XIV. Property

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During this survey year more than sixty cases involving the law of property were decided by the Indiana courts.[1] Many of these cases, however, neither change existing law nor present unique factual or legal problems. These cases are either excluded or merely summarized without extensive comment. The more significant cases are discussed under the following headings: (A) adverse possession, (B) concurrent estates and partition, (C) easements and covenants, (D) landlord and tenant relations, and (E) real estate transactions. Subjects not discussed under these headings include: condemnation by the state,[2]

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[1]There were no significant statutory developments during the survey period. One case decided during the survey period, State v. Innkeepers of New Castle, Inc., 392 N.E.2d 459 (Ind. 1979), is treated in the previous survey issue. *See* Falender, *Property, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 343, 355-57 (1980).

[2]In Highland Realty v. Indianapolis Airport Authority, 395 N.E.2d 1259 (Ind. Ct. App. 1980), Highland Realty appealed from a judgment permitting the Indianapolis Airport Authority to condemn Highland property. The court found that the airport authority could condemn property needed for a "clear zone," but that condemnations for a "clear area protection zone" and a "noise buffer zone" were not authorized. *Id.* at 1268. A "clear zone" is defined as an area at the end of a runway which permits additional clearance in case an aircraft undershoots the runway. A "clear area protection zone" is an area adjacent to the runway that is currently affected by noise. A "noise buffer zone" is the area that is expected to be affected by noise by the year 1995. A "clear zone" is required by the Federal Aviation Administration (FAA), but neither a "noise buffer zone" nor a "clear area protection zone" is required or even defined by the FAA. *Id.* at 1262-63.

The airport authority had sought to condemn the latter zones in hopes of avoiding inverse condemnation suits. Inverse condemnation is an action to recover damages for a taking of property that has not been formally condemned. BLACK'S LAW DICTIONARY 740 (5th ed. 1979). The United States Supreme Court has held that aircraft overflight and accompany noise constitute a compensable taking under the fifth amendment. United States v. Causby, 328 U.S. 256 (1946). The Supreme Court has, however, also tacitly approved the requirement of a physical invasion of the superadjacent space for there to be a taking. Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955, *rehearing denied*, 372 U.S. 925 (1963). Thus, damage done by noise without direct overflight is generally incidental and not recoverable, although a few states have held airports responsible for a taking when noise of aircraft substantially decreases the value of the property. City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. Dist. Ct. App. 1964); Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960). In those

water law,[3] conditional land sales contracts,[4] mechanics liens,[5] mortgages,[6] real property taxation,[7] bailments,[8] zoning,[9] and the right of a

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jurisdictions that have recognized noise damage as a compensable taking, the state constitution provides compensation for "taking or damaging." *See* Baxter & Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1, 34-40 (1972).

Indiana's constitution provides for damages only for a "taking" of property. IND. CONST. art. 1, § 21. The majority of Indiana cases dealing with inverse condemnation are concerned with the right of access to roads. *See* Note, *Inverse Condemnation and the Right of Access of Abutting Property Owners*, 9 IND. L. REV. 859 (1976). The Indiana Supreme Court has recognized a right to compensation for taking an airport easement for approaches to a runway. Indiana Toll Rd. Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965). Indiana courts have not considered whether noise alone is sufficient damage for a compensable taking. Therefore it is unclear whether an inverse condemnation suit based on noise damage would be successful.

[3]In Davidson v. Mathis, 389 N.E.2d 364 (Ind. Ct. App. 1979), the court stated that when surface water flows in a definite direction in a regular channel with well defined banks and bottom for a substantial period of each year, it is a water course. *Id.* at 365 n.1 (citing Lowe v. Loge Realty Co., 138 Ind. App. 434, 436, 241 N.E.2d 400, 402 (1966)). Therefore, the court enjoined the lower landowner from blocking the drainage from the upper lands. Had this been merely surface water, the lower landowner could have taken whatever action was necessary to prevent the water from entering upon his land. Clay v. Pittsburgh, C., C. & St. L. Ry., 164 Ind. 439, 73 N.E. 904 (1905); Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891 (1940).

In Suburban Homes Corp. v. Harders, 404 N.E.2d 629 (Ind. Ct. App. 1980), the corporation sought to establish a legal drain on Harders' property. Mrs. Harders argued that because the drain was not one established by the mutual consent of two or more property owners, it could not be made a legal drain. IND. CODE § 19-4-5-3(c) (1976). In holding for Mrs. Harders, the court determined that the presence of previously laid drainage tile and a culvert between the properties was not sufficient evidence of mutual consent. *Id.* at 633. Rather, the ordinary meaning of "mutual drain" is an artificial drain actually built by the parties, not a drain that is simply used by the parties with their mutual consent. *Id.* at 632. The court noted, however, that a natural watercourse can be made a legal drain. *Id.*

[4]Several decisions during this survey period dealt with the continuing saga of Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), in which the court recognized that the conditional sales land contract is an equitable mortgage, which gives the purchaser the rights of a mortgagor. These cases are discussed in Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. ____ (1981).

[5]Cases involving mechanics liens are discussed in Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. ____ (1981).

[6]Cases dealing with mortgages are discussed in Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. ____ (1981).

[7]The Indiana Court of Appeals, in Hawkins v. Marion County Bd. of Review, 394 N.E.2d 957 (Ind. Ct. App. 1979), held that an Indiana resident purchasing property on a conditional sales contract with a contractual obligation to pay the real estate taxes, is not "one who owns real property" for purposes of qualifying for a mortgage tax deduction. *Id.* at 959-60. *See* IND. CODE § 6-1.1-12-1(a) (1976). The court determined that distinguishing equitable and legal owners of real property is not an irrational and invidi-

ous discrimination in violation of the equal protection clause of the United States Constitution. It deferred to the legislature to grant relief. 394 N.E.2d at 961. The legislature responded by amending the statute. IND. CODE § 6-1.1-12-1(a) (1976) (amended by Act of Mar. 3, 1980, Pub. L. No. 39, § 1, 1980 Ind. Acts 507) (effective Jan. 1, 1980) (this amendment effectively overrules *Hawkins*). The legislature also enacted the Homestead Credit Act, IND. CODE §§ 6-1.1-20.9-1 to -6 (Supp. 1980), which provides a tax credit to persons, other than the legal title holder, who must pay the real estate taxes.

In State v. George, 401 N.E.2d 680 (Ind. 1980), the Indiana Supreme Court held that a sister who held property jointly with rights of survivorship with her deceased brother was entitled to an exclusion from inheritance tax for her one-half interest in the property. The state argued that because the brother had conveyed the joint interest to his sister in 1960, the sister would be unable to show that one-half of the property had never belonged to the brother. Therefore, an inheritance tax should be imposed on the entire property. The court, however, found this interpretation of the statute to be too strict. *Id.* at 682. *See* IND. CODE § 6-4-1-1 (repealed 1976), which provided that jointly held property would be treated as devised or bequeathed to the survivor, and was therefore taxable.

Under the current statute, IND. CODE § 6-4.1-2-5 (1976), property held jointly with rights of survivorship, upon the death of one of the joint owners, is valued for inheritance tax purposes as the total value of the property less the value of the portion the surviving joint owner can prove belonged to him and never belonged to the deceased owner. Thus, the court could have reached the same conclusion under the current statute. Although the facts are incomplete, the court suggested that title to the property was erroneously put in the brother's name alone when his parents died intestate. If so, the sister would have owned a one-half interest in the property from the time of her parents' deaths, and the conveyance by brother to sister in 1960 only confirmed a factual situation that existed prior to the transfer. Furthermore, brother and sister treated the property as jointly held, with each living and working on the property and each paying tax on one-half of the income generated by the property.

[8]The court of appeals decided two cases that raised bailment issues. Hainey v. Zink, 394 N.E.2d 238 (Ind. Ct. App. 1979), involved an automobile accident which occurred while defendants' tow truck was towing plaintiff's vehicle. The plaintiff argued that a trial court instruction, that the accident and resulting damages raised no presumption of wrongdoing, was erroneous. The court of appeals agreed and held that because receipt of the vehicle by the bailee in good condition and return to the bailor in a damaged condition raised an inference of negligence on the part of the bailee, the instruction was confusing. *Id.* at 241-42.

In French v. Hickman Moving & Storage, 400 N.E.2d 1384 (Ind. Ct. App. 1980), the court affirmed a summary judgment in favor of the defendant which had sold plaintiff's household items after several attempts to contact the plaintiff about payment for storage of the items. The plaintiff failed to bring her action within the two-year statute of limitations, which began to run at the time of the sale. She asserted that there was a confidential relationship between herself and the defendant because of the bailment; failure to disclose material information resulted in concealment. By not notifying her of the sale, the defendant had concealed the cause of action; thus, the statute of limitations should not have begun to run until she received actual notice. The court, however, held that while there is a certain degree of confidence with respect to care and custody in an ordinary bailment, that alone does not establish a confidential relationship. *Id.* at 1389. Because the plaintiff failed to establish any other factor creating a confidential relationship, the court found there was no such relation and therefore no fraudulent concealment of the sale. *Id.*

[9]While there were a plethora of zoning cases decided during this survey period,

remote vendee to recover from a builder-vendor on an implied warranty of habitability.[10]

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most were of a routine nature. One decision worthy of comment is Jacobs v. Mishawaka Bd. of Zoning Appeals, 395 N.E.2d 834 (Ind. Ct. App. 1979). At the time the property was zoned as a C-1 use (commercial), a gasoline service station classified as a C-4 use was in existence and operating on the premises. To prohibit the continuation of an existing lawful use within a zoning area is both unconstitutional "as a taking of property without due process of law and as an unreasonable exercise of police power." *Id.* at 836. Thus, operation of the service station became a non-conforming use, or a use of premises which lawfully existed prior to the enactment of a zoning ordinance and which is allowed to continue even though it does not comply with the use restrictions presently applicable to the area. *Id.* at 835-36. The use of the premises as a service station was subsequently discontinued and a used car business, also classified as a C-4 use, was opened. The trial court affirmed an order to cease and desist operation of the used car lot, and the property owner appealed. The court of appeals reversed, interpreting the language in the Mishawaka Zoning Ordinance which prohibited the change of a non-conforming use "to another non-conforming use of greater restriction," to mean "to another non-conforming use of a more restricted zoning classification." *Id.* at 837-38. Because a used car business is also a C-4 use, the court found that it was a permissible non-conforming use under the zoning ordinance.

In a well reasoned dissenting opinion, Judge Staton noted that "the policy of zoning ordinances is to secure the gradual, or eventual elimination of non-conforming uses and *to restrict or diminish rather than increase such uses.*" *Id.* at 840 (Staton, J., dissenting). The majority opinion would increase and prolong non-conforming uses. For example, it would permit a landowner operating a non-conforming C-1 use of the premises as an antique shop to replace it with a motor bus terminal, bowling alley, dance hall, tavern or any of a myriad of activities which are also designated as C-1 uses. *Id.* Clearly this could not have been the intent of the ordinance and thus the phrase "greater restriction" is not synonymous with "more restricted zoning classification." *Id.* at 840-41.

In Metropolitan Dev. Comm'n v. Marianos, 401 N.E.2d 28 (Ind. Ct. App. 1979), the court of appeals held that it is insufficient to merely establish that a non-conforming use existed at some time prior to the enactment of a zoning ordinance. In order to establish a non-conforming use it must be shown that the use existed at the time of the zoning restrictions and has continued since that time in non-conformance to the ordinance. *Id.* at 30. The trial court failed to find that the use existed on the effective date of the ordinance. *Id.* at 31.

[10]In 1971 Indiana joined a growing number of jurisdictions which recognize an implied warranty of habitability from a builder-vendor to the purchaser of a new home. Theis v. Heuer, 149 Ind. App. 52, 270 N.E.2d 764 (1971), *transfer granted and opinion adopted*, 264 Ind. 1, 280 N.E.2d 300 (1972). Indiana became one of the first states to extend this implied warranty of the builder-vendor to a subsequent purchaser. Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976); Polston, *Property, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 297, 299-302 (1976).

In Wagner Constr. Co. v. Noonan, 403 N.E.2d 1144 (Ind. Ct. App. 1980), a subsequent purchaser of a house sued the builder-vendor for breach of an implied warranty of habitability because of a defective septic tank system which caused raw sewage to back into the basement. The plaintiff recovered a small claims judgment of $632.66 and the defendant appealed. Four major issues were raised on appeal: (1) Whether an implied warranty of habitability should be extended to a second purchaser in the absence of privity of contract; (2) Whether five years is an excessive time period to extend the implied warranty of habitation against the original builder; (3) Whether the defect was

A. Adverse Possession

To acquire title to land by adverse possession, the possession must be: (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous.[11] In addition, Indiana Code Section 32-1-20-1 requires that the adverse possessor pay all taxes and special assessments on the land during the period he claims to have possessed the land adversely. These requirements were addressed in two interesting cases decided during this survey period.

In *Berrey v. Jean*,[12] the plaintiffs, two individuals and a cemetery association, claimed title by adverse possession and brought an action to quiet title to land against the record owners. The property, known as Williams Cemetery, had been utilized for systematic burial since before 1880. For sixty years, four concrete

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serious enough to warrant application of the doctrine of implied warranty of habitability; and (4) Whether a breach of the implied warranty of fitness for habitability may be applied against the builder when the purchaser fails to notify the builder and consequently the builder has had no opportunity to correct the problem. *Id.* at 1145-46.

On the first issue the court noted that the Indiana Supreme Court had rejected the privity requirement in *Barnes*. "The traditional requirement of privity between a builder-vendor and a purchaser is an outmoded one." *Id.* at 1146.

Addressing the second issue, the duration of the warranty, the court held that "[t]he duration of the implied warranty of fitness for habitation is determined by the standard of reasonableness," *id.* at 1148, and that a five year period was not too long a period of time to extend the warranty to a latent defect in a septic system because it is common knowledge that the expected life of a properly installed septic system is greater than five years. *Id.* The court noted that the builder-vendor need not be concerned about extending the warranty into the distant future because all claims would be extinguished at the expiration of ten years from the date of substantial completion, pursuant to IND. CODE § 34-4-20-2 (Supp. 1980). *Id.* at 1148 n.3. In another decision, Walsh v. Halteman, 403 N.E.2d 894 (Ind. Ct. App. 1980), the court noted that IND. CODE § 34-4-20-2 (1976) was amended in 1977 to include construction deficiencies. Thus, the ten-year statute of limitation now governs actions based upon breach of an implied warranty of habitability.

With regard to the third issue, whether the defect was sufficiently serious to warrant the application of the implied warranty of habitability, the court concluded that breach of the warranty is established by proof of a defect of a nature which substantially impairs the enjoyment of the residence. 403 N.E.2d at 1148. Raw sewage in the basement of a residence is more than a minor inconvenience and substantially impairs the intended use and enjoyment of the dwelling for habitation.

Finally, the court addressed the notice issue. The court noted that in personal property cases, notice of the breach has been held to be a condition precedent to recovery. IND. CODE § 26-1-2-607(3)(a) (1976). There was no evidence that the plaintiff ever gave notice of the alleged breach of warranty to the defendant. While no particular form of notice is required, the court concluded that the notice must at least inform the builder-vendor of the problem and give him a reasonable opportunity to cure the defect. 403 N.E.2d at 1150. The judgment was reversed on this issue. *Id.*

[11]Worthley v. Burbanks, 146 Ind. 534, 539, 45 N.E. 779, 781 (1897).

[12]401 N.E.2d 102 (Ind. Ct. App. 1980).

corner posts enclosed the gravesites. Members of the community considered these posts as indicating the boundary of the cemetery. A fence which had previously enclosed the area stood on only three sides for thirty-three years; the unenclosed side bordered a highway. An access to the cemetery across the defendants' land was utilized for approximately forty-five years.[13]

The defendants stipulated to the existence of the cemetery and the right of access across their land but contested the extent of the cemetery property, arguing that the boundaries should be restricted to existing gravesites with a ten-foot perimeter and not to the entire area defined by the posts and fence.[14] There was no evidence of any physical use of the disputed area and the trial court quieted title to the property in the plaintiffs. In affirming the judgment of the trial court, the court of appeals noted: "Actual possession has been held to be satisfied if the claimant's possession consists of use to which the land by its nature is suited."[15] Since the land was suitable for use as a cemetery, such use "by its nature requires open space in which to accomodate future burials."[16] This statement might be misleading read outside the context of the case. It seems to suggest that where a part of the land is being physically possessed, the adverse possessor could claim title to additional areas that might be suitable for future expansion for a similar use.[17]

Courts have often relaxed the actual possession requirement where the land, because of its location or physical condition, will not permit a more open, actual, notorious or continuous possession.[18] Although the *Berrey* court cited *Gibson v. Berstein*[19] in support of its position that the use need only be suitable to or consistent with the nature of the land, the facts of *Gibson* are far different from those in *Berrey*. In *Gibson*, the land at the time of the tax sale was worth three to five dollars, was not capable of practical cultivation,

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[13]*Id.* at 104.

[14]*Id.*

[15]*Id.* at 106.

[16]*Id.*

[17]This would be true where a person takes possession of a portion of the land under color of title. 3 AMERICAN LAW OF PROPERTY § 15.11 (A.J. Casner ed. 1952) [hereinafter cited as A.L.P.]. Actual possession of a portion of the land described by the instrument will give him constructive possession of the entire area. City of Noblesville v. Lake Erie and W.R.R. Co., 130 Ind. 1, 29 N.E. 484 (1891). *See* cases cited in Worthley v. Burbanks, 146 Ind. 534, 539-40, 45 N.E. 779, 781 (1897).

[18]Wineberg v. Moore, 194 F. Supp. 12 (N.D. Cal. 1961); Gibbons v. Yosemite Lumber Co., 190 Cal. 168, 172, 211 P. 4, 5 (1922); Worthley v. Burbanks, 146 Ind. 534, 45 N.E. 779 (1897); Whalen v. Smith, 183 Iowa 949, 953, 167 N.W. 646, 647 (1918); Howard v. Kunto, 3 Wash. App. 393, 477 P.2d 210 (1970).

[19]72 Ind. App. 681, 126 N.E. 491 (1920).

and could not be used profitably for any purpose. Thus, going upon the land, locating the corner stones and stakes, and periodically visiting the land were considered exercising all the acts of possession and control of which the land was susceptible.[20] However, in *Berrey* there was no indication that the land could not be used profitably for some purpose which would allow physical possession. While the statement that accomodation of future burials is sufficient use to acquire title by adverse possession might be questionable, the court in *Berrey* also found that the fence and corner posts had been open and visible sixty years or longer and that these monuments were considered to be the boundaries of the cemetery by long-time residents "as long as they could remember."[21] Because acts of possession were performed which were actual, visible, open, notorious and exclusive, holding a portion of the land for future use was consistent with a claim of ownership to the entire area.

The defendants also argued that, as required by statute,[22] the plaintiffs, in order to acquire title by adverse possession, must show that they had paid all taxes and special assessments on the land during the period they possessed the land adversely.[23] In rejecting this argument, the court noted that the cases construing the statute "have not demanded its rigid application in all situations."[24] The court cited *Echterling v. Kalvaitis*,[25] in which the Indiana Supreme Court stated that the intent of the legislature in enacting the statute was to put an end to the practice in the northern portion of the state whereby squatters were obtaining title to large tracts of unoccupied land on which the absentee owners were paying taxes.[26] The tax requirement was intended to provide notice to the record owner that an adverse claimant was making a claim to his land.[27] Because the trial court in *Berrey*, however, had found that the plaintiffs acquired title at a point in time prior to the defendants' purchase of the land, notice to the defendant of their claim by the payment of taxes would not have affected the outcome.[28] In addition, the court concluded that the statute "must be construed as being supplemental to the statute of limitations and not as superseding it."[29]

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[20]*Id.* at 684-86, 126 N.E. at 492-93.

[21]401 N.E.2d at 105.

[22]IND. CODE § 32-1-20-1 (1976).

[23]401 N.E.2d at 104, 105.

[24]*Id.* at 105.

[25]235 Ind. 141, 126 N.E.2d 573 (1955).

[26]*Id.* at 145, 126 N.E.2d at 575; *see* Note, *Adverse Possession in Indiana*, 16 NOTRE DAME LAW. 216, 219-20 (1941).

[27]401 N.E.2d at 105. *See* 235 Ind. at 145, 126 N.E.2d at 575; Kline v. Kramer, 386 N.E.2d 982, 989 (Ind. Ct. App. 1979).

[28]401 N.E.2d at 105.

[29]*Id.* (quoting 235 Ind. at 146, 126 N.E.2d at 575).

In *McCarty v. Sheets*,[30] McCarty brought suit to require Sheets, an adjoining landowner, to move a portion of his garage which extended approximately two feet beyond their mutual property line. The adjoining landowner counterclaimed to quiet title. Sheets acquired title to the land in 1956, but his garage had existed in its present location since 1937.[31] Sheets had cut weeds around the garage, raked leaves on the property, and mowed the grass to the middle line between his garage and McCarty's garage.[32] The trial court quieted title to a strip of land four feet two inches wide along the entire west property line "to give to [Sheets] the land located between the garage of [Sheets] and the garage of [McCarty] to a point half way between said buildings."[33] It is clear from a sketch of the property contained in the opinion that the garage occupied only a small portion of the western property line.[34] Despite the absence of any physical manifestation of the true boundary line, such as a fence or shrub, the court affirmed the judgment of the trial court quieting title to the strip along the entire boundary line,. holding that the absence of a fence or shrub should not defeat Sheets' title to the area which he had mowed and maintained.[35]

Judge Hoffman, in a dissenting opinion, would have limited the area quieted to that occupied by the garage: "No fence or markings of any kind showed where the boundary line existed. It is a sad day in Indiana when the courts take a man's land from him on evidence of mowing grass on the side and behind a garage."[36] He also questioned compliance with the provisions of the statute requiring the adverse possessor to pay taxes on the land.[37] In boundary line disputes, however, the Indiana courts have uniformly held that the provisions of the statute are inapplicable.[38] In such cases each adjoining owner is paying taxes on his land and improvements. The tax duplicates issued by county or city treasurers are usually so sketchy and inaccurate that they would not give notice to the record

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[30]391 N.E.2d 834 (Ind. Ct. App. 1979).

[31]The court noted that periods of adverse possession can be tacked from grantor to grantee. Since Sheets' predecessors in title had occupied the disputed strip in a similar manner, Sheets had acquired title by adverse possession even before McCarty bought the adjoining property in 1967. *Id.* at 836.

[32]*Id.*

[33]*Id.* at 837.

[34]*Id.* at 836.

[35]*Id.* at 837.

[36]*Id.* at 838 (Hoffman, J., dissenting).

[37]*Id.*

[38]Echterling v. Kalvaitis, 235 Ind. 141, 126 N.E.2d 573 (1955); Berrey v. Jean, 401 N.E.2d 102 (Ind. Ct. App. 1980); Kline v. Kramer, 386 N.E.2d 982 (Ind. Ct. App. 1979); Penn Cent. Transp. Co. v. Martin, 170 Ind. App. 519, 353 N.E.2d 474 (1976).

owner that a neighbor was claiming an interest in his land, whereas notice would be given if a squatter suddenly paid the taxes on the entire tract of land.[39]

Another problem raised in boundary line disputes is the requirement that possession be hostile and under claim of right. In most cases the possession is based on a mistake concerning the true boundary line; if called as a witness, the possessor would freely admit that he did not intend to claim more than he actually owned.[40] This has led some courts to hold that such possession is not hostile or under claim of right.[41] Indiana, however, following the weight of authority,[42] has held that when an owner of land takes actual, visible and exclusive possession of the land under a mistake as to the true boundary line and holds it for the statutory period for adverse possession, he thereby acquires title as against the record owner.[43] Once title vests, title is not lost even though he pays rent to the record owner, agrees to survey the land, or offers to buy the disputed area. Likewise, such acts do not work an estoppel.[44] In *McCarty*, Sheets agreed to pay half the cost of the survey, offered to erect eave troughs on the garage to prevent runoff onto McCarty's property, and offered to purchase the disputed area.[45] These pacification efforts, however, did not work an estoppel since the trial court found that Sheets already owned the land by adverse possession at the time the offers of conciliation were made.[46]

B. Concurrent Estates and Partition

When two or more person take as tenants in common under an instrument which is silent regarding their respective interests, there is a presumption that their shares are equal.[47] In *Baker v.*

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[39]Echterling v. Kalvaitis, 235 Ind. 141, 146, 126 N.E.2d 573, 575 (1955).

[40]Kotze v. Sullivan, 210 Iowa 600, 602-03, 231 N.W. 339, 340 (1930); Van Allen v. Sweet, 239 Mass. 571, 574, 132 N.E. 348, 349 (1921); Burns v. Foster, 348 Mich. 8, 10, 81 N.W.2d 386, 387 (1957); Howard v. Kunto, 3 Wash. App. 393, 396 n.4, 477 P.2d 210, 213 n.4 (1970).

[41]*E.g.*, United States v. Wilcox, 258 F. Supp. 944 (N.D. Iowa 1966); Boyle v. D-X Sunray Oil Co., 191 F. Supp. 263 (N.D. Iowa 1961); Ikola v. Goff, 31 Cal. App. 3d 872, 107 Cal. Rptr. 663 (1973); Miller v. Department of State Highways, 30 Mich. App. 64, 186 N.W.2d 67 (1971); Adams v. White, 488 S.W.2d 289 (Mo. Ct. App. 1972).

[42]Annot., 80 A.L.R.2d 1171 (1961). *See* 3 A.L.P., *supra* note 17, § 15.5.

[43]Rennert v. Shirk, 163 Ind. 542, 72 N.E. 546 (1904). *See also* authorities cited in note 38 *supra*.

[44]Kline v. Kramer, 386 N.E.2d 982, 987 (Ind. Ct. App. 1979).

[45]391 N.E.2d at 836.

[46]*Id.*

[47]4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1797 (repl. ed. 1979); 2 A.L.P., *supra* note 17, § 6.5.

Chambers,[48] a case of first impression, the court of appeals concluded that as between the immediate parties this presumption is rebuttable. The parties, Frank Baker and Zona Chambers, acquired title to the property in question as "husband and wife," but were not married at the time of the conveyance.[49] Had they in fact been husband and wife, the conveyance to them would have created a tenancy by the entireties.[50] However, because Indiana abolished common law marriages in 1958[51] and because the conveyance did not include words of survivorship,[52] the court concluded that the conveyance created a tenancy in common.[53] Zona Chambers brought an action for partition claiming a half interest in the property, and the trial court granted her motion for summary judgment.[54] In reversing the decision, the court of appeals held that despite the wording of several earlier Indiana decisions which could be read as creating an irrebuttable presumption of equal shares[55] between the original parties, the presumption is rebuttable.[56] Because Baker stated by affidavit that he paid the entire consideration, that the bank required the nomenclature in the deed, and that no gift of a half interest was contemplated, the court determined that a question of fact was raised which precluded summary judgment.[57] In dictum, the court stated that if the parties involved were not the orginal parties, but were, for example, subsequent purchasers, creditors, or lienholders, the presumption of equal shares would have been conclusive.[58]

While recognizing the general rule that marriage alone does not create an agency relationship,[59] the court of appeals in *Moehlenkamp v. Shatz*[60] affirmed the trial court's use of an implied agency theory

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[48]398 N.E.2d 1350 (Ind. Ct. App. 1980).

[49]*Id.* at 1351.

[50]Where a conveyance is made to a husband and wife without any words limiting the estate, they hold as tenants by the entirety. Brown v. Brown, 133 Ind. 476, 477, 32 N.E. 1128, 1128 (1893).

[51]IND. CODE § 31-1-6-1 (Supp. 1980).

[52]All conveyances to two or more persons not husband and wife shall create a tenancy in common unless words of survivorship or an intent to create a joint tenancy shall manifestly appear from the tenor of the instrument. IND. CODE § 32-1-2-7 (1976).

[53]398 N.E.2d at 1351-52.

[54]*Id.* at 1351.

[55]Spanier v. Spanier, 120 Ind. App. 700, 96 N.E.2d 346 (1951); Singleton v. Cushman, 117 Ind. App. 183, 70 N.E.2d 642 (1947) (could be read as holding that the presumption of equal shares is irrebuttable).

[56]398 N.E.2d at 1352.

[57]*Id.* at 1351-52.

[58]*Id.* at 1352.

[59]Martz v. Selig Dry Goods Co., 76 Ind. App. 135, 131 N.E. 528 (1921); Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891).

[60]396 N.E.2d 433 (Ind. Ct. App. 1979).

to foreclose a mortgage signed by the husband.[61] The only evidence of an agency relationship was that the husband had handled all the business affairs of the family including the purchase of real estate, the securing of loans, and the filing of income tax returns.[62] The court gave considerable weight to the fact that the husband had previously obtained a loan on the real estate without first informing his wife of the arrangement and that she subsequently signed the papers.[63] The court was not impressed that the wife had informed her husband that she did not like him taking out a loan without her consent and that she "would rather he not do that anymore."[64] While the court cited statutory authority[65] for the rule that no particular form of appointment is necessary to authorize an agent to sign his principal's name to a negotiable instrument, the court ignored the provisions of another statute[66] which requires written authority of an agent to sign his principal's name on a mortgage. Perhaps the court did not consider this point because it concluded that there was sufficient evidence to support the trial court's judgment on the alternative theory that the wife had actually signed the note and mortgage.[67]

One of the more interesting cases, *Burford v. Burford*,[68] was a suit to partition two adjoining tracts of land spanned by a common building. In 1945 the Piel family leased Parcel I to S.S. Kresge Co. and at the same time, but by a separate lease, the Burford family

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[61]*Id.* at 437.

[62]*Id.*

[63]*Id.*

[64]*Id.* at 436.

[65]IND. CODE § 26-1-3-403(1) (1976).

[66]*Id.* § 32-1-10-1.

[67]396 N.E.2d at 437.

[68]396 N.E.2d 394 (Ind. Ct. App. 1979).

Another case pointing up the complexities of partition suits is Gilstrap v. Gilstrap, 397 N.E.2d 1277 (Ind. Ct. App. 1979). In an attempt to partition three tracts of land, court-appointed commissioners ordered two tracts sold but found a third tract divisible in severalty with the condition that a sum be paid by one cotenant to another to make the shares equal because the land could not be exactly divided. Unfortunately, in evaluating the land, the commissioners failed to consider a zoning ordinance requiring a sixty foot wide access to industrial property; thus, the designation and valuation of a portion of the property were incorrect. *Id.* at 1281. The trial court committed reversible error when it based the acreage in the final decree upon the description in the petition and not on the acreage in the survey and commissioners' report. *Id.* at 1280. Reversing the case, the court made two important observations: (1) The report of the commissioners should be viewed as a jury verdict rendered upon a trial at law, and it should be disturbed by the court only upon grounds similar to those on which a verdict would be set aside and a new trial granted, *id.* at 1282; and (2) although the court may order a partition and divide the property, once the court appoints commissioners and they render a report, the court must either accept that report or set it aside; the court may not make any adjustments in the recommended distribution. *Id.*

leased Parcel II to Kresge. Under the terms of the separate leases, Kresge had the right to construct a six-story commercial building spanning both parcels in such a manner that the building could be converted into two separate buildings at the expiration of the leases. The building was not so constructed and Kresge separately settled both claims for damages with the owners of the two parcels.[69] Plaintiff, a cotenant of Parcel II, filed suit to partition the building and the two parcels by sale, claiming that they could not be partitioned separately without damage to the whole.[70] The trial court dismissed the petition. The court of appeals, reversing in part, held that the plaintiff was entitled to partition of Parcel II and the portion of the building thereon but denied his right to partition Parcel I or the entire building. The court concluded that each lease contemplated converting the building into two separate buildings, one on each parcel, at the end of the lease, and only Kresge's failure to comply with the terms of the lease prevented this from happening.[71] Thus, there was no intent to create a "community of interest" or "common ownership" in the building as a whole.[72]

Two cases cited by the court denied partition on the theory that each owned a part of the property in severalty. In one case, the party owned a definable floor in a building,[73] and in the other case, the party owned a particular room in the building.[74] These cases can, however, be distinguished from *Burford* in that no practicable use can be made of the separate portions of the building, and apparently each portion was of little or no value apart from the whole. Whatever may have been the original intent of the parties regarding their interest in the building, its fulfillment was rendered impossible by Kresge's failure to comply with the terms of the separate agreements. Payment of damages by Kresge does not make fulfillment of the agreements possible, and to leave the parties with worthless parts of a potentially valuable whole results in economic waste.

C. Easements and Restrictive Covenants[75]

It is generally recognized that the holder of an easement over

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[69]396 N.E.2d at 395.

[70]*Id.* at 395-96.

[71]*Id.* at 397.

[72]*Id.*

[73]Anderson School Township v. Milroy Lodge F. & A.M., No. 139, 130 Ind. 108, 29 N.E. 411 (1891).

[74]School Corp. v. Russelville [*sic*] Lodge, No. 141, F. & A.M., 140 Ind. 422, 39 N.E. 549 (1895).

[75]Another case, involving a covenant not to compete, Unishops, Inc. v. May's Family Centers, Inc., 399 N.E.2d 760 (Ind. Ct. App. 1980), is discussed in the section on Landlord and Tenant, p. 481 *infra*.

the land of another may enjoin the servient tenant from interfering with the use and enjoyment of the easement; yet, the owner of the servient estate may make any use of his land which does not interfere with the use and enjoyment of the easement by the dominant tenant.[76] In *Holding v. Indiana & Michigan Electric Co.*,[77] Indiana and Michigan Electric Company (I&M) acquired an easement for the purpose of transmitting electric current, which included the right to maintain poles and cables across the land of the appellants. The appellants, who were operating an automobile salvage business on the premises, subsequently spread earth fill over a marshy portion of the land, thereby decreasing the clearance between the cables and the ground. I&M discovered this fact when a temporary disruption in the flow of electricity resulted from a dump truck's coming in contact with a cable above the appellant's land.[78] I&M asked for an injunction requiring the appellants to remove the amount of fill dirt necessary to re-establish a twenty-two foot clearance, or alternatively, to pay the cost of adding extensions to the poles and restringing the cables.[79] Appellants argued they were in compliance with the National Electric Safety Code provisions relating to heights of high-voltage transmission lines above the ground.[80] First, they urged that they did not interfere with the transmission of electricity. Second, they suggested that their particular type of business activity was not covered by the Safety Code provisions. In rejecting these arguments and affirming the permanent injunction, the court noted that the National Electric Safety Code established only minimum standards; that Indiana had long recognized the dangerous propensities inherent in electricity; that acquisition of an easement for a public service effectively removed private use of the area to the extent it interfered with the public use; and that "exercise of safety practices in the operation of high voltage transmission lines [was] one of the incidents to the use and enjoyment of the easement."[81]

While not specifically a case involving an easement, *Dolph v. Mangus*[82] made an interesting distinction between prescriptive easements and the statute of limitations. The plaintiff alleged that the defendants' alteration of the natural flow of surface water caused damage to his cropland. The defendants had constructed an extensive drainage system across their lands in 1948 which released

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[76]W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 86 (3d ed. 1965); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 344 (2d ed. 1975).

[77]400 N.E.2d 1154 (Ind. Ct. App. 1980).

[78]*Id.* at 1155-56.

[79]*Id.* at 1156.

[80]*Id.*

[81]*Id.* at 1158.

[82]400 N.E.2d 189 (Ind. Ct. App. 1980).

water onto the plaintiff's land. The court found that the resulting drainage created a "permanent injury"[83] which started the statute of limitations running. Therefore, the plaintiff's action to recover damages for the flooding and erosion of his land was barred by the six-year statute of limitations.[84] There was no discussion of the plaintiff's request for injunctive relief, but perhaps the court concluded that because the injury was of a permanent nature, there was no continuing or recurring injury for which injunctive relief could be granted. The court went to considerable lengths, however, to distinguish a prescriptive easement, which is positive and creates rights, and the statute of limitations, which is negative and destroys remedies.[85] Rejection of the defendants' claim of a prescriptive easement creates a rather interesting legal vacuum. The plaintiff's claim is barred by the statute of limitations, but the defendants have acquired no rights. Since surface water is regarded as a common enemy under Indiana law,[86] there is authority for the position that the plaintiff could use self-help to block the flow of the water by the erection of a dam or barricade.[87]

Indiana has an interesting statute which creates a method of establishing a public highway by use, independent of common law dedication or strict prescription.[88] Unlike the doctrine of prescriptive use, it is not essential to prove that the use of the road by the public was under a claim of right.[89] In *Fenley Farms, Inc. v. Clark*,[90] the defendants owned a five-acre tract of land fronting the Ohio River. The plaintiff owned land which bordered the defendants' property and which prevented access to Westport Road. Both tracts of land and other riverfront parcels were originally part of a single tract, known as the Bowyer tract. Without notifying or obtaining permission from the plaintiff, the defendants bulldozed a road from Westport Road across the plaintiff's property to the defendants' property. The plaintiff filed suit for trespass and sought an injunction. The trial court granted judgment for the defendants and the plaintiff appealed. The evidence established that a road existed from 1852 until 1874 between Westport Road and a ferry landing. The road was

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[83]*Id.* at 192.

[84]*Id.*

[85]*Id.* at 190-91.

[86]Capes v. Barger, 123 Ind. App. 212, 109 N.E.2d 725 (1953).

[87]Clay v. Pittsburgh, C., C. & St. L. Ry., 164 Ind. 439, 73 N.E. 904 (1905); Cairo & V.R.R. v. Stevens, 73 Ind. 278 (1881); Taylor v. Fickas, 64 Ind. 167 (1878). *See also* Polston, *Property, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 297, 307-08 (1976).

[88]IND. CODE § 8-20-1-15 (1976).

[89]Cozy Home Realty Co. v. Ralston, 214 Ind. 149, 14 N.E.2d 917 (1938).

[90]404 N.E.2d 1164 (Ind. Ct. App. 1980).

used sporadically in subsequent years, primarily by the owners of the various riverfront tracts. The parties stipulated that during the past thirty-five years, the road had been used by the defendants, their immediate predecessors in title and other owners of riverfront lots carved from the Bowyer tract.[91] Plaintiff argued that the earlier use of the road to reach the ferry was not a use by the general public under a claim of right, but was a use by customers of a private commercial enterprise. The plaintiff claimed that even if a roadway had existed at one time, it had since been abandoned.[92] The court rejected these arguments, noting that "public" means "'all those who have occasion to use' the road,"[93] and that use of the road by employees and customers of a private enterprise was a public use.[94] The fact that the highway was rarely if ever used by persons other than landowners did not make it less a public road. Even if the road is open only at one end or extends only to one person's property, it is still a public road. Moreover, the continued use of the road by the owners of the riverfront lots was sufficient to negate a claim of abandonment.[95] Likewise, the court noted that it was immaterial under the statute whether the use was with the consent of or over the objection of the landowner. Unlike a prescriptive easement, adverse use was not essential.[96]

The statute also requires that the party alleging a public highway has the burden of proving its exact location, width, and description. Fortunately, at the time the Bowyer land was partitioned among the defendant's heirs, there was a partition plat in a probate order book which showed the location of the road. There was evidence that the roadbed was visible before the bulldozing and that the bulldozed road did not deviate from the existing roadbed.[97]

Unlike easements, restrictive covenants are enforced in equity, and equity may refuse to enforce such covenants where changed conditions in the restricted area have significantly reduced or eliminated any benefits sought to be realized by the enforcement of the covenant.[98] In *Cunningham v. Hiles*,[99] the Board of Trustees of the town of Schererville approved the rezoning of a tract of land in a

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[91]*Id.* at 1167-68.

[92]*Id.* at 1168.

[93]*Id.*

[94]*Id.*

[95]*Id.* at 1170.

[96]*Id.* at 1168-69.

[97]*Id.* at 1170-71.

[98]Bob Layne Contractor, Inc. v. Buennagel, 158 Ind. App. 43, 301 N.E.2d 671 (1973); 2 A.L.P., *supra* note 17, § 9.39; 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 684 (1980).

[99]395 N.E.2d 851 (Ind. Ct. App. 1979).

subdivision from residential to commercial use; the tract had been subject to a covenant restricting land use to residential purposes. Individual defendants purchased one of the lots affected and employed a general contractor to begin construction of a music store on the lot. Homeowners in the subdivision brought an action against the city to challenge the propriety of the zoning reclassification and against the individual defendants to enjoin the construction of the music store. The trial court entered judgment for both the town and the individual defendants finding that the restrictive covenant was unenforceable. The homeowners appealed.[100] In reversing the trial court's determination, the court of appeals did not address the propriety of the zoning reclassification. Rezoning of an area subject to a valid restrictive covenant will not relieve that area of the burdens of the covenant.[101] The court noted that the only change within the restricted area was the permitted construction of an office building which protruded approximately 112 feet into the subdivision at its northeast corner. There had been a substantial increase in commercial activities in the areas surrounding the subdivision, and the traffic had increased eight to ten times on U.S. 30, which bordered the subdivision on one side.[102] However, the court reasoned that "the weight attributed to these changes should not be as great as that accorded changes which have occurred within the restricted area."[103] Similarly, the court gave little weight to the fact that the vacant lots bordering U.S. 30 no longer attracted residential buyers due to the traffic load. Courts have come to realize that changes outside a restricted area may reduce the benefit of the covenant to perimeter lot owners, but to release them from the burden would destroy the benefit to the interior lot owners and eventually erode the benefit to the entire area.[104] To make a restrictive covenant unenforceable, the changes which have occurred in and around the restricted area must be so radical in nature that the purpose of the covenant has been defeated.[105]

While the appeal was pending, the individual defendants proceeded to construct the music store, and subsequently one of the defendants, Hiles, filed a petition for rehearing claiming that a material change in circumstances had rendered the appeal moot.[106] While not entirely convinced that Hiles had the right to proceed

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[100]*Id.* at 853.

[101]Capp v. Lindenberg, 242 Ind. 423, 433, 178 N.E.2d 736, 740 (1961).

[102]395 N.E.2d at 854.

[103]*Id.* at 855.

[104]5 R. POWELL, *supra* note 98, ¶ 684; 2 A.L.P., *supra* note 17, § 9.39.

[105]395 N.E.2d at 856.

[106]Cunningham v. Hiles, 402 N.E.2d 17 (Ind. Ct. App. 1980).

with the construction because the homeowners had failed to file a supersedeas bond,[107] the court resolved the issue on the failure to notify the court of the construction during the appeal. The court stated, "A Petition for Rehearing will not be granted on the basis of acts which occurred during the pendency of the appeal and which were not in any manner presented for this Court's consideration."[108] Graciously, the court did not feel required to modify its order to require the removal of the building but instead directed the circuit court to issue a permanent injunction against the use of the structure for any purpose which volated the terms of the covenant.[109] No doubt the structure will make an impressive, though unique, residence for some lucky homeowner.

Another case involving the enforceability of covenants was *Brendonwood Common v. Franklin*.[110] In August, 1917, a 350 acre tract of land was platted as Brendonwood, "a self-regulated residential zone."[111] The addition consisted of 110 lots with various private roadways and paths, and one public road. In September, 1917, the entire property was conveyed to Charles Lewis. The deed contained the Brendonwood covenants.[112] The grantee was required to organize Brendonwood Common as a corporation, to convey all common areas exclusive of the 110 lots to the corporation,

> to provide for 110 memberships in the corporation with each membership appurtenant to one of the 110 lots and transferable only to successive purchasers of each lot, and to cause the corporation's articles and bylaws to provide for a system of rules and regulations permitting the assessment and collection of charges against each [lot] owner for the maintenance, care and protection of the common areas.[113]

The deed provided that these covenants, stipulations, and agreements were to have the effect of a covenant running with the land and would bind the grantee, his heirs and assignees.[114] The corporation was organized, and its articles and bylaws provided for the maintenance charges to be levied against each property owner, enforceable as liens against their properties. The bylaws further provided that assessments for maintenance, as well as development and improvement charges, would be paid by the owners on an acreage

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[107] *Id.* at 21 n.4.
[108] *Id.* at 21.
[109] *Id.* at 22.
[110] 403 N.E.2d 1136 (Ind. Ct. App. 1980).
[111] *Id.* at 1138.
[112] *Id.*
[113] *Id.*
[114] *Id.*

basis, and in the event of default in payment, the lien on the properties might be foreclosed.[115] In 1974, Brendonwood Common levied a special roadway assessment against the lot owners on an acreage basis. A group of lot owners on the south boundary of Brendonwood refused to pay the special assessment, and several refused to pay other regular assessments.[116] Brendonwood Common filed suit to collect these delinquent assessments with interest and attorney's fees, and sought a foreclosure order to sell the defendants' properties. The defendants filed a cross petition asking the court to declare the covenants unenforceable as to their properties.[117] The trial court held that the covenants were no longer enforceable because of changed circumstances; Brendonwood Common appealed.[118] The court of appeals noted the following changed conditions: (1) the addition was now part of Indianapolis; (2) the roads were paved rather than dirt and gravel; (3) the cost of maintenance had increased; and (4) certain common areas had been turned over to a private country club whose membership did not include all members of the corporation. The court concluded, however, that these changes were not so radical in nature as to defeat the original purpose of the covenant.[119] The appellees argued that while the "changed condition" standard as applied to restrictive covenants might not justify relief, these were affirmative covenants which imposed positive burdens or affirmative duties.[120] Thus, because the defendants owned larger lots, which bordered on a public road, they would pay a greater portion of the costs of maintaining the private roads than owners of smaller interior lots who used those roads, but would receive little or no advantage from such maintenance. While the court conceded that this argument was of some relevance, it noted that most commentators and courts rarely make a distinction between negative and affirmative covenants.[121]

In response to the defendants' argument that the covenants did not run with the land, the court noted that affirmative covenants may run with the land if that was the intention of the grantor and if the covenants touch and concern the land.[122] Although the defendants' contention was unclear, it may have been based on the fact

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[115] *Id.* at 1139.

[116] *Id.* at 1137-40.

[117] *Id.* at 1137-38.

[118] *Id.* at 1140.

[119] *Id.*

[120] *Id.* at 1140 n.4.

[121] *Id.*

[122] *Id.* at 1141. There was reference to a subsequent quitclaim deed from the grantor of the September 1917 deed to the grantee, but the court concluded that it was ineffective to extinguish the covenants. *Id.*

that the affirmative duties were created by the bylaws of the subsequently formed corporation rather than by the deed itself. On the other hand, the deed did require the grantee to establish the corporation and to ensure that the articles and bylaws provided for the assessments and collection of charges against each owner for the maintenance of Brendonwood.

With regard to the defendants' argument that they were no longer members of Brendonwood Common, the court noted that membership was transferable only by sale of the lot to which the membership was appurtenant. Thus, the letters sent to the corporation notifying it of the defendants' withdrawal were ineffective. Only a sale of their properties would be sufficient to extinguish their obligation to pay the fees.[123]

Finally, the court concluded that the provisions in the bylaws making the assessments a lien on the properties and providing for foreclosure "with interest, attorney's fees and costs,"[124] were contractual provisions binding on all members.[125] This conclusion assumed that a purchaser of one of the 110 lots would automatically become a member of the corporation and would be bound by its articles and bylaws. This point relates to the previous discussion of covenants running with the land.[126] The purchaser would be on constructive notice of these provisions in his chain of title because the 1917 deed required the grantee to form the corporation and provide for 110 memberships with each membership appurtenant to one of the 110 lots.

D. Landlord and Tenant Relations

At common law, if a person enters into possession of land with the owner's permission and without any agreement to pay rent, it is referred to as a tenancy at will—a tenancy terminable at the will of either party.[127] If a tenant under a lease holds over at the expiration of the term, it is referred to as a tenancy at sufferance.[128] In *Wallace*

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[123]*Id.* at 1142-43.

[124]*Id.* at 1143.

[125]Had the court continued to treat the promise to pay interest, attorney's fees, and costs as a covenant running with the land, there would have been a problem with the requirement that the promise must "touch and concern" the land. In Levin v. Munk, 97 Ind. App. 118, 169 N.E. 82 (1929), the court refused to allow a landlord reasonable attorney's fees and interest on past due rent, as provided for in the lease from the tenant's assignee, because these promises were merely collateral and in no manner touched or concerned the land. *Id.* at 122, 169 N.E. at 83.

[126]*See* text accompanying note 122 *supra.*

[127]W. BURDY, *supra* note 76, 125-27.

[128]*Id.* at 127-28; J. CRIBBET, *supra* note 76, 56.

v. Rogier,[129] the Indiana Court of Appeals noted that if a person was using or living on another's land with permission but was not paying rent, the term "tenancy at sufferance" was to be used to describe the relationship.[130] By statute a "tenancy at will" cannot arise or be created without an express contract,[131] and once created, one month's notice in writing is required to terminate it.[132] Thus, the statute has changed the common law use of the term "tenancy at will" and has forced the court to use the term "tenancy at sufferance" to describe the relationship. This change of labels, however, does not alter the substantive law governing the relationship.

In *Wallace*, Mrs. Rogier brought an action for damages and ejectment against her daughter and son-in-law, the Wallaces, who with permission had taken possession of the land in the expectation of successfully negotiating a contract for the sale of the land. The Wallaces countersued for specific performance of a land sales contract signed by the Rogiers, but the court found that the "paper" was a sham contract signed for the purpose of obtaining mortgage approval.[133] The trial court granted injunctive relief and awarded the mother $1,000 in damages for wrongful possession.[134] The court of appeals reversed on the damage issue, noting that neither the length of time the Wallaces wrongfully possessed the land nor the rental value of the land had been established.[135] The court of appeals also noted that the measure of damages for the loss of use of land is the rental value of the land for the period of wrongful possession.[136]

The question of damages for wrongful possession by a holdover tenant was raised in *Brummett v. Pilotte*.[137] In the fall of 1972 the landlord served a written notice to quit on the tenant, who was previously under an oral year-to-year farm lease.[138] The tenant refused to vacate and the landlord brought an action for ejectment. The trial court entered judgment ejecting the tenant; the tenant appealed and remained in possession until February 1974 after posting a supersedeas bond which was approved by the trial court.[139] In August 1975, the court of appeals affirmed the judgment of ejection,[140] and

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[129]395 N.E.2d 297 (Ind. Ct. App. 1979).

[130]Carger v. Fee, 140 Ind. 572, 39 N.E. 93 (1894).

[131]IND. CODE § 32-7-1-2 (1976).

[132]IND. CODE § 32-7-1-1 (1976). Compare IND. CODE § 32-7-1-7 (1976), where tenancy at sufferance is terminated.

[133]395 N.E.2d at 299.

[134]*Id.*

[135]*Id.* at 300.

[136]*Id.*

[137]390 N.E.2d 705 (Ind. Ct. App. 1979).

[138]Pilotte v. Brummett, 116 Ind. App. 403, 332 N.E.2d 834 (1975).

[139]390 N.E.2d at 706.

[140]332 N.E.2d at 834.

the landlord brought the present action to recover damages on the bond. The trial court awarded the landlord one-half the sale price of the crop grown during pendency of the appeal, which was the rent called for by the prior agreement; attorney's fees; the cost of weed control measures; and the value of deprivation of use of the farm residence, less certain farm expenses.[141] The landlord appealed, claiming that she should have been awarded the value of the crops grown after the date of the judgment since she prevailed in the prior appeal.[142] The court noted that neither Trial Rule 62, which provides guidelines for determining the size of the bond, nor Indiana case law was conclusive on the elements of damages.[143]

The court distinguished *McCaslin v. State*,[144] in which it was held that the landlord was entitled to the crops planted after an action in ejectment was commenced. *McCaslin* did not, however, involve a tenant who remained in possession under a bond pending an appeal. Similarly, the court did not consider *Sherry v. State Bank*[145] to be controlling. In *Sherry* a tenant farmer who remained in possession of the land during the pendency of an appeal was liable for mesne profits. The court noted, however, that "mesne profits" is a tool of equity to be applied in an equitable manner.[146]

The court cited authority suggesting that casting title to crops upon whomever might prevail in an action to determine title or continued right to possession of land would unnecessarily interfere with the cultivation of agricultural lands, an activity which ought to be encouraged notwithstanding the pendency of a bona fide controversy.[147] Thus, the court concluded that the tenant was liable for the rental value of the farm from the date of the judgment until surrender of possession, but not for the entire product of the farm.[148]

Three cases decided during this survey period exemplify the difficulty inherent in the drafting of leases. In *Shahan v. Brinegar*,[149] the court was faced with the task of interpreting the provisions of a complex commercial lease. Three separate instruments were ex-

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[141]390 N.E.2d at 706.

[142]*Id.* at 707.

[143]*Id.*

[144]99 Ind. 428 (1885).

[145]6 Ind. 397 (1855).

[146]390 N.E.2d at 707.

[147]Annot., 113 A.L.R. 1059 (1938); Annot., 95 A.L.R. 1127 (1935). The court quoted from Woodcock v. Carlson, 41 Minn. 542, 43 N.W. 479 (1889), which held that the tenant should be liable for either rent or crops, but not both. To hold the tenant liable during an appeal for crops personally produced would make the appeal of doubtful value.

[148]390 N.E.2d at 708.

[149]390 N.E.2d 1036 (Ind. Ct. App. 1979).

ecuted on December 7, 1973: (1) a contract for the sale of tavern equipment and the contents of the leased premises; (2) an agreement that the lessee was to serve as sole and exclusive manager of the tavern as of December 17, 1973,[150] and (3) a lease of the tavern for a term of five years ending December 17, 1978, at a rental rate of $500 per month "beginning February 5, 1974."[151] Three separate interpretation problems were presented to the court.

The first problem involved the date on which the lessee became liable for rent under the lease. The court, noting that writings executed at the same time and relating to the same transaction or subject matter are construed together in determining the contract, concluded that the rental provision was ambiguous, and that, considering the surrounding circumstances existing when the lease was executed, the trial court was justified in finding that the lessee was liable for rents during December 1973 and January 1974.[152]

A second problem involved the interpretation of an arbitration agreement contained in the lease.[153] The lessee argued that the provision made arbitration a condition precedent to the initiation of a suit. The court rejected this view, holding that a trial court is required to order the parties to proceed to arbitration only upon the application of one of the parties. There was no showing that either party made such a request.[154]

The third problem involved a ninety-day grace period on rental arrearage. The lessee claimed that he must be in arrears for three months before he is in breach of the lease, whereas the lessor maintained that the ninety days referred not to the amount of rent owed, but to the amount of time the rent was overdue. The court found that the ordinary interpretation of a ninety-day grace period would grant the lessee ninety days from the date payment was due within which to make his payments current.[155] The court found that the lessee had exceeded the ninety-day grace period as to the rent for December 1973, January 1974, and October 1975. Nevertheless, the court found that the landlord had not made a demand for the overdue rent until October 4, 1976, and that the provision in the lease

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[150]*Id.* at 1038.

[151]*Id.* at 1042.

[152]*Id.*

[153]"In the event a dispute should arise between the parties hereto, each party agrees to submit the dispute to arbitration under the rules of the American Arbitration Association." *Id.* at 1040 n.1.

[154]The lessee did not formally request arbitration until page 14 of the lessee's brief. *Id.* at 1040 n.2.

[155]*Id.* at 1043.

for eight percent per annum interest on such accumulated arrearage must be computed from the date of the demand.[156]

In *Unishops, Inc. v. May's Family Centers, Inc.*,[157] the court was presented with the interpretation of a covenant not to compete. The lessee (licensee) entered into two licensing agreements to operate certain departments in all of May's stores. Both licenses contained a provision that during the life of the agreement the licensee would not engage in a business or operate a department similar to that being conducted under the agreement, within a radius of five miles of any May's store, without the written consent of the licensor, "which consent shall not unreasonably be withheld."[158] The covenant further provided that "[a] violation of this provision shall permit the Licensor to cancel this License Agreement with respect to all stores, upon sixty (60) days prior written notice to the Licensee."[159] Without consulting the Licensor, Unishops began negotiations to operate similar departments in a Tradeway store located 4.42 miles from one of May's stores and 4.43 miles from another. As soon as May's learned of the negotiations, they advised Unishops that they would not consent to such a venture. Nevertheless, Unishops entered into three licensing agreements with Tradeway and May's filed this action seeking injunctive relief.[160]

In discussing the enforcement of a restrictive covenant, the court noted that injunctive relief to prevent a breach will be granted "if the restraint is reasonable with respect to the parties involved and the public interest."[161] Citing *Donahue v. Permacel Tape Corp.*,[162] the court used a three-pronged test to determine reasonableness: (1) the scope of the promise in its protection of the covenantee; (2) the effect of the promise upon the covenantor; and (3) the effect of the covenant upon the public interest.[163] The court noted that because Unishops was intimately associated with May's inside operation, it could observe May's advertising programs, marketing policies, purchasing and pricing strategies, and customer lists.[164] Moreover, the effect upon Unishops was not unreasonable; the re-

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[156]*Id.* at 1042-43. There is nothing in the portion of the lease set forth in the decision which would require the landlord to make a demand for overdue rent.

[157]399 N.E.2d 760 (Ind. Ct. App. 1980).

[158]*Id.* at 762.

[159]*Id.*

[160]*Id.*

[161]*Id.* at 763.

[162]234 Ind. 398, 127 N.E.2d 235 (1955).

[163]399 N.E.2d at 763.

[164]*Id.* The evidence at the trial indicated that there was a striking similarity between May's advertising and the initial advertising of the opening of the Tradeway store. *Id.*

striction was limited to a five-mile area, to the life of the license agreement, and to similar activities.[165] Thus, the imposition of the restriction upon the covenantee's liberty or business activity did not contravene public policy.

Unishops argued that the covenant contained an adequate legal remedy, termination of the license.[166] The court rejected this argument: "In order to be adequate, a legal remedy must be as practicable, efficient and adequate as that afforded by equity."[167] Unishops' contention that the termination clause was a liquidated damages provision was not addressed by the court because it was neither raised at trial nor in the motion to correct errors. Finally, Unishops argued that consent to the proposed license agreement with Tradeway was withheld contrary to the clause which provided that "consent shall not be unreasonably withheld."[168] The argument was based partly upon May's anticipatory refusal. However, the court found that May's refusal, without a formal request by Unishops, was not unreasonable.[169] In fact, such notice to Unishops was expeditious and designed to prevent "Unishops costly involvement with Tradeway had they but heeded the letter"[170] informing them of the covenant violation. Unishops also emphasized that the Tradeway store was located at the "outer fringe" of the five mile radius. The court, however, did not find the argument, that the "greater the distance the more unreasonable the refusal," persuasive.

In *Piskorowski v. Shell Oil Co.*,[171] Shell entered into an agreement with Piskorowski on August 31, 1965, to lease property in Hammond, Indiana for a term of ten years. In January 1967, Shell notified the plaintiff that it was terminating the lease effective May 1, 1967, under the auspices of the termination provision of the lease. The plaintiff filed suit for breach of contract and the trial court granted lessee's motion for a summary judgment. On appeal, the plaintiff argued that there was a material issue of fact whether the parties intended the termination provisions to give Shell the unilateral power to terminate the lease at any time for any reason.[172] Article 13 of the lease agreement, set forth in its entirety in the opinion, ended by saying: "*Shell may terminate this Lease at any*

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[165]*Id.* at 764.

[166]*Id.*

[167]*Id.* at 765 (quoting Fisher v. Carey, 67 Ind. App. 438, 442, 119 N.E. 376, 377 (1918)).

[168]399 N.E.2d at 765.

[169]*Id.* at 766.

[170]*Id.*

[171]403 N.E.2d 838 (Ind. Ct. App. 1980).

[172]*Id.* at 843.

time by giving Lessor at least ninety (90) days' notice."[173] Apart from this last sentence, the clause dealt with notice requirements and a rent abatement scheme which Shell could have invoked if, due to the occurrence of certain contingencies, use of the premises as a service station facility was impaired.[174] The plaintiff maintained that Shell's inclusion of the unconditional termination provision in the last sentence of an article otherwise devoted to conditional termination powers and procedures, rendered the article ambiguous, misleading and confusing. The court rejected this contention.[175] The court also rejected the argument that a literal interpretation of the last sentence would make the remainder of the article meaningless.[176] In distinguishing the notice requirements,[177] the court noted that Shell could terminate upon the happening of one of the contingencies with only thirty days notice, whereas at least ninety days notice was required before Shell could unilaterally terminate. Similarly, the court refused to construe the contract against the author of the document because without ambiguity, there was nothing to construe.[178] Unfortunately, the plaintiff's best argument, illegality, was not addressed by the court because the plaintiff never raised the issue.[179] Had the issue been raised, the court might have found the contract unconscionable and oppressive,[180] based upon the unequal bargaining power between the plaintiff and Shell.

It has long been recognized that a landlord has a duty to maintain and repair common areas or areas over which he retains control.[181] However, in *Purcell v. English*,[182] decided in 1882, the Indiana Supreme Court held that this duty did not extend to temporary unsafe conditions caused by the accumulation of ice and snow.

In *Rossow v. Jones*,[183] the plaintiff, a tenant in a three-apartment dwelling, was injured when he slipped and fell on the steps leading from a porch to the sidewalk. All of the apartments exited onto the porch, which was a common area under the landlord's control. At the time of the injury the steps were covered with a natural ac-

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[173]*Id.*

[174]*Id.*

[175]*Id.* at 844-45.

[176]*Id.* at 845.

[177]*Id.*

[178]*Id.* at 846.

[179]*Id.* at 847.

[180]*See* Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971); Annot., 49 A.L.R. 3d 306 (1971).

[181]*See* discussion in Rossow v. Jones, 404 N.E.2d 12, 15-16 (Ind. Ct. App. 1980) (concurring opinion).

[182]86 Ind. 34 (1882).

[183]404 N.E.2d 12 (Ind. Ct. App. 1980).

cumulation of ice and snow. Although snow shovels and a box of salt were available for cleaning the entryway, they had been locked away by the landlord. It was still light enough to see when the plaintiff, wearing leather boots with rubber soles, attempted to descend the stairs, steadying himself with a hand on the porch column. There had been a handrail along the steps from the porch to the walk, but the landlord had removed it.[184] The plaintiff filed suit for personal injuries in a small claims court and recovered a judgment of $2500. The landlord appealed, claiming that he had breached no duty and that the tenant was guilty of contributory negligence.[185] The court reviewed a number of Indiana decisions which have held the landlord liable to a tenant for injuries caused by defective conditions existing in areas under the landlord's control, and concluded: "From these authorities . . . a landlord does have a duty of reasonable care that the common ways and areas, or areas over which he has reserved control are reasonably fit and that hazards created through natural accumulation of ice and snow are not beyond the purview of that duty."[186] The court also concluded that the plaintiff was not guilty of contributory negligence in using the steps for ingress and egress.[187]

In a concurring opinion, Judge Staton noted that one fourth of Indiana's population now resides in rental housing,[188] and many tenants are unequipped to perform the tasks of snow and ice removal.[189] As to the incurred risk-contributory negligence issue, Judge Staton found it difficult to understand how the majority could state that the fact-finder could have found Jones guilty of contributory negligence.[190]

One can envision the tenant faced with the unpleasant alternative of either slowly starving to death in his lonely apartment because the landlord has not provided him with a safe means of ingress and egress or of being without a legal remedy because he has incurred the risk if he attempts to leave and sustains personal injury. In fact, this argument, that the tenant must either abandon the apartment or incur the risk, was rejected in *Coleman v. DeMoss*.[191] The landlord cannot be allowed to constructively evict a tenant by failing to provide him with a safe means of ingress and egress, and

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[184]*Id.* at 14.

[185]*Id.* at 13.

[186]*Id.* at 14.

[187]*Id.*

[188]*Id.* at 15 (Staton, J., concurring).

[189]Some tenants lack physical ability to perform the task; others lack storage space for the equipment necessary to perform the task.

[190]*Id.* at 17.

[191]144 Ind. App. 408, 246 N.E.2d 483 (1969).

conversely the tenant's refusal to abandon the apartment cannot as a matter of law be considered an assumption of the risk.[192]

E. Real Estate Transactions

Section Four of the English Statute of Frauds provides that no action may be brought on any contract for the sale of land unless the contract or some memorandum of it is in writing and signed by the party to be charged or his authorized agent.[193] The Indiana statute of frauds, based on the English model, contains a similar provision.[194] While the English Statute of Frauds made oral contracts for the sale of land unenforceable, only twenty-three years after enacting that statute, the House of Lords enforced an oral contract for the sale of land under the doctrine of part performance.[195] All but four American jurisdictions now hold that an act of part performance by the purchaser will remove the contract from the Statute of Frauds.[196] There are at least four views on what acts of part performance by the purchaser are sufficient,[197] but possession of the land by the purchaser under the oral contract is one of the necessary conditions under all four views.[198] Indiana decisions clearly re-

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[192]*Id.* at 418-19, 246 N.E.2d at 488.

[193]Statute of Frauds, 1677, 29 Car. 2, c.3, § 4.

[194]"No action shall be brought in any of the following cases: . . . Fourth. Upon any contract for the sale of lands[,] . . . [u]nless the promise, contract, or agreement . . . shall be in writing, and signed by the party to be charged therewith." IND. CODE § 32-2-1-1 (1976).

[195]Lester v. Foxcroft, Colles Cases 108, 1 Eng. Rep. 205 (H.L. 1700). Indiana recognized the doctrine of part performance as early as 1820. Tibbs v. Barker, 1 Blackf. 58 (1820).

[196]Kentucky, Mississippi, North Carolina and Tennessee hold that no act of part performance will remove an oral contract for the sale of land from the Statute of Frauds. *See* 2 A. CORBIN, CORBIN ON CONTRACTS § 443 (1950 & Supp. 1971) and cases cited therein.

[197]These views are that: (1) possession alone is sufficient; (2) possession must be accompanied by payment [of all or part of the consideration]; (3) possession must be accompanied by the making of valuable and lasting improvements; and (4) there must be both possession and such change of position by the purchaser that irreparable injury will result unless the oral contract is enforced.

3 A.L.P., *supra* note 17, § 11.7. For the various state views see 3 A.L.P., *supra* note 17, § 11.7-.12; 2 A. CORBIN, *supra* note 196, §§ 420-443. A fifth view is that no acts of part performance will be recognized.

[198]Horner v. McConnell, 158 Ind. 280, 63 N.E. 472 (1902); St. Joseph Hydraulic Co. v. Globe Tissue Paper Co., 156 Ind. 665, 59 N.E. 995 (1901) (possession and such change of position that irreparable injury will result sufficient); Johnson v. Pontious, 118 Ind. 270, 20 N.E. 792 (1889) (possession and payment of the purchase price sufficient); Neal v. Neal, 69 Ind. 419 (1880) (possession sufficient).

quire possession by the purchaser as a necessary element for the application of the doctrine of part performance.[199]

In *Dupont Feedmill Corp. v. Standard Supply Corp.*,[200] the court of appeals apparently departed from the traditional view regarding enforcement of oral contracts for the sale of land. Dupont sued Standard for specific performance of an alleged oral agreement for the sale of land. Although Dupont had tendered a down payment and the parties had discussed a written contract, no contract was ever signed. The down payment was returned, and the property was sold to a third party.[201] The trial court granted the defendant's motion for a summary judgment; yet, none of the traditional acts required for enforcement of the contract under the doctrine of part performance existed. The court of appeals reversed. Even though there was no part performance, the court suggested that the contract might still be enforced under the doctrine of equitable estoppel.[202] In a counter-affidavit filed by Dupont on the motion for summary judgment, Dupont indicated that it had obtained a mortgage in reliance on the contract. It claimed that if the transaction were not completed, its credibility would be shaken, thereby adversely affecting future banking relations.[203] The court determined that this detrimental reliance raised a factual issue regarding the enforceability of the contract.[204] The trial court agreed with Standard that to remove a contract from the Statute of Frauds under the doctrine of equitable estoppel, it was necessary for Dupont to prove a false representation or concealment of a material fact.[205] The court of appeals, however, held that a finding of actual fraud was not required to use equitable estoppel or promissory estoppel to defeat the Statute of Frauds.[206]

In *Billman v. Hensel*,[207] the court of appeals was again presented with the troublesome "subject to financing" clause in a real estate

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[199]Swales v. Jackson, 126 Ind. 282, 26 N.E. 62 (1890); Wallace v. Long, 105 Ind. 522, 5 N.E. 666 (1886); Genda v. Hall, 129 Ind. App. 643, 154 N.E.2d 527 (1958).

[200]395 N.E.2d 808 (Ind. Ct. App. 1979).

[201]*Id.* at 810.

[202]*Id.* at 811.

[203]*Id.*

[204]*Id.*

[205]*Id.* This view is supported by language in earlier Indiana decisions which discuss the doctrine of equitable estoppel. Blake v. Hosford, 387 N.E.2d 1335 (Ind. Ct. App. 1979); Modisett v. Jolly, 153 Ind. App. 173, 286 N.E.2d 675 (1972); Hurd v. Ball, 128 Ind. App. 278, 143 N.E.2d 458 (1957).

[206]*Id.* The court of appeals is correct in holding that actual fraud is not an element of the doctrine of equitable estoppel. 3 S. WILLISTON, A TREATISE OF THE LAW OF CONTRACTS § 533(A) (3d ed. 1960); 2 A. CORBIN, *supra* note 196, § 422(a); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 735-38 (2d ed. 1977).

[207]391 N.E.2d 671 (Ind. Ct. App. 1979).

contract. The contract provided that the sale was conditioned upon the purchaser's ability to obtain a conventional mortgage for not less than $35,000.[208] The purchaser approached only one financial institution and made no formal loan application. In an action by the purchaser to recover his $1,000 earnest money deposit, the trial court entered judgment for the vendor.[209] In affirming, the court of appeals relied on the better view, that a "subject to financing" clause imposes upon the purchaser an implied obligation to make a reasonable and good faith effort to obtain financing.[210] An earlier case, *Blakley v. Currence*,[211] contains language suggesting that a "subject to loan approval" clause does not require the purchaser to make a good faith effort to obtain a loan.[212] The court in *Billman* noted that the two cases are distinguishable since the wording of the finance clause, "subject to loan approval," in the *Blakley* case was not conditioned upon the purchaser's ability to obtain financing.[213] The court suggested that had the words "subject to purchaser's ability to obtain financing" been included, a good faith effort would have been required.[214] Nevertheless, the court expressed the belief that "the rule in *Blakley* should be limited to the facts there present."[215]

In *Staley v. Stephens*,[216] Stephens refused to complete a contract to purchase Staley's residential property. The seller sued to recover the purchase price, and the buyer counterclaimed for damages for failure to tender marketable title.[217] A house, located on the property 8.4 feet from the side property line, was part of a subdivision which was subject to a restrictive covenant requiring a ten foot side line setback. A town zoning ordinance, which was incorporated by reference into the covenant, required an 8.5 foot setback.[218] There was some question as to which requirement controlled,[219] but in any case, the house was in violation of one or both.[220] The court of appeals affirmed the trial court's finding that the title was unmarket-

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[208] *Id.* at 672.
[209] *Id.*
[210] *Id.* at 673.
[211] 361 N.E.2d 921 (Ind. Ct. App. 1977).
[212] *Id.*
[213] 391 N.E.2d at 673.
[214] *Id.*
[215] *Id.*
[216] 404 N.E.2d 633 (Ind. Ct. App. 1980).
[217] *Id.* at 634.
[218] *Id.*
[219] *Id.* at 635.
[220] *Id.*

able and that the buyer would not be forced to accept an unmarketable title no matter how small the defect.[221]

While one might be tempted to criticize the court's refusal to grant specific performance because the defect in title was trivial, a recent court of appeals decision, *Metropolitan Development Commission of Marion County v. Douglas*,[222] should be noted. There, the defendant was forced to remove his carport which was 2.2 feet from an adjacent side property line; a zoning ordinance required a five foot side yard. Although the affected property owner waived the deviation in the setback,[223] the court stated that "zoning violations may be enjoined without regard to the degree of noncompliance."[224] Strict compliance, not substantial compliance, with the zoning law is required.[225] The court noted that the proper remedy for zoning violations was injunctive relief provided for by statute.[226]

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[221] *Id.* at 636.

[222] 390 N.E.2d 663 (Ind. Ct. App. 1979).

[223] *Id.* at 666.

[224] *Id.*

[225] *Id.*

[226] *Id.* at 664 n.3. *See* IND. CODE § 18-7-2-84.1 (1976).