counsel had been ineffective by failing to inform the defendant correctly as to the nature of his plea with the result that his guilty plea to second degree murder was not voluntary and intelligent and, further, was the product of coercive threats suggesting possible use of the electric chair upon conviction. The court stated that, by alleging that his guilty plea was not voluntary, knowing, and intelligent, the defendant had raised constitutional questions and, therefore, "the burden of proof by a preponderance of the evidence is relaxed, and petitioner is permitted to withdraw his guilty plea if he raises a reasonable doubt on the issues of his counsel's effectiveness."[73] Looking to the record, the court concluded that the defendant had received adequate counsel and that, although the interviews with the attorney may have been minimal, it did not appear that the defendant had been coerced or that more time in consultation with the attorney would have brought about a different result.[74]

FRANCES J. HONECKER

XIV. Property

*Debra A. Falender**

Several cases involving property rights were decided during the survey period. The most significant cases[1] are discussed under the

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[73] *Id.* at 641.

[74] *Id.* at 641-42. The Indiana State Bar Association in Opinion Number Two considered a plea bargaining agreement form in which the defense attorney must state that he believed the defendant to be guilty of the crime confessed. Such an assertion by an attorney is inconsistent with DR 7-106(C)(3) which provides that an attorney should not state his personal opinion as to the guilt or innocence of the accused. *Attorneys and Their Ethics*, 22 RES GESTAE 234 (1977).

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[1] A case worthy of note, but not discussed in the text, is *In re* Guardianship of Fowler, 371 N.E.2d 1345 (Ind. Ct. App. 1978). In *Fowler*, the court of appeals restated and applied the rule established in Teegarden v. Lewis, 145 Ind. 98, 40 N.E. 1047 (1895), that the mental capacity required to make a valid inter vivos gift is the same capacity as that required to make a valid will.

In addition to the judicial developments during the survey period, one legislative development is worthy of note. The legislature recently amended the statutes regarding the powers and duties of notaries public. *See* IND. CODE §§ 33-16-2-1 to 9 (1976 & Supp. 1978). A notary not only must affix his name, expiration date, and seal to a notarized document, as required under prior law, *id.* §§ 33-16-2-4, -3-1 (1976), but also "must print or type his name immediately beneath his signature" (unless his name is

following general headings: (1) Landlord and tenant, (2) real estate transactions, (3) real estate brokers, (4) easements, (5) zoning, and (6) eminent domain.

A. Landlord and Tenant

This year, in *Rauch v. Circle Theatre*,[2] the Indiana Court of Appeals recognized the right of a lessor to sue for damages for lessee's anticipatory breach of a lease. *Rauch* involved the alleged breach of a lease involving the Indiana Theatre building in Indianapolis. The lease, executed in 1926, was to run until the year 2015. From 1938 until 1968, the lessee, Circle Theatre Company, entered into management contracts with the Greater Indiana Amusement Company for operation of a theatre on the leased premises. On August 22, 1968, lessee assigned its rights under the lease to the management company.[3] Lessee then instituted voluntary corporate dissolution proceedings and liquidated its other assets.[4]

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already printed on the document or is part of his stamp) and must "indicate his county of residence on the document." *Id.* § 33-16-2-9(a) (Supp. 1978). A notary's failure to print his name or indicate his county of residence will not "affect the validity of any document notarized before July 1, 1982." *Id.* § 33-16-2-9(b). *But see* Act of Apr. 21, 1977, Pub. L. No. 34, § 4, 1977 Ind. Acts 222, effective January 1, 1978, in which the requirement of indicating the county of residence was established without a similar clause saving the validity of documents notarized without such an indication. Arguably, notarizations lacking the notary's county of residence, made between January 1, 1978, and the effective date of the new statute, are invalid.

[2]374 N.E.2d 546 (Ind. Ct. App. 1978). One other landlord-tenant case, Tastee-Freez Leasing Corp. v. Milwid, 365 N.E.2d 1388 (Ind. Ct. App. 1977), is worthy of note because it points out the importance of verifying that an annual rental figure stated in a lease is consistent with the stated monthly rent. In *Milwid*, the lease, prepared by lessor, stated that the "minimum annual rental" was $7,500 payable in monthly installments of $781.25. The annual rental would have been $9,375 if the stated monthly rental were extended over a twelve-month period. Even though lessees paid $781.25 per month, the trial court found that the intended rent was $7,500 per year, or $625 per month. The court of appeals affirmed the trial court's judgment that lessees were not in default for nonpayment of rent. *Id.* at 139. Lessees had, in fact, overpaid. It is interesting to note that lessor practically proved lessee's case. Lessor's ledger sheets denominated $625 as rent and $156.25 as an override. At trial, lessor did not explain the ledger accounts.

[3]The *Rauch* court cogently discussed the liability of the lessee and the assignee by reason of privity of estate and privity of contract. *Id.* at 549-50. The court held that the assignment of the lease did not abrogate lessee's liability, by reason of privity of contract, for rent and other lease covenants. For further discussion of this issue, *see* Townsend, *Secured Transactions and Creditors' Rights, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 317 (1978).

[4]Eventually, lessee distributed $475,145 to its shareholders, retaining $122,000 in escrow to cover dissolution expenses. Of these assets, $325,000 was derived from lessee's sale of its interest in the theatre.

In 1970, lessors sued lessees for damages,[5] alleging that the dissolution of lessee corporation was an anticipatory breach of the lease. After a bench trial, lessors were denied relief. Although the court of appeals affirmed the judgment on the ground that the lessors proved no damages resulting from the anticipatory breach,[6] the court held that an anticipatory breach had occurred when lessee liquidated its assets with the intent to completely and finally terminate its business enterprise.[7] The *Rauch* court stated:

> While there seems to be little Indiana law directly on point, the general rule allows a lessor an election of remedies upon a repudiation of the lease by the lessee. In such a situation, the lessor may elect to either (1) treat the lease as having been terminated and recover damages for breach of contract; or (2) treat the repudiation as a notice of intent to vacate by the lessee and file successive actions to recover each rental payment as it becomes due. 49 Am.Jur.2d *Landlord and Tenant* § 178 (1970). Where the lessor has elected to terminate a lease, his measure of

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[5]Lessors also sought the appointment of a receiver for the preservation of lessee's assets and an injunction restraining the Indiana Secretary of State from issuing a certificate of dissolution. Lessors argued that "adequate provision" had not been made for all "debts, obligations and liabilities of the corporation," IND. CODE § 23-1-7-1(b)(4) (1976), because of the lessee's rental obligation for the remaining term of the lease.

[6]374 N.E.2d at 553. The court noted that the assignee had performed all the covenants in the lease, including the covenant to pay rent. The court also noted that the assignee was "a solvent corporation with assets of equal or greater value than that of Lessee and with a superior ability to manage and operate the leased premises." *Id.* The court held that lessors failed to prove any injury resulting from the breach. *Id.* Lessors argued that, to insure full performance of the lease by the assignee, the court should appoint a receiver to collect from lessee and hold in escrow the present value of all future rentals, taxes, and maintenance expenses due under the lease. The court of appeals responded: "While such an arrangement may offer some surface logic, we think that, as a practical matter such a remedy would be grossly inequitable for all parties concerned, particularly when considering the extended period of time for which the lease is to continue (until the year 2015)." *Id.* at 552.

[7]*Id.* Relying on authority from other states, the court ruled that a voluntary dissolution "does not of itself constitute a breach of the lease." *Id.* at 551. Rights and liabilities under a lease inure to the benefit of the shareholders of the corporate lessee. A breach of the lease would not necessarily occur if, upon dissolution, "the stockholders or other persons who are in equity entitled to the property of the corporation step into the shoes of the corporate lessee with the same rights and liabilities in respect to the lease as attached to the corporate lessee." *Id.* (quoting 49 AM. JUR. 2d *Landlord and Tenant* § 997 (1970)). In *Rauch*, lessee "intended the assignment and dissolution to be a complete and final termination of its business enterprise rather than a mere change in its form or structure." 374 N.E.2d at 552. Thus, a breach occurred upon dissolution because the "corporation was voluntarily placing itself in a position in which it could not perform its obligations" under the lease. *Id.*

> damages will normally be the difference between the rent reserved in the lease for the unexpired term of the lease and the reasonable rental value of the premises for that term or the actual rent procured by a subsequent reletting. 49 Am.Jur.2d, *supra*.[8]

In holding that a lessor may sue at once when lessee anticipatorily repudiates a lease and may recover damages for breach of the entire lease,[9] the court of appeals has finally completely recognized the applicability of contract principles in the landlord-tenant situation.[10] The only problem with the decision of the *Rauch* court is that it does not mention two recent cases, *Roberts v. Watson*[11] and *Booher v. Richmond Square, Inc.*,[12] both of which rejected the anticipatory repudiation doctrine as inapplicable in the landlord-tenant context.[13]

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[8]374 N.E.2d at 552.

[9]If the lease is for so long a period of time that an award of damages for the entire period would be arbitrary and speculative, the court would allow damages for a more limited time. *Id.* (citing Hawkinson v. Johnston, 122 F.2d 724 (8th Cir. 1941)).

[10]Under the traditional view that a lease was a conveyance of an interest in land, the contract doctrine of mitigation of damages was not applied. Lessor could remain idle and sue for rent installments as they came due. *See* Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 637 (1977), and authorities cited therein. Indiana law now requires that a lessor mitigate damages upon lessee's abandonment. *See also* State v. Boyle, 344 N.E.2d 302 (Ind. Ct. App. 1976); Hirsch v. Merchants Nat'l Bank & Trust Co., 336 N.E.2d 833 (Ind. Ct. App. 1975), *noted in* Polston, *Property, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 297, 302 (1976). Under the traditional common law view, a lessor could not use the contract doctrine of anticipatory repudiation on the theory that the covenant to pay rent was not an enforceable obligation until the rent payment was actually due. *See* Krieger & Shurn, *supra*, at 638-39. The *Rauch* decision now makes the contract doctrine applicable in lease situations.

[11]359 N.E.2d 615 (Ind. Ct. App. 1977), *noted in* Falender, *Property, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 232, 233 (1977).

[12]310 N.E.2d 89 (Ind. Ct. App. 1974), *noted in* Polston, *Property, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 228, 228 (1974).

[13]In both cases, the court stated that a landlord may not recover rent which is not alleged to be due. 359 N.E.2d at 621; 310 N.E.2d at 91. *Booher*, however, is consistent with *Rauch*, because in *Booher* the lessor chose the option to recover rent as it became due. The specific holding of the *Booher* court was that a prior action for rent was not res judicata as to a subsequent action for rent which became due after the commencement of the prior suit. In *Roberts*, however, the lessor sued for the total rent owing under a five-year lease. The court held that the lessor could recover only the rent due, but unpaid, at the time the suit was filed. *Roberts* and *Booher* are not distinguishable from *Rauch* in any significant respect. In *Roberts* and *Booher*, the lessees were both individuals who abandoned the premises. The individuals theoretically would be available to defend later suits for rent, unlike the dissolved corporation in *Rauch*. Abandonment might be considered a more equivocal act of repudiation than corporate dissolution. In any event, if the *Rauch* court intended that its decision be reconcilable with the *Roberts* decision, it seems that the *Rauch* court would have referred to *Roberts* and would not have made such broad statements about the lessor's option.

Presumably, inconsistent statements in these cases were impliedly overruled by the *Rauch* decision.[14]

B. Real Estate Transactions

Several cases were decided, during the survey period, involving real estate contracts.[15] In *American Turners of South Bend v. Rodefer*,[16] the purchaser deposited $10,000 as earnest money in connection with an offer to buy vendor's real estate. The offer was expressly conditioned on "Purchaser's ability to secure . . . a firm commitment for a mortgage loan in an amount not less than *One Hundred Six Thousand Dollars* ($106,000.00) to be amortized monthly over a period of not less than 10 years. Purchaser agrees to make a good-faith effort to obtain said mortgage."[17] The offer was accepted, and purchaser applied for a mortgage loan. The loan application was made in the names of purchaser and his wife, but the wife did not sign either the offer or the application. A loan to purchaser and his wife, in the amount of $106,000 for fifteen years at eight percent interest with monthly payments was approved, but purchaser's wife refused to sign the mortgage. The purchaser talked to others about financing the purchase, but did not at any time seek a mortgage loan in his name alone.

Purchaser notified vendor two days before the scheduled closing that he would not go through with the sale. The purchaser later brought an action to recover his earnest money deposit, alleging that he was unable to secure mortgage financing. The trial court granted purchaser's motion for judgment on the evidence and

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The *Rauch* court instead cited 49 AM. JUR. 2d *Landlord and Tenant* § 178 (1970), which states, in general terms, that an unequivocal repudiation will support an immediate action for damages for breach of the entire lease. It seems that abandonment by an individual lessee may often be as unequivocal as assignment by and dissolution of a corporate lessee.

[14]The situation cannot be characterized as one in which there is a divergence of authority among the districts of the court of appeals. *Rauch*, *Roberts*, and *Booher* were all decided by the same three judges of the First District of the Indiana Court of Appeals.

[15]In addition to cases discussed in the text, see Blaising v. Mills, 374 N.E.2d 1166 (Ind. Ct. App. 1978) (court ordered reconveyance of property where prior conveyance to husband was procured by undue influence); Randolph v. Wolff, 374 N.E.2d 533 (Ind. Ct. App. 1978) (summary judgment improper where genuine issue of material fact existed as to construction of sale contract containing an ambiguous property description). A case of particular note to anyone involved in real estate law is Prudential Ins. Co. v. Executive Estates, Inc., 369 N.E.2d 1117 (Ind. Ct. App. 1977), *discussed in* Townsend, *supra* note 3, at 292. Recent cases involving a broker's right to a commission are reviewed at notes 33-63 *infra* and accompanying text.

[16]372 N.E.2d 516 (Ind. Ct. App. 1978).

[17]*Id.* at 518.

ordered the return of his $10,000. The court of appeals reversed, stating that, because the evidence would support an inference that purchaser did not act in good faith in trying to obtain a mortgage loan, the issues of purchaser's ability to obtain a loan and of his good faith should not have been taken from a jury.[18]

In *Finley v. Chain*,[19] the court of appeals, for the first time in Indiana, discussed the rights of a vendor under a long-term land contract to recover damages from the purchaser in possession on a theory of waste.[20] The court noted that the vendor has an interest in real property analogous to that of a mortgagee.[21] The court held that the purchaser in possession, like the mortgagor in possession, may use and enjoy the property in any manner,[22] even to the extent of committing acts or omitting acts which might be considered waste,[23] so long as he does not "render unsafe the security for the remaining debt."[24] The vendor may not recover damages merely because the purchaser's active or permissive waste diminished the value of the property securing the purchase price.[25] Vendor's recovery is limited to the amount that the waste impairs the value of the vendor's security. Apparently, then, vendor can recover only if, and to the extent that, the purchaser has, by active or permissive waste, allowed the value of the property to fall below the balance of the purchase price owed to vendor.[26]

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[18]*Id.* at 519. *Compare Rodefer with* Blakely v. Currence, 361 N.E.2d 921 (Ind. Ct. App. 1977), *noted in* Bepko, *Contracts, Commercial Law, and Consumer Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 100, 100-01 (1977), *and in* Falender, *Property, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 232, 241 (1977).

[19]374 N.E.2d 67 (Ind. Ct. App. 1978).

[20]The court stated: "Waste is the destruction, misuse, alteration, or neglect of the premises by one lawfully in possession to the prejudice of an estate or interest therein of another." *Id.* at 77. The action is an action in tort. *Id.*

[21]*Id.* (citing numerous authorities). The purchaser, like the mortgagor, is the owner of the land for all purposes, while the vendor retains legal title as security for the purchase money, in the same way that a mortgagor holds a mortgage as security for a debt.

[22]The parties to the real estate contract may, as may mortgagor and mortgagee, specify reasonable and unreasonable uses of the property.

[23]Waste may result from omission to do what is necessary to prevent injury (permissive waste) as well as from acts which cause injury (active waste). *Id.* at 79.

[24]*Id.* at 78. The court disagreed with the position of some authorities that the mortgagee (or vendor) can never recover for damages resulting from permissive waste. *See id.* at 79 & n.7.

[25]The court noted that, in title theory jurisdictions where the mortgage is considered a conveyance of legal title to the mortgagee, "remedies against waste arise when the damage lessens the value of the plaintiff's estate." *Id.* at 78 n.6.

[26]For further discussion of *Finley*, *see* Townsend, *supra* note 3, at 296-97. Professor Townsend refers to this case as the "leaky spigot case." The court decided that the vendor could recover damages for the purchaser's failure to repair leaky faucets if, on

In *Brademas v. Real Estate Developments Co.*,[27] the court of appeals affirmed the trial court's decision that the vendor under a real estate sale contract is not entitled to specific performance. The purchase agreement provided that, in the event of the purchaser's default, vendor could either cancel and rescind the agreement and recover the property, or waive the default.[28] The court of appeals agreed with the trial court's conclusion that the two remedies enumerated in the purchase agreement were the exclusive remedies available to the vendor in the event of the purchaser's default. The decision pointed out that individual parties have a right "to make the terms of their agreements as they deem fit and proper, so long as those terms are lawful."[29]

In *Lawyers Title Insurance Corp. v. Capp*,[30] a title insurance company (Lawyers) brought an action against the vendor (Capp) who paid for the policy. The action was to recover $6,900 which the company paid the purchaser of the real estate pursuant to its liability under the policy. The vendor had conveyed land to the purchaser by a warranty deed which erroneously included a 1.38-acre strip that vendor had previously conveyed to another. Since the contract price was $5,000 per acre, when purchaser paid vendor the purchase price, purchaser overpaid by $6,900. In its original insurance commitment, the title insurer noted the fact that the strip had previously been conveyed by vendor. In a revised commitment, however, no mention was made of the prior conveyance.

The theory of the title insurer's action against the vendor was that the insurer, when it paid the purchaser, was subrogated to the purchaser's rights against the vendor. The trial court denied recovery, and the court of appeals affirmed, holding that the equitable doctrine of subrogation did not apply under the "unusual factual setting" of the case.[31] The court carefully and emphatically

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remand, the trial court found that the leaky faucet injured the vendor's security interest. The court denied recovery for damages for a broken water cooler and a broken front door, not because of any inherent distinction between faucets and water fountains, but because the evidence did not show that the purchaser caused or allowed the door and the water cooler to break.

[27]370 N.E.2d 997 (Ind. Ct. App. 1977).

[28]Vendor argued that the right to waive a default is meaningless unless it carries with it the ability to seek specific performance. The court stated that the vendor had the option of allowing the company to continue performance after a default, but vendor did not have the option of requiring purchaser to perform. *Id.* at 1000.

[29]*Id.*

[30]369 N.E.2d 672 (Ind. Ct. App. 1977).

[31]*Id.* at 674. The court noted that any right of subrogation that the insurer might have against the vendor must originate "from either the policy of insurance, or from the operation of the equitable doctrine of subrogation." *Id.* The policy of insurance was not in the record, so the court could look only to the equitable doctrine to support the insurer's claim.

limited its holding to apply only to the unusual facts presented. The court listed all the following facts as relevant and, apparently, as equally decisive:

> (1) The title insurance policy here involved is basically a tripartite agreement involving vendor, vendee and insurer.
> (2) Capp paid the consideration for the policy of title insurance.
> (3) Lawyers had actual knowledge of the overlap and had originally excepted that land from coverage under its commitment.
> (4) Capp paid and relied on Lawyers to search the record and provide an accurate legal description, which Lawyers failed to do.
> (5) Since Lawyers had excepted the overlap from its original commitment, failed to except it from the amended commitment, and offered no explanation, it is safe to assume that the error was Lawyers' mistake.
> (6) The policy of insurance and exceptions thereto were not made a part of the record.
> (7) Since a potential cause of action in tort existed in favor of [the vendee] and against Lawyers, the trial court may have interpreted Lawyers' payment of funds to be a settlement under the tort theory.[32]

It would seem that vendors would be justified in relying only on the first, second, and fourth factors to preclude the insurer's equitable or contractual right of subrogation.

C. Real Estate Brokers

In two cases during the survey period, *Gerardot v. Emenhiser*,[33] and *Day v. West*,[34] the Indiana Court of Appeals discussed the statutory requirement that a contract for a broker's commission must be in writing. Indiana Code section 32-2-2-1, the so-called broker's Statute of Frauds, provides:

> No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one (1) person of a purchaser for the real estate of another, shall be valid unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative: Provided, That

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[32] *Id.*
[33] 363 N.E.2d 1072 (Ind. Ct. App. 1977).
[34] 373 N.E.2d 935 (Ind. Ct. App. 1978).

> any general reference to such real estate sufficient to identify the same shall be deemed to be a sufficient description thereof.[35]

In *Day*, the written and signed listing agreement identified various buildings located on the property[36] and described the property as eighty acres "Located in Troy twp Dekalb Co Ind . . . 1 mile north McClellan Church on Bellefountain Rd. between Hamilton and Edgerton."[37] In deciding that this general description satisfied the statutory requirement, the court enunciated a new test for a sufficient description: "Whether from the information found within the four corners of the listing agreement a reasonable man could locate the correct property."[38] A 1922 case, *Hutchinson v. Borum*,[39] had interpreted the description proviso of the statute to require a written description sufficient to identify the property without resort to any parol evidence. In *Hutchinson*, a street address was determined to be inadequate.[40] The *Day* court noted that today in urban areas "the common and most reasonable means of locating property is by street address."[41] The *Day* court overruled *Hutchinson* to the extent that *Hutchinson* was inconsistent with the reasonable man test enunciated in *Day*.[42]

The *Day* court also ruled that the trial court had no probative evidence to justify the conclusion that the broker had failed to perform all the acts required to entitle him to a commission.[43] Under the arrangement in *Day*, as in most listing arrangements, the broker was entitled to a commission only if he procured a buyer ready, willing, and able to purchase the property on the listed or other satisfactory terms.[44] In *Day*, the broker procured an offer, the terms of which tracked the listed terms. Thus, the buyer was clearly ready

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[35]IND. CODE § 32-2-2-1 (1976). If the broker's right to a commission is not in writing, the broker cannot recover on a theory of quantum meruit. *E.g.*, Voelkel v. Berry, 139 Ind. App. 267, 218 N.E.2d 924 (1966).

[36]The listing agreement referred to a three-bedroom house, a two-car garage, a pole barn, a basement barn, a brick school and a one-acre pond.

[37]373 N.E.2d at 937.

[38]*Id.* at 938.

[39]78 Ind. App. 214, 135 N.E. 179 (1922).

[40]*Id.* at 218, 135 N.E. at 180. The description was "549 East Drive Woodruff Place, Marion County, Indiana." *Id.* at 215, 135 N.E. at 179.

[41]373 N.E.2d at 938.

[42]*Id.*

[43]*Id.* at 940.

[44]The broker was also entitled to a commission if the owner himself sold the property during the listing period. This created a so-called exclusive right-to-sell agreement. *See* Comment, *Colorado Real Estate Broker Listing Contracts*, 35 U. COLO. L. REV. 205, 211 (1963).

and willing to purchase on terms agreeable to sellers. Sellers, however, refused to sell.

The broker argued on appeal that he was not required to prove the buyer's financial ability to perform.[45] The court of appeals stated that, because the seller refused the buyer's offer outright: "[T]he question of [the buyer's] financial ability to purchase the farm never materialized."[46] If the court, by that statement, meant that the broker need not prove the buyer's financial ability to perform if the seller refuses to accept an offer which tracks the listed terms, the court's decision is contrary to the holding of *Kaiser v. Shannon*,[47] the case cited by the court in support of the above-quoted statement. A rule dispensing with the requirement for proof of financial ability would also not be a sound policy. An unscrupulous broker, knowing that his seller has had second thoughts about selling, could recover a commission upon proof that he produced a human being, physically and mentally capable of entering into a contract, with an acceptable offer in hand.[48]

In *Gerardot* the court of appeals considered whether the broker's services were the "essential cause" of a sale for which he claimed a commission.[49] The court found sufficient evidence to support the trial court's finding that the broker "was not instrumental in bringing the sellers and buyer together and that the ultimate

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[45]It is universally agreed that "able" refers to financial ability. See the historical discussion in Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967).

[46]373 N.E.2d at 939 (citing Kaiser v. Shannon, 120 Ind. App. 140, 90 N.E.2d 819 (1950)).

[47]120 Ind. App. 140, 90 N.E.2d 819 (1950). In *Day*, the evidence of the buyer's financial ability to perform was apparently uncontradicted. The buyer's loan was "ready to be closed," and Day himself had offered to loan the buyer any money he needed to consummate the deal. 373 N.E.2d at 939. Thus, the *Day* court's holding could be interpreted as a determination that all the evidence of probative value supported the conclusion that the buyer was financially able to perform. In *Kaiser*, the broker procured an offer, but the seller refused to accept it. The court held that the purchaser's financial ability would not be presumed. 120 Ind. App. at 144, 90 N.E.2d at 820. The court noted that a presumption of financial ability arises when seller and buyer enter into a contract to buy and sell the real estate. *Id.* at 144, 90 N.E.2d at 820-21. *See* Stauffer v. Linenthal, 29 Ind. App. 305, 64 N.E. 643 (1902); McFarland v. Lillard, 2 Ind. App. 160, 28 N.E. 229 (1891). For a discussion of the injustice of raising a presumption of financial ability when seller accepts an offer made by broker's buyer, see Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967).

[48]This may well have been what was attempted in *Kaiser*.

[49]363 N.E.2d at 1077. The broker must prove that through his procurement "a third party had entered into a valid executory contract with vendors for the purchase of" the listed property. *Id.* The question of whether the broker was the procuring cause of a sale typically arises, as here, when the broker with a listing on the seller's property dealt with a potential buyer to whom, after the listing expired, the seller sold the property. For an excellent discussion of procuring cause, *see* Cramer v. Guercio, 331 So. 2d 550 (La. Ct. of App. 1976).

transfer was substantially altered in form, substance, and as to the parties involved."[50] The broker had tried to arrange an agreement between the seller and Martin Maciejko, but was unable to do so.[51] Maciejko, in fact, became the ultimate purchaser of seller's property, but only by means of a complicated transfer whereby Maciejko exchanged his own farm for the seller's property and another property. This exchange was effected through the efforts of a third party. The court held that the evidence supported the conclusion that the broker was not the procuring cause of the multi-party transaction involving several parcels of real estate.[52]

The court's conclusion on the procuring cause issue should have been sufficient to support an affirmance of the trial court's judgment denying the broker a commission.[53] The court, however, also discussed whether there was an agreement satisfying the Statute of Frauds requirement that the contract for a broker's commission be "in writing, signed by the owner of [the] real estate."[54] The broker had procured and forwarded to seller an offer to purchase seller's property. When the broker relayed the offer, he did not have a listing on the property. The seller proposed a counter-offer in writing, which he signed, and in which appeared the following:

> If the above or approximate deal should go through, I would be willing to pay you [broker] 6% on the first $50,000.00, 5% on the balance of the $175,000.00. I would not expect to pay you any commission on the sale of any of the personal property.
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> . . . .
>
> I will expect an answer from you on all that I have written by Apr. 4, '72. In event I do not hear by that time, I will count it as a negative reply.[55]

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[50]363 N.E.2d at 1073.

[51]The broker had a listing on the seller's property, but the listing had expired when the ultimate sale to Maciejko occurred. The broker had "tried to conclude an agreement between Martin Maciejko and Dr. Emenhiser but was unable to do so because Maciejko apparently had objection to the size, topography and improvements of the Emenhisers' farm." *Id.* at 1074.

[52]*Id.* at 1077-78.

[53]If the broker had had an exclusive agency or an exclusive right-to-sell listing at the time the seller entered into the exchange agreement with Maciejko, then the broker would have been entitled to a commission regardless of the outcome on the procuring cause question. *See generally* Comment, *supra* note 44, at 211. The terms of the seller's letter offering to pay the broker a commission, printed in the text accompanying note 55 *infra*, seem insufficient to create an exclusive agency or an exclusive right to sell. Thus, affirmance on the procuring cause issue would have been sufficient for affirmance of the trial court's judgment.

[54]IND. CODE § 32-2-2-1 (1976). The entire statute is printed in the text accompanying note 35 *supra*.

[55]363 N.E.2d at 1074.

The broker did not reply in writing by April 4, but he did bring another offer to the seller before that date. Nothing ever materialized between the seller and either of these two buyers.

Despite the fact that the "owner of such real estate"[56] signed a document which appeared to be an agreement to pay the broker a commission if "the above or approximate deal should go through,"[57] the *Gerardot* court held that because the broker did not sign anything, there was no writing sufficient to satisfy the statutory requirement.[58] The reasoning of the court is strained and faulty. The statute expressly requires only the signature of the owner of the real estate. The court seems to have reasoned that, by the terms of the seller's offer, there could be no "agreement" to pay a commission until the broker accepted the offer by a timely response[59] and, consequently, that there was no written "contract" without the broker's signature.[60] In fact, the court is doing exactly what it said the broker was doing when he argued that he did *not* have to reply in writing to the seller's offer to pay a commission—equating "inappropriately the need for a contract acceptance with the need for a broker's signature."[61] The broker's acceptance of the seller's offer to pay a commission could be proved by parol evidence without contravening the Statute of Frauds writing requirement.[62] The Statute of Frauds precludes proof of a different non-written offer to pay a

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[56]IND. CODE § 32-2-2-1 (1976).

[57]363 N.E.2d at 1074. This is language of the seller's offer to pay a commission.

[58]*Id.* at 1075.

[59]The court referred to the seller's offer as "bilateral in nature." *Id.* at 1076. Presumably the court did not mean to suggest that the seller's offer promising to pay a commission looked to acceptance by a promise on the broker's behalf to procure a buyer. Perhaps the court meant that the seller's offer to pay a commission would be accepted not merely by the broker's performance of the requested act of procuring "the above or approximate deal" (a truly "unilateral" arrangement), but also by the broker's timely notification of his intent to attempt to arrange a satisfactory deal. This is pure speculation. The court's characterization of the seller's offer to pay a commission as "bilateral in nature" is not explained in the opinion. In any event, the court distinguished between the ambiguous "bilateral" arrangement in the present case and what the court refers to as "a unilateral contract form offered by a broker requiring [only] the signature of a seller." *Id.*

[60]Perhaps the court is suggesting that the statutory requirement that the "contract" be in writing supersedes the express statutory provision that the owner is the one, impliedly the only one, who must sign. In other words, the court is saying that the "contract" is not in writing, as required by the statute, unless both the offer and the acceptance are in writing. This would be an unreasonable interpretation of legislative intent. The express requirement that the owner sign would have been unnecessary if the legislature intended that the term "contract" be read to require that both parties to the commission agreement sign.

[61]363 N.E.2d at 1076.

[62]*See* cases cited in Annot., 30 A.L.R.2d 972 (1953).

commission, but the Statute of Frauds cannot be used, on the facts presented, to support a conclusion that there was no written agreement to pay a commission.[63] There was a written agreement, properly signed by the owner of the listed real estate; the only question that needed to be answered in *Gerardot* was whether the broker complied with the terms of the agreement.

D. Easements

In 1970, Center Company conveyed part of a parcel of real estate to Sedgwick House, a limited partnership of which Center Company was a general partner. In 1972, Center Company conveyed the remainder of the parcel to Brademas. The deed to Brademas contained a reservation, in favor of "Grantor, its successors and assigns," of an "easement for roadway, parking purposes and for the drainage of surface waters and waters discharged from the roof and floor drains of 'Sedgwick House' over, along and across" a described portion of the property conveyed to Brademas.[64] In *Brademas v. Hartwig*,[65] the court of appeals affirmed the trial court's judgment that, although Sedgwick House was not named as a grantee in the deed, the deed created an easement in its favor.

Relying on *Ogle v. Barker*,[66] Brademas argued that the reservation was ineffective to convey an interest to a stranger to the deed. In *Ogle*, the court had held that a grantor cannot, by reservation, convey a life estate to a party not named as a grantee in the deed.[67] The *Brademas* court distinguished *Ogle* as involving a life estate rather than an easement.[68] The court noted that, even under *Ogle*,

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[63]This statement is made on the assumption that there was an adequate description of the real estate in the signed writing. There is no discussion of the description in the recited facts of the case.

[64]Brademas v. Hartwig, 369 N.E.2d 954, 956 (Ind. Ct. App. 1977).

[65]369 N.E.2d 954 (Ind. Ct. App. 1977).

[66]224 Ind. 489, 68 N.E.2d 550 (1946).

[67]*Id.* at 495, 68 N.E.2d at 553.

[68]369 N.E.2d at 957. The *Brademas* court gave no indication whether it would have followed the *Ogle* decision if a life estate had been reserved in the instant case. This author can think of no reason to treat a reservation of a life estate differently from a reservation of an easement. The *Ogle* decision was based upon the traditional, technical rule: "[T]here can be no valid and operative conveyance of land without words of grant or alienation." 224 Ind. at 494, 68 N.E.2d at 553. *Brademas* was willing to discard the technical rule in favor of a rule effectuating the "patently evident" intentions of the parties. 369 N.E.2d at 957. Whether an easement or a life estate is involved, it seems appropriate to reject technical rules of form and to attempt to discern and effectuate the parties' intentions from the substance of the transaction. It is interesting to note that the RESTATEMENT OF PROPERTY § 472, Comment b (1944), explicitly states that an easement may be created by reservation in favor of one not named as a grantee in the deed, but takes no position with respect to the creation of a life estate by such a reservation. *See* RESTATEMENT OF PROPERTY § 107, Comment g (1936).

the reserved interest was removed from the operation of the grant and was left in the grantor, who could, by a proper conveyance, convey it to anyone he chose.[69] The *Brademas* court, unable to think of a reason "why the grantor should be prevented from doing in one step that which he could do in two,"[70] adopted the policy propounded in the *Restatement of Property:* "[A]n easement may be created in C by a deed by A which purports to convey Blackacre to B in fee reserving an easement to C."[71] This logical approach will serve to promote, rather than frustrate, the obvious intentions of the parties in most cases.

Brademas also contended that the deed could not create an interest in Sedgwick House because it did not describe the dominant estate. The court of appeals held that the dominant estate was adequately described.[72] The deed, in fact, contained a legal description of property designated in the deed as "Sedgwick House."

In *Searcy v. LaGrotte*,[73] the court of appeals affirmed the trial court's denial of the existence of an easement over LaGrotte's property. The Searcys argued that an easement had been created by implication.[74] In 1925, a former owner divided a parcel of property between two of his children. The two children regarded a dirt road as the dividing line between the two parcels without concern as to the actual boundary. The dirt drive led from Franklin Road to a barn lot used by both children. In 1959, one parcel was conveyed to the Searcys, and, in 1960, the other was conveyed to LaGrotte. Subsequently, a survey was conducted which established that a part of the drive, including the access to Franklin Road, was located entirely on the Searcy parcel, another part of the drive and the barn lot were located entirely on the LaGrotte parcel, and the rest of the drive straddled both properties. A dispute arose over the Searcys' use of the parts of the drive on LaGrotte's land.[75] After a bench

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[69]369 N.E.2d at 957.

[70]*Id.*

[71]RESTATEMENT OF PROPERTY § 472, Comment b (1944).

[72]369 N.E.2d at 957. *See* Ross v. Valentine, 116 Ind. App. 354, 364, 63 N.E.2d 691, 695 (1946), in which the court stated: "The instrument by which an easement by express grant is created should describe with reasonable certainty the easement created and the dominant and servient tenements. . . . A reservation of an easement is not operative in favor of land not described in the conveyance." (citations omitted).

[73]372 N.E.2d 755 (Ind. Ct. App. 1978).

[74]The Searcys also argued that an easement had been acquired by prescription, that is, by adverse use for 20 years. *See* IND. CODE § 32-5-1-1 (1976). The court of appeals held that there was evidence to support the trial court's conclusion that the use was not adverse for the prescriptive period. 372 N.E.2d at 757. *See also* Umbreit v. Chester B. Stem, Inc., 373 N.E.2d 1116 (Ind. Ct. App. 1978) (finding that appellants failed to meet burden of proving that easement had been acquired by prescription).

[75]The facts are unclear. It seems that the Searcys were not asserting a right to use the barn lot.

trial, the Searcys were enjoined from using any part of the drive on LaGrotte's land.

The court of appeals stated the general rule that an easement will be implied by law "when the owner of an estate imposes an obvious and permanent servitude on one part in favor of another part, and at the time ownership is severed the servitude is in use and reasonably necessary for the fair enjoyment of the part benefited . . . ."[76] This statement reflects the traditional view regarding the implied grant of an easement.[77] When a use is apparent, permanent, and reasonably necessary to the enjoyment of the dominant estate at the time of a severance of title, an easement may be implied by law as part of the grant of the dominant estate, and as a burden on the servient estate, on the theory that the parties intended this result.[78] Once created, the implied easement may be extinguished only in the manners in which an express easement may be extinguished.[79] Cessation or diminution of the original reasonable necessity alone would not, by the traditional view, extinguish the implied easement.[80]

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[76]372 N.E.2d at 757.

[77]Most courts hold that reasonable necessity is sufficient for an implied grant of an easement, but strict necessity is required for an implied reservation because the implied reservation derogates from the terms of the grantor's otherwise absolute grant. *See generally* 2 G. THOMPSON, THE MODERN LAW OF REAL PROPERTY §§ 351-55 (repl. ed. J. Grimes 1961). Indiana seems to follow the view that reasonable necessity is sufficient in either case. *See, e.g.*, Indiana Truck Farm Co. v. Chambers, 69 Ind. App. 292, 121 N.E. 662 (1919). In any event, in *Searcy*, because the severance occurred by apparently contemporaneous conveyances to two grantees, the policy reason supporting the imposition of the strict necessity requirement did not exist. All statements in this discussion regarding implied easements refer to easements implied because of prior use. *See* note 80 *infra* regarding implied ways of necessity.

[78]*See, e.g.*, Shandy v. Sell, 207 Ind. 215, 189 N.E. 627 (1934); John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N.E. 188 (1885). G. THOMPSON, *supra* note 77, § 351, at 309, states:

> In determining whether an easement by implied grant has arisen, the cardinal consideration is the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other. Implied easements rest upon the intent of the parties not necessity alone.

(Footnotes omitted.)

The dominent estate is the estate benefited by the easement. The servient estate is the estate burdened by the easement. Before severance, because an owner cannot own an easement in his own land, the easement is frequently described as a "quasi-easement."

[79]An easement may be extinguished by abandonment, release, adverse use, or merger of the dominant and servient estates. *See generally* G. THOMPSON, *supra* note 77, §§ 440-49.

[80]The crucial determination in deciding whether an implied easement was created is whether a reasonable necessity existed at the time of severance of title. If the requirements for the creation of an implied easement then existed (apparent, permanent,

The troublesome feature of the *Searcy* decision is that several of the court's statements suggested that, to establish the existence of an implied easement, a reasonable necessity must exist not only at the time of severance of the unity of the title (in this case, when the former owner divided his land between his two children), but also throughout the existence of the easement. In other words, the court's language indicated that an implied easement will be extinguished when the reasonable necessity terminates. The court used the present tense in reference to whether use of the dirt road meets the reasonable necessity requirement. For example, the court stated: "Accordingly, the burden *is* on the party asserting the implied easement to prove that the servitude *is* reasonably necessary for the fair enjoyment of his land, not merely convenient or beneficial."[81] Furthermore, the court stated: "The fact that the Searcys *have access* to a public road without passing over the LaGrotte parcel even more firmly establishes that use of the Disputed Area *is* merely convenient and beneficial, rather than reasonably necessary for the fair enjoyment of the Searcy property."[82] The court's stated conclusion is unfortunately ambiguous as to the time when a reasonable necessity must exist: "There was sufficient evidence to find that the Disputed Area was neither permanent nor reasonably necessary for the fair enjoyment of the Searcy parcel, thereby negating the existence of an implied easement."[83] *Searcy* could be reconciled with the traditional views regarding the creation and

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and reasonably necessary use), then the easement exists as if it had been expressly granted or reserved in the deed severing the unity of ownership. *See* Romanchuk v. Plotkin, 215 Minn. 156, 9 N.W.2d 421 (1943), where the court stated:

> [T]he grant of the easement is implied only in the sense that the easement passes by the conveyance although not expressly mentioned . . . . It is immaterial, from a legal point of view, whether the easement passes because the instrument expressly says that it shall pass, or because the circumstances are such as to call for a construction of the language used as so saying.

Id. at 165, 9 N.W.2d at 426 (*quoting* 3 H. TIFFANY, REAL PROPERTY § 780 (3d ed. 1939)).

A distinct type of implied easement is a way of necessity. A way of necessity will be implied, more because of a public policy against property without access than because of the parties' intent, if there was unity of title and a strict necessity at the time of severance, regardless of the existence of an apparent and permanent use at severance. A way of necessity lasts only so long as the necessity lasts. *See generally* G. THOMPSON, *supra* note 77, §§ 362-68. Several Indiana cases confuse easements implied from quasi-easements with ways of necessity. *See, e.g.*, Hunt v. Zimmerman, 139 Ind. App. 242, 215 N.E.2d 867 (1966); Krueger v. Beecham, 116 Ind. App. 89, 61 N.E.2d 65 (1945). Perhaps the *Searcy* court was a victim of this confusion.

[81]372 N.E.2d at 758 (emphasis added).

[82]*Id.*

[83]*Id.* at 757. The court refers to the dominant parcel by using the name of the present owner. Arguably, this is only for convenience of identification.

duration of implied easements, if one concludes that the court chose its words carelessly in applying the stated rule to the facts. Perhaps the court could have found that the evidence supported the conclusion that use of the easement was merely convenient or beneficial, but not reasonably necessary, at the time of severance. The disputed portion of the road then was a dirt road, evident but not permanent, leading to a rear barn lot.[84] It is disconcerting, however, to see another ambiguous decision in an area of Indiana law that is already confused.

E. Zoning

In *Carpenter v. Whitley County Plan Commission*,[85] the court construed Indiana law to determine the number of votes required for official action of a plan commission. The statue provides: "A majority of members qualified by this chapter to vote, shall constitute a quorum. No action of the commission is official, however, unless authorized by a majority of the commission at a regular or properly called special meeting."[86] Several remonstrators challenged the Whitley County Plan Commission's approval of a plat for a proposed subdivision. The nine-member commission had voted five times on essentially the same plat, with the following results: (1) Four against approval, two in favor; (2) four in favor, two against; (3) four in favor, four against; (4) six in favor, two against; and (5) seven in favor, one against. The remonstrators argued that the first three votes were denials of the proposed plat and, thus, on the basis of *Braughton v. Metropolitan Board of Zoning Appeals*,[87] the Commission should not have reconsidered the determination "absent a change of conditions or circumstances."[88] A majority of the *Carpenter* court held that the *Braughton* rationale would not apply unless the prior actions were legally effective. The majority decided that the statute required, for official action by the Plan Commission, a vote one way or the other of five of the nine members—that is, a vote of a majority of the commission rather than a majority of those present and constituting a

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[84]The *Searcy* court inferentially noted that an apparent purpose to "service the barns rather than the homestead" supported the conclusion that use of the drive was merely convenient or beneficial, but not reasonably necessary. *Id.* at 758.

[85]367 N.E.2d 1156 (Ind. Ct. App. 1977).

[86]IND. CODE § 18-7-5-19 (1976).

[87]146 Ind. App. 652, 257 N.E.2d 839 (1970).

[88]*Id.* at 658, 257 N.E.2d at 842. The *Carpenter* court noted the rationale of *Braughton*: "[I]n the interest of economy, predictability, and repose of the parties, a matter which is finally determined should not be relitigated." 367 N.E.2d at 1158.

quorum.[89] The dissent argued that the majority misinterpreted the statute.[90]

F. Eminent Domain

The Indiana Court of Appeals was very active in the eminent domain area during the survey period.[91] In *City of Indianapolis v. Central Railroad*,[92] the City of Indianapolis filed a complaint to condemn certain rail spurs owned by two railroads. Six months after the complaint was filed, the City moved to dismiss the condemnation action because of a change of plans. In granting the motion to dismiss, the trial court ordered the City to pay the railroads a total of $12,365.25 to cover their attorneys' fees and expenses. The court of appeals reversed the award of attorneys' fees, following the general rule that each party involved in litigation must bear his own

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[89]367 N.E.2d at 1158-59, adopting the reasoning of the minority in Ratner v. City of Richmond, 136 Ind. App. 578, 591-93, 201 N.E.2d 49, 56-57 (1965) (Hunter, C.J., dissenting). In Pruden v. Trabits, 370 N.E.2d 959 (Ind. Ct. App. 1977), the Board of County Commissioners of Warrick County decided to approve a rezoning ordinance contrary to the recommendation of the Plan Commission. Plaintiffs argued that the Board's approval was not final because the ordinance had to be referred back to the Plan Commission for reconsideration. The court noted that, if an ordinance is amended or rejected, the Board is mandated by statute to return the ordinance to the Commission for reconsideration. Return of the rejected or amended ordinance is mandated by IND. CODE § 18-7-4-51 (1976). If, however, the ordinance is approved by the Board, even though it had been rejected by the Commission, nothing in the statute requires, and no purpose would be served by, further consideration by the Commission. The court noted that the Plan Commission "would have no authority to override or change the accepted version. Thus no purpose is served by requiring any further reconsideration [unless the ordinance is rejected by the Board or approved in an amended condition]." 370 N.E.2d at 966. If the Plan Commission's affirmative recommendation is not acted upon by the Board of County Commissioners within 90 days, it becomes effective. IND. CODE § 18-7-4-50 (Supp. 1978).

[90]367 N.E.2d at 1162 (Staton, J., dissenting).

[91]In addition to the cases discussed in the text, *see* Indianapolis Power & Light Co. v. Barnard, 371 N.E.2d 408 (Ind. Ct. App. 1978) (reversing trial court's judgment that utility lacked the statutory authority to condemn the land); State v. Zehner, 369 N.E.2d 1103 (Ind. Ct. App. 1977) (construing IND. CODE § 32-11-1-6 (1976)) (holding condemnee's sale of fill dirt from residual land to contractors building a highway was not a special benefit and was not relevant as set-off against condemnation award); Board of Aviation Comm'rs v. Schafer, 366 N.E.2d 195 (Ind. Ct. App. 1977) (holding members of Clark County Board of Aviation Commissioners were de facto officers and were empowered to act to condemn property, despite alleged irregulatities in certificates of appointment); City of Hammond v. Drangmeister, 364 N.E.2d 157 (Ind. Ct. App. 1977) (affirming judgment for damages in inverse condemnation action arising from taking by construction of a street on condemnee's property); State v. Jones, 363 N.E.2d 1018 (Ind. Ct. App. 1977) (approving income capitalization approach for establishing the fair market value of land when the income is derived from a sale of minerals or other soil materials).

[92]369 N.E.2d 1109 (Ind. Ct. App. 1977).

counsel fees in the absence of specific statutory authority or a contractual agreement otherwise.[93] The court reviewed and rejected four grounds for the award of attorneys' fees. First, the court held that there was not sufficient evidence of "obdurate behavior," "oppressive conduct," or bad faith to justify the recognition of an exception to the general rule.[94] Second, the court held that Trial Rule 41(A)(2), which states that "an action shall not be dismissed at the plaintiff's instance save . . . upon such terms and conditions as the court deems proper,"[95] is "not elastic enough to embrace attorneys' fees on dismissal."[96] Third, the court held that the provision of the Eminent Domain Statute[97] that allows for "costs" to be paid by plaintiff does not encompass attorneys' fees as part of the term "costs."[98] Fourth, the court held that the Indiana Relocation Assistance Act[99] did not provide a basis for the award of fees because the condemnor was not an agency as defined in the Act.[100]

In deciding that the award of attorneys' fees was not authorized, the court of appeals adhered to precedent established by the Indiana Supreme Court.[101] Judge Sullivan expressed his dissatisfaction with this precedent:

> I concur but do so in hope that the Supreme Court might reevaluate the course heretofore taken and under these circumstances, permit a trial court to award attorney fees under T.R. 41(A)(2) for condemnees who are put to unwarranted expense for the defense of actions improvidently brought by condemnors and which are voluntarily abandoned.[102]

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[93]*Id.* at 1112.

[94]*Id.* at 1113.

[95]IND. R. TR. P. 41(A)(2).

[96]369 N.E.2d at 1114.

[97]IND. CODE § 32-11-1-10 (1976) provided: "The costs of the proceeding shall be paid by the plaintiff, except that in case of contest, the additional costs thereby caused shall be paid as the court shall adjudge." This section was amended by Act of May 3, 1977, Pub. L. No. 312, § 3, 1977 Ind. Acts 1434 (codified at IND. CODE § 32-11-1-10 (Supp. 1978)) to provide, in pertinent part:

> However, if, in case of trial, the amount of damages awarded to the defendant by the judgment, exclusive of interest and costs, is greater than the amount specified in the last offer of settlement made by the plaintiff . . . , the court shall allow the defendant his litigation expenses in an amount not to exceed twenty-five hundred dollars ($2,500).

[98]369 N.E.2d at 1114.

[99]IND. CODE §§ 8-13-18.5-1 to 20 (1976).

[100]369 N.E.2d at 1114. "Agency" is defined in IND. CODE § 8-13-18.5-2(a) (1976).

[101]State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973) (Prentice, J., concurring) (Arterburn, J., dissenting with opinion) (Hunter, J., concurring in dissent).

[102]369 N.E.2d at 1116 (Sullivan, J., concurring).

In *State v. Peterson*,[103] the court of appeals reversed a judgment of condemnation damages because the trial court refused to give the state's tendered instruction: "Loss of access is compensable and may be considered by you in determining the damages to be awarded the defendant[s] only when such loss of access is special and peculiar to this property, and only when no other reasonable means of access is available to the property."[104] Judge Garrard dissented on the ground that the tendered instruction was a misleading statement of the law.[105] He stated:

> [T]he concept that there is no compensable injury unless "no other reasonable means of access is available," to be correct, must contemplate reasonableness in terms of the highest and best use of the property immediately prior to the take. . . . [W]here, as here, that relationship is not made clear, the instruction tends to mislead and confuse the jury into the belief that it should award no damages if there remains a reasonable means of securing ingress and egress for *any* purpose. Such a construction would deny the landowner damages to which he might be properly entitled.[106]

In *Indiana & Michigan Electric Co. v. Stevenson*,[107] the court of appeals held that, when the utility cut a strip of corn on one property and cut several trees on another property in the course of surveying the properties prior to condemnation, the jury could reasonably have concluded that the utility so substantially interfered with the owners' rights as to amount to a taking.[108] The court also upheld jury awards of punitive damages.[109] Alternative methods of surveying were available which would have resulted in only slight damages to the corn and trees. The court stated: "The jury could have reasonably inferred that IMEC had knowledge of these alternative methods of surveying property, but elected not to use them because of the additional time and expense involved[;] hence, IMEC's actions exhibited a heedless disregard for the property rights of landowners."[110]

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[103]364 N.E.2d 767 (Ind. Ct. App. 1977).

[104]*Id.* at 768. The court held that a "party is entitled to have an instruction based upon his theory of the case submitted to the jury if within the issues and if there is evidence to support it." *Id.* Since the appellees did not argue that the refused instruction was covered by other instructions, the court assumed that it was not. In State v. Beck, 256 Ind. 318, 268 N.E.2d 874 (1965), the court found no reversible error when the trial court gave an identical instruction.

[105]364 N.E.2d at 768 (Garrard, J., dissenting).

[106]*Id.* at 769.

[107]363 N.E.2d 1254 (Ind. Ct. App. 1977).

[108]*Id.* at 1260.

[109]*Id.* at 1261.

[110]*Id.* at 1260.