, PROPERTY § 222, comment h (1936). But this would seem an undesirable policy which grants more protection to a man holding severable interests than would be afforded a fee owner.

enacted re-recording acts. This legislation is based upon the logical theory that a requirement of periodic re-recording of interests in land is a reasonable duty which will be complied with by those whose claims are substantial. The acts provide generally that interests must be re-recorded at periodic intervals or be subject to extinguishment in favor of a purchaser for value from the record owner. The Michigan type statute begins by defining a marketable title as being one held by a possessor who has an unbroken record chain of title for forty years; succeeding sections then terminate all interests in the land based on records or acts originating more than forty years in the past, if the interests have not been re-recorded.[18] The Indiana act, though not a statute of limitations, provides that no action shall be commenced, based upon various events occurring more than 50 years in the past.[19] It is further

18. MICH. COMP. LAWS §§ 565.101 to 565.109 (1948). The Michigan type act was adopted by two other states, Nebraska and South Dakota. NEB. REV. STAT. ANN. §§ 76-288 to 76-298 (Supp. 1949); S.D. Laws, c. 233 (1947). Recently South Dakota enacted another statute which is, theoretically, to be construed with the prior act. S.D. Laws, c. 256 (1951). The history of the Michigan act is of special interest in indicating that the moving force behind the statutes was the flyspeckers who establish unreasonable standards for land titles. MICHIGAN H.B. 120, 1945, provided that if any attorney should recommend a quiet title action, and if the things alleged to be flaws would be cured by reason of any rule of law (such as laches or estoppel), then the attorney's opinion and the abstract would be prima facie evidence of barratry. Though the bill was not passed, it gave a strange impetus to the re-recording act which shortly followed.

19. IND. ANN. STAT. §§ 2-628 to 2-637 (Burns' Supp. 1951). The statute provides that "no action affecting the possession or title of real property shall be commenced" which is based upon: (1) an unrecorded instrument executed more than fifty years prior to the commencement of the action, or (2) an instrument recorded more than fifty years prior to the action, held by a person not in possession himself or through a tenant, or (3) a transaction, act, event, or omission occurring more than fifty years prior to the action, or (4) a claim arising out of a failure of a husband and wife to join in a deed which was recorded more than fifty years prior to the action; but in no case will an interest be extinguished which is inherent in the muniments of title of the record title owner, nor will a greater interest be given a record owner than the muniments of his title purport to convey. If within the fifty year period there is filed for record a claim against the property and an "action" is commenced within one year, the re-recorded interest shall be protected. Section five provides that one having a good record title for fifty years shall have a marketable title, and any purchaser for value shall take free of any claim not recorded within the prior fifty years; but the provisions of the act are inoperative if the land is in the hostile adverse possession of one other than the record owner. The act does not extend the period of any Statute of Limitations, nor does it affect the acquisition of title by adverse possession. Neither disability nor "lack of knowledge of any kind on the part of anyone" shall suspend the running of the fifty year periods. Section eight provides that the act shall be inoperative against either a lessor or a mortgagee. Section nine states the purpose of the act to be "to facilitate and simplify land transactions . . . by allowing persons dealing with the record title owner to rely on the record title covering a period of not more than fifty years." Section ten contains an adequate saving clause for claims already ancient when the act was passed.

There has as yet been no judicial interpretation of the statute, the only reference being a dictum in Fouts v. Largent, 228 Ind. 547, 94 N.E.2d 448 (1950).

provided that purchasers for value shall take free of all claims required by the act to be of record, but which are not so recorded, within 50 years prior to a purchase for value.[20] And it is then stated that "claims extinguished shall include any and all interests of any nature, including statutory rights in lieu of dower or curtesy, reversions, tax deeds, rights as heirs or under wills, and whether such claims are asserted by a person for himself or another, whether such a person is natural or corporate, private or governmental."[21]

Two exceptions are made to the operation of the Indiana statute: neither a reversioner of a long term leasehold nor a mortagee is required to re-record his interest at fifty year intervals.[22] The exceptions are probably unjustified. The burden of re-recording is slightly greater for a realty management concern or a lending agency than it would be for individuals; but the increased duties do not warrant the decrease in alienability that will result from disagreements as to when a document constitutes either a mortgage or lease.[23] But the practical effects of the exceptions are mitigated slightly by the fact that an exception to the act probably exists in favor of the federal government;[24] thus, a complete abstract search would be necessary even without the exceptions. But although an incidental result may be to lessen abstracting chores by permitting a cursory examination and analysis of most ancient claims, in any event such is not the purpose of the statute.

It should be emphasized that the re-recording acts do not replace,

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20. Section 2-636 provides: "This act is intended to effect the legislative purpose of simplifying and facilitating land transactions by allowing persons dealing with the record title owner to rely on the record title covering a period of not more than fifty years prior to the date of such dealing."

Other acts similar to that of Indiana: ILL. REV. STAT. c. 83, § 10a; IOWA CODE § 614.17 (1946); MINN. STAT. § 541.023 (1949); WIS. STAT. § 330.15 (1949). Several surveys of the different acts have been made and would provide valuable data for property lawyers: Research Dept. Kansas Legislative Council, *Record Land Titles,* Publication No. 155 (August 1948); Basye, *Streamlining Conveyancing Procedure,* 47 MICH. L. REV. 1097 (1949); Aigler, *Clearance of Land Titles,* 44 MICH. L. REV. 45 (1945); Note, 33 MINN. L. REV. 54 (1948).

21. IND. ANN. STAT. § 2-634 (Burns' Supp. 1951).

22. IND. ANN. STAT. § 2-635 (Burns' Supp. 1951).

23. For purposes of judicial interpretation of the statute the exceptions raise no problem since, as to the operation of and exceptions to recording laws, the legislature may use its sound discretion in the light of surrounding circumstances. Turner v. New York, 168 U.S. 90 (1897); Conn. Mutual Life Ins. Co. v. Talbot, 113 Ind. 373, 14 N.E. 586 (1887).

24. Stanley v. Schwalby, 147 U.S. 508 (1892); United States v. 7,405.3 acres of Land, 97 F.2d 417 (4th Cir. 1938). The United States has voluntarily limited its power to annul land patents to six years from issuance date, 26 STAT. 1099 (1891), 43 U.S.C. § 1166 (1946). However, there are numerous situations where the United States need not base its rights upon an original patent. For example, the statute does not bar the United States from protecting Indian rights. United States v. State of Minnesota, 270 U.S. 181 (1926).

but merely supplement, the traditional recording system. All the recording act requirements of both inquiry and record notice are applicable. Thus a purchaser has legal notice of all facts that would be disclosed by a reasonable inquiry of such things as possession of the premises[25] and of all facts disclosed by properly recorded instruments.[26] If the data upon re-recording has its source in a recorded instrument, the original instrument will be incorporated by reference. For example, one who re-records a contingent remainder which he had been devised would be protecting interests under the entire will.[27] Although interests acquired by prescription or adverse possession must be (re)-recorded, their recordation still is not required by the recording acts. Therefore a purchaser for value will continue to take the risks of non-discovery where the unrecordable interests have been created within the re-recording period.

Since the traditional recording acts protect only a *bona fide* purchaser for value, knowledge of any unrecorded interest of less than fifty years of age will prevent a purchaser from being protected by the re-recording acts.[28] But while a purchaser for value will still need to be bona fide as to all items originating within the re-recording period prior to the purchase,[29] the re-recording acts grant their protection to purchasers for value with no bona fide requirement. And since they become operative where an interest is not re-recorded within a certain period prior to a purchase, the result is that a purchaser for value will be granted protection though he has knowledge of a non-re-recorded interest that arose prior to the re-recording period. The purpose of the re-recording statutes to increase alienability of land would be thwarted if any chance knowledge of ancient claims would nullify the protection of the act. Though the original Wisconsin act indicated only bona fide purchasers would be protected, the position was much criticized;[30] an amendment quickly repealed this requirement, permitting interests not timely re-recorded to be defeated absolutely upon a purchase for value.[31] This Wisconsin action emphasizes that the recording acts are operative only within the statutory period permitted for re-recording.

While it is declared expressly that interests not re-recorded within

25. Armstrong v. Azimow, 118 Ind. App. 213, 76 N.E.2d 692 (1947).
26. Fisher v. Bush, 133 Ind. 315, 32 N.E. 924 (1892).
27. IND. ANN. STAT. § 2-630(4) (Burns' Supp. 1951).
28. Walter v. Hartwig, 106 Ind. 123, 6 N.E. 5 (1885); Carmichael v. Arms, 51 Ind. App. 689, 100 N.E. 302 (1912).
29. Section nine of the act provides that a purchaser for value shall be able to rely on a record title of not over fifty years. Within this period he operates under the recording act and his bona fides as to the fifty year period will be inspected.
30. Tulane-Axley, *Title to Real Property*, 1942 WIS. L. REV. 258.
31. WIS. STAT. § 330.15(4) (1949).

the required period will be defeated in favor of a purchaser for value, it may be questioned whether the acts extend their protection to other than purchasers. For example, suppose *B* has the remainder interest in Blackacre which arose in 1896 and was then recorded; in 1947 *A*, the possessory life tenant, dies and by will leaves Blackacre to *C* who records the will; in 1948 *C* makes a gift of Blackacre to *D*; in 1949 *B* re-records his remainder interest; and in 1950 *D* conveys Blackacre to *E* for a valuable consideration. An analysis must commence with the realization that even under the recording acts unrecorded deeds and other recordable interests are valid as to all persons except subsequent purchasers, lessees or mortgagees in good faith and for a valuable consideration.[32] There is no substantial contrary argument as to the re-recording acts. Alienability of land would not be materially increased by granting protection to volunteers. It would be difficult to defend a statute which, even occasionally, defeats a substantial property interest in favor of one who receives unearned wealth. On this basis neither *C*, the heir, nor *D*, the gratuitous donee, would be protected by the statute. Since *B*'s interest was re-recorded before *E* made a purchase for value, the remainder interest of *B* should be protected. The fact that *B*'s interest was re-recorded later than fifty years from its origin should not be material since the statute is not one of limitation. One state, Wisconsin, thought it necessary to provide expressly that interests can be re-recorded at any time, with the power to record being terminated only when a record owner in possession deals with a purchaser for value.[33]

A modification of the strict re-recordability requirements of the Indiana act is provided by the sections which state that provisions and limitations contained in the muniments of title of the record title owner will adequately protect all included interests.[34] This is important in two respects. First, it explains the failure of the legislature to enumerate remainders as being subject to extinguishment. For except in instances

32. State Bank v. Backus, 106 Ind. 682, 67 N.E. 512 (1903); Larrance v. Lewis, 51 Ind. App. 1, 98 N.E. 892 (1912).

33. WIS. STAT. § 330.15(1) (1949). An analogous problem is that of the effective period of a re-recorded claim. The Wisconsin Act is the only act that provides for successive re-recording: ". . . and like notices or instruments may thereafter be recorded with like effect before the expiration of each successive 30-year period." WIS. STAT. § 330.15(2) (1949). Such a construction is probably implicit in most of the acts. It should be remembered, however, that by only permitting a single re-recording, all interests would be required to vest in possession within one hundred years of creation. This construction could provide a solution to the ever-annoying problem of estates subject to forfeitures, though the limitations and conditions might be protected by the muniment provision. Such problems are without the scope of this note.

34. IND. ANN. STAT. §§ 2-628, 2-632 (Burns' Supp. 1951).

of erroneous or fraudulent recording, remainders will be protected by this provision. Since the possibility of erroneous or fraudulent recording exists, however, remainders must be re-recorded the same as any other interest. Second, the muniment provision provides a solution to the situation where one in possession sells but there is no recorded instrument within the prior fifty years. For example, suppose *A* has a life estate in Blackacre; in 1952 *B*, having no interest therein, enters upon Blackacre and takes possession; the last recorded instrument concerning Blackacre is dated 1895. *B* then conveys the fee to *C* for value. *B* of course had no legal interest in Blackacre; at most he was a tenant *per autre vie*. Here clearly the muniment provision would deny *B* the power to give legal title to *C* since the muniments of the record title owner (*A*) are required to be inspected by *C*.[35] It is a reasonable duty to require a purchaser to inspect the last recorded deed and take subject to the interests disclosed therein.

But though it is reasonable to compel a purchaser to inspect the last recorded instrument, it would be quite another matter to compel him to take the risk of the authenticity of what is recorded. Suppose *B*, possessing land adversely or having a limited interest therein, records a fictitious deed with himself as grantee of the fee. Unlike the situation under the traditional recording system, the fraudulent document could be perfectly consistent with all recorded documents under the protection of the re-recording acts. The inquiry thus posed is whether *B* would then be a fifty year record titleholder in possession with power to convey good title to a purchaser for value. If it were decided that a purchaser for value must bear the risks of recorded fictitious conveyances, alienability would be substantially decreased. Although the recording acts place the risks of fictitious deeds on a purchaser, failure to re-record introduces another fault element which proves decisive in shifting the risks from the purchaser to the party at fault.[36]

While in general there is little ground for objection to the re-recording acts, two provisions of the Indiana statute, possible sources

35. It is of course a reasonable duty to require a purchaser of realty to inspect at least the last recorded deed. *Cf.* MICH. COMP. LAWS § 565.102 (1948) which requires a continuing search back through the records if the instrument under which an owner claims is less than forty years of age. The search will not be terminated until a deed from an ancestor of the owner is found; intermediate inconsistent interests are fully protected since their recordation would prevent the purported owner from having an "unbroken chain of title."

36. Michigan has attempted to reduce the incidence of fraudulent re-recording by providing criminal penalties therefor. MICH. COMP. LAWS § 565.108 (1948). It should also be remembered that civil remedies, such as constructive trusteeships of money received, or tort actions for interference with contractual relations, would very often be available against the fraudulently recording party.

of criticism, should be carefully construed. (1) The possible destruction of contingent remainders before the remainderman is ascertainable; (2) The duty of a claimant to bring an action within a year of re-recording or be forever barred from asserting his claim.

The act grants no special protection to unascertainable contingent remaindermen. However, this should raise no serious objection; for an extension of re-recording time would not only decrease alienability of land, but would also afford more protection than has traditionally been granted these interests.[37] Legislatures have recognized that it is often desirable that unascertainable contingent remainders be subject to statutory destruction.[38] And while there are but few cases interpreting such statutes, the few have been well reasoned. Though unascertainable contingent remainders have been held to be "property,"[39] they can be statutorily destroyed[40] if someone is appointed by the court to plead the cause of the unascertainable remainderman.[41] In no cases have remainders with a substantial chance of vesting in interest been destroyed.[42] Under these decisions the relevant inquiry would be whether the provision in the Indiana act that claims of unascertained remaindermen could be filed by "any person" would be a sufficient protection of those interests. Taken in context of the statute, the provision is very reasonable and entirely adequate. When one considers how very few remainders of any type will be subject to destruction and how seldom will there be remainders which fail to vest in interest within fifty years of creation, it is obvious that cases where unascertainable interests are destroyed will be extremely few.[43] The same interest in alienability which nurtured the Rule Against Perpetuities would in effect establish a rephrasal of the Rule: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the

37. Though the terminology "unascertainable remaindermen" is used in the discussion, it should be noted that this also comprehends the problems of those who will take under executory limitations; they would not be available to re-record their interests before their claim vests in interest and possession.

38. MASS. ANN. LAWS c. 240, §§ 6, 8 (1933); MICH. COMP. LAWS § 703.12 (1948).

39. Aetna Life Ins. Co. v. Hoppin, 214 Fed. 928 (7th Cir. 1914); Cress v. Hammett, 144 Kan. 128, 58 P.2d 61 (1936).

40. Loring v. Hildreth, 170 Mass. 328, 49 N.E. 652 (1898); Mathews v. Lightner, 85 Minn. 333, 88 N.W. 992 (1902).

41. Copeland v. Wheelwright, 230 Mass. 131, 119 N.E. 667 (1918).

42. The only case found where it was held a contingent remainder could be destroyed without the court providing adequate representation for the interest of the unascertainable remainderman was reversed on appeal. McArthur v. Scott, 3 Fed. 313 (D.C. Cir. 1880), *rev'd*, 113 U.S. 340 (1885).

43. Thus it could well be that the protection given by the "any person" provision would be held unnecessary in those states which have not provided for re-recording by a third party.

interest,"[44] provided, however, that such interest will become void if not a matter of record within the fifty years prior to a purchase for value.

A more substantial and vexing problem is raised by the provision that a claimant must bring an action within a year after re-recording or his claim shall be completely barred and all rights under such notice shall terminate.[45] Only one of the other acts, Minnesota's, contained a similar provision; and that was promptly eliminated by amendment.[46] This provision, which either creates or accelerates controversies, is subject to four interpretations: (1) The claimant must bring an action of ejectment; (2) The claimant must bring an action of ejectment if he has a possessory interest; (3) The claimant must bring a quiet title action; (4) The claimant must bring a quiet title action if he had filed an interest unrecordable under the recording acts.

If an action of ejectment were required of all claimants, the result would be a legislative declaration that all land interests must vest in *possession* within fifty-one years of creation, subject to possible extension until there is a purchase for value. This considerable alteration of the 1945 Indiana Statute Against Perpetuities, while an extremely interesting theory, seems far in excess of the purpose of the re-recording acts. The acts are concerned with *alienability* of land, permitting a landowner to easily sell what he owns, rather than to change the rule as to what land interests may be created.

Another possible construction is that an action of ejectment must be commenced within one year if the claimant has a possessory interest at the time he re-records. This would have the effect of shortening the Statute of Limitations for ejectment in many cases.

The provision could be interpreted to require that a quiet title action be brought by *all* claimants upon re-recording. From the standpoint of fairness, such a requirement appears untenable. For the result would be a requirement that an action be brought to protect the interest of one already in the enjoyment of all he claims. How any useful purpose would be served is difficult to perceive. Moreover, for the same reason, such a provision could well be in conflict with the Natural Rights

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44. GRAY, RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

45. IND. ANN. STAT. § 2-631 (Burns' Supp. 1951). One mechanical problem immediately arises where the one re-recording takes by an instrument which also conveyed interests to other persons. Though these other interests have been re-recorded by reference, see *supra*, n.27 and text, the problem arises as to whether an "action" brought by the one re-recording satisfies the bring-an-action clause as to the other interests included in the original document.

46. Minn. Laws 1947, c. 118.

Clause of the Indiana Constitution[47] or the Fourteenth Amendment.[48] Recent Kansas[49] and Pennsylvania[50] cases have held unconstitutional similar statutory requirements. Since the social interest in alienability is adequately served by re-recording, the requirement of an action could thus prove an unwarranted interference with property.

The final interpretation of the bring-an-action requirement would be the most desirable. That is, whenever an interest unrecordable under the recording acts is filed, a quiet title action must be commenced by the claimant. In most instances, claims affected would be those acquired by prescription or adverse possession. Such interests are of course subject to (re)-recording within fifty years after acquisition; and a subsequent quiet title action would determine the bona fides of the claimant's interest. In such situations there should be no objection on grounds of fairness, for interests acquired adversely may remain uncertain in any event, until it is judicially recognized that the requisites for ownership have been met.[51] Of course, the outstanding weakness

47. IND. CONST. Art. I, § 1. It has been stated that: "The guarantee of natural rights, curtailed only to the extent to which the promotion of the public peace, safety, health or welfare *requires* has become the basic doctrine of Indiana constitutional law for the twentieth century." Paulsen, *Natural Rights—A Constitutional Doctrine in Indiana,* 25 IND. L.J. 123, 143 (1950) (italics supplied).

48. See Department of Insurance v. Schoonover, 225 Ind. 187, 72 N.E.2d 747 (1947). Long ago Judge Cooley stated that one in the enjoyment of all he claims cannot be required to bring an action to protect his interests. 2 COOLEY, CONSTITUTIONAL LIMITATIONS 763 (8th ed. 1927).

49. Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949). A statute provided that where a plat of an original town or addition thereto has been of record for over twenty-five years, deeds given by the person platting the same shall be conclusively presumed to have conveyed perfect title. The court said in part: ". . . since the involved statute has the effect of divesting the holder of a record fee simple title to land of his title and transferring it to another without regard to the possession and occupancy of the owner . . . unless his title is asserted in an action brought within one year from the date such statute took effect, we are constrained to hold it violates the due process clause of the federal constitution."

50. Girard Trust Company v. The Pennsylvania Railroad Co., 364 Pa. 576, 73 A.2d 371, 71 Pa. D. & C. 533 (1950). A statute provided that fifty years after ground rents or mortgages had been payable by a single payment, the same would be conclusively presumed to have been paid and discharged unless an action or proceeding shall have been instituted for the payment or collection of such charge. The lease under the ground rents had contained a clause by which the lessees could forever redeem all future rents by a fixed payment. The fixed sum was not paid and fifty years thereafter an action was commenced by the lessees to quiet title under provisions of the statute. The joined action was based upon an open end mortgage fifty years after its creation. In holding the statute unconstitutional the court said: "One of the most irreconcilable parts of this act . . . is that it requires parties to institute an action where no controversy exists. Suits must be instituted . . . where no defaults have occurred, where no cause of action has arisen, and where all parties are in agreement concerning the charge or obligation. . . ."

51. That title acquisition by adverse possession is predominantly based upon legislative toleration is indicated by a trend to the policy of requiring an adverse claimant to pay the taxes. See, *e.g.,* IND. STAT. ANN. § 3-1314 (Burns' Repl. 1946).

of this interpretation is that the claim need not be filed for at least fifty years subsequent to acquisition. For this reason, the provision perhaps would be of little effect.

None of these interpretations is satisfactory. The language of the provision clearly is inadequate to indicate a choice. And at least one construction would raise constitutional questions. The only solution is immediate clarification by the legislature in order to aid judicial construction.

The re-recording acts provide a desirable solution to the chronic problem of land alienability. As a supplement to the recording system, the statutes require that interests in land to be protected against extinguishment by a purchaser for value, must be a matter of record within a certain period prior to the purchase. Such legislation is, naturally, a valid exercise of the police power; the states' authority to regulate the holding of property by requiring timely recording has long been recognized.[52] The fairness and efficacy of the acts are remarkable: simple re-recording gives almost maximum protection to security of title, but immaterial and irrelevant data will no longer constitute a deterrent to land alienability.[53]