with the need for continuing coordination between its efforts in this field and compatible efforts by the American Bar Association and by the Indiana State Bar Association.

Incidentally, in closing it should be noted that the court and other lawyers in Indiana are well served in the area of Professional Responsibility by *Res Gestae,* the monthly magazine of the Indiana State Bar Association. It has regularly printed proposed rules affecting the area of professional responsibility, and almost every issue has carried one or more articles, notices, messages, or features on this important subject.

XV. Property

*Ronald W. Polston**

Several significant cases involving property rights were decided by the Indiana courts during the survey year. Four classes of cases are discussed below: (1) right of a remote vendee to recover on the implied warranty of habitability of a builder-vendor, (2) landlord and tenant relationships, (3) liability for interference with the flow of surface waters, and (4) survivorship rights in personal property held by joint tenants. Other classes of cases decided during the year, but not discussed in detail below, include the following: subdivision covenants,[1] condemnation by state[2] and federal authorities,[3] remedies of the seller under conditional land

*Professor of Law, Indiana University School of Law—Indianapolis. LL.B., University of Illinois, 1958.

The author thanks Philip C. Thrasher for his assistance in preparation of this discussion.

[1]In Highland v. Williams, 336 N.E.2d 846 (Ind. Ct. App. 1975), the appellant was required to remove his home from his subdivision lot because it was deemed to be in violation of a subdivision covenant and he failed to prove that there had been a radical change in the subdivision, an abandonment of the subdivision's general plan, a substantial prior nonconformity, or laches.

[2]In Alabach v. Northern Indiana Pub. Serv. Co., 329 N.E.2d 645 (Ind. Ct. App. 1975), the court held that a public utility with power of eminent domain need not obtain approval from the Public Service Commission of the quantity or location of its land acquisitions. *See also* Harding v. State *ex rel.* Dep't of Natural Resources, 337 N.E.2d 149 (Ind. Ct. App. 1975) (condemnation awards do not include attorney's fees for the defendant).

[3]United States v. 573.88 Acres of Land, 531 F.2d 847 (7th Cir. 1976) (a commission's award will not be held "clearly erroneous" when the record shows that the commission was given adequate instructions, weighed conflicting evidence, and granted awards consistent with the evidence submitted).

contract,[4] zoning,[5] real property taxation,[6] and mechanics' liens.[7]

[4]In the continuing saga of vendor's remedies against a purchaser defaulting on a conditional land contract, the plaintiff-appellant in Skendzel v. Marshall, 330 N.E.2d 747 (Ind. 1975), appealed the trial court judgment as not conforming to the guidelines set forth in the landmark decision of the Indiana Supreme Court, Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973). On remand the trial court awarded the plaintiff-appellant the principal sum remaining unpaid on the contract and real estate taxes paid by her plus 8 percent interest, attorney's fees of $1,000, and half the costs and "accruing" costs of the action from the proceeds of sale of the real estate. The foreclosure sale was stayed for 65 days to give defendants an opportunity to redeem. The supreme court upheld this judgment as being neither inequitable nor insufficient. However, in Donaldson v. Sellmer, 333 N.E.2d 862 (Ind. Ct. App. 1975), the court allowed forfeiture rather than requiring a foreclosure proceeding and awarded seller damages for repair costs in excess of amounts paid by purchaser under the contract. In *Donaldson* the purchaser defaulted in payment of property insurance, fell three months behind on contract payments, failed to maintain the property in a good state of repair, and executed a second conditional contract to sell the real estate to a third party without the seller's permission. *Skendzel;* Tidd v. Stauffer, 308 N.E.2d 415 (Ind. Ct. App. 1974); and Goff v. Graham, 306 N.E.2d 758 (Ind. Ct. App. 1974) were cited in support of the holding. The rationale for allowing forfeiture in this case was the fact that the cost to return the property to its original condition and reimburse the seller for her additional interim expenses exceeded the equity of the purchaser. This case is also discussed in Townsend, *Secured Transactions & Creditors' Rights, infra* at 315.

[5]In City of Beech Grove v. Schmitt, 329 N.E.2d 605 (Ind. Ct. App. 1975), the court discussed the elements of "existing non-conforming use" and types of alternation of the premises which are permissible under a zoning code exemption. Board of Zoning Appeals v. Shell Oil Co., 329 N.E.2d 636 (Ind. Ct. App. 1975), included a holding that the date of filing of an application for a building permit determines the date of the applicable zoning law. The court in City of Evansville v. Reis Tire Sales, Inc., 333 N.E.2d 800 (Ind. Ct. App. 1975), held that zoning is a valid exercise of police power, but when a zoning ordinance prevents any reasonable use of land, the ordinance is unconstitutional. See Marsh, *Constitutional Law, supra* at 139. The court in Pitts v. Mills, 333 N.E.2d 897 (Ind. Ct. App. 1975), found that although residents of adjacent land did not have standing as remonstrators in regard to annexation and rezoning of vacant land, they could maintain an action for declaratory judgment to challenge the annexation ordinance.

[6]*See* Board of Tax Comm'rs v. Valparaiso Golf Club, Inc., 330 N.E.2d 394 (Ind. Ct. App. 1975), holding that when assessment regulations of the state board of tax commissioners do not contain regulations for a particular type of property, the board must consider all elements of just valuation set forth in IND. CODE § 6-1-33-3 (Burns 1972) [amended after this decision to IND. CODE § 6-1.1-31-6 (Burns Supp. 1976].

[7]*See* Nicholson's Mobile Home Sales, Inc. v. Schramm, 330 N.E.2d 785 (Ind. Ct. App. 1975), which held that a mobile home park owner may perfect a hotel keeper's lien by mere possession of a mobile home after he has provided services thereto. See Townsend, *Secured Transactions & Creditors' Rights, infra* at 316. In Lake County Title Co. v. Root Enterprises, Inc., 339 N.E.2d 103 (Ind. Ct. App. 1975), the Third District Court of Appeals, citing IND. CODE § 32-8-3-3 (Burns 1973), held that failure to comply with

A. The Right of a Remote Vendee To Recover on the Implied Warranty of Habitability of a Builder-Vendor

In *Barnes v. Mac Brown & Co.*,[8] the Indiana Supreme Court reversed the Indiana Court of Appeals[9] and extended the builder-vendor's implied quality warranty on new homes to all subsequent owners of the home. In the hands of the subsequent owner the implied warranty now extends to "latent defects, not discoverable by a subsequent purchaser's reasonable inspection, manifesting themselves after the purchase."[10] The majority in this 3-2 decision seemed to characterize the problem as one governed by the laws of products liability or tort, citing as its only authority a personal injury case in which the purchaser of a second-hand farm tractor was injured because of a manufacturer's hidden defect in the tractor.[11] The minority viewed the interests of the appellants as having arisen from the contract for purchase between them and the first buyers, a contract in which the builder-vendor had no interest; thus, lack of privity would be a complete defense for the builder-vendor.

Only four years ago the Indiana Supreme Court, in *Theis v. Heuer*,[12] established that a builder-vendor has some quality obligations with respect to new housing which he produces or markets. Those obligations are referred to as implied warranties of habit-

---

statutory requirements in filing a mechanic's lien is tantamount to waiver of the rights provided to subcontractors by the mechanic's lien statutes. Following such waiver, a subcontractor who has not contracted directly with the owner has no rights against the owner if he has paid the general contractor. *See also* Van Wells v. Stanray Corp., 341 N.E.2d 198 (Ind. Ct. App. 1976), in which the court enumerated the elements a materialman must prove to perfect a lien on the premises. He must prove that the material was delivered to the owner's job site, was intended to be used in the building, was actually incorporated in the building, and proper lien notice was filed. The court held that actual incorporation in the building may be proved either through estoppel of denial by the owner or through presumption arising on delivery of the materials to the job site. This case is also discussed in Townsend, *Secured Transactions & Creditors' Rights*, *infra* at 323.

[8]342 N.E.2d 619 (Ind. 1976).

[9]323 N.E.2d 671 (Ind. Ct. App. 1975). *See* Bepko, *Contracts and Commercial Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 132, 141 (1975).

[10]342 N.E.2d at 621.

[11]J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964), *cited at* 342 N.E.2d at 620.

[12]280 N.E.2d 300 (1972), *aff'g* 149 Ind. App. 52, 270 N.E.2d 764 (1971) (adopting opinion of court of appeals). *See* Comment, *Theis v. Heuer: Implied Warranties in Sale of Housing*, 5 IND. LEGAL F. 221 (1971).

ability. *Theis v. Heuer* and other similar cases[13] quite naturally did not involve the question of the effect of lack of privity because the parties to the actions were the same as the parties to the contracts of sale into which the warranties were being implied.

The Indiana Supreme Court's decision in *Barnes* is clearly consistent with the approach being taken elsewhere with respect to the privity question,[14] but the split between the majority and minority is indicative of a general lack of agreement with respect to the theory to be employed in approaching the question. Courts have rejected the defense of lack of privity by using strict liability in tort,[15] negligence,[16] and fraud[17] as the theoretical basis of their decisions. Despite this lack of uniformity in reasoning, the trend is nevertheless clearly toward elimination of privity as an element in a suit for breach of implied warranty of habitability of used houses.

While the trend seems to be in favor of rejecting the need for privity, a few jurisdictions retain the privity requirement.[18] Most of the judicial statements that lack of privity is a good defense, however, are either dicta or are not supported by the facts of the cases in which they appear. One case which imposed liability on a builder-vendor in an action by his immediate vendee included dictum which seemed to indicate that only the first purchaser could recover.[19] Decisions based on unsupportive facts include suits by a subsequent vendee against an intervening vendor who purchased directly from the builder for resale.[20]

---

[13]*E.g.*, Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[14]*E.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1962); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); MacPherson v. Buick Motors Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[15]*E.g.*, Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

[16]*E.g.*, Steinberg v. Coda Roberson Constr. Co., 79 N.M. 123, 440 P.2d 798 (1968).

[17]*E.g.*, Belote v. Memphis Dev. Co., 208 Tenn. 434, 346 S.W.2d 441 (1961).

[18]See notes 19-22 *infra.*

[19]Leffler v. Banks, 251 Ark. 277, 472 S.W.2d 110 (1971): "[W]e adopted the modern rule by which an implied warranty may be recognized in the *first sale* of a new house by a seller who was also the builder." *Id.* at 277, 472 S.W.2d at 111 (emphasis added). *See also* Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972): "This appeal presents squarely the question of whether implied warranties of merchantable quality and fitness exist in the purchase of a *new* home by the *first purchaser* from a vendor-builder. We hold such warranties do exist." *Id.* at 796 (emphasis added).

[20]H.B. Bolas Enterprises, Inc. v. Zorlingo, 156 Colo. 530, 400 P.2d 447 (1965); Utz v. Moss, 31 Colo. App. 475, 503 P.2d 365 (1972).

There are two states, however, where the position taken by the dissent in *Barnes* is accepted. In Mississippi, a second purchaser was not allowed to recover, but it is unclear whether the court was sustaining a defense of lack of privity or simply rejecting creation of an implied warranty of habitability.[21] In Maryland, by statute, lack of privity is clearly a defense.[22] The Maryland statute is interesting, however, because as the act was originally introduced it provided the opposite result.[23]

Extension of the implied warranty of habitability to subsequent purchasers has the effect of increasing the magnitude of the risk, the uncertainty of the type of risks, and the time within which these risks may result in loss and/or litigation for the builder-vendor. The courts have, in the past, seemed to incorporate the fears aroused by these risks in members of the building community as a policy argument in favor of restricting the extension of liability contemplated in *Barnes*.[24] Such an argument loses sight, however, of existing ten and fifteen-year statutes of limitation[25] and the fact that the implied warranties of *Theis v. Heuer* remain enforceable by the original vendee if he chooses not to sell to a subsequent vendee. These same issues have been raised in cases involving the sale of personal property, and in those cases the defense of lack of privity had, until recently, been more successful. While such defense was long ago abandoned in situations in which a defectively manufactured product caused personal injury or property damage,[26] it has prevailed until very recently when the injury complained of is mere economic loss of bargain by a subvendee.[27] As the dissent pointed out in *Barnes*, because the defendant builder-vendor did not participate in the bargaining, there is a feeling that he should not be held responsible for economic loss to the subsequent buyer.[28] In fact, the drafters of the Uniform Commercial Code elected to leave the question of privity to be

---

[21]Oliver v. City Builders, Inc. 303 So. 2d 466 (Miss. 1974).

[22]MD. REAL PROP. CODE ANN. §§ 10-201 to 10-205 (1974).

[23]1970 Md. Laws, ch. 151 (1970).

[24]This argument, contending that the builder would be in the position of an insurer with respect to personal injuries occurring in all houses he erected, was suggested by the defendant in Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 214 (1965).

[25]IND. CODE § 34-4-20-2 (Burns Supp. 1976), establishes a 10-year limitation for those who design, plan, supervise, or observe construction. *Id.* § 34-1-2-3 (Burns 1973) provides a 15-year limit on all actions not otherwise barred.

[26]MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

[27]*See, e.g.*, Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953).

[28]342 N.E.2d at 621.

determined by the law of the various states adopting the Code.[29] Indiana has adopted the most restrictive of the three provisions suggested in the Code, limiting the third party beneficiary class for sellers' warranties to the buyer's family, household, and guests.[30]

A growing minority of states have adopted the broader alternatives, which expand liability of builder-vendors beyond that contemplated by section 402A of the *Restatement (Second) of Torts*.[31]

Inasmuch as the need for privity has been rejected in the law of products liability and placed in doubt in the law of personal property sales, it is not surprising that it should also be rejected by the courts when the suit involves the sale of real property. The decision of the Indiana Supreme Court was therefore a sound and welcome advance in the law of real property.

B. Landlord and Tenant Relationships

Several cases decided this year by the Indiana courts involving landlord and tenant relations marked changes in Indiana law.

In *Hirsh v. Merchants National Bank & Trust Co.*,[32] the court held in part that the landlord was required to make diligent efforts to relet the premises in mitigation of damages upon abandonment by the lessee. Unfortunately, the only authority cited was *Carpenter v. Wisniewski*,[33] a case in which the obligation of the landlord to mitigate was imposed by the lease. Actually, case law in Indiana prior to this decision was to the effect that the landlord has no such obligation;[34] however, this holding quite clearly follows the modern trend of the law.[35]

Another interesting aspect of the *Hirsch* decision was the court's discussion of the burden of proof. In *Carpenter* the court placed the burden of proof of mitigation of damages on the landlord because the lease required the landlord to relet the premises

---

[29]U.C.C. § 2-318, Comment 3.

[30]IND. CODE § 26-1-2-318 (Burns 1974).

[31]J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-3, at 331 n.15 (1972).

[32]336 N.E.2d 833 (Ind. Ct. App. 1975).

[33]139 Ind. App. 325, 215 N.E.2d 882 (1966).

[34]Patterson v. Emerick, 21 Ind. App. 614, 52 N.E. 1012 (1899); Aberdeen Coal & Mining Co. v. City of Evansville, 14 Ind. App. 621, 43 N.E. 316 (1895).

[35]*See* LaVasque v. Beeson, 164 Ark. 95, 261 S.W. 49 (1924); Wohl v. Yelen, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1959); Friedman v. Colonial Oil Co., 236 Iowa 140, 18 N.W.2d 196 (1945); Marmont v. Axe, 135 Kan. 368, 10 P.2d 826 (1932); System Terminal Corp. v. Cornelison, 364 P.2d 91 (Wyo. 1961). *See also* Note, *A Lessor's Duty to Mitigate Damages*, 17 WYO. L.J. 256 (1963).

upon abandonment by the tenant.[36] In the *Hirsch* case, however, citing *Miller v. Long*[37] and *Mug v. Ostendorf*,[38] the court held that such burden was on the tenant when the lease did not require the landlord to relet.

Having decided that the landlord has a duty to mitigate, the court examined the effect of repossession by the landlord. Such an act must be viewed in a different perspective in a system which requires the landlord to mitigate his damages than in one which does not require mitigation. In an era in which the landlord was *not required* to mitigate damages, older cases evolved the "surrender by operation of law" doctrine, according to which mere repossession of the abandoned leased premises could terminate the liability of the absconding tenant under the lease.[39] It would be unfair, however, to hold that although the landlord is required to relet he can only do so at the risk of relinquishing all rights to recover from the breaching tenant. The court was therefore quite correct when it held: "Merchants had a valid right to take possession and thereby mitigate damages as was their obligation under the law."[40]

This issue was before the same court again in *State v. Boyle*,[41] in which the court adhered to its decision that the landlord by taking possession to mitigate damages does not effect a surrender by operation of law. The *Boyle* case also involved the question of who has the duty to repair when the commercial lease is silent on the subject. It was contended by the lessee that the landlord has an implied duty to repair. The court did not find it necessary to decide this issue, however, because it found that even if there were such a duty the record did not indicate that there were facts sufficient to constitute a breach of that duty.[42]

Pilotte v. Brummett[43] was a landlord and tenant case with an interesting procedural question. In that case the landlord brought suit for possession prior to expiration of the lease. By the time of the trial the lease had expired, however, and judgment was given for the landlord. The court of appeals affirmed, holding that the

---

[36]139 Ind. App. at 327, 215 N.E.2d at 884.

[37]126 Ind. App. 482, 131 N.E.2d 348 (1956) (involving an award of special damages in an action for conversion of personal property).

[38]49 Ind. App. 71, 96 N.E. 780 (1911) (involving a breach of contract to make a will in which the plaintiff proved and was awarded damages in excess of the contract when defendant failed to show why the higher award was not justified).

[39]*See, e.g.*, Terstegge v. First German Mut. Benev. Soc., 92 Ind. 82 (1883).

[40]336 N.E.2d at 837.

[41]344 N.E.2d 302 (Ind. Ct. App. 1976).

[42]*Id.* at 304.

[43]332 N.E.2d 834 (Ind. Ct. App. 1975).

defendant had waived the question by failing to plead prematurity in the trial court.

The Second District Indiana Court of Appeals delivered a 2-1 decision in *Old Town Development Co. v. Langford*[44] which should have a considerable impact on the law relating to the landlord and tenant relationship in Indiana. The primary opinion by Judge Buchanan takes a fundamentally different approach to that relationship than has heretofore been taken by Indiana courts.

Heretofore, Indiana has viewed the landlord and tenant relationship in the traditional manner, deeming the transaction between them primarily as a conveyance of property. The Buchanan opinion, on the other hand, consistent with a growing number of authorities,[45] views the transaction as a contract to furnish a housing package to the tenant.[46] Substantially different results obtain under the two theories. Under the conveyance approach, the tenant was regarded as the owner and as such was responsible for the condition of the premises; therefore, the landlord undertook no implied obligations with respect to the quality of the premises either at the beginning of the term[47] or thereafter, and the duty to repair was placed upon the lessee.[48] Except for concealed conditions, the landlord was not liable for injuries suffered by the tenant or third persons which resulted from defects in the leased premises.[49] Under the contract approach, on the other hand, the landlord has an obligation to furnish habitable housing at the beginning of the term and a duty to keep it habitable.[50] When this duty is breached the landlord may be required to respond in damages for injuries caused to the tenant or third persons.[51]

---

[44]349 N.E.2d 744 (Ind. Ct. App. 1976). A petition to transfer has been filed in this case, and the Indiana Supreme Court may choose to rule on this important area of the law.

[45]*See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

[46]349 N.E.2d at 764.

[47]Anderson Drive-In Theatre, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

[48]Stover v. Fechtman, 140 Ind. App. 62, 222 N.E.2d 281 (1966); Barman v. Spencer, 49 N.E. 9 (Ind. 1898).

[49]Hunter v. Cook, 149 Ind. App. 657, 274 N.E.2d 550 (1971); Stover v. Fechtman, 140 Ind. App. 62, 222 N.E.2d 281 (1966); Guenther v. Jackson, 79 Ind. App. 127, 137 N.E. 582 (1922).

[50]Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973).

[51]It has not always been held that the landlord is liable for personal injuries which may result from a breach of a contractual duty to repair. Rather, damages in such a case have been limited to the cost of repair. For a discussion of this issue, see Faber v. Creswick, 31 N.J. 234, 156 A.2d 252 (1959). Damage limitations inherent in the doctrine of Hadley v. Baxendale, 9 Exch. 341 (1854), seem to be relied on in such holdings. Judge Buchanan

In the *Old Town* case, the tenant's wife and children were killed and the tenant was injured when a fire swept the leased apartment. There was evidence to show that the fire was caused by the furnace flue having been installed too close to combustible floor joists at the time of original construction, approximately twenty months before the fire. The liability of the landlord was asserted on the basis of negligence, an implied warranty of habitability arising from the lease, strict liability in tort similar to that which has been imposed in products liability cases, and res ipsa loquitur. It was in this context, then, that Judge Buchanan adopted a contract approach to the landlord and tenant relationship, and the court affirmed a judgment in favor of the tenant in excess of one-half million dollars.

The court held that there was evidence sufficient to find the defendant liable for personal injury and property damage on three theories: negligence,[52] res ipsa loquitur,[53] and breach of implied warranty of habitability;[54] however, the court refused to extend strict liability in tort to the defendant.[55] The first two theories were supported by evidence of improper initial construction, improper inspections during construction, and exclusive control by the landlord of the defective heating system since construction.

In holding the defendant liable for breach of an implied warranty of habitability the court made several significant holdings. These include a finding that residential leases are contracts[56] and that such contracts contain a "bifurcated" implied warranty of habitability. One part of this warranty is similar to the implied warranties of merchantability and fitness for a particular purpose of the Uniform Commercial Code,[57] and warrants freedom from latent defects causing the premises to be uninhabitable. The other part of the warranty is a promise to maintain the premises in habitable condition.[58] The court also held that the landlord must receive notice of a defect and be allowed a reasonable opportunity

notes, however, that the *Hadley v. Baxendale* doctrine has recently been extended to include such consequential damages as personal injuries. 349 N.E.2d at 761.

[52] *Id.* at 781.

[53] *Id.*

[54] *Id.* at 774.

[55] *Id.* at 769-72. The court held that a jury instruction applying a standard of strict liability in tort was harmless error, as the verdict was supported by evidence of breach of implied warranty and of negligence.

[56] *Id.* at 764. The court found that a lease, contractual in nature, gives rise to the full range of breach of contract remedies.

[57] *Id.* at 776. The lessor warrants that the leasehold is fit for residential purposes. U.C.C. §§ 2-314, 2-315.

[58] 349 N.E.2d at 764.

to repair, that a defect which is latent is a breach of an implied warranty of freedom from latent defects, and that the notice requirement for such a breach is "minimal"; notice will be presumed where the landlord was also the builder. The decision also establishes that breach of the warranty will subject the landlord to liability (1) for damages "for breach of contract . . . including any consequential damages . . ." and (2) "for personal injury and personal property damage in tort . . . ."[59] The court did, however, stop short of extending strict liability in tort, as represented by the *Restatement (Second) of Torts* section 402A, to residential landlords or applying this new implied warranty of habitability to landlords who had no substantial connection with the defect at the time of construction.[60]

In a concurring opinion, Judge Sullivan stated that he could see no justification for not extending section 402A principles to this case, inasmuch as the constructive notice found by Judge Buchanan converted the implied warranty theory into one of strict liability. Judge Sullivan's opinion may also fairly be read as authority for not imposing strict liability upon a mere residential landlord who had no connection with the creation of the latent defect.[61]

In view of the lack of consensus among the three judges, it is possible to construe *Old Town* as imposing a form of strict liability for latent defects rendering the leased premises uninhabitable only on builder-landlords, while retaining substantial notice requirements in cases of vendee-landlords. It is apparent, therefore, that the application of the strict liability doctrine has nothing to do with the fact that a landlord is involved. It is based rather on the fact that a builder is involved in one case and not in the other. Where a builder is involved, strict liability is applied. Where a mere landlord is involved, negligence continues to be the basis for finding liability. It would seem, then, that whether the apartment builder keeps and manages the complex himself, or sells it to another, would have no bearing on his liability should an injury thereafter occur as a result of a construction defect. In either case, he is being held strictly liable as the manufacturer of a product. The only part of the equation that changes when he sells the complex is that he has now destroyed the privity of contract which would otherwise have existed between him and the apartment dweller and it seems that *Barnes v. Mac Brown* would render that fact immaterial.

---

[59] *Id.* at 765.

[60] Dissimilarities between the sellers of defective goods contemplated by § 402A and the residential lessor were observed, and a need for judicial and legislative action on this issue was noted. *Id.* at 776-79.

[61] *Id.* at 790-93.

C. Liability for Interference with the Flow of Surface Waters

In *Gene B. Glick Co. v. Marion Construction Corp.*[62] the Indiana Court of Appeals considered the problem of increased discharge of surface waters upon a lower watershed owner as a result of subdivision of the upper watershed land. The case was factually interesting because, while the creek which provided drainage to both the upper and lower watershed properties originated on the lower land, there was no natural channel carrying the water from the upper land to the creek. Therefore, prior to development of the upper land, storm waters drained to the lower land simply as diffused surface water. In developing a subdivision, the owner of the upper land constructed storm sewers and ditches thereon and channelled the surface drainage toward the lower land. Thereupon, the upper land owner trespassed onto the lower property and dug a ditch carrying the water from the storm sewers and ditches to the creek. The defendant upper owner would therefore have been liable as a trespasser quite apart from the law in relation to surface waters, but only the latter issue was dealt with at length by the court of appeals. In discussing the liability of the appellant the court reflected the confusion that has characterized cases in Indiana and elsewhere concerning the rights of adjoining landowners with respect to diffused surface waters. Three different approaches to the problem have been taken by the courts of this country: (1) the "common enemy" or common law, (2) the civil law, and (3) the reasonable user approach.[63] In a leading law review article on the subject Indiana was placed among the "common enemy" group.[64] In purest form the "common enemy" approach holds that surface owners may do anything they wish to combat the surface waters without incurring liability to anyone injured thereby.[65] At the other extreme, the civil law doctrine

---

[62]331 N.E.2d 26 (Ind. Ct. App. 1975).

[63]*See* Kenyon & McClure, *Interference With Surface Waters*, 24 MINN. L. REV. 891 (1940) and cases cited therein.

[64]*Id.* at 903.

[65]*See, e.g.*, Cairo & Vin. R.R. Co. v. Stevens, 73 Ind. 278 (1881):

> Dillon, in his work on Municipal Corporations, speaking of the surface water, says: "This the law very largely regards (as Lord Tenterden phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may. . . . On the other hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their powers in respect to graduation, improvement, and repair

provides that anyone who interferes in any way with the natural flow of water is liable to any other landowner who suffers damage as a result thereof.[66] The reasonable user approach would impose liability only for an unreasonable interference with, or increase in, the flow of surface waters.[67]

Some early Indiana cases which adopted the "common enemy" approach did so on facts which are consistent with that doctrine;[68] however, such cases all involved obstructions to the flow of surface water constructed by a lower watershed owner. When the court was first faced with the converse of the obstruction, i.e., building ditches and drains by the upper owner to concentrate and increase the flow of surface water, however, it expressly adopted the civil law doctrine without seeming to recognize that Indiana had adopted the common enemy approach in prior cases. The confusion that has resulted is illustrated by a paragraph in *Indiana Law Encyclopedia* which is quoted in the principal case and which states, in effect, all three of the rules in regard to surface waters,[69] without recognizing the three are inconsistent.

The court had an excellent opportunity to adopt the more sensible "reasonable user" approach inasmuch as the case also involved an ordinance of the Metropolitan Planning Commission

---

of streets, without being liable for the consequential damages caused by surface water to adjacent property."

Id. at 281.

[66]*See, e.g.*, Templeton v. Voshloe, 72 Ind. 134 (1880), in which the court quoted approvingly from an authority expressing the civil law approach:

> Before proceeding to consider the law as to water percolating through the earth, beneath its surface, it is necessary to refer to a few principles which seem now to be pretty well settled as to the respective rights of adjacent land-owners, in respect to waters which fall in rain, or are in any way found upon the surface, but not embraced under the head of streams or watercourses, nor constituting permanent bodies of water, like ponds, lakes, and the like. It may be stated as a general principle, that, by civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows, and the like, upon one, naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land if desired by the owner of the upper field. But the latter can not, by artificial trenches, or otherwise, cause the natural mode of its being discharged, to be changed to the injury of the lower field, as by conducting it by new channels in unusual quantities on to particular parts of the lower field.

Id. at 136.

[67]*See, e.g.*, City of Franklin v. Durgee, 71 N.H. 186, 51 Atl. 911 (1901).

[68]Clay v. Pittsburgh, C.C. & St. L. Ry., 164 Ind. 439, 73 N.E. 904 (1905); Cairo & Vin. Ry. v. Stevens, 73 Ind. 278 (1881); Taylor v. Fickas, 64 Ind. 167 (1878).

[69]The court cites 29 INDIANA LEGAL ENCYCLOPEDIA *Water* 53 (1960). 331 N.E.2d at 31.

which imposed a duty on the lower land owner to provide for safe handling of prospective surface drainage from the upper land at the time of development of the lower land.[70] The court held, however, that the ordinance was not intended to change the common law and, consistent with prior Indiana authority, that an upper land owner is liable for damage caused a lower land owner by an increase in the flow of surface waters onto the lower land as a result of the construction of ditches and drains on the upper land.

D. Survivorship Rights in Personal Property Held by Joint Tenants

Three major events involving survivorship rights occurred in Indiana since the last Survey of Recent Developments in Indiana Law. First, the Indiana Supreme Court affirmed the decision of the Third District Indiana Court of Appeals[71] and adopted the lower court's opinion in the landmark case of *In re Estate of Fanning,*[72] which stated that certificates of deposit belong to the surviving donee co-owner because such certificates are in reality third-party donee beneficiary contracts. Second, the Second District Indiana Court of Appeals was called upon to apply the *Fanning* doctrine in *Robison v. Fickle,*[73] a case involving survivorship rights, not only in certificates of deposit, but also in corporate stock and a joint savings account. Third, the Indiana General Assembly enacted legislation, effective January 1, 1977, setting forth the rights of various parties in and to funds deposited in multiple-party accounts in financial institutions.[74] The new law should greatly reduce the uncertainties with respect to joint accounts which have resulted in such litigation as *Fanning* and *Robison.*

Initially, it should be noted that the new law affects only accounts in financial institutions, including certificates of deposit, and no other property. The new law provides that, in the case of multi-party accounts, during the lifetime of all the parties the account funds are deemed to be owned in the same proportion as the net contributions to the account by the parties; however, upon the death of a party all funds belong to the survivor or survivors.[75] In addition to a requirement that "clear and convincing evidence" be admitted to prove an intent different from the result set forth

---

[70] *Id.* at 30.

[71] 315 N.E.2d 718 (Ind. App. 1974), discussed in *Property, 1975 Survey of Recent Developments in Indiana Law,* 9 IND. L. REV. 294 (1975).

[72] 333 N.E.2d 80 (Ind. 1975).

[73] 340 N.E.2d 824 (Ind. App. 1976).

[74] IND. CODE §§ 32-4-1.5-1 to -15 (Burns Supp. 1976).

[75] *Id.* §§ 32-4-1.5-1 to -4.

above,[76] the new law also provides a presumption that all joint accounts are intended to have the survivorship characteristics set forth in the statute.[77] In keeping with the apparent intent of the courts in *Fanning* and *Robison*, the Act specifically allows such accounts as exceptions to the wills statutes;[78] however, donee-beneficiaries are not allowed to retain the funds as against the "claims, taxes, and expenses of administration, including the statutory allowance to the surviving spouse or dependent children," to the extent of the donee-beneficiary's gain and the insufficiency of estate assets.[79]

XVI. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

A. Recording Statutes: Recording Contracts Affecting Persons Tapping into Municipal Sewers

Legislation permits owners and developers of land outside a municipality to connect to municipal sewers by contract binding the owners and their successors to pay a fair pro rata share of the cost of the sewer when they tap into the line.[1] This statute requires that the contract include a provision binding owners and their successors to an agreement not to remonstrate against annexation. However, an owner will not be bound unless the contract is recorded in the real estate records before he taps into the line.[2]

A recent Indiana Court of Appeals decision[3] holds that recording of a contract between the municipality and the developer's contractor (who was not a record owner of the land) is ineffective

---

[76] *Id.* §§ 32-4-1.5-3(a) and -4(a).

[77] *Id.* § 32-4-1.5-1(4) provides that "joint account" means an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.

[78] *Id.* §§ 32-4-1.5-6 and -14.

[79] *Id.* § 32-4-1.5-7.

*Professor of Law, Indiana University School of Law—Indianapolis. A.B., Coe College, 1938; J.D., University of Iowa, 1940.

The author thanks Joan Godlove and Gloria Samuels for their valuable assistance in preparing this article.

[1] IND. CODE § 19-2-7-16 (Burns 1974).

[2] *Id.* Such recorded contracts will bind owners and their successors. Doan v. City of Fort Wayne, 253 Ind. 131, 252 N.E.2d 415 (1969).

[3] Residents of Green Springs Valley Subdivision v. Town of Newburgh, 344 N.E.2d 312 (Ind. Ct. App. 1976).