An exception to preserve health, whether achieved by statutory reform or judicial interpretation, is clearly desirable. It is not only sound from an ethical and medical viewpoint, but it is at the same time in keeping with existing mores. The distinction between saving the mother's life and preserving her health seems both tenuous and artificial. Not only is it frequently difficult to ascertain what constitutes a peril to life as opposed to impairment of health, but it is equally difficult to rationalize why one should be morally acceptable while the other is not. Therapeutic abortion as defined by the *Bourne Case* provides a flexible exception which can meet a variety of contingencies. With increasing knowledge in the field of mental health, it is apparent that an exception to preserve health would allow induced abortion for psychiatric indications as well as for preservation of physical health. The much discussed rape and insantity cases would thereby be provided for.

The high incidence of illegal abortion has had tragic consequences, but, unfortunately, resort to the legislative process is not an automatic panacea. Legal reforms which will immediately correct the evils of non-enforcement are so antagonistic to the basic purpose of the law as to be undesirable, while proposals such as expanded therapeutic exception, which are consistent with the underlying rationale of the law, will ameliorate the situation only slightly. Prosecutors should avail themselves of every opportunity to enforce existing laws, but success depends on the co-operation of the public, a factor over which the prosecutor has no control. The ability of the legislature to deal with the problem is similarly dependent on public opinion. The result of this anomalous situation is that the status quo will remain undisturbed until either public opinion becomes aroused sufficiently to enforce abortion laws, or existing mores change enough to make legalized abortion a legislative feasibility.

PROCEDURAL TECHNIQUES FOR BELATED ATTACKS ON JUDGMENTS IN INDIANA

It is one objective of our legal system to bring litigation to a timely and final conclusion. However, correction of unjust decisions cannot be completely subverted to the interest in finality. Some method must be devised which permits the courts to balance the interest in finality and that of correcting erroneous judgments. How great must be the hardship before the law will sacrifice finality to prevent injustice? Several factors must be weighed in making such a decision; the length of time

the judgment stands, possible injury to the prevailing party and third person, and culpability or negligence of the parties involved.

Relief from judgments, formerly supplied by ancillary common law and equitable writs, is now extensively controlled in Indiana by various statutes. The Federal Rules of Civil Procedure provide similar relief under Rule 60(b). The substantive content and procedural aspects of these available remedies may be determined only by considering an extensive array of case and statutory materials.

Mistake, Surprise, Inadvertence, or Excusable Neglect

In Indiana, a judgment may be set aside under Burns 2-1068 when taken against a party through mistake, surprise, inadvertence, or excusable neglect.[1] The majority of the cases decided under this statute are those seeking relief from default judgments, but the statute is also applicable to judgments rendered in litigated cases, although actions to set aside a judgment rendered in a litigated case rarely arise.[2] For example,

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1. "The court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, on complaint filed and notice issued, as in original actions within two [2] years from and after the date of judgment, except where judgment on default has been rendered in a suit to quiet title to real estate in which case the complaint for relief from judgment on default shall be filed within one [1] year from and after the date of judgment quieting title, and if the complaint is not filed within the period of time herein prescribed, then the action shall be forever barred; . . ." IND. ANN. STAT. § 2-1068 (Burns 1946).

This proceeding has been declared comparable to a motion for new trial. State *ex rel.* Krodel v. Gilkinson, 209 Ind. 213, 198 N.E. 323 (1935). While it has some characteristics of a motion for new trial, there are several material differences between the two remedies. Motion for new trial may raise questions of law and may determine questions arising out of the original cause. The complaint to vacate raises only questions of fact and is concerned only with matters not raised in the original cause. State *ex rel.* Beckham v. Vandeburgh Circuit Court, 233 Ind. 368, 119 N.E.2d 713 (1954).

Although notice is required, it may be waived. Flaherty v. Stalcup, 121 Ind. App. 659, 101 N.E.2d 820 (1951); Swartz v. Swartz, 121 Ind. App. 635, 101 N.E.2d 822 (1951); Gilmer v. Hurst, 117 Ind. App. 102, 69 N.E.2d 608 (1946).

Necessary parties to the action to set aside include those parties having a "unity of interest" in the action to vacate. It is not sufficient that the parties had identical interests in the subject matter of the original action, they must also have like interest in the relief sought in the proceedings to vacate. Thus, unity of interest includes an interest in both the subject matter of the original cause and in the relief demanded at the subsequent proceeding to vacate. See for example, Durre v. Brown, 7 Ind. App. 127, 34 N.E. 579 (1893), where the original judgment was rendered by default against two parties, one party sought relief under Burns 2-1068. Applicant alleged that she was so ill at the time the summons was read to her, that she could not understand its import and did not know that she was a defendant in the original action. Thus the subject matter of the action to set aside is the applicant's excusable neglect due to illness. The other defendant against whom the judgment was rendered was not ill and had no reason to contend that the judgment against him should be set aside beeause of the applicant's illness. Therefore, there was not unity of interest between the original defendants in the subsequent suit to vacate.

2. Globe Mining Co. v. Oak Ridge Coal Co., 204 Ind. 11, 177 N.E. 868 (1932); Syfers v. Keiser, 31 Ind. App. 6, 66 N.E. 1021 (1903).

This statute relates only to civil actions. It does not apply to special proceedings

where a litigant was deprived of his right to a motion for new trial and appeal because of the judge's failure to notify the applicant's attorney, after agreeing to do so, that he was handing down the judgment, the judgment was vacated.[3] Non-appearance is the chief cause that motivates application for relief under this statute. However, the problem involved in this section is in determining whether the specific circumstances which combined to result in non-appearance, or in some other cause, are such as the court will denominate mistake, surprise, inadvertence, or excusable neglect.

What constitutes mistake, surprise, inadvertence, or excusable neglect is a question of fact to be determined by the trial court.[4] The trial court is accorded a wide area of discretion, and as a result there are few fixed rules available to guide the researching attorney in determining whether his facts constitute grounds for relief under this statute. This is exemplified in the case of *First Nat'l. Bank v. Stillwell,*[5] where the court said, "No rule can be fixed by which to determine in all cases whether the neglect is excusable, or whether the proper degree of diligence has been exercised. Each case must depend on its own particular facts and circumstances, and can seldom serve as precedent for another case depending on different facts."

A survey of the cases in search of what constitutes excusable neglect, etc., avails little. The only rules capable of formulation are broad, general ones and the results within these rules fluctuate with the changing of seemingly insignificant facts. Generally, when a settlement is made between the parties, failure to appear and defend is excusable neglect.[6] For example, the opposing attorneys in one case reached a definite agreement of compromise after the complaint had been filed, and the plaintiff's attorney agreed not to take a default judgment but to have the case dismissed. The defendant's attorney relied on these promises and failed to appear; the plaintiff's attorney allowed a default judgment to be entered against the defendant. Relief from the default judgment was granted.[7] But when one party agrees to ignore an order of the court

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unless they are made applicable by special authorizing statute. Thus, it is not applicable to findings of the Industrial Board. Jefferson Hotel Co. v. Young, 70 Ind. App. 172, 121 N.E. 94 (1918).

3. Globe Mining Co. v. Oak Ridge Coal Co., *supra* note 2. *Contra,* Stampfer v. Peter Hand Brewing Co., 67 Ind. App. 485, 118 N.E. 138 (1917).

4. Hoag v. Jeffers, 201 Ind. 249, 159 N.E. 753 (1929); United Taxi Co. v. Dilworth, 106 Ind. App. 627, 20 N.E.2d 699 (1939).

5. 50 Ind. App. 226, 231, 98 N.E. 151, 152 (1912).

6. McGaughey v. Woods, 92 Ind. 296 (1883); Dallin v. McIvor, 12 Ind. App. 150, 39 N.E. 765 (1894); Hoag v. Old People's Mut. Benefit Soc'y, 1 Ind. App. 28, 27 N.E. 438 (1890); *accord,* Nord v. Marty, 56 Ind. 531 (1877); Riddle v. McNaughton, 88 Ind. App. 352, 163 N.E. 846 (1928); Dennis v. Scanlon 66 Ind. App. 453, 118 N.E. 370 (1918).

7. Hoag v. Old People's Mut. Benefit Soc'y, *supra* note 6.

and suffers a default as a result, it is not excusable neglect. In one such case the applicant's attorney attempted to avoid compliance with an order of the court to answer by a certain date. The opposing attorneys agreed that the applicant could take additional time in complying with the rule to answer, the rule having been previously obtained by the adverse party. The default taken because of non-compliance with the rule to answer was not set aside.[8]

Void judgments may be successfully attacked under these proceedings.[9] This is not an attack on the court's jurisdiction, but is based on the sound premise that non-appearance is excusable when no notice is received.[10] Likewise, where the judgment is not void, but where the defendant receives no actual notice and has no knowledge of the summons, the cause is brought within the purview of the statute.[11]

Failure of an attorney to appear without excuse is not grounds for setting aside a judgment under these proceedings.[12] But relief has been granted where the excuse was weak. For example, when the applicant's attorney told him not to appear until he was notified by the attorney, and the attorney later "became very busy" and forgot to file answers, thereby causing a default judgment to be entered, relief was granted.[13] Other cases have not been so lenient in vacating judgments taken through the mistakes of attorneys.[14] For example, an attorney was retained to litigate a case in another county. He wrote the clerk of the court requesting that his client's appearance be entered, but his stenographer inadvertently omitted this request from the letter. Later, he dictated a letter to an attorney in the town where the trial was to be held requesting legal representation for his client. This letter was not written through an oversight of his stenographer. The attorney was then called out of town and upon his return, he learned that default judgment had been entered against his client. This was held not to amount to excusable neglect, etc.[15]

Some acts of third persons have constituted valid grounds for relief. Where the applicant relied on his co-defendant's promise to obtain coun-

8. Daub v. Van Lundy, 67 Ind. App. 468, 118 N.E. 140 (1917).
9. Houk v. Barthold, 73 Ind. 21 (1880).
10. See Houk v. Barthold, note 9 *supra*.
11. Indiana v. Stultz, 208 Ind. 543, 196 N.E. 873 (1935); Indiana Travelers' Acc. Ass'n v. Doherty, 70 Ind. App. 214, 123 N.E. 242 (1918); Kolb v. Raisnor, 17 Ind. App. 551, 47 N.E. 177 (1897).
12. Rastovaski v. Betz, 91 Ind. App. 5, 169 N.E. 926 (1930); Smith v. Heyns, 78 Ind. App. 565, 136 N.E. 563 (1922).
13. Anderson v. Leonard, 51 Ind. App. 14, 98 N.E. 891 (1912); *accord,* Masten v. Indiana Car and Foundry Co., 25 Ind. App. 175, 57 N.E. 148 (1900).
14. Kreite v. Kreite, 93 Ind. 583 (1883); Houser v. Laughlin, 55 Ind. App. 563, 104 N.E. 309 (1913); Masten v. Indiana Car and Foundry Co., note 13 *supra;* Baltimore & O. & C. Ry. v. Flinn, 2 Ind. App. 55, 28 N.E. 201 (1891).
15. Mut. Reserve Life Ins. Co. v. Ross, 42 Ind. App. 621, 86 N.E. 506 (1908).

sel and defend the suit for both parties, but the co-defendant neglected to inform the attorney that he was also to defend the applicant, and the applicant was defaulted, relief was granted.[16] Also where the applicant's husband paid the plaintiff's attorney sums due on a street assessment lien, but the attorney inadvertently failed to note the payment and the applicant believed that the assessment had been paid until after the redemption period had expired, a decree which executed a deed to the plaintiff as a result of a sheriff's sale was set aside under Burns 2-1068.[17] However, all mistakes of third persons are not cause for vacating judgment. Reliance upon the promise of the clerk of the court to keep the applicant advised of all developments in the pending case which results in default through an error of the clerk is not grounds for relief under this statute.[18] One cannot on the advice of his own attorney refuse to appear and then utilize reliance upon this advice to obtain a vacation of judgment.[19] Nor can a defendant rely on erroneous advice of a sheriff[20] or the plaintiff's attorney[21] and obtain relief on these grounds.

Illness of a litigant has been held to constitute excusable neglect within the meaning of the statute.[22] For example, where the applicant was ill and unable to leave home, relief was granted, although she could have engaged counsel through her husband who was not ill.[23] However, relief was denied when the defendant's nine month old child became so ill as to require her constant attention and the applicant depended upon her husband to arrange for her defense, which he neglected to do.[24] It seems well settled that insanity on the part of the applicant at the time the judgment is rendered against him, when he is not represented by guardian, amounts to excusable neglect.[25]

Ignorance of the litigant has been held grounds for relief under the statute.[26] Where a German woman, barely able to speak or understand English, was served with summons but failed to understand its import,

16. Neat v. Topp, 49 Ind. App. 512, 97 N.E. 578 (1912).
17. Richcreek v. Russell, 34 Ind. App. 217, 72 N.E. 617 (1904); *accord,* Hunter v. Francis, 56 Ind. 460 (1877).
18. Western Union Tel. Co. v. Griffin, 1 Ind. App. 46, 27 N.E. 113 (1890).
19. Lowe v. Hamilton, 132 Ind. 426, 31 N.E. 1117 (1892).
20. Bowen v. Bragunier, 88 Ind. 558 (1883).
21. Snipes v. Jones, 59 Ind. 251 (1877).
22. Comstock v. Whitworth, 75 Ind. 129 (1881); Ziegler v. Funkhauser, 42 Ind. App. 428, 85 N.E. 984 (1908).
23. Comstock v. Whitworth, *supra* note 22.
24. Schlemmer v. Rossler, 59 Ind. 326 (1877).
25. McClain v. Davis, 77 Ind. 419 (1881); Judd v. Gray, 156 Ind. 278, 286, 59 N.E. 849, 851 (1901); Dickerson v. Davis, 111 Ind. 433, 12 N.E. 145 (1887).
26. Thompson v. Herlow, 150 Ind. 450, 50 N.E. 474 (1898); Adams v. Citizens State Bank, 70 Ind. 89 (1880).

relief was granted.[27] But where another German woman who was barely able to speak or understand English was defaulted because a cross-complaint was filed after the parties had reached an agreement in open court and her attorney had withdrawn, it was held not to amount to excusable neglect.[28] The decision was not predicated on the error of the attorney in premature withdrawal, but upon the litigant's error of law, her failure to seek legal advice and her reliance upon those who were no better informed than she.

It is seen that conflicting and often irreconcilable results arise under Burns 2-1068. This emphasizes the extreme importance of the surrounding circumstances of the particular case. The general areas outlined above must therefore be considered as merely examples, not definitive rules. Thus precedent cannot be relied upon too heavily, but situations may arise where the particular facts in question will be closely analogous to one or more of the decided cases.

Judicial error is generally not grounds for relief under the statute.[29] But a distinction is made in the cases between clerical errors, those which were not a result of the exercise of the judgment of the court;[30] and judicial errors, rulings on points of law and special findings of fact which are a consequence of judgment exercised by the court.[31] Clerical error is a proper ground for relief,[32] but judicial error is not.[33]

Mistakes of law committed by the litigant or his attorney are not grounds for relief under the statute.[34] But in practice the rule is of doubtful utility because mistakes of law and fact are often so similar as to be practically indistinguishable.[35] Thus, the problem becomes one of categorization, and in close cases the term mistake of law is merely a label applied by the court to reach a result and is of little value as a legal standard. However, it is clear that a litigant is not excused from informing himself of his legal rights, and a party who suffers a default

27. Thompson v. Herlow, *supra* note 26.

28. Nash v. Cars, 92 Ind. 216 (1883).

29. Center Township v. Bd. of Comm'rs, 110 Ind. 579, 10 N.E. 291 (1886); Lawler v. Couch, 80 Ind. 369 (1881); Colvert v. Colvert, 95 Ind. App. 325, 180 N.E. 192 (1932).

30. Globe Mining Co. v. Oak Ridge Coal Co., 204 Ind. 11, 177 N.E. 868 (1932). See 1 FREEMAN, JUDGMENTS § 220 (5th ed. 1925). See note 3 *supra* and accompanying text.

31. Lawler v. Couch, 80 Ind. 369 (1881). See 1 FREEMAN, JUDGMENTS § 221 (5th ed. 1925).

32. Globe Mining Co. v. Oak Ridge Coal Co. 204 Ind. 11, 177 N.E. 868 (1932).

33. See note 29 *supra*.

34. Carty v. Toro, 223 Ind. 1, 57 N.E.2d 434 (1944); Thompson v. Herlow, 150 Ind. 450, 50 N.E. 474 (1898); Thacker v. Thacker, 125 Ind. 489, 25 N.E. 595 (1890).

Certainly the wisdom of such a rule cannot be challenged. One who mistakes his legal rights ought not be allowed another opportunity. A different rule would represent too great a threat to finality.

35. See notes 27 and 28 *supra* and accompanying text.

judgment, mistakenly believing he has no defense, cannot be relieved.[36] Applicability of this rule has been limited to mistakes concerning legal rights or defenses the applicant knew, or should have known, existed.[37] If the facts which constituted the defense were known but not believed to be a defense it is a mistake of law. But where the facts were unknown and are later discovered it is not a mistake of law and relief may be allowed.

Although the discovery of new evidence is generally held not proper grounds for relief under Burns 2-1068,[38] such new evidence has been admitted to establish a mistake of fact sufficient to allow relief under this statute. For example, in an original suit to quiet title, the plaintiff had been a tenant by the entirety with her deceased husband. Defendants were children of the deceased by a former marriage. The defendants did not contest the suit because of the apparent legal right of the plaintiff. After judgment had been rendered, it was discovered that the plaintiff had been married at the time she married the defendants' father. The court set aside the judgment under Burns 2-1068.[39] The facts of this case clearly indicate that this was newly discovered evidence, or material new matter, the proper remedy being review of judgment or complaint for a new trial. However, a valid claim was upheld in spite of the technical error, and justice was done by overlooking mistakes in form.

This case does manifest one of the major advantages of Rule 60(b) over the Indiana system. One seeking relief under Rule 60(b) need not select the exact ground upon which the relief is sought. It is sufficient if the facts constitute grounds for relief under any one of the six causes set out in Rule 60(b). Therefore, an action cannot fail because of the applicant's error in selecting the wrong form. While the illustrated case reached the right result, there are cases in Indiana that deny relief because it was sought by an improper remedy.[40]

The complaint, under Burns 2-1068, must allege: (1) the nature of the original cause of action;[41] (2) a meritorious defense;[42] and (3) facts

36. Thacker v. Thacker, 125 Ind. 489, 25 N.E. 595 (1890).
37. Wellinger v. Wellinger, 39 Ind. App. 60, 79 N.E. 214 (1906).
38. Hobbs v. Bd. of Comm'rs, 122 Ind. 180, 23 N.E. 714 (1889).
39. See note 37 *supra.*
40. See Hoag v. Jeffers 201 Ind. 249, 159 N.E. 753 (1929); Ross v. Banta, 140 Ind. 120, 34 N.E. 865 (1895); Ervin School Township v. Tapp. 121 Ind. 463, 23 N.E. 505 (1889); Masten v. Indiana Car and Foundry Co., 25 Ind. App. 175, 57 N.E. 148 (1900). *But see* Michener v. Springfield Engine and Thresher Co., 142 Ind. 130, 40 N.E. 679 (1895).
41. Hall v. Durham, 116 Ind. 198, 18 N.E. 181 (1888).
42. Becker v. Tell City Bank, 142 Ind. 99 (1895); Swartz v. Swartz, 121 Ind. App. 635, 101 N.E.2d 822 (1951); Graves v. Kelly, 62 Ind. App. 164 (1916). As applied to plaintiffs, the rule is that a valid cause of action must be alleged. Williams v. Kessler, 82 Ind. 183 (1882). The rationale of this requirement is that courts should not be re-

showing mistake, surprise, inadvertence, or excusable neglect.[43] The action is in the nature of a new proceeding, but where relief is erroneously pursued by motion, the technical error has been overlooked if the adverse party received proper notice.[44] The allegation must factually set out a meritorious defense supported by affidavit,[45] but counter-affidavits are inadmissible on this point.[46] However, where the defense has already been made no meritorious defense need be alleged.[47] The requisite of establishing surprise, mistake, excusable neglect or inadvertence points up the primary objective of the litigation. Both parties may submit evidence on this issue by oral testimony, affidavit, or deposition.[48] The burden of proving the facts is on the party seeking relief;[49] however, any doubt as to whether the proven facts constitute excusable grounds for

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quired to do a useless thing. If the applicant has no valid defense (or cause of action), then a vacation of the judgment and a subsequent trial on the merits would serve no purpose.

43. Rooker v. Bruce, 171 Ind. 86, 85 N.E. 351 (1908); Swartz v. Swartz, 121 Ind. App. 635, 101 N.E.2d 822 (1951).

44. Gilmer v. Hurst, 117 Ind. App. 102, 69 N.E.2d (1946); Isaacs v. Fletcher Am. Nat'l Bank, 98 Ind. App. 111, 185 N.E. 154 (1933); Indiana Travelers' Acc. Ass'n v. Doherty, 70 Ind. App. 214, 123 N.E. 242 (1918). In this situation, the court looks through an error in form to reach the substance. The proceedings are summary in nature, requiring no formal pleading beyond the complaint of the party seeking relief. Graves v. Kelly, 62 Ind. App. 164, 112 N.E. 899 (1916). The court has an imperative duty to set aside the judgment when it appears from the facts alleged and proved that the applicant had the judgment taken against him through his mistake, surprise, excusable neglect or inadvertence. Indiana Travelers' Acc. Ass'n v. Doherty, *supra;* Daub v. Van Lundy, 67 Ind. App. 468, 118 N.E. 140 (1917). A ruling of the court denying relief under this statute is an absolute bar to another proceeding for the same purpose. Moore v. Horner, 146 Ind. 287 (1896). The action is tried without a jury. State *ex rel.* Hobbs v. Claycombe, 233 Ind. 247, 118 N.E.2d 489 (1954); and before the same court that rendered judgment in the original cause. State *ex rel.* Beckham v. Vandeburgh Circuit Court, 233 Ind. 368, 119 N.E.2d 813 (1954); Christ v. Jovanoff, 84 Ind. App. 676, 151 N.E. 26 (1925). No change of venue may be taken, but a change of judge is proper. State *ex rel.* Beckham v. Vandeburgh Circuit Court, *supra;* State *ex rel.* Hobbs v. Claycombe, *supra;* State *ex rel.* Krodel v. Gilkinson, 209 Ind. 213, 198 N.E. 323 (1935).

45. Lake v. Jones, 49 Ind. 297 (1874); Roy v. Scales, 77 Ind. App. 619, 133 N.E. 924 (1921). Affidavits not referred to in the complaint and which do not refer to the complaint or show by whom the affidavit was filed, will not be considered part of the complaint and therefore fail to meet this requirement. Parker v. Indianapolis Nat'l Bank, 1 Ind. App. 462, 27 N.E. 650 (1890). Alleging that one is not a member of a firm that was sued on a promissory note is a meritorious defense. Bristor v. Galvin, 62 Ind. 352 (1878). But merely alleging that the applicant has a meritorious defense and that, if the judgment is set aside, he would appear at the trial and prove that the judgment plaintiff had not been damaged as was alleged, does not meet the requirement of alleging a meritorious defense. Roy v. Scales, *supra.*

46. Bristor v. Galvin, *supra* note 45. Haas v. Schrum, 72 Ind. App. 381, 124 N.E. 761 (1919). The admission of counter-affidavits on the issue of a meritorious defense would place the merits of the case in issue. This would result in a trial on the merits before the court has determined whether one is warranted. Lake v. Jones, 49 Ind. 297 (1874).

47. Globe Mining Co. v. Oak Ridge Coal Co., 204 Ind. 11, 177 N.E. 868 (1932).

48. Lake v. Jones, 49 Ind. 297 (1874).

49. Carty v. Toro, 223 Ind. 1, 57 N.E.2d 434 (1944).

relief should be resolved in favor of the applicant since the statute is remedial in nature and its terms should be liberally construed.[50]

In addition to the fixed time requisite, diligence is also required. An applicant must act with due diligence in asserting a timely request for relief.[51] While the diligence requirement might also be imposed on an applicant to assure seasonable discovery of the excusable neglect, no cases have been discovered confirming this point.[52] Reasonable diligence is a question of fact to be determined by the court[53] and smacks of the doctrine of laches. The courts have also imposed another requirement of diligence on the applicant; he must act diligently in seeking to prevent rendition of the original judgment.[54] Diligence, used in this sense, is not a time limit but a component of the type of conduct required by the court before the neglect is considered excusable. The words excusable neglect, surprise, mistake, or inadvertence connote a degree of negligence, while reasonable diligence implies that the applicant acted without fault. The interposition of the requirement of diligence in this respect seems to represent not a fixed rule but an attitude of the courts. This requirement cannot be literally construed in light of the decided cases.[55] It is submitted that it is merely a reminder that, while the statute authorizing vacation of judgments taken through excusable neglect is a remedial one, the interest of finality is to be highly regarded and not readily subverted.

A decision vacating a judgment is not a final judgment from which an appeal will lie.[56] Nor can such a holding be assigned as error on a motion for new trial following the hearing on the merits, unless it is shown that the alleged error resulted in prejudice to the former judgment holder at the subsequent trial on the merits.[57] But a decision refusing to

50. Indiana Travelers' Acc. Ass'n v. Doherty, 70 Ind. App. 214, 123 N.E. 242 (1918); Neat v. Topp, 49 Ind. App. 512, 97 N.E. 578 (1912).

51. Ammerman v. State *ex rel.* Wasson, 98 Ind. 165 (1884); Birch v. Frantz, 77 Ind. 199 (1881); Dausman v. Dausman, 110 Ind. App. 238, 33 N.E.2d 775 (1941).

52. In many situations this phase would be non-existent, as in the case where a non-default judgment is taken through excusable neglect, etc., or where execution is levied on a default judgment immediately. But it is submitted that a judgment could go undiscovered for months, and if the losing party, through the exercise of reasonable diligence, could have earlier discovered the existence of the judgment, it is doubtful that the court would grant relief.

53. First Nat'l Bank v. Stillwell, 50 Ind. App. 227, 98 N.E. 151 (1912).

54. Moore v. Horner, 146 Ind. 287, 45 N.E. 341 (1896); Delewski v. Delewski, 76 Ind. App. 44, 131 N.E. 229 (1921); Houser v. Laughlin, 55 Ind. App. 563, 104 N.E. 309 (1913).

55. See notes 6 through 28 *supra* and accompanying text.

56. Woddard v. Killen, 196 Ind. 570, 148 N.E. 195 (1925); Staggs v. Wright, 118 Ind. App. 247, 76 N.E.2d 588 (1948); Heck v. Wayman, 94 Ind. App. 74, 179 N.E. 785 (1932). It is questionable whether a judgment holder should be required to bear the expense, delay and inconvenience of a new trial if the new trial was erroneously granted.

57. Oil Express, Inc. v. Mid-States Freight Lines, Inc., 124 Ind. App. 243, 116 N.E.2d 531 (1954).

set the judgment aside is a final judgment from which an appeal lies.[58] The appellate court will uphold the findings of the trial court unless there is an abuse of discretion.[59] The appellate court is indeed reluctant to find abuse of discretion, and leaves a wide area open to the trial court in which it is free to decide either way.[60] Therefore, except in the most clear abuse of discretion, appeal is futile. The appellate court is more reluctant to interfere when the judgment has been set aside and the cause heard on the merits than when the former judgment is not disturbed.[61]

Federal Rule 60(b)(1) is the comparable section under the Federal Rules.[62] Neither the Federal Rules nor the Indiana statute is restricted to default judgments.[63] Both have essentially the same requirements of alleging a meritorious defense[64] and introducing facts amounting to excusable neglect, etc.[65] The Indiana statute expressly provides that the judgment must be "taken against him" before relief can be granted, so in absence of any precedent it must be concluded that Burns 2-1068 is not available to prevailing parties.[66] This phrase was deleted from Rule 60(b)(1) by a 1946 amendment to provide for situations where the prevailing party was not accorded adequate relief.[67] In this respect, the Federal Rule is superior to the Indiana rule. Another distinction is in the inclusion of the word "his" in the Indiana statute[68] and its absence from Rule 60(b)(1).[69] A literal application of the Indiana statute would limit relief to cases where the mistake, excusable neglect, surprise, or inadvertence was that of the litigant. But the cases have generally ignored this restriction or have given it a broad construction.[70]

Federal Rule 60(b)(1) must be invoked within one year from the

58. Heck v. Wayman, 94 Ind. App. 74, 179 N.E. 785 (1932).

59. United States Fidelity and Guaranty Co. v. Poetker, 180 Ind. 255, 102 N.E. 372 (1913); Delewski v. Delewski, 76 Ind. App. 44, 131 N.E. 229 (1921); Masten v. Indiana Car and Foundry Co., 25 Ind. App. 175, 57 N.E. 148 (1900).

60. See Hoag v. Jeffers, 201 Ind. 249, 159 N.E. 753 (1929); Neat v. Topp. 49 Ind. App. 512, 97 N.E. 578 (1911); Comstock v. Whitworth, 75 Ind. 129 (1881); Ayrshire Coal Co. v. Thurman, 73 Ind. App. 578, 127 N.E. 810 (1920).

61. Winer v. Mast, 146 Ind. 77, 45 N.E. 66 (1896); Neat v. Topp, *supra* note 60.

62. 7 MOORE, FEDERAL PRACTICE § 60.22 (2d ed. 1955).

63. Fleming v. Huebsch Laundry Corp., 159 F.2d 581 (7th Cir. 1947). See note 2 *supra* and accompanying text.

64. Fernow v. Gubser, 136 F.2d 971 (10th Cr. 1943); Sebastiano v. United States, 103 F. Supp. 278 (N.D. Ohio 1951); Bowles v. Branick, 66 F. Supp. 557 (W.D. Mo. 1946). See note 42 *supra* and accompanying text.

65. Bowles v. Branick, 66 F. Supp. 557 (W.D. Mo. 1946). See note 43 *supra* and accompanying text.

66. See note 1 *supra*. *But see* IND. ANN. STAT. § 2-2406 (Burns 1946).

67. 7 MOORE, FEDERAL PRACTICE, § 60.22 [1] (2d ed. 1955).

68. See note 1 *supra*.

69. 7 MOORE, FEDERAL PRACTICE § 60.22 [1] (2d ed. 1955).

70. See notes 13 through 18 *supra* and accompanying text.

date of judgment,[71] while Burns 2-1068 allows proceedings within two years.[72] Both are subject to the additional requirement that an action must be brought within reasonable time after discovery of the mistake,[73] both allow appeal from a judgment refusing to set aside the original judgment[74] and deny appeal when the judgment is vacated.[75] Both permit reversal on matters of fact only where there has been abuse of discretion.[76] Procedural formalities are similar under the two remedies and, except as to prevailing parties, the substantive relief is identical. Allowances must be made for factual interpretation, and differences will arise in a few situations, but for the most part the two jurisdictions reach similar results. Because the two remedies are so similar, it must be concluded that the Indiana statute, in permitting application for relief for twice the time allowed under Federal Rule 60(b)(1), places greater emphasis on the interest in correcting erroneous judgments.

The rules governing the applicability of Burns 2-1068 are aimed at granting relief liberally.[77] The statute is clearly intended to preserve finality while eliminating the hardships of unfair judgments. The nature of the remedy requires that its effectiveness depend to a great extent upon the discretion of the trial court. No rule requiring liberal construction of the statute[78] or requiring doubt to be resolved in favor of a trial on the merits[79] can itself determine what is excusable neglect, etc. These rules are an aid, but the ultimate decision must necessarily lie with the trial judge. This feature of the remedy naturally causes occasional undesirable results and inconsistencies. Here the fault is not in the statute but in the attitude of the trial courts. Some Indiana courts demand that an applicant must exercise due diligence in seeking to prevent rendition of the original judgment. While not condoning vacation of judgments where the applicant acted with gross carelessness, it is submitted that some Indiana courts have so strictly applied this aspect of diligence that, had it been complied with, there would have been no necessity for an

71. FED. R. CIV. P. 60 (b).
72. See note 1 *supra*.
73. FED. R. CIV. P. 60(b). See note 52 *supra* and accompanying text.
74. Cromelin v. Markwalter, 181 F.2d 948 (5th Cir. 1950). See note 58 *supra* and accompanying text.
75. United States v. Agne, 161 F.2d 331 (3d Cir. 1947). See note 56 *supra* and accompanying text.
76. Independence Lead Mines Co. v. Kingsbury, 175 F.2d 983 (9th Cir. 1949). See note 59 *supra* and accompanying text.
77. Neat v. Topp, 49 Ind. App. 512, 97 N.E. 578 (1912); Ziegler v. Funkhouser, 42 Ind. App. 428, 85 N.E. 984 (1908).
78. See note 50 *supra*.
79. *Ibid.*

action to vacate.[80] Some courts have thus corrupted a fair and workable rule by imposing a gloss on the statute.

Relief Where Defendant Had No Notice Other Than By Publication

By statute Indiana provides that a defendant to an action in which notice was given by publication only may, within five years,[81] have a default judgment opened as a matter of right. If the applicant complies with the statutory provisions, he leaves the court with no discretion and the judgment must be vacated.[82] If the proceedings are instituted after the expiration of the term in which the judgment was rendered, the action is an independent proceeding.[83] The applicant must give notice to the original parties or their successors and file a full answer to the original complaint with an affidavit stating that no actual notice was received in time to allow appearance in court.[84] The complaint must show that the original plaintiff received actual notice of the present action within five years of the original judgment.[85] The proceedings must be instituted in the same court in which the original judgment was rendered.[86] This means of opening judgment unlike others, does not require the defendant to show that the original judgment was erroneous.[87] Legal disabilities do not extend the time allotted for re-opening the judgment

80. Houser v. Laughlin, 55 Ind. App. 563, 104 N.E. 309 (1913). See notes 15 and 28 *supra* and accompanying text.

81. "Parties against whom a judgment has been rendered without other notice than the publication in a newspaper as herein required, except in cases of divorce, may, at any time within five [5] years after the rendition of the judgment, have the same opened, and be allowed to defend." IND. ANN. STAT. § 2-2601 (Burns 1946). See IND. ANN. STAT. § 2-2602 and 2-2603 (1946). The statute is remedial in nature and must be liberally construed. Padol v. Home Bank and Trust Co., 108 Ind. App. 401, 27 N.E.2d 917 (1940).

82. Padol v. Home Bank and Trust Co., *supra* note 81.

83. Padol v. Home Bank and Trust Co., 108 Ind. App. 401, 405, 23 N.E.2d 917, 919 (1940).

84. IND. ANN. STAT. § 2-2602 (Burns 1946). This section requires an affidavit stating that during the pendency of the action the applicant received no actual notice in time to appear in court and object to the action. However, the required affidavit need not be sworn to by the applicant. Anyone who submits such an affidavit fulfills the requirement. Padol v. Home Bank and Trust Co., *supra* note 81. The applicant is required to file a "full answer to the original complaint" before the judgment will be vacated. The rationale of this requisite is the prevention of further delay. However, an answer filed at the time of vacation of the judgment meets this requirement. Bryant v. Richardson, 126 Ind. 145, 75 N.E. 807 (1890). While the court appears to have violated the literal meaning of the statute, it allowed the cause to be heard on the merits and still complied with the policy of preventing further delay.

85. Young v. Foster, 58 Ind. App. 253, 104 N.E. 769 (1915). This unusual method of computing time is occasioned by a jurisdictional requirement. Thus, even the original plaintiff's appearance after five years would not waive the notice requirements because the court loses jurisdiction under the statute after five years if all statutory requirements have not been complied with.

86. Padol v. Home Bank and Trust Co., 108 Ind. App. 401, 27 N.E.2d 917 (1940).

87. *Id.* at 405, 27 N.E.2d at 919.

under this section.[88] If relief is unavailable under this section because a legal disability has extended the time beyond five years, the proper remedy is Burns 2-1068.[89]

Federal Rule 60(b) contains no comparable provision. A possible explanation for its absence is that there is no general authorization of notice by publication under the Federal Rules.[90] Notice by publication is available under certain specified actions,[91] and in comparing these to the Indiana rule, it is clear that the Indiana statute places greater emphasis on the interest in correcting erroneous judgments.

Complaint For New Trial

In the complaint for new trial, Indiana offers additional statutory machinery for opening judgments.[92] To be successful, this must: (1) show that it was filed within a year from the date of the judgment;[93] (2) allege that the complaint was filed not later than the second term after discovery of the cause for new trial;[94] (3) state facts which show the causes for new trial could not have been discovered by the use of due diligence in time to file a motion for new trial;[95] (4) set out the issues and the evidence given in the former trial;[96] and (5) state what the newly discovered evidence is and show its materiality.[97]

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88. Hollenback v. Poston, 34 Ind. App. 481, 73 N.E. 162 (1904).

89. See note 11 *supra* and accompanying text.

90. But FED. R. CIV. P. 4(b)(7) may provide for such service in that it legalizes any method of service of summons in force in the state in which the service is made.

91. 62 STAT. 944 (1948), 28 U.S.C. § 1655 (1952). Judgment may be re-opened within one year.

92. "Where causes for a new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by a complaint filed with the clerk, not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court upon the evidence produced by the parties. But no such application shall be made more than one [1] year after the final judgment was rendered." IND. ANN. STAT. § 2-2405 (Burns 1946).

Divorce decrees may not be attacked under this section. Powell v. Powell, 104 Ind. 18, 3 N.E. 639 (1885). Divorce decrees entered when notice is given by publications are dealt with by a separate statute. The time limit for re-opening divorce decrees is two years. IND. ANN. STAT. § 3-1224 (Burns 1946). Partition proceedings are also dealt with by separate statute. Here the time limit is one year. IND. ANN. STAT. § 3-2425 (Burns 1946). The brief time limit is probably based on a consideration of marketability and security of land titles.

93. Hiatt v. Ballinger, 59 Ind. 303 (1877); McKernan v. Estabrook, 66 Ind. App. 212, 115 N.E. 956 (1917).

94. McKernan v. Estabrook, *supra* note 93.

95. McKernan v. Estabrook, *supra* note 93; Anderson v. Hathaway, 130 Ind. 528, 30 N.E. 638 (1891).

96. Hines v. Driver, 100 Ind. 315 (1885); Carver v. Compton, 51 Ind. 451 (1875).

97. Anderson v. Hathaway, 130 Ind. 528, 30 N.E. 638 (1891); Hines v. Driver, 100 Ind. 315 (1885). Where the complaint is initiated by more than one party, all material

Complaint for new trial is a new and independent action[98] which lies for the same causes that would warrant granting a motion for new trial[99] and is tried summarily without a jury.[100] It may not be initiated within the thirty day period allowed for the filing of a motion for a new trial.[101] The complaint must be filed in the court that rendered the original judgment[102] and, when possible, heard by the same judge.[103] All parties to the original action must be made parties to the subsequent complaint for new trial.[104]

The chief and perhaps only causes for granting relief on a complaint for new trial are newly discovered evidence and misconduct of the jury or prevailing party.[105] Where the judgment is taken by default, complaint for new trial is an improper remedy.[106] The applicant should introduce in evidence the testimony heard at the former trial.[107] It is not necessary that the court find an absolute defense; it is sufficient if the newly discovered evidence be of such nature that it will probably produce a different result if a new trial is granted.[108] The newly discovered evidence must not be merely cumulative nor impeaching in nature.[109] After the complaint has been found sufficient, the evidence may be heard by parol.[110] Misconduct of the jury or prevailing party includes fraud

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allegations must be shown as to both parties or the entire complaint is insufficient. Bertram v. State *ex rel.* Lowell Dredge Co., 32 Ind. App. 199, 69 N.E. 479 (1903).

98. Jones v. Kolman, 50 Ind. App. 158, 98 N.E. 74 (1911). IND. ANN. STAT. § 2-2405 (Burns 1946).

99. IND. ANN. STAT. § 2-2405 (Burns 1946).

100. Houston v. Bruner, 59 Ind. 25 (1877). IND. ANN. STAT. § 2-2405 (Burns 1946).

101. McKernan v. Estabrook, 66 Ind. App. 212, 115 N.E. 956 (1917); Fisher v. Southern Ry. Co., 55 Ind. App. 599, 104 N.E. 521 (1914).

102. Lowry v. Indianapolis Traction and Terminal Co., 77 Ind. App. 135, 120 N.E. 223 (1921).

103. Burton v. Harris, 76 Ind. 429 (1881). The judge who heard the original cause is more qualified to evaluate the validity of the cause for new trial because of his familiarity with the prior proceedings.

104. Carver v. Compton, 51 Ind. 451 (1875); East v. McKee, 14 Ind. App. 45, 42 N.E. 368 (1895).

105. See IND. ANN. STAT. § 2-2401 (Burns 1946). The other causes listed for which a motion for new trial will be granted, by their nature, would not be grounds for relief on a complaint for new trial because, if not pursued on a motion for new trial, the diligence requirement could not be fulfilled.

106. Burton v. Harris, 76 Ind. 429 (1881). Applicant cannot be accorded new trial because there never has been a trial.

107. Meldon v. Cox, 60 Ind. App. 403, 110 N.E. 1008 (1916). The applicant should introduce in evidence the record of the former trial, show what the evidence was, prove the newly discovered evidence, and show how it will probably change the result. Meldon v. Cox, *supra.*

108. Hines v. Driver, 100 Ind. 315 (1885); Eastern Rock Island Plow Co. v. Stout 84 Ind. App. 217, 147 N.E. 160 (1925); Meldon v. Cox, *supra* note 107. See Lowry v. Indianapolis Traction and Terminal Co., 77 Ind. App. 138, 120 N.E. 223 (1921).

109. Marshall v. Mathers, 103 Ind. 458, 3 N.E. 120 (1885); Hines v. Driver, 100 Ind. 315 (1885).

110. Allen v. Gillum, 16 Ind. 234 (1861).

in procurement of the judgment, but intrinsic fraud such as perjury is not grounds for relief under complaint for new trial.[111]

The judgment rendered on a complaint for new trial is a final appealable judgment,[112] but motion for new trial is required before an appeal may be taken.[113] The decision to grant a new trial under this proceeding is largely up to the discretion of the trial court and it will not be reversed on appeal except for abuse of discretion.[114] This remedy is not barred when an appeal was taken from the original judgment and may be instituted even while such appeal is pending.[115] An applicant refused relief during the pendency of the original appeal may appeal the decision on the complaint for new trial and the two will be consolidated.[116] If a new trial is granted while the appeal from the original judgment is pending, the appeal becomes moot and will be dismissed.[117]

The complaint for new trial for newly discovered evidence, like review of judgment for material new matter,[118] is comparable to Federal Rule 60(b)(2).[119] The evidentiary requirement of Rule 60(b)(2) seems almost identical to that of the complaint for new trial. The time limit is the same[120] and both have similar requirements as to diligence[121] and the categories of evidence that are admissible.[122] The terminology

111. Brassard v. Stoner, 83 Ind. App. 655, 149 N.E. 646 (1925); Pepin v. Lautman, 28 Ind. App. 74, 62 N.E. 60 (1901). *Contra,* Vivian Collieries Co. v. Cahall, 184 Ind. 473, 481, 110 N.E. 672, 675 (1915) (dictum).

112. Lowry v. Indianapolis Traction and Terminal Co., 77 Ind. App. 138, 126 N.E. 223 (1921); Jones v. Kolman, 50 Ind. App. 158, 98 N.E. 74 (1911). This is the rule regardless of whether an appeal was taken from the original judgment.

113. Starke County Trust and Sav. Bank v. Hobart, 89 Ind. App. 637, 167 N.E. 720 (1929).

114. Eastern Rock Island Plow Co. v. Stout, 84 Ind. App. 217, 147 N.E. 160 (1925). A decision refusing relief does not bar another proceeding if a new cause for new trial would arise. However, the new evidence must be more compelling than that required on the prior complaint for new trial.

115. Louisville and N. R.R. Co. v. Vinyard, 39 Ind. App. 628, 79 N.E. 384 (1906). This raises an interesting question on how the appellate court and the trial court can act on the same judgment at the same time. Admittedly, the two procedures are separate and distinct, but the judgment under attack is the same one. It would seem that the appellate court's interest should pre-empt action by the trial court and in absence of permission of the appellate court, the trial court should not entertain a complaint for new trial. Perhaps the answer is one of practicality. No one is harmed or prejudiced by the present rule and it eliminates a formality which is of no real usefulness.

116. Oldfather v. Zent, 11 Ind. App. 430, 39 N.E. 221 (1894).

117. Thalman v. Montgomery Ward, 120 Ind. App. 532, 94 N.E.2d 370 (1950).

118. IND. ANN. STAT. § 2-2605 (Burns 1946). See note 134 *infra* and accompanying text.

119. See 7 MOORE, FEDERAL PRACTICE § 60.23 (2d ed. 1955).

120. FED. R. CIV. P. 60(b); IND. ANN. STAT. § 2-2405 (Burns 1946).

121. Greenspahn v. Joseph E. Seagram and Sons, 186 F.2d 616 (2d Cir. 1951). See note 95 *supra* and accompanying text.

122. Baruch v. Beech Aircraft Corp., 172 F.2d 445 (10th Cir. 1949). See note 109 *supra* and accompanying text.

of Rule 60(b)(2) is the same as that of a complaint for new trial for newly discovered evidence and the standards are stated in almost identical terms.[123] Therefore, both remedies provide substantially the same amount of relief.

Federal Rule 60(b)(3) provides for relief for fraud, misrepresentation, or other misconduct of an adverse party,[124] but misconduct of jurors apparently is not included.[125] However, relief on the grounds of jury misconduct is as a practical matter severely limited in Indiana.[126] Both rules have a time limit of one year.[127] Federal Rule 60(b)(3) makes no restriction based on the intrinsic-extrinsic fraud dichotomy, in contrast to complaint for new trial.[128] Abrogation of the arbitrary intrinsic fraud rule gives the Federal Rule a much broader basis of substantive relief than that granted under the complaint for new trial.

In respect to newly discovered evidence and misconduct of the jury or prevailing party, the complaint for new trial is as broad as the statute authorizing motion for new trial. Therefore, its practical effect is to extend the time for motion for new trial for these causes from thirty days to one year. As to newly discovered evidence, such an extension seems unnecessary in view of the remedy for review of judgments for material new matter.[129] Because the standard imposed is theoretically the same as that used on a motion for new trial for newly discovered evidence, the complaint for new trial for newly discovered evidence threatens the conventional concept of finality. The area of discretion of the trial court is broad and its decision will not be disturbed unless there is an abuse of this discretion.[130] This factor may allow the court to re-

123. Baruch v. Beech Aircraft Corp., *supra* note 122. See note 108 *supra* and accompanying text.

124. See 7 MOORE, FEDERAL PRACTICE § 60.24 (2d ed. 1955).

125. See 7 MOORE, FEDERAL PRACTICE § 60.22[3] (2d ed. 1955). Moore contends that because of the express language of Rule 60(b)(3), "of an adverse party," that this section is not applicable where the fraud is perpetrated solely by a third person. However, he contends that relief would be granted either by Rule 60(b)(6), fraud on the court, or an independent equitable proceeding. Thus, relief in this situation is adequately provided for.

126. One practical difficulty in the problem of misconduct of a juror is that the evidence must be submitted by one other than a juror. Evidence based on information or belief is not admissible. The required affidavit must disclose the source of the affiant's information and show that it did not come directly or indirectly from a juror. Pittsburgh C., C., & St. L. Ry. Co. v. Collins, 168 Ind. 467, 80 N.E. 415 (1906). There would be relatively few situations where a complainant could obtain the necessary evidence that would entitle him to a new trial. No cases are available on this point under a complaint for new trial. However, from the language of the statute it appears that this type of rule on a motion for new trial would be equally applicable to a complaint for new trial.

127. FED. R. CIV. P. 60(b); IND. ANN. STAT. § 2-2405 (Burns 1946).

128. FED. R. CIV. P. 60(b)(3).. See note 111 *supra*.

129. IND. ANN. STAT. § 2-2604, 2-2605 (Burns 1946).

130. Eastern Rock Island Plow Co. v. Stout, 84 Ind. App. 217, 147 N.E. 160 (1925).

quire slightly stronger evidence than that required on motion for new trial. A blameless judgment holder should not be forced to relinquish rights in a judgment upon which he has relied for almost a year. After such a period a new trial places many hardships upon the judgment holder in gathering evidence and recalling witnesses. Though other remedies providing for vacation of judgment may impose equal hardship, it must be remembered that, with the exception of review of judgment for material new matter, the other remedies provide relief because of an error or a wrongful act of another party.[131] On a complaint for new trial for newly discovered evidence no one has erred or committed a wrongful act. Therefore, the reasons for vacating the judgment are more compelling under the other remedies than under complaint for new trial for newly discovered evidence. As to review of judgment for material new matter,[132] the evidence must be stronger than that required on complaint for new trial for newly discovered evidence. Thus, the hardship placed on the judgment holder appears more justifiable in the case of review for material new matter. It is argued that if the judgment is unjust, the prevailing party ought not be heard to complain, because his sole property right in the judgment is derived from the court; that the judgment is recognized by the court only because the claim is believed righteous and if it subsequently appears unjust the court should be allowed to vacate the judgment. This argument, while upholding justice, completely ignores finality. Because review of judgment for new matter requires a stronger showing of new evidence, it is submitted that review of judgments best serves the principle of finality in requiring that a stronger case be made as the period of attack becomes more belated. However, if the remedy of complaint for new trial is to be retained, it is submitted that courts, through their broad discretionary powers, should impose a stricter standard as the time period between judgment and attack becomes greater. The greater the period of time that has transpired, the stronger case the complainant should be required to make. There are situations where the injustice would be great enough to warrant setting the judgment aside, but in others the hardship imposed on the prevailing party and on third persons may outweigh the interest in vacating the judgment; even where the complaint sets out grounds which, if raised sooner, would have justified granting a new trial. The court, balancing the interests of finality and rights of the judgment holder and third parties on one side against the interests in correcting erroneous judgments and rights of the complainant on the other, could probably

131. IND. ANN. STAT. § 2-1068, 2-2604 (Burns 1946).
132. IND. ANN. STAT. § 2-2605 (Burns 1946).

achieve a more equitable result by exercising sound discretion than by any rigid rule. The flexibility of this method would allow the court to tailor relief to the ramifications of the specific situation. It is not contended that the discretion of the trial court be unrestricted, but only that standards be pliable enough to allow the court to weigh the relevant factors in making a decision. The requirement of diligence in discovering the evidence in the complaint for new trial may tend to accomplish this purpose within the one year period.[133]

Review of Judgment[134]

Indiana provides by statute that relief under review of judgment is

133. See note 95 *supra*. Gavit questions the validity of the complaint for a new trial in light of the thirty day period allowed for filing a motion for new trial. Conceding its utility, he contends that the statute authorizing a complaint for new trial be repealed and the statute authorizing a motion for new trial be amended to permit the filing of a motion on grounds of newly discovered evidence (and misconduct of the jury or prevailing party?) within a reasonable time. Thus, the "cumbersome procedure of a new action" would be repudiated. 2 GAVIT, INDIANA PLEADING AND PRACTICE § 471 (1942). "Any person who is a party to any judgment, or the heirs, devisees or personal representatives of a deceased party, may file in the court where such judgment is rendered a complaint for a review of the proceedings and judgment. Any person under legal disabilities may file such complaint at any time within one [1] year after the disability is removed. But no complaint shall be filed for a review of a judgment of divorce." IND. ANN. STAT. § 2-2604 (Burns 1946).

The prescribed time limits are equally applicable to non-residents. Rosa v. Prather, 103 Ind. 191, 2 N.E. 575 (1885). Because the statute sets out its own time limits, the statute of limitations is not applicable. Rosa v. Prather, *supra*. However, the defendant in the proceedings to review may defend on the grounds that the statute of limitations has run on the original cause of action. Kiley v. Murphy, 7 Ind. App. 238, 34 N.E. 112 (1893).

"The complaint may be filed for any error of law appearing in the proceedings and judgment, within one [1] year; or for material new matter, discovered since the rendition thereof, within three [3] years; or for both causes, within one [1] year after the rendition of the judgment, and without leave of the court." IND. ANN. STAT. § 2-2605 (Burns 1946).

"When the complaint for a review is filed for new matter discovered since the rendition of the judgment, it shall be verified by the complainant, and show that the new matter could not have been discovered before judgment by reasonable diligence, and that the complaint is filed without delay after the discovery." IND. ANN. STAT. § 2-2606 (Burns 1946).

"At any time after filing the complaint, and before the final hearing, the court may, upon application of the plaintiff, stay all further proceedings on the judgment. When proceedings are stayed, the court shall direct bond and surety to be given, as in cases of appeal." IND. ANN. STAT. § 2-2607 (Burns 1946).

"The defendant shall be notified of the filing of such complaint, and the parties shall proceed to form issues of law and fact as in other cases." IND. ANN. STAT. § 2-2608 (Burns 1946).

"Upon the hearing, the court may reverse or affirm the judgment, in whole or in part, or modify the same, as the justice of the case may require, and award costs according to the rule prescribed for the awarding of costs in the Supreme Court on appeal." IND. ANN. STAT. § 2-2609 (Burns 1946).

134. It is to be noted that the statutes governing review of judgments are extremely comprehensive, leaving a minimum to the construction of the courts.

The complaint for review of judgment evolved from the equitable remedy of bill of

available for two causes: (1) errors of law appearing in the proceedings and judgment, if the complaint is filed within one year from the date of judgment;[135] or (2) material new matter discovered since rendition of the judgment, if the complaint is filed within three years from the date of judgment.[136] All final judgments, except divorce decrees,[137] *ex parte* proceedings,[138] and matters connected with a decendent's estate,[139] may be reviewed under these sections.[140] Decrees of partition may be reviewed under certain circumstances.[141] Default judgments are subject to review,[142] as are void judgments.[143]

The complaint is an independent proceeding and must be brought in the same court that rendered the original judgment.[144] It is a direct attack[145] from which no change of venue may be taken.[146] The proceeding may be brought by a party to the original suit or by his heirs, devises, or personal representatives;[147] a grantee of property affected by the judgment is also entitled to review if his grantor would have had the right.[148] All parties to the original suit must be made parties to the

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review, initiated by the Ordinances of Chancellor Bacon. Ross v. Banta, 140 Ind. 120, 136, 34 N.E. 865, 869 (1895); Nealis v. Dicks, 72 Ind. 374 (1880).

135. IND. ANN. STAT. § 2-2605 (Burns 1946).

136. *Ibid.*

137. IND. ANN. STAT. § 2-2604 (Burns 1946). Willman v. Willman, 57 Ind. 500 (1877). See IND. ANN. STAT. § 44-110 (Burns 1946).

138. Guy v. Pierson, 21 Ind. 18 (1863); Williams v. Williams 18 Ind. 345 (1862); Davidson v. Lindsay, 16 Ind. 186 (1861).

139. McCurdy v. Love, 97 Ind. 62 (1884). Contra, Funk v. Davis, 103 Ind. 281, 2 N.E. 739 (1885) (review allowed for improper correction of a will).

140. First Nat'l Bank v. Hanna, 12 Ind. App. 240, 39 N.E. 1054 (1895).

No review for error of law is allowed from a judgment taken by agreement of the parties. The errors of the prior proceeding are waived. Collins v. Rose, 59 Ind. 33 (1877). But there is no apparent reason to waive any right to review for material new matter. A waiver of one's rights to pursue review for material new matter would encourage litigation and deter settlement.

141. IND. ANN. STAT. § 3-2425 (Burns 1946).

142. Michener v. Springfield Engine and Thresher Co., 142 Ind. 130, 40 N.E. 679 (1895); Ervin School Township v. Tapp, 121 Ind. 463, 23 N.E. 505 (1889); Montgomery v. Hamilton, 43 Ind. 451 (1873).

143. Shafer v. Shafer, 181 Ind. 244, 104 N.E. 507 (1914); Bartmess v. Holiday, 27 Ind. App. 544, 61 N.E. 750 (1901). See Willman v. Willman, 57 Ind. 500 (1877), where a divorce decree was vacated on the grounds that it was void; *cf.* note 138 *supra.*

144. IND. ANN. STAT. § 2-2604 (Burns 1946). Attica Bldg. and Loan Ass'n v. Colvert, 216 Ind. 192, 23 N.E.2d 483 (1939).

145. Deputy v. Dollarhide, 42 Ind. App. 554, 86 N.E. 344 (1908).

146. Attica Bldg. and Loan Ass'n v. Colvert, 216 Ind. 192, 23 N.E.2d 483 (1939).

147. IND. ANN. STAT. § 2-2604 (Burns 1946). Ross v. Banta, 140 Ind. 120, 136, 34 N.E. 865, 869-870 (1895).

148. Ross v. Banta, 140 Ind. 120, 135-137, 34 N.E. 865, 870 (1895). *But see* Egoff v. Bd. of Children's Guardians, 170 Ind. 238, 244, 84 N.E. 151, 154 (1907). This case holds an applicant who was not a party to the original suit may not bring a proceeding to review the judgment. However, it is submitted that this result does not contravene the result reached in Ross v. Banta, *supra,* because in the instant case the applicant did not stand in an analogous position to the party in the former case. There the applicant had purchased land which was later affected by a judgment from an heir of an original

action to review.[149] The complaint to review is defective unless it sets out a copy of the original judgment;[150] however, the complaint may be amended.[151] A judgment granting relief under these proceedings places the parties in the same position they were in before the original suit.[152] One under legal disability may file a complaint to review within one year after the disability has been removed.[153] This rule has sometimes resulted in an unusual time lapse between judgment and attack.[154]

The complaint for review for errors of law must: (1) set out the alleged erroneous rulings, (2) specifically point out the error, and (3) show the facts upon which the ruling is based.[155] Review for error

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party to the suit. In the latter case, the applicant could not be related to the original litigants in any way.

149. Douglas v. Davis, 45 Ind. 493 (1874); Tereba v. Standard Cabinet Mfg. Co., 32 Ind. App. 9, 68 N.E. 1033 (1903). If parties will not join as plaintiffs they may be made defendants. Douglas v. Davis, *supra*.

150. Bradford v. School Town of Madison, 107 Ind. 280, 7 N.E. 256 (1886).

151. Alexander v. Daugherty, 69 Ind. 388 (1879); Foster v. Potter, 24 Ind. 363 (1865).

152. Leech v. Perry, 77 Ind. 422 (1881); Maghee v. Collins, 27 Ind. 83 (1866). A judgment may be vacated as to some parties and remain in force as to others. Wright v. Churchman, 135 Ind. 683, 35 N.E. 835 (1893).

153. IND. ANN. STAT. § 2-2604 (Burns 1946). Attica Bldg. and Loan Ass'n v. Colvert, 216 Ind. 192, 23 N.E.2d 483 (1939).

154. See, *e.g.*, Attica Bldg. and Loan Ass'n v. Colvert, 216 Ind. 192, 23 N.E.2d 483 (1939) (setting aside a twelve year old judgment). The case also has the effect of cutting off the rights of bona fide purchasers. On this point, see Comment, 15 IND. L.J. 437 (1940).

Because of this rule, the statutes dealing with review of judgments have been strongly attacked. JUDICIAL COUNCIL OF INDIANA, RECOMMENDATIONS TO THE SUPREME COURT, pt. III, at 59-77 (1940). The report points out that the rule results in instability of land titles and heavily burdens the concept of finality. It proposes that the statutes be amended, contending that the remedies of equitable relief and vacation for mistake, surprise, excusable neglect, or inadvertence are usually adequate and allowing an extension of time because of a disability only for fraud. The proposed change would not permit an applicant to initiate a review of judgment after a disability has extended the time beyond the express statutory limits except when the judgment had been procured by fraud. It is submitted that these remedies do not ordinarily grant relief for errors of law or material new matter. The statutes dealing with review of judgment furnish a remedy of an entirely different nature than the remedies of equitable relief and relief for excusable neglect, etc. There is merit in the suggestion that judgments should not be subject to uncertainty for what could be a considerable length of time, but the interest of according justice to a litigant who is under a disability cannot be totally ignored. The disabled party who is represented by a guardian ad litem may be adequately protected, but what of the incapacitated litigant whom the court neglects to protect by failure to appoint a guardian ad litem? Judgments taken against persons under a disability, and not represented by guardian, are not void, but are only erroneous and may not be collaterally attacked. Judd v. Gray, 156 Ind. 278, 286, 59 N.E. 849, 851 (1901). Therefore, if the rule allowing suit by one under a disability after the disability has been removed were completely abrogated, there would be many cases where such a person would be without remedy. It is submitted that it is not necessary to repeal the laws on review of judgment to cure the fault objected to; a revision providing that bona fide purchasers would not be affected by the proceedings would afford an adequate remedy.

155. Hague v. First Nat'l Bank, 159 Ind. 636, 65 N.E. 907 (1903); Michener v. Springfield Engine and Thresher Co., 142 Ind. 130, 40 N.E. 679 (1895). The complaint must set out a complete record of the original cause, or at least that much that is neces-

of law lies only for those errors which occurred prior to, or in conjunction with, the judgment and only if proper objection was made at the original trial.[156] A complaint to review for error of law and appeal are alternative remedies and the utilization of one waives the right to pursue the other.[157] Because review for error of law is a substitute for appeal, it can only be asserted where an appeal might be taken and it must be tried solely by the record.[158] The original trial court sits as an appellate court. Substantial error will justify reversal; great injustice is not necessary, and any errors of law committed will be presumed prejudicial unless the contrary is shown.[159]

The complaint to review for material new matter must contain three elements: (1) it must allege that the new matter was not known when the judgment was rendered;[160] (2) it must show facts which prove that the new matter could not have been discovered by the use of reasonable diligence before rendition of the judgment;[161] and (3) it must show that proceedings to review were instituted without undue delay after the discovery of the new matter.[162] The complaint must be verified, but affidavits of witnesses as to the new matter need not be included.[163] The

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sary to fully present the errors complained of. Whitehall v. Crawford, 67 Ind. 84 (1879). However, in Wabash R.R. Co. v. Young, 154 Ind. 24, 55 N.E. 853 (1900), it was held that the complaint is sufficient if it sets out so much of the record that would be necessary on appeal, and that irrelevant parts should be omitted. A transcript may be attached to the complaint as an exhibit, but the complaint must still contain enough of the pleadings in its body to present the error without resorting to the transcript. Michener v. Springfield Engine and Thresher Co., 142 Ind. 130, 40 N.E. 679 (1895).

156. Ferguson v. Hull, 136 Ind. 339, 36 N.E. 254 (1894).

157. Calumet Teaming and Trucking Co. v. Young, 218 Ind. 468, 33 N.E.2d 109 (1941); Talge Montgomery Co. v. Astoria Mahogany Co., 195 Ind. 433, 141 N.E. 50 (1924).

158. See Calumet Teaming and Trucking Co. v. Young, *supra* note 157.

The complaint must show that proper exceptions were made in the original proceedings. Wohaldo v. Fary, 221 Ind. 219, 46 N.E.2d 489 (1943); Calumet Teaming and Trucking Co. v. Young, *supra*. But this rule is not applicable when failure to except does not waive the error. Calumet Teaming and Trucking Co. v. Young, *supra;* Lambert v. Smith 216 Ind. 226, 23 N.E.2d 430 (1939). *E.g.*, where the court has no jurisdiction.

159. Calumet Teaming and Trucking Co. v. Young *supra* note 157. The error of law must be such that would result in reversal on appeal. Hancher v. Stephenson, 147 Ind. 498, 46 N.E. 916 (1897).

160. Alexander v. Daugherty, 69 Ind. 388 (1879); Whitehall v. Crawford, 67 Ind. 84 (1879).

161. Warne v. Irwin, 153 Ind. 20, 53 N.E. 926 (1889).

162. Tereba v. Standard Cabinet Mfg. Co., 32 Ind. App. 9, 68 N.E. 1033 (1903).

163. Hill v. Roach, 72 Ind. 57 (1880). Review for material new matter involves no error committed at the original trial. It is similar to a coram nobis proceeding in that only questions of fact are involved. Calumet Teaming and Trucking Co. 218 Ind. 468, 33 N.E.2d 109 (1941).

The defendant, in his answers, may deny the correctness of the new matter or assert an affirmative defense such as payment, statute of limitations and other errors apparent on the face of the record of the original cause which, if assigned as cross-error on

words "material new matter" have a different connotation than "newly discovered evidence" as used in a motion for new trial and complaint for new trial. For example, in *Yuknavich v. Yuknavich*,[164] the court said, "The asserted 'new matter' consists merely of subsequently discovered receipts, documents and other evidence of these facts. While it may have supplied sufficient grounds for a new trial, upon proper and timely motion, as newly discovered evidence, it is not material new matter as contemplated by the statute authorizing review of judgments." Material new matter is such evidence that would probably entitle the complainant to have the judgment reversed or at least modified.[165]

Generally, an appeal may be taken from a determination of the trial court in an action to review judgments if an appeal would have been allowed from the original judgment.[166] Such appeal must be taken to the same court that would have had jurisdiction of an appeal from the original judgment.[167] Appeal from a determination made in the action to review for error of law will not be allowed unless the complaint was filed before the expiration of the period allowed for appeal from the original judgment.[168] But in cases of review for material new matter expiration of such period bars neither party from appealing the determinations in the proceedings to review.[169]

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appeal, would result in the original judgment being affirmed. Kiley v. Murphy, 7 Ind. App. 239, 34 N.E. 112 (1893).

164. 115 Ind. App. 530, 534, 58 N.E.2d 447, 448 (1945). Material new matter must be something more than newly discovered evidence. Jones v. Tipton, 142 Ind. 643, 42 N.E. 221 (1895); Trust and Sav. Bank v. Brusnahan, 88 Ind. App. 257, 147 N.E. 168 (1928).

165. Ross v. Clore, 120 Ind. App. 145, 81 N.E.2d 290 (1950); Trust and Sav. Bank v. Brusnahan, 88 Ind. App. 257, 147 N.E. 168 (1928).

166. See Slebar v. Corydon, 80 Ind. 95 (1881); Brown v. Keyser, 53 Ind. 85 (1876).

Where relief is denied in a proceedings to review, the applicant is barred from filing another complaint to review. Coen v. Funk, 26 Ind. 289 (1866). But it is submitted that this rule should be limited to review for the same cause (error of law or material new matter). Certainly pursuit of relief under one cause should not preclude the applicant from asserting the other. Thus, where an appeal has been prosecuted from a proceeding to review for errors of law, a complaint to review for material new matter may be initiated regardless of whether the judgment has been affirmed. Ross v. Clore, *supra* note 165.

167. Jones v. Tipton, 142 Ind. 643, 42 N.E. 221 (1895); Dallin v. McIvor, 140 Ind. 386, 39 N.E. 461 (1895).

168. Rittenour v. Hess, 96 Ind. App. 161, 174 N.E. 714 (1931); Am. Creosoting Co. v. Reddington, 83 Ind. App. 365, 146 N.E. 761 (1925).

An applicant cannot raise errors committed in the original proceedings on an appeal from a judgment rendered in a trial to review for errors of law. Such an appeal is limited to errors committed in the latter proceedings. Calumet Teaming and Trucking Co. v. Young, 218 Ind. 468, 33 N.E.2d 109 (1941).

169. Ross v. Clore, 120 Ind. App. 145, 81 N.E.2d 290 (1950). The party successful in the original cause can appeal in any case. There was no reason for him to appeal at the original suit, therefore he is not bound by the rule governing applicants in proceedings for review for error of law. Calumet Teaming and Trucking Co. v. Young, 218 Ind. 468, 33 N.E.2d 109 (1941).

Federal Rule 60(b) provides no relief similar to that granted by review of judgment for error of law.[170] It therefore appears conclusive that in this respect Indiana is less restricted by the concept of finality. The purpose of such a provision is to grant an opportunity to the trial court to correct its own errors, but it is difficult to comprehend why the trial court should be allotted such an extraordinary length of time in which to make its corrections. If the length of time allowed for appeals is equitable and fair, there appears little reason to extend it merely because the relief is sought on the trial rather than appellate level.

Remembering that review for error of law and appeal are mutually exclusive remedies, it is clear that review is less satisfactory than appeal when the latter is available. The trial judge presumably has deliberated upon the question previously and has ruled against the complainant, while the appellate court has had no previous experience with the case. With these considerations in mind, it would seem that review for error of law would be resorted to only when: (1) the complainant cannot afford the expense involved in taking an appeal; (2) the judgment rendered against the complainant is so small an appeal would not be worth while; (3) the complainant feels that the error is so obvious that he is willing to resubmit it to the trial court; or (4) when appeal is not available because of the expiration of time. There is merit in the first reason listed, since such review is better than no remedy at all when lack of financial resources precludes the complainant from his remedy of appeal. The second and third reasons are sound and the existence of review for error of law can readily be justified on these grounds, although it is conceded that the third could be fraught with risk. The last reason cannot be jutsified. It is clear that the use of review of judgment for error of law results in extension of appeal time from ninety days to one year—more than four times as long. The one penalty for the delay is that the complainant must submit the question to the trial court rather than the appellate court. In weighing the interests of finality of judgments and substantial justice, keeping in mind that this remedy seeks to rectify erroneous rulings of the court and other errors of law committed

170. FED. R. CIV. P. 60(b). But this portion of the review of judgment statutes may have a counterpart under Federal Rule 60(b)(1). See 7 MOORE, FEDERAL PRACTICE § 60.22 [3] (2d ed. 1955). There is authority to the contrary. Gilmore v. Hinman, 191 F.2d 652 (D.C. Cir. 1951). But Moore contends that because such relief was available by a bill of review, and because the word "his" (mistake, etc.) has been deleted from this section, that errors of law should now afford a basis for relief under this section. However, Moore limits his contention by stating that relief from errors of law should be granted only if the motion is made before the time allowed for appeal from the original cause has expired. Thus, even viewed in its most liberal light, it is seen that the Indiana rule concerning errors of law is less restrictive in its concept of when litigation should finally cease.

before or during the proceedings, it is submitted that the usual time afforded for appeal is adequate for corrections which may be necessary to meet the ends of justice. It is therefore suggested that the time limit for review for error of law should be limited to conform with the period regularly allotted for appeals. This solution preserves the trial court's interest in correcting its own error, allows the justifiable policy grounds to remain effective, and still supplies a solid buttress to the interest of finality.

Review of judgment for material new matter is comparable to Federal Rule 60(b)(2) which grants relief for newly discovered evidence. The standards set forth by the courts of the two jurisdictions differ slightly. The material new matter in Indiana must be such that would probably entitle the applicant to have the judgment reversed or at least modified.[171] Under 60(b)(2), the newly discovered evidence must be of such a material and controlling nature that, had it been before the court, it would probably have induced a different conclusion.[172] Neither will grant relief for evidence which is merely cumulative in nature.[173] Both have the same requirements as to diligence and pursuit of relief within a reasonable time.[174] Indiana has the more lenient rule in that it allows relief within a three year period, while 60(b)(2) is limited by a one year period.[175] But, in view of the standards used, it would seem that 60(b)(2) is more liberal than the Indiana rule respecting the requisites for substantive relief.

Equitable Relief

Courts of general jurisdiction have power to enjoin the enforcement of judgments, to order judgments set aside to permit the filing of a motion for new trial, and to grant a new trial.[176] The court will grant such relief whenever by fraud, accident, mistake or otherwise an unfair advantage has been taken and it is against good conscience to allow the prevailing party to use this advantage.[177] The action is in personam and acts against the person holding the judgment, not against the court that

171. See note 68 *supra.*
172. Baruch v. Beech Aircraft Corp., 172 F.2d 445 (10th Cir. 1949).
173. See note 172 *supra.* See Yuknavich v. Yuknavich, 115 Ind. App. 530, 58 N.E.2d 447 (1945).
174. FED. R. CIV. P. 60(b). See note 162 *supra.*
175. FED. R. CIV. P. 60(b).
176. Indianapolis Life Ins. Co. v. Lundquist, 222 Ind. 359, 53 N.E.2d 338 (1943); Gilkison v. Darlington, 123 Ind. App. 28, 106 N.E.2d 473 (1952). Weiss v. Guerineau, 109 Ind. 438, 9 N.E. 399 (1886).
177. Himelstein Bros., Inc. v. Texas Co., 125 Ind. App. 448, 125 N.E.2d 820 (1955); Hitt v. Carr, 77 Ind. App. 488, 130 N.E. 1 (1921).

rendered it or the judgment itself.[178] Because the injunction acts against the person, it would seem that a complaint for equitable relief could be initiated in any court of general jurisdiction, but relief in Indiana must be sought in the same court that rendered the judgment, if that court is one of general jurisdiction.[179]

Four general rules govern the applicability of equitable relief: (1) complainant must show that the judgment could not have been prevented by exercise of due diligence;[180] (2) complainant must have been reasonably diligent in discovering the fraud, surprise, or accident;[181] (3) after discovery, relief must be diligently pursued;[182] and (4) complainant must show a meritorious defense that will probably produce a different result at the new trial.[183]

Courts exercise their equitable powers with reluctance and will do so only if there is no adequate legal remedy.[184] Equity will go no further in granting relief than is necessary to correct the wrong.[185] Thus the enforcement of the judgment will not be enjoined where setting aside the judgment and ordering a new trial provides an adequate remedy. What comprises mistake, accident, fraud, or a situation where equity

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178. 3 FREEMAN, JUDGMENTS § 1178 (5th ed. 1925).

179. Scott v. Runner, 125 Ind. 12, 44 N.E. 755 (1896); Gilkison v. Darlington, 123 Ind. App. 28, 106 N.E.2d 473 (1952). See Steinmetz v. G. H. Hammond Co., 167 Ind. 153, 78 N.E. 628 (1906). (City courts do not have equitable jurisdiction to set aside a judgment.)

It is not clear whether a change of venue may be granted. Gilkison v. Darlington, *supra,* declares that a change of venue and change of judge may be granted, but the court immediately qualified this statement by noting that the protesting party had waived any right to protest he may have had by appearing and answering without objection. While it is not clear that a change of venue may be taken, it appears that the court favored such a rule, but any future court that wishes to negate this view may do so by alluding to the qualifying language and reach an opposite result without overruling the case.

180. Majors v. Craig, 144 Ind. 39, 43 N.E. 3 (1895); Hollinger v. Reeme, 138 Ind. 363, 36 N.E. 1114 (1894); Branham v. Boruff, 82 Ind. App. 370, 145 N.E. 901 (1925).

181. Majors v. Craig, *supra* note 180; Hollinger v. Reeme, *supra* note 180.

182. *Ibid.* Nicholson v. Nicholson, 113 Ind. 131, 15 N.E. 223 (1888).

183. Hollinger v. Reeme, 138 Ind. 363, 36 N.E. 1114 (1894); Wiley v. Pratt, 23 Ind. 628 (1864). Where the judgment is void, a meritorious defense need not be alleged. Dobbins v. McNamara, 113 Ind. 54, 14 N.E. 887 (1888); Ward v. Ward, 117 Ind. App. 225, 71 N.E.2d 131 (1947). *Contra,* Schilling v. Quinn, 178 Ind. 443, 99 N.E. 740 (1912); Williams v. Hitzie, 83 Ind. 303 (1882).

184. Gilkison v. Darlington, 123 Ind. App. 28, 106 N.E.2d 473 (1952). Statutory provisions do not affect the court's equitable jurisdiction to act, but courts of equity will refuse to assume jurisdiction when the statutory remedy is adequate. Legal rights against third parties do not prevent a court of equity from assuming jurisdiction. Hitt v. Carr, 77 Ind. App. 488, 130 N.E. 1 (1921).

185. Indianapolis Life Ins. Co. v. Lundquist, 222 Ind. 359, 53 N.E.2d 338 (1943). Equity will not grant relief when the rights of bona fide purchasers have intervened. Majors v. Craig, 144 Ind. 39, 43 N.E. 3 (1895).

should act is a question to be determined by the facts of each particular case.[186]

Equitable relief in Indiana takes two general forms. The first enjoins enforcement of the judgment and the second sets aside the judgment and orders a new trial on the merits. The former is a much stronger remedy in that it finally bars the judgment holder from exercising any rights he had under the judgment.[187] The latter is not a complete bar because the judgment holder may prevail in the subsequent trial and thereby regain some enforceable rights. Both remedies are separate and independent proceedings and therefore require notice to adverse parties. Both are direct attacks.[188] While it is true that equitable powers extend to absolute injunction, in no case should the decree go beyond the relief prayed for in the petition.[189] Where part of the judgment appears just, the injunction should allow that part to stand while enjoining proceedings on the unjust portion.[190] The absolute injunction is infrequently used since the mere vacation of judgment is usually adequate.

The only time limit on proceedings in equity is set by the doctrine of laches,[191] but the doctrine of equitable estoppel may serve to cut off an equitable cause of action. To raise an equitable estoppel, the judgment holder, acting in good faith, must materially change his position in reliance on the judgment.[192] An application to set aside or enjoin the judgment can be initiated only by one who was a party to the original suit or his successors.[193] The chief cause for granting equitable relief is fraud in procurement of the judgment. The fraud must be practiced by the prevailing party upon the opposite party; fraud between co-

186. Aetna Securities Co. v. Sickels, 120 Ind. App. 300, 88 N.E.2d 789 (1950).

187. Gilkison v. Darlington, 123 Ind. App. 28, 106 N.E.2d 473 (1952); Hitt v. Carr, 77 Ind. App. 488, 130 N.E. 1 (1921).

188. Harman v. Moore, 112 Ind. 221, 13 N.E. 718 (1887); Gilkison v. Darlington, *supra* note 187; Ayres v. Smith, 227 Ind. 82, 84 N.E.2d 185 (1948).

189. Gilkison v. Darlington, *supra* note 187.

190. Gilkison v. Darlington, 123 Ind. App. 28, 106 N.E.2d 473 (1952). But where it is not clear what portion is just, the judgment should be set aside in toto. Gilkison v. Darlington, *supra*.

191. Livingston v. Livingston, 190 Ind. 223, 130 N.E. 122 (1921); Nicholson v. Nicholson, 113 Ind. 131, 15 N.E. 223.

The statute of limitations may serve to bar a cause of action, but it does not start running until the grounds for equitable relief are discovered. Brake v. Payne, 137 Ind. 479, 37 N.E. 140 (1893). It would appear that a complaint barred by the statute of limitations would have long been barred by laches.

192. Meyer v. Wilson, 166 Ind. 651, 76 N.E. 748 (1906); Brake v. Payne, *supra* note 191. Expense incurred in the issuance of the execution will not raise an estoppel. Brake v. Payne, *supra* note 191.

193. Brokaw v. Brokaw, 99 Ind. App. 385, 192 N.E. 728 (1934). This rule seems unjust. If the judgment works an unjust hardship on one whose legal interest is involved, he should be allowed to bring an action for equitable relief, regardless of whether he was a party to the original suit or is in privity with an original litigant.

defendants or co-plaintiffs will not affect the prevailing party's rights.[194] In proceedings to enjoin or vacate on grounds of fraud, the burden of proof is on the applicant and the fraud must be proved affirmatively.[195]

Fraud is divided into two categories. Conduct consisting of perjured testimony or introduction in evidence of a fraudulent instrument is called intrinsic fraud.[196] Intrinsic fraud consists of matters which were litigated and in which the fraudulent matter was before the court.[197] It is extrinsic fraud when the successful party has been prevented from fully presenting his case by acts which result in a failure to put the issues of the case in contest.[198] Only extrinsic fraud is grounds for equitable relief.[199] The rationale of this rule is that in intrinsic fraud the court is being asked to retry an issue which should have been contested at the original trial, whereas extrinsic fraud prevents the court from reaching the merits of the case.[200] However, there is a great difference between recognizing perjury and proving its existence. Another objection to the rule is its difficulty of application. To a certain degree, all fraudulent acts affect the matters being litigated and all fraudulent acts influence the court in its decision. It is difficult to defend on any logical grounds what appears to be a purely arbitrary rule. It is unjust to have the result depend on the use of a label when intrinsic fraud is as culpable and injurious as extrinsic fraud. It is submitted that a better test would be to inquire whether, if the particular fraud had not occurred, there would probably have been a different result. This preserves finality in a practical way, unlike the artificial rule concerning intrinsic fraud. The sug-

194. State *ex rel.* Cartwright v. Holmes, 69 Ind. 577 (1880). The rationale of this rule is that the prevailing party's rights would be subverted without his fault and fraud could be easily practiced by the co-parties for their own benefit. This reasoning cannot be sustained. The defrauded litigant is injured as greatly by the fraud of his co-party as he is by the fraud of its adversary. Further, the requirement of a meritorious defense would greatly deter the utilization of fraud as a dilatory device. Certainly the need to fill the gap left in this remedy by this rule is greater than is the interest of preventing the unlikely event of co-parties using fraud against one another to "de-fraud" their adversary.

195. Postal v. Postal, 192 Ind. 376, 136 N.E. 570 (1922); Himelstein Bros., Inc. v. Texas Co., 125 Ind. App. 448, 125 N.E.2d 820 (1955).

196. Walker v. State *ex rel.* Laboyteaux, 43 Ind. App. 605, 86 N.E. 502 (1908); Pepin v. Lautman, 28 Ind. App. 74, 62 N.E. 60 (1901).

197. *Ibid.*

198. Walker v. State *ex rel.* Laboyteaux, 43 Ind. App. 605, 86 N.E. 502 (1908).

199. Brake v. Payne, 137 Ind. 479, 37 N.E. 140 (1893); Johnson's Adm'r v. Unversaw, 30 Ind. 435 (1868); Pepin v. Lautman, 28 Ind. App. 74, 62 N.E. 60 (1901).

200. Pepin v. Lautman, *supra* note 199. "The party present at the trial must be prepared to meet and expose perjury, because he must know that in no other way can a false claim be supported, and the purpose of the trial is to ascertain the truth, and that in doing so the court must determine the truth or falsity of the testimony given." Pepin v. Lautman, 28 Ind. App. 74, 77, 62 N.E. 60, 61 (1908).

gested standard would allow courts more freedom to aid a defrauded litigant and still not require performance of a useless act.

Fraud for which the court will grant relief is usually designated as fraud in procurement of the judgment.[201] Included in this category is fraud in obtaining jurisdiction. Where jurisdiction is acquired by fraud, the judgment may be attacked by a complaint in equity.[202] Void judgments are proper grounds for attack under equitable proceedings.[203] Earlier cases indicate that newly discovered evidence is a proper ground for equitable relief, but no recent cases have been found on this point.[204] This may be due to the statutory remedies now available.[205] Since equitable relief also requires due diligence in discovering the new evidence, few situations would justify granting relief after three years had expired. Until then the legal remedy is adequate.[206] However, review of judgment for material new matter requires stronger evidence than a complaint for new trial for newly discovered evidence.[207] Therefore, in cases where the evidence is discovered after one year and is thus not grounds for complaint for new trial, and it also cannot be characterized as material new matter but is considered newly discovered evidence, the evidence might be grounds for equitable relief. But the possibility seems slight in view of the lack of precedent and the argument that the legislature impliedly abrogated this form of relief by enacting a statute providing for a complaint for new trial, thereby formulating the policy that no judgment should be set aside on the grounds of newly discovered evidence after the expiration of one year.[208]

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201. Friebe v. Elder, 181 Ind. 597, 105 N.E. 151 (1914); Miedreich v. Lauenstein, 172 Ind. 140, 86 N.E. 963 (1909). Fraud which would have amounted to a defense to the original cause is not cause for setting aside the judgment. Ferrara v. Genduso, 214 Ind. 99, 14 N.E.2d 580 (1938).

202. Miedreich v. Lauenstein, *supra* note 201; Cavanaugh v. Smith, 84 Ind. 380 (1882). See Cully v. Shirk, 131 Ind. 76, 30 N.E. 882 (1892).

203. Traders Loan and Investment Co. v. Houchins, 195 Ind. 256, 144 N.E. 879 (1924); Brown v. Goble, 97 Ind. 86 (1884). But where the judgment is not void, although no actual notice was received, equitable relief will not be granted. Thus, in absence of fraud, a false return of summons does not constitute grounds for equitable relief. Friebe v. Elder, 181 Ind. 597, 105 N.E. 151 (1914); Graham v. Loh, 32 Ind. App. 183, 69 N.E. 474 (1904). Here the proper remedy is application for relief for excusable neglect, etc. Nietert v. Trentman, 104 Ind. 390, 4 N.E. 306 (1885). See note 11 *supra* and accompanying text.

204. See Thompson v. Adams, 2 Ind. 151 (1850); Mason v. Palmerton, 2 Ind. 117 (1850); Fitch v. Polke, 7 Blackf. 564 (Ind. 1845).

205. See IND. ANN. STAT. § 2-2405 (Burns 1946) (complaint for new trial) and IND. ANN. STAT. § 2-2605 (Burns 1946) (Review of judgment for material new matter).

206. *Ibid.*

207. See notes 108 and 165 *supra* and accompanying text.

208. However, the validity of this argument can be questioned by reference to the fact that the complaint for new trial grants relief on grounds of extrinsic fraud and this has not deterred the court from affording equitable relief on the same grounds.

Judicial error is not a ground for equitable relief.[209] But where a litigant's right of appeal is hindered or destroyed through an error of an officer of the court, such as destruction of the trial record, equity will grant relief.[210] A new trial will be ordered only when the proposed appeal involves questions that cannot be determined without the evidence and when a general bill of exceptions containing this evidence cannot be procured in any other manner.[211] Whether the questions to be raised on appeal are of such a nature is a question of fact to be determined by the trial court.[212] Equity will relieve a party from a judgment entered as a result of the mutual mistake of the parties and the officers of the court.[213] An execution that is sought to be levied on a satisfied judgment will be enjoined, as will an execution on a judgment where payment has been tendered and refused.[214] But a litigant who has mistaken his legal rights and therefore fails to assert a defense that was competent, is not entitled to equitable relief on grounds of mistake.[215]

The remedy available in equitable proceedings is stronger than statutory relief because of the power of absolute injunction and lack of a fixed time limit. For these reasons the court is cautious in granting relief. This is as it should be; were it otherwise, the statutory remedies would be void of significance and purpose. Equitable proceedings should grant relief in situations not covered by statutory remedy and where extreme injustice would exist if relief was not granted; but in view of the lack of a definite time limit and the potential strength of this valuable remedy, the courts should exercise restraint in asserting their equitable powers.

See note 111 *supra* and accompanying text. Also, void judgments constitute grounds for relief for excusable neglect, etc. and review of judgments. See notes 10 and 144 *supra*.

209. Wohaldo v. Fary, 221 Ind. 219, 46 N.E.2d 489 (1943); Rhodes Burford Furniture Co. v. Mattox, 135 Ind. 372, 34 N.E. 326 (1893) (wrong number of jurors); Martin v. Pifer, 96 Ind. 245 (1884) (verdict rendered on insufficient evidence). Clerical errors are not grounds for equitable relief because the legal remedy is adequate. See note 30 *supra* and accompanying text.

210. Indianapolis Life Ins. v. Lundquist, 222 Ind. 359, 53 N.E.2d 338 (1943); King v. King, 119 Ind. App. 46, 82 N.E.2d 527 (1948); Hitt v. Carr, 77 Ind. App. 488, 130 N.E. 1 (1921).

211. King v. King, *supra* note 210.

212. *Ibid.*

213. Livengood v. Munns, 108 Ind. App. 27, 27 N.E.2d 92 (1940).

214. Bowen v. Clark, 46 Ind. 405 (1874).

215. Murphy v. Blair, 12 Ind. 184 (1859); Dickerson v. Bd. of Comm'rs, 6 Ind. 128 (1855). But where one is fraudulently prevented from asserting a defense, equity will grant relief. Johnson's Adm'r v. Unversaw, 30 Ind. 435 (1868). Where one is defrauded after a compromise, and thereby prevented from asserting a legal defense, it is proper grounds for equitable relief. Greenwaldt v. May, 127 Ind. 511, 27 N.E. 158 (1890); Nealis v. Dicks, 72 Ind. 374 (1880); Cory v. Howard, 88 Ind. App. 503, 164 N.E. 639 (1928). *But see* Mitchell v. Boyer, 58 Ind. 19 (1877). Where a party allows a judgment to be taken against him on the promise that his opponent will never issue execution, equity will not intercede.

The Federal Rules provide similar relief by Rules 60(b)(3) and 60(b)(5). The former provides for vacating judgments on grounds of fraud.[216] The motion must be made within a reasonable time and in any event not later than one year from the date of judgment.[217] As in Indiana, a motion to vacate on grounds of fraud must be made in the court that rendered the original judgment.[218] A meritorious defense must also be shown under Federal Rule 60(b)(3).[219] The rule on extrinsic and intrinsic fraud is specifically abrogated.[220] Rule 60(b)(3) is applicable only to fraud perpetrated by the adverse party.[221] Relief from fraud on the part of a third person should be sought under Rule 60(b)(6), by an independent action in equity, or possibly on the ground of fraud on the court.[222] Rule 60(b)(5) provides for relief where the judgment has been satisfied, released, or discharged. There is no time limit under this section other than a reasonable time.[223]

Independent equitable proceedings are also available in the federal courts.[224] It is substantially the same action as the one available in Indiana. The intrinsic-extrinsic fraud dichotomy is still in effect under the federal equitable proceeding.[225] Another remedy available in the federal courts which is comparable to the Indiana equitable proceeding, is relief based on fraud on the court.[226] It recognizes an inherent power in any court against which fraud was perpetrated to vacate a judgment so procured.[227] The court may act upon the motion of an injured litigant,[228] an interested third person,[229] or on its own motion.[230] Here there is no attempt to classify fraud as extrinsic or intrinsic.[231] There is no fixed time limitation,[232] nor is laches a defense.[233] Fraud on the court

216. FED. R. CIV. P. 60(b)(3). See Note, 3 DUKE B.J. 40 (1952).
217. FED. R. CIV. P. 60(b).
218. United States *ex rel.* Aigner v. Shaughnessy, 175 F.2d 211 (2d Cir. 1949). See note 179 *supra* and accompanying text.
219. Assmann v. Fleming, 159 F.2d 332 (8th Cir. 1947).
220. FED. R. CIV. P. 60(b)(3).
221. See 7 MOORE, FEDERAL PRACTICE § 60.25 [5] (2d ed. 1955).
222. *Ibid.*
223. FED. R. CIV. P. 60(b).
224. *Ibid.* See Note, 3 DUKE B.J. 40 (1952).
225. United States v. Throckmorton, 98 U.S. 61 (1878). *But see* Marshall v. Holmes, 141 U.S. 589 (1891). This case casts serious doubt on the validity of the rule, but did not expressly overrule the former case. See 7 MOORE, FEDERAL PRACTICE § 60.37 [1] (2d ed. 1955).
226. FED. R. CIV. P. 60(b). Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). See Note, 3 DUKE B.J. 40 (1952).
227. Hazel-Atlas Glass Co. v. Hartford Empire Co., *supra* note 226.
228. *Ibid.*
229. Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514 (3d Cir. 1948).
230. *Ibid.*
231. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944).
232. See note 229 *supra.*
233. See note 231 *supra.*

must involve an officer of the court such as a judge, attorney, or juror.[234] No such remedy appears to exist in Indiana, although similar relief may be obtained under independent equitable proceedings and complaint for new trial.[235]

The Federal Rules, in conjunction with the supplementary actions of independent proceedings in equity and fraud on the court, furnish a much broader basis for relief than the Indiana equitable proceedings. The chief reason for this is the elimination by 60(b)(3) of the rule precluding relief when the asserted ground was intrinsic fraud. This represents a most desirable innovation in the law.

Ancillary Remedies

Federal Rule 60(b) has abolished the ancient ancillary remedies of coram nobis, audita querela, bill of review and bills in the nature of bill of review, but the substantive relief formerly embodied in these remedies has been retained.[236] These remedies have never been expressly abolished in Indiana, but, as under the Federal Rules, the relief obtainable through thse remedies is now largely accorded by statutory procedures.

Coram nobis[237] is a common law writ which granted relief from judgments for error of fact. It permitted the court to set aside its judgment which was made while some fact existed, that, had it been before the court, would have prevented rendition of the judgment. As applied to civil judgments in Indiana it has been superceded by the statutes which provide relief from judgments taken through excusable neglect, etc.,[238] review of judgments for material new matter,[239] complaint for new trial for newly discovered evidence,[240] and equitable relief.[241]

Audita querela[242] is another common law writ that accorded relief from judgments for error of fact. It is very similar to the writ of coram nobis and the distinction is often ignored by the courts. The writ provides for vacation of judgment when the party was prejudiced by a

234. See 7 MOORE, FEDERAL PRACTICE § 60.33 (2d ed. 1955).
235. See notes 111 and 201 *supra* and accompanying text.
236. FED. R. CIV. P. 60(b).
237. See 1 FREEMAN, JUDGMENTS § 256 (5th ed. 1925); 7 MOORE, FEDERAL PRACTICE § 60.14 (2d ed. 1955); ORFIELD, *Writ of Error Coram Nobis,* 8 IND. L.J. 247 (1933); THORNTON, *Coram Nobis et Coram Vobis,* 5 IND. L.J. 603 (1930); ORFIELD, *Writ of Error Coram Nobis in Civil Practice,* 20 VA. L. REV. 423 (1933).
238. IND. ANN. STAT. § 2-1068 (Burns 1946); see note 1 *supra* and accompanying section.
239. IND. ANN. STAT. § 2-2605 (Burns 1946); see note 134 *supra* and accompanying text.
240. IND. ANN. STAT. § 2-2405 (Burns 1946); see note 92 *supra* and accompanying text.
241. See note 176 *supra* and accompanying section.
242. See 1 FREEMAN, *op. cit. supra* note 246, § 257; 7 MOORE, *op. cit. supra* note 237, § 60.13.

wrongful act of his adversary and for matters of fact arising after rendition of the judgment which would have been a good defense to the action had they occurred before the judgment was rendered. It is doubtful if the writ of audita querela ever existed under Indiana law. The substance of the remedy is available to litigants in the form of equitable relief, the material new matter portion of review of judgment, and a complaint for new trial.

Bills of review[243] and bills in the nature of bills of review[244] were equitable remedies which provided relief from judgment for errors of law, newly discovered evidence, new matters of fact occurring after the decree has been entered, and fraud. Historically these remedies applied only to equitable decrees. A bill of review may be brought only by the original parties or their privies whose interests have been affected by the decree; a bill in the nature of a bill of review may be brought by anyone other than the original parties or their privies whose interests have been affected by the decree.[245] The substance of these remedies was adopted in Indiana by statutes for review of judgment, complaint for new trial, and equitable relief.

There was no time limit under these ancillary remedies except laches. Since these remedies have never been expressly abrogated, it is theoretically possible that they are available to the person whose meritorious cause for relief is barred under the present statutory remedies because of the lapse of time or for some other reason. The strongest possibility would be coram nobis because it is used to attack criminal judgments and has never been specifically forbidden to a litigant in a civil action. Audita querela probably would not be available as a method of attack because it seems to have been a stranger to Indiana law. Relief is not likely to be granted through bills of reviews; since the statutory remedy of review of judgment evolved directly from this remedy. An extremely strong argument could be made that bills of review were impliedly abolished. As for coram nobis, while an argument for its use might be plausible, it is submitted that in view of the many statutory remedies available it probably would not be well received by the courts.

Conclusion

The law on judgments in Indiana is represented by many statutory and equitable remedies. Each has its own rules and its own time limits.

243. See 7 MOORE, *op. cit. supra* note 237, § 60.15.
244. *Ibid.*
245. Another distinction sometimes advanced is that bills of review sought to attack a properly enrolled decree, while a bill in the nature of a bill of review sought to attack a decree that had not been properly enrolled. 7 MOORE, *op. cit. supra* note 237, § 60.15 [1].

They are scattered throughout the statute books and the common law with no thread of centralization or continuity. The present statutory remedies have sprung from different sources and have evolved independently; consequently, many areas overlap and others are not adequately provided for. There is great need for compilation and centralization. Through careful consolidation an area presently replete with conflicts and gaps could be resolved into an efficient, comprehensive body of law. The law germane to vacation of judgments in Indiana has various time limits governing its applicability. When the interests involved are as nebulous as the ones dealt with here, setting a fixed time limit amounts to little more than guesswork.[246] Therefore, the real problem is to determine the most effective method by which litigation may be terminated and still preserve maximum freedom to the courts to correct injustice. It is submitted that this principle could best be attained through the elimination of fixed time limits and the use of a reasonable time as a standard.[247] The fixed statutory time limits protect against unnecessary delay by imposing the requirement of diligence but fail to provide for the occasional extreme cases that go uncorrected. A reasonable time limit furnishes safeguards on both sides of the scale. It is not sufficient to argue that the reasonable time limit would unduly burden the judgment holder because he would never be sure that the matter has been brought to an end. The courts should consider the hardship a vacation would impose on the judgment holder as one of the circumstances in deciding whether to set aside the judgment; however, the policy underlying finality of judgments is not primarily the protection of the judgment holder but a societal interest aimed at securing an end to litigation.

The Federal Rules provide for relief on motion; under the Indiana procedure the applicant must proceed by complaint. It is submitted that the federal rule offers a more flexible and expeditious method of handling pleas for relief. Proceedings on motion have several advantages over the complaint. First, bearing in mind that finality is a desirable policy and that just claims should be adjudicated and disposed of as rapidly as possible, hearing on motion allows the courts to dispose of

246. Such a practice admits that justice must be denied in some case, but that this concession is justified by the benefits that accrue to society by securing an end to litigation.

247. Admittedly this condemns the present fixed time limits as being too short in some cases and moves the balance away from finality toward justice in the individual situations. However, the decree of the shift is slight, as illustrated by the cases dealing with equitable relief. By use of a reasonable time limit it is assumed that the longer the lapse between judgment and prayer for relief the stronger the circumstances in favor of the applicant must be.

claims more quickly. Secondly, proceedings on motion allow the court to definitely retain jurisdiction over the parties.[248]

It is suggested that the above recommendations would result in a more effective and clearer procedure of attacking judgments. Consolidation especially would have an advantageous effect. It would benefit both judgment holders and applicants in clarifying the law. Consolidation would restrict ill-defined causes of action, thereby protecting finality, and would afford clear relief to claimants who have set out meritorious causes.

THE MOTION FOR A DIRECTED VERDICT IN INDIANA: AN EVALUATION OF PRESENT STANDARDS

A motion for a directed verdict, properly viewed, tests the legal sufficiency of the evidence to sustain each of the ultimate propositions which collectively constitute the cause of action or defense that the proponent has asserted.[1] A proponent attempts to prove these ultimate

248. By requiring a complaint, the court must again obtain jurisdiction over the parties before it can proceed with the hearing. This might prove difficult in some cases. For example, where one who prevailed in the original cause has left the state or where he was a non-resident and sued in an Indiana court, the applicant who has a valid cause for relief might be defeated on jurisdictional grounds. Gavit contends that jurisdiction may be obtained by publication in these situations, the action being in rem with the judgment the res. 2 GAVIT, INDIANA PLEADING AND PRACTICE § 216(c) (1942). This reasoning is supported in Padol v. Home Bank and Trust Co., 108 Ind. App. 401, 27 N.E.2d 917 (1940). This case allowed notice by publication in an action under Burns 2-1068, but the question was not raised or discussed by the court.

1. "Our procedure and practice do not recognize the right of a defendant to require the withdrawal of a case from the jury by a motion for a nonsuit." Diamond Block Coal Co. v. Edmonson, 14 Ind. App. 594, 595, 43 N.E. 242, 243 (1896); City of Plymouth v. Milner, 117 Ind. 324, 20 N.E. 235 (1888). But if the defendant seeks to make an attack upon the evidence supporting one of several allegations in a complaint, the proper procedure is to request the court to withdraw that issue from the consideration of the jury, rather than to request a directed verdict. In New York Cent. R.R. Co. v. Verkins, 125 Ind. App. 320, 122 N.E.2d 141 (1954), the plaintiff alleged that the defendant was negligent in three particulars; high and dangerous rate of speed, failure to give a warning, and failure to keep a lookout. The defendant tendered what appears to be a peremptory instruction in his favor on the later allegation, but the Appellate court treated the instruction as one to withdraw the issue from the jury and held that it was error for the trial court to refuse this motion when there was no evidence to support the issue. See Johnson v. Estate of Gaugh, 125 Ind. App. 510, 124 N.E.2d 704 (1955). If the paragraphs of the complaint state different causes of action, the proper motion to attack one paragraph is the request for a directed verdict. Hamling v. Hildebrandt, 119 Ind. App. 22, 81 N.E.2d 603 (1948); Chicago, S.S. & S.B. R.R. Co. v. Pacheco, 94 Ind. App. 353, 181 N.E. 7 (1932).

Evidence is not categorically divided or compartmentalized into the ultimate propositions that such evidence is adduced to prove. Chacker v. Marcus, 119 Ind. App. 672, 86 N.E.2d 708 (1949). In determining whether the ultimate propostions have been