XIII. Property

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During this survey period there were more than eighty decisions by state and federal courts that, to some degree, touched upon Indiana property law.[1] Many of these decisions, however, do not change or clarify existing law, nor do they present interesting applications of the law. These cases have either been excluded or summarized without extensive comment. The more significant cases are discussed under the following headings: (A) Adverse Possession; (B) Bailment; (C) Easements and Restrictive Covenants; (D) Landlord and Tenant; (E) Mines and Minerals; (F) Real Estate Transactions; and (G) Slander of Title. Cases not discussed under the above headings involved the following subjects: eminent domain,[2]

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[1]There were no significant statutory developments during this survey period.

[2]In Oxendine v. Public Service Co., 423 N.E.2d 612 (Ind. Ct. App. 1980), the first district court of appeals held that Public Service Company of Indiana, Inc. (PSI) had made "good faith offers" prior to filing eminent domain actions against two landowners.

The trial court granted PSI's request for easements for a transmission line across two properties. On appeal, the landowners argued that the precondemnation offers were not made in good faith because the amounts offered were not based on actual characteristics, including improvements on the land. *Id.* at 615. The landowners further argued that the offers were not based on good faith opinions of fair market values, as required by Indiana Code section 32-11-1-2.1 (1982). *Id.*

The court of appeals rejected the landowners' first argument holding that failure to consider factors which affect damages and value "does not render the offer invalid as not being in good faith." 423 N.E.2d at 620 (citing Wyatt-Rauch Farms, Inc. v. Public Service Co., 160 Ind. App. 228, 311 N.E.2d 441 (1974)). Additionally, the court noted that PSI employed an independent appraiser who applied certain accepted techniques to arrive at an offer and that although PSI made numerous contacts with the landowners, the landowners never expressed an opinion of value at the negotiation stage or at trial. 423 N.E.2d at 620.

The court of appeals also rejected the landowners second argument holding that the adoption in 1977 of the Uniform Land or Easement Acquisition Offer, which is found in Indiana Code section 32-11-1-2.1 (1982), did not require a precondemnation offer to be based upon fair market value. 423 N.E.2d at 621. The court came to this conclusion though the offer form in the statute contains the following sentence: "It is our opinion that the fair market value of the (property) (easement) we want to acquire from you is $_____, and, therefore, _____ (condemnor) offers you $_____ . . ." IND. CODE § 32-11-1-2.1 (1982).

Thus the court concluded that a precondemnation offer must be based only upon the reasonable value of the property, but not necessarily the fair market value. 423 N.E.2d at 619 (citing Wampler v. Trustees of Indiana University, 241 Ind. 449, 172 N.E.2d 67 (1961)); *See also* Chambers v. Public Service Co., 265 Ind. 336, 355 N.E.2d 781 (1976).

In Unger v. Indiana & Michigan Electric Co., 420 N.E.2d 1250 (Ind. Ct. App. 1981), the first district court of appeals was faced with the same "good faith offer" issue

joint bank accounts,[3] and the Occupying Claimant

addressed in *Oxendine*. This time the court of appeals reached a different conclusion. In *Unger*, Indiana & Michigan Electric Co. (I. & M.) sought an easement over the property of Ruby Unger. I. & M. made Unger several offers before they tendered a uniform offer in accordance with Indiana Code section 32-11-1-2.1 (1982). The uniform offer was rejected and I. & M. filed an eminent domain action. At trial, the evidence showed that the I. & M. offers were determined by reference to a standard schedule of land values. 420 N.E.2d at 1251. The evidence further showed that an I. & M. agent based his opinion of the fair market value of the Unger property on the value which was accepted by other persons along the same route. *Id.* at 1252. There was no other appraisal of the Unger property.

The landowners appealed the trial court's denial of objections to the condemnation action. The critical issue before the court of appeals was "whether the trial court erred in concluding I. & M. made a good faith effort to purchase." *Id.* at 1254. As in *Oxendine*, the landowners argued that by enacting Indiana Code section 32-11-1-2.1 (1982) the legislature intended the condemnor to form an opinion of the fair market value of the land sought and to submit an offer based on that opinion prior to filing a condemnation action. The court in *Unger* agreed and held that "a condemnor must base its offer upon a stated opinion of the fair market value of the property sought." 420 N.E.2d at 1260. However, the court noted that a precondemnation offer need only be reasonable and a "conflict in opinion as to fair market value will be insufficient to sustain an objection to the complaint in condemnation." *Id.* The court concluded that reference to a state-wide schedule of damages without reference to the particular real estate was not a good faith offer to purchase. *Id.* at 1261. Therefore, the court in *Unger* held that "the trial court erred in overruling the landowners' objections that I. & M. had not made a good faith effort to purchase" and the trial court's order was reversed with "orders to dismiss the complaint in condemnation." *Id.*

[3]In Blaircom v. Hires, 423 N.E.2d 609 (Ind. 1981), Marie Van Blaircom and Maude A. Hires established a joint saving account. The deposit contract with the bank indicated that Maude and Marie were joint tenants with right of survivorship. *Id.* at 610. All the deposits were made with the funds of Maude, but the funds were physically deposited by Marie who retained the passbook. In 1974, Alva Hires was appointed guardian of the person and estate of his wife, Maude, and in January 1975, Alva demanded possession of the passbook. Instead, Marie withdrew all the funds from the account. Alva, as guardian, brought suit to recover the funds. The trial judge, now a judge on the Indiana Supreme Court, entered judgment in favor of the guardian. In an unpublished Memorandum Decision, the court of appeals reversed finding that where the rights of the parties are clearly established in a joint bank account by unequivocal language, the clear meaning of the language can not be varied by the admission of parol evidence. The court of appeals held that Marie and Maude had acquired all the rights incident to joint ownership and awarded Marie one half of the funds. In response to a petition to transfer, the Indiana Supreme Court divided equally on whether a petition to transfer should be granted; Justice Pivarnik, who was the trial judge below, disqualified himself. This left the decision of the court of appeals in full force and effect. *Id.* at 610.

In a dissenting opinion in which Justice Hunter concurred, Chief Justice Givan pointed out that Indiana Code section 28-1-20-1 (repealed 1980) was designed to protect the banks and was not intended to prevent designation of joint account interests by separate agreement between the parties. 423 N.E.2d at 611. Chief Justice Givan noted that, in some jurisdictions, parol evidence is not admissible after the death of one of the parties, but in the case at bar both parties were alive when the action was commenced. *Id.* at 611-12 (citing 10 AM. JUR. 2d *Banks* § 389 (1963)). This case was decided prior to the effective dates of Indiana Code sections 32-4-1.5-1 to -14 (1982) which now govern joint bank accounts. Under the current law, during the lifetime of

Act.[4]

A. Adverse Possession

A frequent factual situation arising in the area of adverse possession involves boundary line disputes between adjoining property

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the cotenants, the account belongs to the parties in proportion to the net contributions by each to the sums on deposit. *Id.* § 32-4-1.5-3(a) (1982). At the death of one of the cotenants, the statute provides that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." *Id.* § 32-4-1.5-4(a). It would thus appear that the dissenting opinion will be followed in cases arising after the effective date of the statute.

[4]In Freson v. Combs, 433 N.E.2d 55 (Ind. Ct. App. 1982), Millard and Fanny Combs brought an action to quiet title and for damages alleging that Ronald and Peggy Freson had unlawfully occupied and improved the Combs' property by building a house thereon. *Id.* at 57-58. The Combs also filed suit against John and Corabel Hopkins, who had deeded the land to the Fresons, and the Harrison Building & Loan Association, apparently a mortgagee. In their answer, the defendants asserted that under the Indiana Occupying Claimant Act, Indiana Code sections 34-1-49-1 to -12 (1982), they would be required to pay the Combs the fair market value of the land in its unimproved state if there was a judgment for the Combs. The court then tried the case under the Occupying Claimant Act. The jury returned a verdict in favor of the Combs and valued the land at $2,000, which on appeal was reduced to $1,500 to conform to the evidence. 433 N.E.2d at 58, 60-62. The Occupying Claimant Act is far more complicated than suggested by this case, and the particular way in which it was applied by the court in *Combs* might have been in error except for a post-trial motion filed by the Combs stating that it was never their intention to eject the Fresons from their home and that they only desired to be paid the value of their land which the Fresons occupy. *Id.* at 58.

The Occupying Claimant Act states that before the true owner can recover possession of his land against an occupying claimant who made improvements to the land in good faith and under color of title, the owner must comply with certain provisions of the Occupying Claimant Act. IND. CODE § 34-1-49-1 (1982). The court or jury trying the case must assess: (1) the value of the lasting improvements made by the occupying claimant; (2) the damages to the land caused by waste or cultivation by the occupying claimant; (3) the value of any rents and profits which might have been received by the occupying claimant from the land in its unimproved state (without improvements); (4) the value of the land without the improvements made by the occupying claimant; and (5) the taxes with interest paid by the occupying claimant and those under whose title he claims. *Id.* § 34-1-49-3. The court shall then give the true owner the option of paying the occupying claimant the value of his improvements plus the taxes paid, with interest, less the value of rents and profits received and any damages as assessed on the trial. *Id.* § 34-1-49-4. If the true owner shall fail to do so within a reasonable time fixed by the court, the occupying claimant can take the property by paying the true owner the value of the land without the improvements. *Id.* § 34-1-49-5. If this is not done within a reasonable time fixed by the court, the true owner and occupying claimant will be held as tenants in common. *Id.* § 34-1-49-6. In the case at bar, it is not clear whether all the assessments were made by the jury, and the court did not give the owner the first option as required by the statute. Nevertheless, the post-trial motion corrected any error by waiving the right to pay the Fresons the value of their improvements, and thus the Fresons had the option of paying the Combs the value of the land. For further discussion of this case see Karlson, *Evidence, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 191, 200 (1983).

owners. Through mutual mistake, a fence or other monument is treated as the true boundary line, and as a result one of the parties has been in possession of a strip of land belonging to the other for a period of time sufficient to invoke the doctrine of adverse possession. Two such cases were decided during this survey period.

In *Dowell v. Fleetwood*,[5] the plaintiffs, Everett and Karen Fleetwood, purchased a one-acre tract of land in 1960. They regularly mowed the grass, cleared brush, and generally maintained their property to an existing fence which they believed to be the true boundary line. In 1975, the defendants, Alva and Evelyn Greathouse, purchased a contiguous five-acre tract. A survey conducted by the county surveyor established that the existing fence encroached 50.59 feet onto the Greathouses' property. The plaintiffs brought suit to quiet title. The trial court found in favor of the plaintiffs based on the theory of adverse possession, and the defendants appealed.

The first argument presented by the defendants was based on the fact that the plaintiffs had not paid taxes on the disputed strip of land. The defendants argued that the plaintiffs could not prevail because Indiana Code section 32-1-20-1 requires that the adverse possessor pay all the taxes on the land during the period he claims to have possessed the same adversely. This argument, as it relates to boundary line disputes, has been repeatedly rejected by the Indiana courts. Citing *Echterling v. Kalvaitis*,[6] the *Fleetwood* court pointed out that if there has been an open, continuous, exclusive, adverse, and notorious possession of a contiguous strip of land for the statutory period of time, and if the taxes have been paid according to the tax duplicates, even though the duplicate does not include the disputed strip, then adverse possession is established to the strip. The adverse possessor who meets these criteria will be successful, though technically the taxes on the strip of land have not been paid by the adverse possessor.[7] The court declined the Greathouses' invitation to overrule *Echterling*, noting that the *Echterling* decision preserves continuity of possession and supports stability in real estate titles.[8]

The second argument advanced by the defendants dealt with the sufficiency of the evidence. The defendants argued that mowing grass and general maintenance of the disputed area was not the type of open, continuous, exclusive possession that is necessary to acquire title by adverse possession. The court declined to reweigh the evidence and pointed out that mowing and maintaining property to a fence for the full period of the ten year statute of limitation for the recovery

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[5]420 N.E.2d 1356 (Ind. Ct. App. 1981).
[6]235 Ind. 141, 126 N.E.2d 573 (1955).
[7]420 N.E.2d at 1358.
[8]*Id.*

of possession of real property has previously been held sufficient in Indiana.[9]

The second case, *McCarty v. Sheets*,[10] presented a somewhat different factual situation than that involved in *Fleetwood*. The plaintiff, Russel McCarty, and the defendants, Carl and Anna Sheets, owned adjoining tracts of land. In 1937, a garage was erected on the defendants' land by their predecessor in title. The garage, situated on the side boundary line approximately midway between the front and rear lot lines, encroaches upon the McCarty property 1.4 feet at the rear end of the building and 2 feet at the front end. The eaves of the garage encroach an additional 1 foot. The evidence showed that from 1956 until 1973 the defendants cut the grass, maintained the area around the garage, and paid all taxes on their property including the taxes assessed against the garage. When McCarty brought an action to require the defendants to move their garage, the defendants counterclaimed to quiet title. The trial court entered judgment against the plaintiff and for the defendants on their counterclaim, quieting title to a strip of land 4 foot 2 inches wide and 150 feet in length along the entire east side boundary of the plaintiff's land. The court of appeals affirmed the judgment of the trial court and the plaintiff filed a petition to transfer.[11] The Indiana Supreme Court vacated the decision of the court of appeals, affirmed the denial of relief to the plaintiff, but reversed and remanded the case as to the relief granted the defendants.[12]

Both the supreme court and the court of appeals found relevant the testimony of the defendant, Carl Sheets, regarding the acts of possession upon which his claim was based. After examining this testimony, the supreme court concluded,[13] as had the dissent in the court of appeals decision,[14] that at best the testimony indicated that Sheets did some yard work on the side of the garage and behind the garage, but that there was absolutely no evidence that he did anything to the strip of land along the whole side of McCarty's land. The court found that the evidence only supported awarding the defendants the land actually occupied by their garage and a prescriptive easement to maintain the eaves of their garage as presently located.[15] While

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[9]*Id.* at 1359 (citing Ford v. Eckert, 406 N.E.2d 1209 (Ind. Ct. App. 1980)).

[10]423 N.E.2d 297 (Ind. 1981).

[11]*Id.* at 298.

[12]*Id.* at 301.

[13]*Id.* at 300.

[14]McCarty v. Sheets, 391 N.E.2d 834, 838 (Ind. Ct. App. 1981) (Hoffman, J., dissenting). For a discussion of the court of appeals decision in *McCarty*, see Krieger, *Property, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 459, 466-67 (1981).

[15]423 N.E.2d at 301.

the decision in *McCarty* rests on a narrow point, that is the failure to prove acts of possession along the entire boundary line, there is language in the decision that suggests that the court will not find maintenance activities in a residential area sufficient to support a claim to adverse possession where there are no fixed or established boundary lines such as a fence or other monument.[16]

B. Bailment

Carr v. Hoosier Photo Supplies, Inc.,[17] decided during this survey period, establishes that the Uniform Commercial Code will not extend to cases involving bailment for services. John Carr, an attorney and amateur photographer, puchased ten rolls of Eastman Kodak Company film to be used on a trip to Europe. Each roll of film had a "notice" printed on the package that stated that if the film was defective or if "damaged or lost by us or any subsidiary company even though by negligence or other fault," the film would be replaced. "Except for such replacement," the notice continued, "the sale, processing, or other handling of this film for any purpose is without other warranty or liability."[18]

Upon returning home from the European trip, Carr took nine rolls of exposed Kodak film to Hoosier Photo for processing. The receipt for the film which Carr received from Hoosier Photo also contained a "notice" on the back. The notice stated that

> [a]lthough film price does not include processing by Kodak, the return of any film or print to us for processing . . . will constitute an agreement by you that if any such film or print is damaged or lost by us or any subsidiary company, even though by negligence . . . it will be replaced . . . and except for such replacement, the handling by us . . . is without other warranty or liability.[19]

Only five of the nine rolls of Kodak film were returned to Carr; the others were lost by either Kodak or Hoosier Photo. Carr filed suit against Kodak and Hoosier Photo asking for $10,000 in damages, which would include the cost of returning to Europe to retake the

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[16]*Id.* at 300-01. *Cf.* Penn Cent. Transp. Co. v. Martin, 170 Ind. App. 519, 353 N.E.2d 474 (1976) (erecting permanent structures and thereafter mowing grass and erecting improvements held sufficient to establish adverse possession); Smith v. Brown, 126 Ind. App. 545, 134 N.E.2d 823 (1956) (establishing hedge fence, trimming shrubbery, mowing grass and planting flowers held sufficient to establish adverse possession).

[17]422 N.E.2d 1272 (Ind. Ct. App. 1981), *rev'd*, No. 1182 S 426 (Ind. Nov. 12, 1982). For further discussion of this case see Bepko, *Commercial Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 83, 90 (1983).

[18]422 N.E.2d at 1274.

[19]*Id.*

photos. Kodak and Hoosier Photo claimed that because of the limitation of liability clauses contained on both the film packages and the receipt, Carr's recovery should be limited to $13.60.[20] The trial court awarded Carr $1,013.60 and all parties appealed. The court of appeals affirmed the judgment of the trial court.[21]

The primary issue addressed by the court of appeals was whether the film processing transaction should be governed by the Uniform Commercial Code as was claimed by the defendants, Kodak and Hoosier Photo. The defendants advanced two arguments to support this contention. The first argument was that the limitation of liability clause on the film box, which related to film processing, was sufficient to bring the processing transaction within the ambit of the UCC. The court of appeals summarily rejected this argument.[22]

The second argument advanced by the defendants was that this service transaction is analogous to a leasing arrangement, which type of arrangement has been held in Indiana as covered by the UCC.[23] The court of appeals, however, found that "there is a distinction between a bailment which arises from the lease of personal property and a bailment which arises from the service transaction."[24] The distinction the court drew lies in the fact that one who leases personal property has the use of that property for a specified time. The bailee who is to perform a service upon the personal property in his possession, however, does not have the use of the personal property. The court of appeals thus found that to extend the scope of the UCC to cover service transactions would be to "distort the language of the U.C.C."[25]

Hoosier Photo and Kodak advanced a separate argument on the damages question. The argument was that neither defendant accepted the images on the film for bailment and that it would be unfair to hold them liable for the value of the exposed film. In rejecting this argument, the court noted that this was not a case where unexpectedly valuable objects are placed in a car trunk or left inside a suitcase without the knowledge of the bailee, in which case the bailee would not be liable for the loss.[26] In this case, both Hoosier Photo and Kodak

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[20]*Id.*

[21]*Id.*

[22]*Id.* at 1275.

[23]*Id.* at 1277. *See* McDonald's Chevrolet, Inc. v. Johnson, 176 Ind. App. 498, 376 N.E.2d 106 (1978).

[24]422 N.E.2d at 1275.

[25]*Id.* at 1276. *But see* Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979). In *Mieske*, the Supreme Court of Washington held that the UCC applied to film processing. *Id.* at 47-48, 593 P.2d at 1312. The court in *Mieske* found that the UCC application to "transactions in goods" was intended by the drafters to include a broad spectrum of sales and transactions including a bailment for services. *Id.*

[26]422 N.E.2d at 1278.

were aware that the film was exposed and that the images on it made it more valuable than unexposed film.

C. Easements and Restrictive Covenants

Two easement cases decided during this survey period warrant comment.[27] In *Hartwig v. Brademas*,[28] there was an express easement for drainage of surface water that was reserved in a deed from 100 Center Company to T. Brooks Brademas in favor of Sedgwick House, a limited partnership that had previously purchased an apartment house on an adjoining tract of land from 100 Center Company. When the apartment house owned by Sedgwick was built, a subterranean spring was uncovered. Therefore, a drainage system was constructed to carry off the spring water, the runoff from the roof, and the water from the floor drains. The system ended north of the apartment house, on land now owned by Brademas. When the land was sold to Brademas, the deed created an easement in favor of Sedgwick "for the drainage of surface waters and waters discharged from the roof and floor drains of 'Sedgwick House' over, along and across the following described real estate: [The description of Easement Z]."[29]

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[27]Another case in this area is Ellis v. George Ryan Co., 424 N.E.2d 125 (Ind. Ct. App. 1981). Suit was brought by George Ryan Co., Inc. for declaratory judgment to determine the validity of a restrictive covenant that, if valid, would prohibit Ryan from building a proposed six-story condominium. *Id.* at 126. The trial court found for Ryan on two separate grounds: the covenant was void because it was not signed by all of the property owners, and there had been a waiver of the enforcement of the restrictions because of the acquiescence of the property owners in numerous violations of the covenant. *Id.* The court of appeals affirmed. *Id.* at 127.

Prior to *Ellis*, the court of appeals had held that, absent a showing that the contract is not to be deemed complete unless signed by all the parties, the parties signing may be bound even though others have not signed. Curtis v. Hannah, 414 N.E.2d 962, 963 (Ind. Ct. App. 1981). In *Ellis*, the court found that the covenant was void because it "speaks in terms of 'all parties hereto.' " 424 N.E.2d at 126. Moreover, the court noted that the intent that the contract was not complete unless signed by all parties can be found from the fact that the parties did not comply with the convenants. *Id.* at 127.

What is troublesome about the court's conclusion that the parties had waived the covenant because of prior violations is the fact that the violations were of a minor nature. The violations cited by the court were: occasional use of a mobile home as a residence, building of an additional house on one of the lots, building a doghouse and garages, construction of various outbuildings, use of a chicken house, use of a house as an office, and holding church meetings in a residence. *Id.* at 126. What property owner who is living in an area restricted to single family dwellings would believe that he must bring legal action against a neighbor who occasionally parked a mobile home on his lot, held church meetings in his home, raised a few chickens, or built a garage on his lot in order to assure that he has not "waived" a covenant which could result in the construction of a six-story condominium?

[28]424 N.E.2d 122 (Ind. Ct. App. 1981).

[29]*Id.* at 123.

The drainage system, however, crossed through Easement Z and deposited the water north of Easement Z preventing the development of the land. Brademas brought an action seeking injunctive relief and damages. The trial court permanently enjoined Sedgwick from trespassing on the property of Brademas and awarded Brademas $8,800 damages for the two years he had been unable to develop the land. Sedgwick appealed.[30]

Sedgwick argued that the easement should not be limited to the area described in Easement Z. In a rather novel argument, Sedgwick claimed that in addition to the reserved easement, there was also an implied easement that was created at the time the land was severed because there was an apparent and obvious servitude in favor of the dominant estate, Sedgwick House, which was reasonably necessary for its use and enjoyment. The court noted that in order to find an implied easement "the servitude must be (1) obvious, (2) permanent, (3) in use at the time ownership in the land is severed, and (4) reasonably necessary for the fair enjoyment of the party benefited, not merely convenient or beneficial."[31] The court found that Sedgwick had failed to prove two essential elements: that the servitude was permanent, and that it was reasonably necessary.[32] As to its permanency, the court noted that the testimony of the construction superintendent for the apartment house indicated that allowing the water to dissipate onto the Brademas land was only a temporary situation, which would be remedied when an open ditch could be constructed to the river.[33] As to whether the servitude was reasonably necessary for the enjoyment of the estate, the court remarked that several alternative methods were available to Sedgwick for disposing of its water.[34]

Sedgwick also argued that the reserved easement should not be limited to the described area. This argument was summarily rejected by the court of appeals. If an area outside the described easement was intended, it should have been included in the area of the drainage easement. The court in *Brademas* found that the inclusion of one area as an easement is the exclusion of all others.[35] Therefore, based on its findings, the appellate court affirmed the judgment of the trial court.[36]

One of the more factually complicated decisions reported during

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[30]*Id.*

[31]*Id.* at 124 (citing Searcy v. LaGrotte, 175 Ind. App. 498, 372 N.E.2d 755 (1978)).

[32]424 N.E.2d at 124.

[33]*Id.*

[34]*Id.* at n.4.

[35]*Id.* at 124.

[36]*Id.* at 125.

this survey period is *Enderle v. Sharman.*[37] While the legal issues raised are not themselves complicated, the factual context of this case is difficult. William and Sallie Ijams were the common owners of a tract of land subsequently divided into four tracts. In 1916, the Ijams entered into an agreement with an adjoining property owner, Julia Donham, for an easement across the Donham property. The purpose of the Ijams-Donham agreement was to provide the Ijams with an access to a public road, now State Highway 41. The easement expressly stated that the Ijams desired to subdivide the land into lots, streets, and alleys and to sell the land for residential purposes, and for establishment of a country club. In 1917, the Ijams conveyed a portion of the land, now Tracts III and IV, to the Terre Haute Country Club and retained title to the remaining portion of the land, now Tracts I and II. At the time of this conveyance, there was a road running through the Ijams' land which is now known as Country Club Road. The deed provided that both the grantor and the grantee, their heirs and assigns, could use the roadway, "each having a common and not exclusive right to use same perpetually."[38] The deed also incorporated by reference the Ijams-Donham agreement, and a copy of the agreement was attached to the deed. While the facts only discuss Country Club Road in relation to the Ijams' land, it would appear that the road continues in a westerly direction across the Donham's land to Highway 41, and that its use by the owners of Tracts I and IV is necessary in order to use the right of way set forth in the Ijams-Donham agreement.

The Ijams died intestate and the land retained by them, Tracts I and II, passed to their three children, Jessee Ijams, Alice Ijams Benbridge and Frank Ijams. In 1929, Jessee Ijams and Alice Ijams Benbridge, together with her husband, conveyed their interests in Tract II to Helen Ijams, the wife of Frank Ijams, but the conveyors specifically retained an easement over Country Club Road. Frank Ijams later died and his interest in Tract II passed to Helen Ijams, his wife. In 1937, the Country Club conveyed Tract III to Helen so that Helen Ijams ultimately became the owner of Tracts II and III.

The history of Tract I was different. In 1930, Jessee Ijams conveyed his interest in Tract I to other cotenants, Frank Ijams and Alice Ijams Benbridge. In 1956, Frank Ijams and Alice Ijams Benbridge conveyed Tract I to Alice Ijams Williams and her husband, John Williams. Alice Ijams Williams subsequently divorced her husband and reconveyed her interest to herself under the name Alice I. Sharman. Alice Sharman's exact relation to the Ijam family is not stated, but

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[37]422 N.E.2d 686 (Ind. Ct. App. 1981).

[38]*Id.* at 693.

the facts indicate that she was co-executor and heir of the estate of Helen Ijams.

When Helen Ijams died, the plaintiffs, Frank and Kay Enderle purchased Tract II from the co-executors of her estate and subsequently purchased Tract III from the Helen Ijams' estate. Later, when Alice I. Sharman died, Fereydoon B. Boushehry entered into an agreement to purchase Tract I from the co-executors of her estate. Boushehry claims an easement over Tracts II and III appurtenant to Tract I, and the Enderles brought this action to quiet title. The action was referred to a special master. The co-executors of the estate of Alice Sharman and Boushehry moved for summary judgment and, after a hearing was held, the master recommended the motion be granted. The trial court adopted the findings of fact and conclusions of law recommended by the master and the Enderles appealed.

The major substantive issue raised on appeal was the trial courts finding that there was an easement over Tracts II and III appurtenant to Tract I. The trial court found that the conveyance to the Country Club in 1917 created an easement over Tract III.[39] It is important to remember that the Ijams retained title to Tract I and the deed expressly reserved the right to use the road by the grantors. The court noted, however, that the 1917 deed did not create an easement across Tract II since this tract was still owned by the Ijams and it is a rule of law that an owner cannot possess an easement in his own land.[40]

The trial court found an easement over the portion of the road which lies in Tract II on two separate grounds. First, there was an easement by reservation contained in the 1929 deed from Jessee Ijams and Alice Ijams Benbridge conveying Tract II to Helen Ijams.[41] In a rather confusing argument, the Enderles claimed that the deed did not create an easement by reservation because there can be no reservation in a stranger.[42] While the court answers this argument by citing *Brademas v. Hartwig*,[43] which recognizes the right of a grantor to convey an easement by reservation to a party who is a stranger to the transaction, the fact is that the persons from whom defendants claim title to Tract I were not strangers to the transaction but were the grantees. The Enderles also argued that the reservation was not effective because one of the cotenants did not convey his interest in Tract I. This is further complicated by the fact that this cotenant is the husband of the grantee. The court could not see how the reserva-

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[39]*Id.* at 692.
[40]*Id.* at 693.
[41]*Id.* at 690.
[42]*Id.* at 693.
[43]175 Ind. App. 4, 369 N.E.2d 954 (1977).

tion of an easement over Tract II by the two cotenant grantors in any way diminished the rights of the third cotenant, who did not need an easement because he still retained an interest in both tracts.[44]

In addition to an easement by reservation, the trial court found that an implied easement across Tract II existed, based on the Ijams-Donham agreement.[45] Citing *John Hancock Mutual Life Insurance Co. v. Patterson*,[46] the court of appeals noted that where there exists, during the unity of title, a permanent and obvious servitude that is imposed on one part of an estate in favor of another, and, at the time of severence, the servitude is in use and is reasonably necessary for the fair enjoyment of the other part of the estate, there arises by implication of law a grant or reservation of the right to continue such use.[47]

The Enderles objected to the trial court's use of the Ijams-Donham agreement to find an intent to create an easement over Tract III in the 1917 deed to the Country Club and to find an implied easement across Tract II. While the court of appeals agreed with the Enderles that the Ijams-Donham agreement only created an easement over the Donham's land and not the Ijams' land, which was the dominant estate, the court did not agree with the Enderles' conclusion that it was erroneous to rely upon the agreement in construing the other conveyances.[48] It is hard to follow the Enderles' argument on this point. Clearly Country Club Road exists because of the easement and, from the facts, exists for no other reason. Without the Ijams-Donham agreement, the use of Country Club Road would not be reasonably necessary for the use and enjoyment of Tract I.[49]

Finally, the Ijams-Donham agreement became relevant with regard to the scope of the easement. The Enderles argued that to allow Boushehry to subdivide Tract I would create an undue burden of the servient estates, Tracts II and III. In answering this argument, the court noted that the Ijams-Donham agreement provided that the Ijams intended to subdivide the land into lots and streets for residential purposes. Because the agreement is incorporated by reference into many subsequent conveyances, residential development must have been contemplated by the parties when the easement was created.[50]

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[44]422 N.E.2d at 694.

[45]*Id.*

[46]103 Ind. 582, 2 N.E. 188 (1885).

[47]422 N.E.2d at 694.

[48]*Id.* at 693.

[49]It does not appear that Tract I is landlocked. Otherwise, the parties would have argued a way of necessity.

[50]422 N.E.2d at 695.

D. Landlord and Tenant

There are three types of leasehold estates recognized at common law: an estate for years, an estate from period to period, and an estate at will.[51] An estate at will is created whenever the lease can be terminated at the will of the lessor.[52] While it can be created by express contract, if often occurs when a person takes possession of the land with the consent of the owner under an oral lease or a contract for sale which can not be enforced because of the statute of frauds.[53] One of the most important common law characteristics of the tenancy at will is that it can be terminated at any time by either party without notice.[54]

The second type of leasehold estate is the estate for years or tenancy for a term of years. Any lease for a fixed term is called an estate for years even though the length of the terms is less than a year, such as a week or six months.[55] At the end of the term, the estate automatically comes to an end, and, absent a provision in the lease to the contrary, no notice of termination is required by either landlord or the tenant.[56]

The third type of leasehold estate is known as the estate from period to period or periodic tenancy. It is also referred to as a tenancy from year to year, even though the period may be from week to week or month to month.[57] This type of tenancy has no fixed termination date and will continue from period to period until one of the parties gives notice of termination. At common law, if the tenancy period was six months or longer, a six months notice was required, and if the tenancy period was less than six months, the notice had to be as long as the tenancy period itself and given at the beginning of a new period.[58] Today in most states the notice requirements are covered by statute.[59]

The case of *Edward Rose of Indiana v. Fountain*[60] emphasizes a

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[51]W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 123-34 (3d ed. 1965); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 53-56 (2d ed. 1975).

A fourth type of estate, a tenancy at sufference, was really not an estate but a term used to describe the situation in which a tenant remains in possession after the termination of a leasehold estate. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 85-86 (1962).

[52]CRIBBET, *supra* note 51, at 56-57.

[53]BURBY, *supra* note 51, at 125-126; MOYNIHAN, *supra* note 51, at 85-86.

[54]CRIBBET, *supra* note 51, at 56.

[55]*Id.* at 53.

[56]*Id.*

[57]BURBY, *supra* note 51, at 128.

[58]CRIBBET, *supra* note 51, at 54.

[59]*See* BURBY, *supra* note 51, at 132; MOYNIHAN, *supra* note 51, at 80.

[60]431 N.E.2d 543 (Ind. Ct. App. 1982).

potential problem in the wording of the Indiana statutes that govern notice of termination and also raises other interesting issues regarding the termination of leasehold estates. The plaintiff, C. Wayne Fountain, leased an apartment from the defendant, Edward Rose, for a term of six months. Normally, no notice of termination would have been required, but the written lease provided that "before the expiration of the term of this lease, the tenant shall give the Landlord at least thirty (30) days written notice in any one calendar month of his intention to surrender said premises."[61] The lease further provided that if such notice was not given, the tenant would be liable for an additional month's rent.

To understand the purpose for the notice provision, it should be noted that the lease did not operate like a tenancy for a fixed term. At the end of the term, the lease became a tenancy from month to month requiring both parties to give notice of termination, and the lease gave the lessee rights in addition to those he would have had as a tenant at sufferance.[62] Thus, there was a valid reason why the landlord needed notice because the tenancy would not automatically terminate at the end of the six-month period.

Prior to the end of the term, Rose notified Fountain by letter of his obligation under the lease to give notice of termination.[63] Fountain ignored the letter and moved out at the end of the term without giving notice. Rose retained Fountain's $150 security deposit as liquidated damages for breach of the notice of termination covenant in the lease. Fountain brought suit to recover his security deposit, and the trial court entered judgment in favor of Fountain, holding that notice was not required by statute.[64] Rose appealed and the court of appeals reversed.[65]

The court of appeals noted that even if Indiana Code section 32-7-1-7 applied, the parties were free to provide for notice of termination in the lease agreement. Moreover, the court noted that this code section deals solely with the landlord's obligation to give notice to the tenant. In fact, the court pointed out that "[a]bsent from those

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[61]*Id.* at 544 n.2.

[62]*See* BURBY, *supra* note 51, at 128; MOYNIHAN, *supra* note 51, at 85.

[63]It is not clear if the letter was sent in time to inform Fountain of his duty while there was still time to comply with the provision. If not, then an issue of unconscionability could have been raised. A person signing a lease for a fixed term would assume that the lease would come to an end automatically and would not be looking for such a clause in the lease. A court might find such a notification provision unconscionable unless the provision was clearly labeled and not buried in fine print, or brought to the attention of the lessee. *See* Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

[64]431 N.E.2d at 545 (citing IND. CODE § 32-7-1-7 (1982)).

[65]431 N.E.2d at 546.

code provisions is any reference to a tenant's obligation to give notice of his intent to surrender leased premises."[66]

Thus, the court in *Fountain* calls to our attention a potentially serious problem regarding notification requirements that surprisingly has existed for over 100 years. Clearly, the problem could arise in two situations. Indiana Code section 32-7-1-2 changes the common law rules regarding a tenancy at will and provides that "[a] tenancy at will can not arise or be created without an express contract"[67] and Indiana Code section 32-7-1-1 provides that the landlord may terminate an estate at will "by one (1) month's notice in writing, delivered to the tenant."[68] Because there was no notice requirement at common law to terminate a tenancy at will,[69] and the statute seems to exclude any notice requirement on the part of the tenant, it is difficult to see how a court would impose such a duty on the tenant.

The problem could be more serious when dealing with periodic tenancies. Indiana Code section 32-7-1-3 provides that "[a]ll tenancies from year to year, may be determined by at least three (3) months' notice given to the tenant prior to the expiration of the year; and in all tenancies . . . of less than three (3) months' duration, a notice equal to the interval between such periods shall be sufficient."[70] Although the statute again fails to impose any duty on the part of the tenant to give notice, in this instance the statute is in derogation of the common law.[71] While there are no cases that directly address this problem, in a 1978 Indiana Attorney General's Opinion, the Attorney General stated that the notice requirements in the statute on termination of periodic tenancies applies equally to the tenant and the landlord.[72]

Perhaps the problem caused by the wording of the statutes governing notice of termination has not arisen because most standard leases creating a periodic tenancy contain a provision requiring the tenant to give notice of termination, or because in situations where there is not a written lease, the amount of money involved is so trivial that the landlord suffers the loss or keeps the security deposit as liquidated damages, and neither party is willing to adjudicate the issue. It should

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[66]*Id.* at 545. Landlord and tenant relations are covered in Indiana Code sections 32-7-1-1 to -18 (1982). Code sections pertaining specifically to notices to quit are covered in Indiana Code sections 32-7-1-3 to -8 (1982).

[67]IND. CODE § 32-7-1-2 (1982).

[68]*Id.* § 32-7-1-1.

[69]*See* CRIBBET, *supra* note 51, at 56.

[70]IND. CODE § 32-7-1-3 (1982).

[71]As a general rule, where a statute is found to be in derogation of the common law, it should be construed so as not to change the common law. *See* Helms v. American Sec. Co., 216 Ind. 1, 6, 22 N.E.2d 822, 824 (1939).

[72]1978 Op. Att'y Gen. 61, 62.

be noted that in the case at bar there was a provision in the lease allowing the landlord to apply the security deposit "upon rent or other charges in arrears or upon damages for Tenant's failure to perform the said covenants, conditions or agreements."[73] The court in *Fountain* stated that such provisions, which require the lessee to deposit with the lessor a sum of money as security for the performance of covenants of the lease, are valid and enforceable.[74]

E. Mines and Minerals

Two significant cases involving the interpretation of mineral deeds were decided during the survey period.[75] The first case, *Lippeatt v.*

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[73]431 N.E.2d at 545 n.3.

[74]*Id.* at 546.

[75]There were two United States Supreme Court decisions in this area which deserve mention, although the cases deal primarily with constitutional law issues. In Texaco, Inc. v. Short, 102 S. Ct. 781 (1982), *aff'g* 406 N.E.2d 625 (Ind. 1980), the Court upheld the constitutionality of Indiana's Dormant Mineral Act (Act), IND. CODE §§ 32-5-11-1 to -8 (1982). (Note that sections -4, -5, -7, and -8 of the Act were amended in 1982 to include minor language changes.) The Act provides that a mineral interest that has not been used for a period of twenty years shall be extinguished and shall revert to the surface owner, unless the owner of the interest files a statement of claim in the Dormant Mineral Interest Record in the county recorder's office prior to the expiration of the twenty year period of nonuse. IND. CODE §§ 32-5-11-1 to -8 (1982). However, there is a provision in the Act that exempts from the operation of the Act those owners with ten or more separate mineral interests in a county who have made a good faith effort to record all the interests. IND. CODE § 32-5-11-5 (1976) (amended 1982). The court found that Indiana had legitimate state goals, such as the encouragement of mineral development and the collection of property taxes, that justified enactment of the statute. 102 S. Ct. at 792. Because owners of multiple interests are more likely to be able to engage in the actual production of mineral resources, there was justification for giving those owners special treatment under the Act; therefore, the Act did not violate the equal protection clause. *Id.* at 797. The Court also concluded that there was no violation of the fourteenth amendment because there was no "taking" of property without just compensation; it was the nonuse by the owner and his failure to file a statement of claim which caused the abandonment of the interest and not state action. *Id.* at 792. In resolving this case, the Court seemed to emphasize the fact that the Act provided a two-year period of grace after the effective date to file claims, which would otherwise have been extinguished. *Id.* at 788-89.

The Indiana Marketable Title Act may be of interest to abstractors and others conducting title searches. The Act, IND. CODE §§ 32-1-5-1 to -10 (1982), provides that a person shall have marketable record title to any interest in land if he can trace an unbroken chain of title back to a root of title at least fifty years old. IND. CODE § 32-1-5-1 (1982). Interests in the land created prior to the root of title, with some important exceptions, were void unless recorded within the chain of title in the Notice Index in the county recorder's office. IND. CODE §§ 32-1-5-2 to -6 (1982). This Act does not appear to cover mineral "interests" created prior to the root of title because the mineral estate would exist separate and apart from the surface estate. The Dormant Mineral Act may prove useful in clearing title to property by extinguishing old, unused mineral claims.

Comet Coal & Clay Co.,[76] illustrates the classic case of a latent ambiguity in the terms of a deed.[77] In 1919, the Vandalia Coal Company executed a deed to plaintiff's grandfather conveying "[t]he sixth (6th) or surface vein of coal only" underlying certain land in Sullivan County, Indiana.[78] The grantor retained title to all other seams of coal in and under the above described lands, together with the right to mine and remove them. Comet Coal and Clay Company, Inc., (Comet) and the other defendants eventually acquired title to the other veins of coal.

Later, it was determined that there were seven veins of coal underlying the land involved in the 1919 conveyance so that the sixth vein and the surface vein were not the same. Lippeatt filed suit claiming the deed conveyed the surface vein, and Comet argued the deed conveyed only the sixth vein; however, all parties agreed that only one vein of the coal was conveyed in the deed.[79] Both parties moved for summary judgment, and the trial court granted summary judgment in favor of Comet holding that the deed conveyed only the sixth vein as a matter of law.[80]

Lippeatt appealed arguing that the deed was ambiguous, and that the trial court should have considered extrinsic evidence. In reaching its decision, the trial court concluded that the words "sixth (6th) vein" were more specific than the words "surface vein," and that if any ambiguity existed, it must be resolved in favor of Comet because the habendum clause only referred to the sixth vein. In affirming the judgment of the trial court, the court of appeals looked to the rules of construction applied by the trial court.[81] However, it is questionable whether the rules of construction relied upon by the court of appeals were correctly applied.

The court of appeals appears to have agreed with the trial court's determination that the term "sixth vein" is more specific than the term "surface vein" because the surface vein can be composed of coal from the fifth, sixth, seventh, or eighth veins but there is only one

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In Hodel v. Indiana, 452 U.S. 314 (1981), the State of Indiana, the Indiana Coal Association and others challenged the constitutionality of the "prime farmland" provisions of the Surface Mining and Reclamation Control Act of 1977. *Id.* These provisions require the applicant for a permit to mine on prime farmland which is historically used as cropland, to show that he has the capacity to restore the land to prime farmland within a reasonable period of time after completion of mining operations. *Id.* The Court held that the provision of the Act did not violate the commerce clause because the production of coal for interstate commerce cannot be at the expense of agriculture, the environment, public health or safety. *Id.*

[76]419 N.E.2d 1332 (Ind. Ct. App. 1981).

[77]*See, e.g.*, Hauck v. Second Nat'l Bank, 153 Ind. App. 245, 286 N.E.2d 852 (1972).

[78]419 N.E.2d at 1333.

[79]*Id.* at 1334.

[80]*Id.*

[81]*Id.* at 1336.

vein that can be the sixth vein.[82] While it is true that specific words control general words, it is unclear why the court found the term "sixth vein" to be more clear because, for reasons of geographical uncertainty, it is difficult to determine if a vein is the sixth or seventh vein of coal, but the surface vein is always the vein nearest to the surface.[83]

The court of appeals also approved the trial court's application of the "four corners" rule of construction. The rule states that in interpreting an instrument, parol evidence is inadmissible to expand, vary, or explain the instrument unless there is evidence of fraud, mistake, illegality, duress, undue influence, or ambiguity.[84] Furthermore, even if an ambiguity is shown, extrinsic evidence is not admissible " 'until the four corners have been searched to ascertain whether the instrument itself affords a reasonably clear understanding of what the drafters intended.' "[85] Assuming that the meaning of the disputed terms could be determined by reference to all parts of the instrument, the trial court looked to the habendum clause in the deed, which can be used to explain, qualify, lessen, or enlarge the estate granted in the premises or granting clause of a deed.[86] The trial court noted that while the granting clause used the terms "sixth (6th) vein" and "surface vein," the habendum clause of the deed *clarified* the granting clause by twice referring to the sixth vein of coal without mentioning the surface vein.

The court's reliance upon the habendum clause to clarify the granting clause is questionable. As the court itself points out, that granting clause usually controls the habendum.[87] In addition, numerous cases hold that if there is an irreconcilable conflict between the granting clause and the habendum, which renders intention doubtful, the granting clause will control.[88] Thus, the court in *Lippeatt* looked to the habendum clause, without first establishing whether there was an irreconcilable conflict between the terms of the granting clause and the terms of the habendum.

The court also rejected Lippeatt's argument that the surface vein should control because it is a natural monument. The court noted that

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[82]*Id.* at 1335.

[83]*Id.*

[84]*See, e.g.*, Hauck v. Second Nat'l Bank, 153 Ind. App. 245, 260, 286 N.E.2d 852, 861 (1972).

[85]419 N.E.2d at 1335 (emphasis deleted) (quoting Hauck v. Second Nat'l Bank, 153 Ind. App. 245, 263, 286 N.E.2d 852, 862 (1972)).

[86]419 N.E.2d at 1334-35. For a discussion of this rule, see Prior v. Quackenbush, 29 Ind. 475 (1868).

[87]419 N.E.2d at 1335. *See also* Shoe v. Heckley, 78 Ind. App. 586, 593, 134 N.E. 214, 217 (1922).

[88]*See* Pointer v. Lucas, 131 Ind. App. 10, 169 N.E.2d 196 (1960); Long v. Horton, 126 N.E.2d 568 (1956); Richards v. Richards, 60 Ind. App. 34, 110 N.E. 103 (1915).

the rule that monuments control over course and distance is a rule used for determining the location and boundaries of land and "is of limited usefulness to determine the extent of the conveyance."[89] It could be argued that the rule of construction, that where the granting clause is indefinite, the habendum can be used to clarify the granting clause, could have been used to determine the type of estate conveyed and not just the extent of the conveyance.[90]

As exemplified in *Lippeatt*, some of the rules of construction are inconsistent with each other, and the decision in a given case can vary depending upon which rules of construction are chosen.[91] For example, the court in *Lippeatt* chose to ignore a basic rule of construction; that is, the deed should be construed most strongly against the grantor.[92] While the application of the rules of construction in *Lippeatt* may be less than perfect, it is not clear that the admission of extrinsic evidence to determine the intent of the parties to a 1919 deed would have proven any more satisfactory.

The second decision involving mineral deeds, *Richardson v. Citizens Gas & Coke Utility*,[93] presents a similar deed interpretation problem as that encountered in *Lippeatt*. The plaintiffs, Claude and Elma Richardson, brought an action against Citizens Gas & Coke Utility and others, collectively referred to as Citizens, claiming an inverse condemnation as a result of Citizens' improper seizure of the Richardsons' interest in coal and other minerals lying beneath the land of Section 10 in Green County, Indiana, which was conveyed to Claude Richardson by deed in 1933. Citizens argued that the Richardsons' 1933 deed conveyed title only to the coal and hard minerals lying beneath the land, and that it did not convey any interest in oil or gas. Therefore, Citizens claimed the rights to the oil and gas interests as well as the rights to underground storage, by virtue of leases and assignments of leases that were executed by the surface owners of Section 10. In addition, Citizens claimed a way of necessity through the Richardsons' coal strata to reach the oil and gas lying beneath the coal, and Citizens argues that such drilling through the coal strata would not constitute a taking of Richardsons' interest. This argument implies that coal mining and gas removal and/or storage are compatible.[94]

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[89]419 N.E.2d at 1336. *See also* CRIBBET, *supra* note 51, at 169-70.

[90]*See* CRIBBET, *supra* note 51, at 165 n.34.

[91]For a discussion of various rules of construction, see CRIBBET, *supra* note 51, at 169-70.

[92]*See* Davenport v. Gwilliams, 133 Ind. 142, 31 N.E. 790 (1892); Shoe v. Heckley, 78 Ind. App. 586, 134 N.E. 214 (1922).

[93]422 N.E.2d 704 (Ind. Ct. App. 1981).

[94]It is not clear from the facts whether only native gas, only injected gas, or a mixture of native and injected gas is involved. The facts indicate that Citizens is using the land in connection with its Linton gas storage field, and the Richardsons are

The facts show that the mineral rights in Section 10 were severed from the surface rights by a series of thirteen mineral deeds executed between 1899 and 1905. Ten of the deeds conveyed coal and other minerals, two of the deeds conveyed only coal, and one deed conveyed "coal, clays, minerals and mineral substances."[95] The three grantees who purchased these rights consisted of two incorporated coal companies, whose articles of incorporation did not authorize the exploration or development of oil or gas properties, and one individual who dealt only in coal properties. Historical documents showed that at the time the severance deeds were executed, oil or gas had not been discovered in Green County.

The rights under these deeds eventually were acquired by the United Fourth Vein Coal Company (United). United subsequently became bankrupt, and its coal and mineral rights in Section 10 were sold to Claude Richardson. The first deed from United conveyed only unmined coal. It was later discovered that United did not own title to the entire tract conveyed and as a compromise, Richardson accepted a second deed conveying all right and title "to *coal and minerals* lying in and under (Section 10)."[96] Richardson did not explore for oil and gas until 1943 when he executed a gas and oil lease with Sun Oil Company. Natural gas was discovered by Sun Oil in 1947, but due to lack of interest in natural gas, the well was capped and Richardson was released from the lease.

In 1921, Ferd Bolton purchased oil and gas leases from the grantors and/or their successors in interest of the thirteen original severance deeds. In 1961, Citizens received assignments of these gas and oil leases from the surface owners of Section 10. The assignment granted Citizens not only the right to remove existing gas, but the right to "*inject, store and remove gas, whether native or otherwise* . . . regardless of the source of such gas."[97]

The Richardsons became aware of Citizens' interest in 1963 when they discovered Citizens drilling exploratory wells on Section 10. The

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claiming an inverse condemnation under Indiana Code section 32-11-4-5 (1982) (Title 32, article 11, chapter 4 of the Indiana Code is entitled, "Eminent Domain for Gas Storage"). Thus, it is not clear whether the Richardsons' claim, apart from the claim with regard to the taking of their coal interest, is based on Citizens' taking of native gas to which the Richardsons claim the right to explore under the 1933 deed, or whether the Richardsons, as the owners of the mineral rights, including oil and gas, are claiming an interest in the strata for storage rights once the native gas has been removed, or whether they are claiming both. The decision of the court of appeals resolving the ownership of oil and gas rights against the Richardsons renders these issues moot. 422 N.E.2d at 704.

[95]422 N.E.2d at 707.

[96]*Id.* at 708 (emphasis in original).

[97]*Id.* (emphasis in original).

Richardsons attempted to lease their interests to Citizens, but when negotiations failed, the Richardsons filed suit.

Three issues were presented at the trial, and the trial court ruled on them at three separate hearings. At the first hearing, the trial court found that Citizens owned title to the gas and oil exploration rights and gas storage rights and thus granted a partial summary judgment in Citizens' favor. At a second evidentiary hearing, the court found that coal mining and gas storage are compatible but did not expressly find that Citizens had an easement through the Richardsons' coal strata to reach the gas. At a third hearing, final arguments were held and the court ruled that no compensable taking of the Richardsons' coal interests had occurred, thus impliedly finding an easement through the coal strata.[98] The Richardsons appealed.

In affirming the judgment of the trial court,[99] the court of appeals considered the three issues raised at the trial. In discussing the ownership of gas and oil rights, the court of appeals stated that a conveyance of "coal and other minerals" plus "coal, clays, minerals and mineral substances" is interpreted "to include gas and oil unless a contrary intention of an ambiguity is manifested by the language of the instrument as a whole."[100] The case cited as authority by the court, *Monon Coal Co. v. Riggs*,[101] does not appear to support this position. In fact, several leading authorities have cited the case for the proposition that, in Indiana, when the term "minerals" is used in a mineral deed, the term "minerals" is found to be ambiguous with regard to whether oil and gas are conveyed, and extrinsic evidence on this issue is freely admitted.[102]

Despite this misleading reference, the court of appeals went on to examine the circumstances surrounding the original conveyances to ascertain the grantors intent because the phrase "coal and other minerals" was ambiguous. The court of appeals also noted that Indiana takes the position that oil and gas are substances ferae naturae and, unlike hard minerals, are subject to the rule of capture.[103] This characterization of oil and gas adds an element of ambiguity to the deed because title to the oil and gas cannot be conveyed by the owner of the land, and a conveyance of minerals raises the question of whether the grantor intended to also convey the right to explore for

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[98]*Id.* at 706-07.

[99]*Id.* at 713.

[100]*Id.* at 709 n.4 (citing Monon Coal Co. v. Riggs, 115 Ind. App. 236, 56 N.E.2d 672 (1944)).

[101]115 Ind. App. 236, 56 N.E.2d 672 (1944); *See* Annot., 37 A.L.R.2d 1435 (1959).

[102]*See* R. HEMINGWAY, THE LAW OF OIL AND GAS § 1.1, at 2 n.5 (1971); 1A W. SUMMERS, THE LAW OF OIL AND GAS § 135, at 275-76 n.32 (1954); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219.4, at 275 n.1 (1981).

[103]422 N.E.2d at 711.

oil and gas and thereby allow the grantee to acquire title by reducing it to possession.[104] After examining the circumstances existing at the time of the conveyance to determine the intent of the parties, the court concluded that there was no material issue of fact in dispute and that the trial court had properly granted a partial summary judgment on the issue.[105]

The second issue relating to the compatibility of coal mining and gas storage was decided on the evidence and presents no problem. However, had they not been compatible, the Richardsons' interest could have been condemned for underground storage of gas.[106]

The third issue discussed by the court of appeals relates to the easement through the coal field to reach the gas strata. The court found that because the original deeds conveyed only the right to the coal, the grantors retained the gas and oil exploration rights and, thus, impliedly reserved an easement through the coal for drilling purposes.[107] In reaching this finding, the court relied upon *Pyramid Coal Corp. v. Pratt*,[108] one of the leading cases on this point. *Pratt* holds that where the owner of land conveys coal beneath his land but retains title to everything beneath the coal, the surface owner has the right of access to the strata beneath the coal, even though the deed does not expressly reserve such a right.[109] The *Richardson* court found that the easement was 300 feet in diameter, basing this finding on a federal law requiring a 300 foot safety barrier around each well.[110]

For some unknown reason, the court of appeals concluded that the easement was an easement in gross and criticized the trial court and the parties for using the phrase "way of necessity" to describe the easement.[111] While not wishing to appear petty, one could argue that the term "easement in gross" may be even less accurate than the term "way of necessity." In the leading case in this area, *Chartiers Block Coal Co. v. Mellon*,[112] the term "way of necessity" was rejected by the majority of the court because its use in this context would require a major modification of the common law rules regarding a surface right of way.[113] Nevertheless, the *Mellon* court did find that the owner of the land who retained oil and gas rights had a "right

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[104]*Id.* (quoting Monon Coal Co. v. Riggs, 115 Ind. App. 236, 240, 56 N.E.2d 672, 673 (1944)).

[105]422 N.E.2d at 710.

[106]*See* IND. CODE §§ 32-11-4-1 to -5 (1982).

[107]422 N.E.2d at 713.

[108]229 Ind. 648, 99 N.E.2d 427 (1951).

[109]*Id.* at 652-53, 99 N.E.2d at 429.

[110]422 N.E.2d at 713. *See* 30 U.S.C. § 877 (1976).

[111]422 N.E.2d at 706 n.2.

[112]152 Pa. 286, 25 A. 597 (1893).

[113]*Id.* at 298, 25 A. at 599.

of access" to these minerals through a superjacent coal strata which he had previously conveyed.[114] Many subsequent decisions have used the term "way of necessity" to describe this right of access.[115] The term "easement in gross," however, is misleading when applied to such a right of access because it suggests that the easement is personal and that there is no dominant estate.[116] It is important to note that the right of access through the superjacent strata by the owner of the subjacent mineral interests is a right which exists without any express grant or reservation.[117] Thus, the subjacent owner's estate is dominant in the sense that he has the right to drill wells as may be reasonably necessary for production even though the wells penetrate superjacent estates.[118]

Perhaps what led the court of appeals to use the term "easement in gross" is the the fact that in *Richardson* the right to drill through the coal strata was connected, in part, with the right to store gas in the strata. As the court stated, "[b]y introducing evidence that the gas storage fields were below the coal, Citizens established the need for utilizing these easements reserved by the original grantors which were conveyed to the subsequent surface owners and leased by Citizens."[119] Perhaps the court of appeals was not sure if an implied easement exists to drill through a superjacent strata to inject gas into a subjacent strata. In fact, where there has been a severence of the surface and mineral estates, which includes oil and gas, there is disagreement as to who has the right to use a strata for the storage of gas.[120] Some courts have held that only the minerals are conveyed by a mineral deed, and that the space, once the minerals have been removed, remains with the surface estate.[121] Other courts have held that the owner of the mineral estate, which includes oil and gas, should be considered as having the right to use the strata for all purposes relating to minerals whether native or injected, absent contrary language in the deed.[122] Had the court in *Richardson* found that the deed to Richardson conveyed to him the oil and gas interest, an interesting question would have arisen in the condemnation action as to

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[114]*Id.*

[115]*See, e.g.*, Pyramid Coal Corp. v. Pratt, 229 Ind. 648, 99 N.E.2d 427 (1951); *see also* Annot., 25 A.L.R.2d 1245 (1952).

[116]"An easement (or profit) is in gross when in its creation it is not intended to benefit the owner or possessor of land as such but is intended to exist without a dominant tenement." R. BOYER, SURVEY OF THE LAW OF PROPERTY 561 (3d ed. 1981).

[117]*See* Pyramid Coal Corp. v. Pratt, 229 Ind. 648, 651-52, 99 N.E.2d 427, 429 (1951).

[118]*See* Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 296, 25 A. 597, 598 (1893).

[119]422 N.E.2d at 713.

[120]*See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 222, at 332-33 (1981).

[121]*E.g.*, Tate v. United Fuel Co., 137 W. Va. 272, 71 S.E.2d 65 (1952).

[122]*E.g.*, Central Ky. Natural Gas Co. v. Smallwood, 252 S.W.2d 866 (Ky. 1952).

the Richardsons' claim for compensation with regard to the injected gas and storage rights.

F. Real Estate Transactions

1. Real Estate Broker.—There were three cases decided during this survey period dealing with real estate brokers and listing agreements.[123] The first case involves the interpretation of an extension clause in a listing agreement. In *Barrick Realty Co. v. Bogan*,[124] Nick Adams, an agent for Barrick Realty Company (Barrick) was contacted by Herbert Gehring regarding commercial real estate in Valparaiso, Indiana. Gehring expressed interest in purchasing the Lembke Hotel. Adams contacted Charles Bogan, who represented the hotel owners. Bogan signed an exclusive listing agreement on the hotel with Adams and Barrick for a two-day period. The asking price for the property was $275,000 and provided for the payment of a ten percent commission of the gross sale price. The listing agreement contained an extension clause which provided that if the hotel were sold within six months after the expiration of the agreement to any person with whom negotiations had taken place during the exclusive listing period, the commission would still be paid to the realtor.

After touring the hotel, Gehring did not accept Bogan's offer nor did he make any counter offers. However, within six months, Gehring, Gehring's partner, and Gehring's brother purchased the hotel for $220,000. Adams and Barrick filed suit for their commission and appealed from a negative judgment. The court of appeals found that the word "negotiations" suggested something more than "discussions" but less than a sale, and that there was evidence to support the trial court's findings that negotiations had not taken place.[125] The appellate court suggested that if the parties had intended a commission to be payable upon the sale during the extension period to any buyer to whom the property was shown and with whom "discussions" had ensued, the agreement should have provided for this contingency.[126] In a situation where there is only one prospective buyer, as in this case, the court suggested that the parties' agreement might provide specifically for a commission if the property is sold to the named individual within the period of the extension agreement.[127]

The other two cases in this area illustrate a problem which arises

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[123]*See also* Plymale v. Upright, 419 N.E.2d 756 (Ind. Ct. App. 1981) (representations by the broker regarding the sale are an opinion and do not give legal effect to an offer to purchase).

[124]422 N.E.2d 1306 (Ind. Ct. App. 1981).

[125]*Id.* at 1308-09.

[126]*Id.* at 1308.

[127]*Id.* at 1308 n.1.

in brokerage agreements. This problem concerns the interpretation of when a broker has found a buyer "ready, willing and able" to purchase the property on the terms listed in the brokerage agreement. In *Wilson v. Upchurch*,[128] Upchurch, a veterinarian, was interested in selling his veterinary hospital, its equipment and a two-bedroom apartment located on 1.11 acres of land. The property was listed with Marion and Joanne Loser. The asking price was $290,000 with a $40,000 down payment, and the balance to be paid over twenty years at a ten percent interest rate. The Losers found a potential buyer, James Wilson, who made a counter offer to purchase for $280,000. The Upchurches eventually signed a purchase agreement with Wilson, but the sale was never completed because the parties could not agree on the terms of two contracts that were conditions for the sale. In a suit for specific performance the trial court found for Upchurch, and the Losers appealed for their sales commission.

Both the trial court and court of appeals found that the agreement was not meant to be binding on the parties because there were at least two conditions precedent contained in the agreement: the drafting of a mutually agreed upon sales contract and an employment contract whereby Upchurch would work for Wilson at the hospital.[129] The court of appeals noted that

> Before a broker is entitled to his commission he must prove 1) an actual sale of the real estate or 2) that he had secured a buyer who was ready, willing and able to purchase the property upon the terms listed by the seller and the seller refused to complete the transaction, or 3) that by and through the procurement of the broker, a third party had entered into a valid executory contract with the seller.[130]

Here the parties had not entered into a binding contract because the purchase agreement was not binding on the parties, the counter offer by Wilson was not upon the terms listed by the sellers, and there was no contract entered into by a third party. Thus, the Losers had not fulfilled one of the prerequisites for earning their commission.

As with *Upchurch, Blue Valley Turf Farms v. Realestate Marketing & Development, Inc.*,[131] adds a gloss to the interpretation of ready, willing and able as it applies to listing agreements. In July 1974, Blue Valley Turf Farms, Inc. (Blue Valley) listed certain equipment and real estate with Realestate Marketing and Development, Inc. (Realestate). On September 2, 1974, Blue Valley entered into an agreement of pur-

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[128]425 N.E.2d 236 (Ind. Ct. App. 1981).

[129]*Id.* at 239.

[130]*Id.* at 238.

[131]424 N.E.2d 1088 (Ind. Ct. App. 1981).

chase with a buyer, John Hilger, and agreed to pay Realestate a commission of $9,000. The agreement was conditional upon Hilger obtaining a new mortgage loan with thirty days. On December 10, 1974, Blue Valley notified Hilger that the agreement was terminated because Hilger had not obtained the mortgage. Hilger brought suit against Blue Valley for specific performance and this suit was settled. Realestate then filed suit against Blue Valley to recover its commission. The trial court found that Hilger was ready, willing, and able to purchase the property, and that Blue Valley had failed to perform pursuant to the agreement. The court of appeals affirmed.[132]

On appeal, Blue Valley argued that the contract was unenforceable against Hilger because Hilger had only obtained an oral commitment from a lender to loan the funds in exchange for a mortgage securing the loan. In answering this argument, the court of appeals noted that only parties and privies have the right to plead the statute of frauds as a defense.[133] While the lender might have been able to raise this defense in a suit instituted by Hilger, Blue Valley could not raise it for them. The court alluded to, but did not answer, the question whether an agreement to lend money in exchange for a mortgage interest comes within the statute of frauds. However, this point was not relevant to the case at bar, because the suit was based on the agreement between Blue Valley and Realestate and not the contract between Hilger and his lender.

2. Vendor and Purchaser.—In *Lewandowski v. Beverly*,[134] the buyers of certain real property, the Lewandowskis, brought an action for specific performance and damages against the sellers, the Beverlys, for failure to perform a contract for sale. The facts show that the buyers agreed to purchase for $7,900 a one-acre tract of land located at the southeast corner of a twenty-two acre tract of land owned by the sellers. The sellers were to furnish a stake survey and evidence of title in the form of an owner's guarantee policy in the amount of the purchase price. The buyers paid $500 down as earnest money. On the date set for closing, the buyers went to the sellers' home with a check for the balance of the purchase price, and certain problems became evident. The sellers had failed to provide evidence of good title because they mistakenly had believed this provision had been stricken from the contract. Other evidence indicated that there was a $66,000 mortgage on the twenty-two acre tract, that the sellers had not obtained a release of the mortgage on the land to be sold, and that there were certain unpaid taxes. What subsequent negotiations ensued are unclear; each party claimed the other failed to cooperate.

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[132]*Id.* at 1090.

[133]*Id.*

[134]420 N.E.2d 1278 (Ind. Ct. App. 1981).

Eventually, the sellers returned the buyers' earnest money deposit and the buyers commenced suit. The trial court found for the sellers and the buyers appealed.

In reversing the decision of the trial court, the court of appeals held that the buyers had remained ready, willing, and able to perform all obligations under the contract and that the trial court's decision was "against the logic and effect of the facts."[135] Although the sellers contended that any problems surrounding the release of the mortgage and payment of the taxes would have been resolved at the closing, the court noted that the evidence of good title was to be obtained five days prior to closing.[136] The fact that the property had increased in value to between $15,500 and $16,000 was not grounds for denying relief because the delay was the fault of the sellers.

The sellers argued that material alterations made the contract unenforceable. This argument was based upon the agreement between the parties to move the boundary line of the property to account for an encroachment upon the land, which was discovered in the stake survey.[137] In rejecting this argument, the court quoted from an earlier decision that held that where modifications or alterations are required to be in writing and oral alterations or modifications are made, the original contract, unless it is entirely abandoned, still exists and binds the parties.[138] In conclusion, the court held that "[t]he contract, *as altered*, is valid and binding on both parties."[139]

If the modification of the contract was in writing, there is nothing unusual about the court's decision in *Lewandowski*. One suspects, however, that the modification was oral and thus the court's decision is not in accord with the general rule of law that oral modifications to a contract for the sale of real property are not enforceable.[140] It is true that the original contract may still be enforced, [141] but the decision in *Lewandowski* seems to suggest that the contract as modified is binding on the parties. Had the court not enforced the contract as modified, however, a serious problem would have been presented to the trial court because there is no evidence that the sellers could clear title to the four-foot strip on which the neighbors' fence encroaches.

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[135]*Id.* at 1281.

[136]*Id.* at 1279-80.

[137]*Id.*

[138]*Id.* at 1282 (quoting Foltz v. Evans, 113 Ind. App. 596, 612, 49 N.E.2d 358, 365 (1943)).

[139]420 N.E.2d at 1282 (emphasis added).

[140]*See* 4 S. WILLISTON, A TREATISE OF THE LAW ON CONTRACTS § 593 (3d ed. 1961). *See also* Ward v. Potts, 228 Ind. 228, 91 N.E.2d 643 (1950); Bradley v. Harter, 156 Ind. 499, 60 N.E. 139 (1901).

[141]*See* CRIBBET, *supra* note 51, at 132. *See also* Imperator Realty Co. v. Tull, 228 N.Y. 447, 127 N.E. 263 (1920).

This problem is solved in *Lewandowski* by enforcing the contract as altered.

The case of *Workman v. Douglas*,[142] one of the more interesting cases decided during this survey period, is significant because the court analyzes the doctrines of resulting trust and part performance. Steven and Betty Douglas, a young married couple who were unable to finance the purchase of a home, sought aid from a friend, Buford Workman. Under an alleged oral agreement, Workman purchased a house in his own name for $15,000. He paid $3,000 as a down payment and obtained a $12,000 mortgage for twenty-five years at eight and one-half percent interest with monthly payments of $96.80. Workman then allowed Steven and Betty to move into the house and to pay him $96.80 a month. The controversy in this case involves the classification to be given the arrangement between Workman and the Douglases. According to Workman, the couple was merely renting the home; according to the Douglases, they were buying the house from Workman for $96.80 a month for a term of tweny-five years. Steven and Betty were divorced in 1979, and by divorce decree Betty received the property in contention. At that time, the payments were in arrears approximately $1,152, and Workman filed suit for the rent, damages, and possession. Betty counterclaimed on a resulting trust theory, alleging that an oral contract existed to purchase the property.

The trial court found that there was an oral contract to purchase, and that a formal contract for sale should be prepared using the Indianapolis Bar Association or Allen County Bar Association Land Contract. The contract was to supply such terms as who was responsible to pay taxes and to provide insurance, what amount was due monthly, and what interest rate was applicable to the monthly installment. The judgment also provided that if Betty paid Workman the sum of $1,529.35 on or before May 2, 1980, and the sum of $96.80 on May 5, 1980, she would be entitled to remain in possession; otherwise, Workman would be entitled to a judgment for such sums and would have the right to immediate possesison. Workman appealed.

The court of appeals examined the resulting trust theory upon which the trial court had based its decision and concluded that the judgment could not be affirmed on this theory.[143] The purchase money resulting trust, as it was known at common law, was abolished by statute in Indiana except in three distinct situations:

> Where the alienee shall have taken an absolute title in his own name without the consent of the person with whose money the consideration was paid; or where such alienee, in

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[142]419 N.E.2d 1340 (Ind. Ct. App. 1981).

[143]*Id.* at 1345.

> violation of some trust, shall have purchased the land with *moneys not his own*; or where it shall be made to appear that, by agreement . . . the party to whom the conveyance was made . . . was to hold the land or some interest therein *in trust for* the party paying the purchase-money or some part thereof.[144]

The court noted that in all of these situations the purchase money or some part thereof must be furnished by the person claiming a resulting trust. Since all the purchase money in the instant case was furnished by Workman, the agreement could not have created a resulting trust.[145]

The court of appeals next addressed the issue of part performance. Although the judgment could not be sustained on the theory of a resulting trust, possession under the oral contract and part payment of the purchase price by the Douglases appeared to be sufficient acts under the doctrine of part performance to remove an oral contract from the statute of frauds.[146] Thus, if the case were remanded, the trial court might have reached the same conclusion based on the doctrine of part performance. However, the court of appeals went on to find that the oral agreement was not sufficiently definite to be enforceable.[147] There had been no agreement as to who should pay the taxes and insurance during the twenty-five year period, whether the $3,000 down payment was to be repaid to Workman, what the rights of the parties were in the event of default, who would make repairs, and finally what rate of interest would be paid. The court concluded that these elements are essential in a time-payment contract.[148] In essence, the anomalous proposition advanced by the Douglases was that Workman, as a reward for helping out the young couple, would lose the $3,000 down payment and be forced to pay the costs of taxes, insurance, and repairs for twenty-five years.[149]

The court of appeals criticized the trial court for attempting to write a contract for the parties—in other words "to do for the parties what they should have done in the first place."[150] Courts can only enforce contracts made between the parties, not create new ones, and in this case the court of appeals found that the oral agreement was

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[144]*Id.* at 1344 (citing IND. CODE § 30-1-9-8 (1982)) (emphasis in original).

[145]419 N.E.2d at 1344-45.

[146]*See* Bastian v. Crawford, 180 Ind. 697, 103 N.E. 792 (1914); McMahan Constr. Co. v. Wegehoft Bros., Inc., 170 Ind. App. 558, 354 N.E.2d 278 (1976). For a general discussion of the doctrine of part performance, see 3 AMERICAN LAW OF PROPERTY §§ 11.7-.12 (A. Casner ed. 1952).

[147]419 N.E.2d at 1345.

[148]*Id.* at 1346.

[149]*Id.*

[150]*Id.*

too indefinite to be enforced. While the doctrine of part performance can remove an oral contract from the statute of frauds, a valid oral contract is a prerequisite.

G. Slander of Title

In *Curry v. Orwig*,[151] the court examines the issue of what constitutes a sufficient "interest" to justify filing lis pendens notice and to not cause a slander of title. In 1959, Heritage Woods subdivision was developed by Roger and Carol Curry and the Bryan Corporation. The area was to be exclusively residential, and all residents were required to enter into a restrictive agreement with the developers that was to insure the community's character and to enhance property values. The restrictive agreement document, which contains a legal description of the subdivision, was never recorded. The road, Heritage Woods Road was mentioned in the agreement, and the Currys and the Bryan Corporation retained legal title to the road and granted the residents an easement for ingress and egress. The deeds granting the easements were recorded with specific legal descriptions. When William and Jane Orwig purchased their lot in Heritage Woods in 1963, Heritage Woods Road ended in a cul-de-sac, and the Orwigs understood this was to be the permanent end of the road. The Currys, however, maintained that they had always made clear their intent to use the land to the east of the subdivision, if it became available. In 1968, the Currys and the Bryan Corporation acquired the land to the east of Heritage Woods and drew up plans for a subdivision to be known as Heritage Woods East. The Currys envisioned extending Heritage Woods Road into this area. They denied that there was any plan to develop the area to the south of Heritage Woods known as the Curry-Bryan farm. Despite these assurances, the Orwigs and other residents became concerned that an expansion to the south might also occur. In December 1968, the Orwigs filed a declaratory action to determine their rights in the easement to Heritage Woods Road and also filed a lis pendens notice, which indicated that a suit had been filed. In the lis pendens notice, the legal description of the real estate involved described some 299.5 acres to the east and south of the subdivisions owned by the Currys and the Bryan Corporation.

When the Currys attempted to sell part of the land to the south which was included in the lis pendens notice, they failed because the purchasers were unable to obtain financing or title insurance. The Currys then filed this suit for slander of title. The trial court entered judgment for the Orwigs, finding that they had legal justification for filing the notice because of the controversy surrounding the interpreta-

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[151] 429 N.E.2d 268 (Ind. Ct. App. 1981).

tion of the easement and the impact of the proposed extension on the neighborhood.[152] The Currys appealed.

The court of appeals noted that the elements of slander of title are: the statements made regarding title must have been false; they must have been made maliciously; and they must have caused the plaintiff pecuniary loss.[153]

To understand the basis of the Currys' claim, it is necessary to examine the lis pendens notice statute.[154] Essentially, the statute provides that if a person commences a suit in a state court or a federal district court sitting in Indiana, either by complaint or cross-complaint, to enforce any lien upon, right to, or interest in any real estate, and that suit is not founded on an instrument signed by the party having title of record, and either properly recorded or a judgment recorded in the county where the land is located, then the person may file a lis pendens notice. If such a notice is not filed, then the bringing of the suit will not act as constructive notice of the interest as against bona fide purchasers or encumbrancers of the property.[155]

The Currys advanced several arguments involving the interest necessary before lis pendens notice may be filed. The first argument was that the interest referred to in the statute refers to an interest affecting title and that an easement is not the type of interest intended to be filed in the lis pendens notice. The easement involves land referred to in the instruments creating the easement, in the easement deed, in the deed conveying the Orwigs' property in Heritage Woods, and in the unrecorded agreement between the residents and developers. The Currys argued that because the purpose of the lis pendens statute was to give notice of unrecorded interests, the Orwigs' filing of notice was improper because the easement deed, the only source of the Orwigs' rights, was already properly recorded.[156] If there were no interest entitled to be recorded, the Currys argued that the statements regarding title were false, and thus the Currys hoped to establish one of the elements of slander of title.[157]

Secondly, the Currys argued that the Orwigs' lack of an interest in the property described in the lis pendens notice overcame any claim of privilege. Apparently, the Orwigs were claiming that the filing of the notice was privileged. This argument is premised on the rule that ordinarily actionable statements are absolutely privileged when made in the course of judicial proceedings, and that this rule should be ex-

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[152]*Id.* at 270.
[153]*Id.* at 270 n.1.
[154]IND. CODE § 34-1-4-2 (1982).
[155]IND. CODE § 34-1-4-8 (1982).
[156]429 N.E.2d at 271-72.
[157]*Id.*

tended to the filing of notice in the lis pendens records. In *Albertson v. Raboff*,[158] a California case cited by both parties, Judge Traynor extended such a privilege to lis pendens notices on the theory that the notices are simply republications of the pleadings. The Currys argued that a suit involving title to an easement does not affect title to the land described in the lis pendens notice and thus it is more than a mere republication of the complaint.[159] The Currys used similar reasoning to conclude that the Orwigs made the statements with malice, another element of slander of title.

The court of appeals observed that the focal point in the case was the question of what constitutes an "interest" in real estate as enunciated in the lis pendens statute.[160] The court noted that there were no cases defining the term under the statute. The court then turned to several secondary authorities and concluded that the statute was designed to protect in rem claims which were not recorded or perfected.[161] The court then examined the Orwigs' claim and concluded that it involved more than just personal rights.[162] The court also noted that while the easement deed was recorded, it was not recorded in the chain of title of the purchasers in the new addition. Thus, the only way the Orwigs could put third parties on notice of their rights was by filing the lis pendens notice.

What is unique about the interest asserted by the Orwigs is that it is not a claim to an affirmative right in the described land, but rather a claim to limit the use of the land with regard to the easement. As the court observed: "Given the terrain surrounding the new addition, they might arguably proceed on the theory of an easement by implication or necessity."[163]

Finally, throughout the Currys' argument is the suggestion that somehow the amount of land described in the lis pendens notice, 299.5 acres more or less, showed bad faith or malice on the part of the Orwigs. The trial court found that no precise legal description of Heritage Woods East was even filed and the original plat contained a description different from a subsequent plat. The court of appeals believed there was evidence to support the trial court's finding that the Orwigs were justified in including a description of the land to the south of the subdivision is the lis pendens notice.[164]

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[158]46 Cal. 2d 375, 295 P.2d 405 (1956).
[159]429 N.E.2d at 272.
[160]*Id.*
[161]*Id.* at 272-73.
[162]*Id.* at 273.
[163]*Id.*
[164]*Id.* at 273-74.