XII. Property

SANDRA ROTHBAUM*
JAMES N. SCAHILL**

A. Bailments

During the survey period the Indiana Supreme Court vacated the court of appeal's decision in *Carr v. Hoosier Photo Supplies, Inc.*,[1] Indiana's first film processing case. The plaintiff, an attorney who presumably was familiar with the recent Washington Supreme Court decision upholding a $7,500 damage award for the loss of several reels of movie film,[2] had taken many photographs during a trip to Europe. After returning from his vacation, the plaintiff delivered eighteen rolls of film to Hoosier Photo Supplies, Inc. (Hoosier). When only fourteen of the rolls were returned, the plaintiff sued both Hoosier and Eastman Kodak Co. (Kodak), which was to have processed the film, for damages resulting from the loss of the four rolls of film.[3] The defendants stipulated that either Hoosier or Kodak had lost the film, and the plaintiff sought $10,000 in damages. The Indiana Court of Appeals had upheld the trial court's award of $1,013.60 in damages.[4] The Indiana Supreme Court vacated this decision and held that the plaintiff was entitled to no damages beyond the cost of replacing the four rolls of lost film.[5]

The supreme court agreed with the conclusion of both the trial and appellate courts that the law of bailments and not the Uniform Commercial Code[6] applied.[7] The principal issue was the legal effect of two notices

---

*Associate Editor of the *Indiana Law Review*.
**Associate Editor of the *Indiana Law Review*.

[1]441 N.E.2d 450 (Ind. 1982), *vacating*, 422 N.E.2d 1272 (Ind. Ct. App. 1981).

[2]Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979) (applying the Uniform Commercial Code and not the law of bailments).

[3]441 N.E.2d at 452.

[4]422 N.E.2d at 1278. For a discussion of the appellate court decision, see Bepko, *Commercial Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 83, 90 (1983) and Krieger, *Property, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 283, 288 (1983). For a general discussion of "film processing cases" see Annot., 6 A.L.R. 4TH 934 (1981).

[5]441 N.E.2d at 456.

[6]IND. CODE §§ 26-1-1-101 to 1-10-106 (1982 & Supp. 1983). Section 26-1-2-618 provides that parties may limit liability so long as such limitation is not unreasonable; and section 26-1-2-302 gives the court the power to refuse to enforce unconscionable contract clauses. Therefore, even though declining to apply the Indiana Uniform Commercial Code, the supreme court applied an analysis essentially identical to one which could have occurred under Indiana's version of the U.C.C.

[7]441 N.E.2d at 453. *But see* Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979).

purporting to limit the liability of Kodak.[8] A notice appearing on the packages of film when purchased stated that if the film was "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."[9] A second notice, appearing on the back of the receipt given to the plaintiff by Hoosier when the film was brought in for processing, stated:

> Although film price does not include processing by Kodak, the return of any film or print to us for processing or any other purpose, 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 or other fault, it will be replaced with an equivalent amount of Kodak film and processing and, except for such replacement, the handling of such film or prints by us for any purpose is without other warranty or liability.[10]

The supreme court disagreed with the appellate court's conclusion that the statement limiting liability on the receipts given to Carr by Hoosier was ambiguous.[11] The court found that both notices referred to Kodak and were actually receipts from that company.[12] However, the court found that Hoosier was included in the disclaimer notice to the extent that Hoosier was acting as Kodak's agent in the transaction.[13]

Carr admitted familiarity with notices of the type promulgated by Kodak; however, he asserted that he had not actually read the two notices.[14] The court found that the case did not involve such disparate bargaining power that would make the liability-limiting clauses unconscionable and concluded that Carr had assented to those clauses.[15] The court reasoned that because Carr practiced as an attorney in the field of business law and admitted his awareness and understanding of the clauses, he was not in an inferior bargaining position.[16] Similarly, the court reasoned that Carr's knowledge of the clauses, combined with his delivery of the film to Hoosier for processing, established his consent to the terms of the clauses.[17] The court's ruling leaves unclear, however, whether less

---

[8] 441 N.E.2d at 452-53.
[9] *Id.* at 452.
[10] *Id.*
[11] *Id.* at 453.
[12] *Id.* at 453-54.
[13] *Id.* at 454.
[14] *Id.* at 455.
[15] *Id.* at 456
[16] *Id.* at 455.
[17] *Id.* at 456.

sophisticated persons might be able to obtain a ruling that the contract was unconscionable or that consent was absent.

In support of its holding that the limitation of liability was not unconscionable, the court advanced the somewhat questionable proposition that the plaintiff was not in a take-it-or-leave-it position. The court reasoned that Carr might have processed the film himself, or found a processor willing to accept the film on terms different than Kodak's.[18] Other courts have relied on different rationales to refuse large damage awards in similar cases.[19] In *Bowes v. Fox-Stanley Photo Products, Inc.*,[20] for example, a Louisiana court held that non-pecuniary damages were not within the contemplation of the defendant when the contract was entered and were not recoverable.[21] The court indicated, however, that acceptance of the film by the defendant with notice of the special intellectual value of the film could make the defendant liable for non-pecuniary damages.[22]

B. Deeds

In *Hemenway Memorial Presbyterian Church v. Aigner*,[23] the Indiana Court of Appeals was asked to determine the ownership of property known as the "Dr. T.D. and Emma Hart Scales Park." The property had been deeded to the State in 1933 by an instrument which provided in part:

> It is further hereby especially agreed that should the grantee fail or refuse to maintain the same for the use contemplated and herein provided, for a period of three consecutive years, then the same shall revert to the grantors and/or the survivor should they be living, and should the same occur after the death of said grantors, then the same shall be owned by and the same is hereby conveyed and transferred to the Trustees of Hemenway Memorial Church of Boonville, and their successors in office.[24]

In 1972, because the Indiana State Legislature had determined that the Warrick County Commissioners could more appropriately administer the park,

---

[18] *Id.* at 455.

[19] *See* Annot., 6 A.L.R. 4TH 923 (1981).

[20] 379 So. 2d 844 (La. Ct. App. 1980).

[21] *Id.* at 847.

[22] *Id.* at 846. The court in *Bowes* also found that the clause which purported to limit liability and appeared on the receipt given the plaintiff was ineffective. The court reasoned that the defendant had not explained or pointed out the clause to the plaintiff and that lacking special knowledge of the disclaimer, the plaintiff was not bound by it. *Id.*

Bailment was also raised in Tucker v. Capital City Riggers, 437 N.E.2d 1048 (Ind. Ct. App. 1982). In that case the Indiana Court of Appeals held that possession lawfully obtained under a contract of bailment could not lawfully be extended merely because the bailor had failed to pay the bailee an amount owed under an unrelated contract. *Id.* at 1053.

[23] 443 N.E.2d 93 (Ind. Ct. App. 1982).

[24] *Id.* at 94.

the State conveyed the property to Warrick County by quitclaim deed. The deed provided that if the property was no longer used as a general recreation area, the State had a right to cause ownership to revert to the State, i.e., the State had a right of re-entry.[25]

The church brought an action against the State of Indiana and the Warrick County Commissioners to enforce the church's right to the property.[26] The 1933 deed created a reversion in the grantors during the joint lives of the grantors and a subsequent executory interest in the church trustees.[27] The church contended that the deed created a public trust with the State as trustee and that to allow the park to be maintained by another entity would, in effect, rewrite the deed.[28] The State countered that the intent of the grantor was to have the property maintained as a recreation area.[29] The court agreed with the church and ordered that the property be transferred to the trustees of the church.[30]

Courts have generally refused to allow governmental units to sell property dedicated for use as parks.[31] However, in this case, the 1972 deed from the State to the county contained the stipulation that if the property were used for other than a park or recreation area, the State had a right of re-entry.[32] While a right of re-entry might appear to be an adequate provision for carrying out the intention of the grantors, under a right of re-entry the State might ignore a contrary use of the property and allow title to remain in Warrick County. Had the deed to the county contained instead a possibility of reverter in the State, which reversion would automatically revest ownership in the State upon contrary use of the property, enforcement of the wishes of the original grantors might have been more easily accomplished. The court did not consider this issue, but held simply that the State could not alienate the property.[33]

C. Easements

In *Bulatovich v. Easton*,[34] the Indiana Court of Appeals affirmed a trial court decision granting the plaintiffs a prescriptive easement across

---

[25] *Id.*

[26] 443 N.E.2d at 93. The court did not discuss why the action was brought by the church and not by the trustees, who held the executory interest.

[27] It might be noted that the deed did not violate the rule against perpetuities, since the grant was to a public or charitable organization. *See* IND. CODE § 23-10-2-11 (1982); Herron v. Stanton, 79 Ind. App. 683, 147 N.E. 305 (1920).

[28] 443 N.E.2d at 94.

[29] *Id.*

[30] *Id.* at 95.

[31] *See* Annot., 18 A.L.R. 1246 (1922); Annot., 63 A.L.R. 484 (1929); Annot., 144 A.L.R. 486 (1943).

[32] 443 N.E.2d at 94.

[33] *Id.*

[34] 435 N.E.2d 997 (Ind. Ct. App. 1982).

the defendants' property.[35] To gain a prescriptive easement, a party must "establish an actual, open, notorious, continuous, uninterrupted, adverse use [of the property] for twenty years under a claim of right, or show such continuous adverse use with [the owner's] knowledge and acquiescence."[36] In the present case, the issue was whether the use of a graveled area as a driveway was adverse to the owners' use of the property.[37] The court stated that a showing of open and continuous use creates the rebuttable presumption that the use is adverse.[38] The owner attempted to rebut the presumption by claiming that the plaintiffs' use of the area did not interfere with the owners' use.[39] The court found that the owners used the graveled area for parking, and that in order for the graveled area to be used simultaneously as a driveway and a parking area, the owners had to park their cars close to their house.[40] Moreover, when the owners wished to block the driveway for parking, they asked permission of the plaintiffs. The appellate court upheld the trial court's finding that the use of the area as a driveway was adverse to the defendants' use of the property.[41]

In *Kanizer v. White Excavating, Inc.*,[42] the court reiterated the long-standing rule that, absent the express granting of an openway, the owner of the servient estate "may maintain a gate across an easement for a right-of-way where that right-of-way terminates on his land"; but the servient estate holder "may not lock the gate or in any way interfere with [the dominant tenant's] reasonable use of the right-of-way."[43]

D. Gifts

Two cases concerning gifts of property were decided during the survey period. In *Rogers v. Rogers*,[44] a father sued his son for the return of funds withdrawn from a joint bank account by the son. The son contended that the father had made a gift to the son of the funds in the account.[45] The court stated that in order to make an inter vivos gift of property, a party must have a donative intent and must irrevocably surrender dominion and control over the property.[46] However, unless a joint

---

[35] *Id.* at 999.

[36] *Id.* at 998.

[37] *Id.*

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

[39] 435 N.E.2d at 998.

[40] *Id.* at 998-99.

[41] *Id.* at 999.

[42] 444 N.E.2d 353 (Ind. Ct. App. 1982).

[43] *Id.* at 354.

[44] 437 N.E.2d 92 (Ind. Ct. App. 1982).

[45] The son also argued on appeal that because both he and his father had signed the account's signature card, the son had a right to withdraw the funds. *Id.* at 95. The court ruled that the son had waived this argument by failing to raise it in the trial court. *Id.*

[46] *Id.* at 96.

tenant is incapable of withdrawing funds, the deposit of funds into a joint account cannot strip a party of dominion and control over the funds. Therefore, the focus must be on the intent of the alleged donor. The general assumption is that a person who deposits funds in a joint account does not intend to make an irrevocable gift of all or any part of the funds in the account.[47] This assumption was incorporated into Indiana Code section 32-3-1.5-3, which provides that "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."[48]

In *Rogers*, the son claimed that by signing the signature card the father had demonstrated his intent to give the funds to the son.[49] The court distinguished the present case from *Moore v. Bowyer*,[50] in which the court held that an inter vivos gift from a mother to her son was intended where the mother had been ill and the son had a power of attorney to withdraw funds from the mother's accounts. The signature card signed by the mother in *Moore* stated that "any funds placed in . . . the account by any one of the parties is and shall be conclusively intended to be a gift . . . to the other signatory."[51] Unlike the signature card involved in *Moore*, the card signed by the father in *Rogers* was found to contain no express intention to make a gift to the son.[52] The court found that the son's own testimony established that the father's intent was to permit the son to withdraw funds for the father if he became ill and unable to do so.[53] Thus, the court affirmed the trial court's order that the son return the funds to his father.[54]

In *Larabee v. Booth*,[55] the defendant, Larabee, owned a remainder interest in real property subject to a life estate in her mother. The plaintiffs wanted to build a house on the property. Larabee agreed to convey the land to the Booths as a gift when she acquired fee simple title. Larabee, with her husband, executed a document which stated that they agreed to convey the property "at the time that we acquire a fee simple title and the expiration of the outstanding life estate."[56] The Booths constructed a house on the land, and when Larabee refused to supply a deed to the property, the Booths brought suit to compel Larabee to convey the prop-

---

[47]IND. CODE ANN. § 32-4-1.5-3 official comment to Uniform Probate Code (West 1979), *quoted in Rogers*, 437 N.E.2d at 96.

[48]437 N.E.2d at 96 (quoting IND. CODE § 32-4-1.5-3(a) (1982)).

[49]437 N.E.2d at 95.

[50]180 Ind. App. 429, 388 N.E.2d 611 (1979). For a further discussion of the *Moore* case, see Falender, *Property, 1980 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 343, 364 (1980).

[51]180 Ind. App. at 431, 388 N.E.2d at 612.

[52]437 N.E.2d at 97.

[53]*Id.*

[54]*Id.*

[55]437 N.E.2d 1010 (Ind. Ct. App. 1982).

[56]*Id.* at 1010.

erty to them.[57] The court of appeals reversed the trial court decision ordering Larabee to convey the property.[58] The appellate court held that a written promise to transfer property in the future did not constitute a gift.[59] The court listed the requirements for a valid inter vivos gift: donor competency, free will, completion of the gift, delivery and acceptance of the property, and immediate and absolute effect.[60] The court found that the gift was not complete because the deed had not been conveyed, and that it was not immediately effective as the property was to be transferred at some future date.[61]

The court did not expressly state the rationale usually relied on in this type of case—that a court will not enforce a promise unsupported by consideration.[62] The plaintiffs in *Larabee* might have invoked the doctrine of promissory estoppel, an equitable doctrine holding that a promise unsupported by consideration may be enforceable if (1) the promisor should reasonably have foreseen that his promise would induce reliance by the promisee, (2) the promisee did in fact materially change position in reliance on the promise, and (3) justice requires that the promise be enforced.[63] On facts substantially similar to *Larabee*, the supreme court, in *Horner v. McConnell*,[64] compelled conveyance of real property from a father and his wife to his daughter and her husband. In *Horner*, the daughter and her husband had taken possession of and made substantial improvements on the property in reliance on the owners' promise to convey the land as a gift. In that case the court held that the younger couple's expenditure of money on the property in reliance on the promise constituted sufficient consideration, in equity, to require enforcement of the promise.[65]

E. Real Estate Transactions

1. Real Estate Brokers.—In *Shrum v. Dalton*,[66] a property owner appealed from a decision granting a real estate broker a commission on a sale of the property owner's farm. The broker and seller had entered into an exclusive listing agreement. When a potential buyer was procured, a written offer to purchase was executed. The offer to purchase, which contained a commission clause, was contingent upon the buyer's selling two other properties. The contingency was not contained in the written

---

[57] *Id.* at 1011.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *See, e.g.* , Hathaway v. Roll, 81 Ind. 567 (1882).
[63] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).
[64] 158 Ind. 280, 63 N.E. 472 (1902).
[65] *Id.* at 286-87, 63 N.E. at 474-75.
[66] 442 N.E.2d 366 (Ind. Ct. App. 1982).

contract and was, therefore, an oral term of the agreement. The court stated that " '[a] contract partly in writing and partly in parol is a parol contract, and does not satisfy a statute requiring a written contract.' "[67] Since an oral contract for the sale of land is unenforceable,[68] the broker was not entitled to a commission based on procurement of such a contract.[69]

In *Deltona Corp. v. Weiss*,[70] a licensed real estate salesperson contended that recovery on an oral contract to pay a commission on the sale of real estate was enforceable because the salesperson was an employee of the seller.[71] The court, however, held that the oral contract to pay the commission was unenforceable[72] and further stated that no alternative theory could be invoked to bypass the rule.[73]

2. Vendor-Vendee.—In *Kokomo Veterans, Inc. v. Shick*,[74] the court addressed the issues of whether the defendant-seller had the apparent authority to enter into a land sale contract,[75] and whether the failure to fulfill a condition precedent of the contract precluded an action for specific performance.[76] The property involved, which was used to hold V.F.W. meetings, was listed for sale. Negotiations between the plaintiff Schick and trustees of the V.F.W. Post culminated in a signed counter-offer by the V.F.W. Post which was accepted and signed by Schick. After entering into the contract, the parties were informed that the property was owned by Kokomo Veterans, Inc., and not by the V.F.W. Post. Thereafter, the officers of Kokomo Veterans authorized the sale in a signed document. Later, after Schick had obtained working capital by refinancing his home and had begun work on the property, he was informed that floor approval of the sale was necessary. When floor approval was not obtained, Schick brought an action for specific performance of the sales contract.[77]

The defendant-seller claimed that the parties who signed the contract did not have authority to enter into a binding agreement.[78] The Indiana Court of Appeals, however, applied the doctrine of equitable estoppel[79] and affirmed the trial court's order of specific performance.[80] Under the

---

[67] *Id.* at 370 (quoting Ward v. Potts, 228 Ind. 228, 234, 91 N.E.2d 643, 645 (1950)).

[68] Indiana's statute of frauds requires land sale contracts to be in writing. 442 N.E.2d at 369 (citing IND. CODE § 32-2-1-1 (1976)).

[69] 442 N.E.2d at 370.

[70] 441 N.E.2d 697 (Ind. Ct. App. 1982).

[71] *Id.* at 699.

[72] *Id.* (citing IND. CODE § 32-2-2-1 (1982)).

[73] 441 N.E.2d at 699-700.

[74] 439 N.E.2d 639 (Ind. Ct. App. 1982).

[75] *Id.* at 642.

[76] *Id.* at 643.

[77] *Id.* at 642.

[78] *Id.* at 643.

[79] *Id.* at 644.

[80] *Id.* at 646.

doctrine of equitable estoppel a principal is estopped to deny the authority of an agent whom the principal has cloaked with apparent authority when a third party has been induced to change position in reliance on the apparent authority of the agent.[81] The court also noted that the sale had been ratified by the corporation.[82] The court had little sympathy for the defendant-seller, since it was apparent to the court that the defendant was balking at the sale because of an increase in interest rates which had made the sale less favorable to the defendant.[83]

Another issue raised in the case was the effect on the action for specific performance of two unfulfilled conditions precedent to the contract.[84] The two conditions were the workability of an air conditioner and the purchaser's being able to obtain a change in use permit. The court stated that a party could not raise the nonfulfillment of a condition precedent as a bar to enforcement of a contract when it was the party's duty to procure fulfillment.[85] The court also noted that the party benefited by a condition precedent to a contract may waive fulfillment of that condition.[86]

In *Zalewski v. Simpson*,[87] a vendor sued purchasers for damages under a liquidated damages clause in a contract of sale when the purchasers refused to perform the contract.[88] The purchasers alleged that the vendor failed to provide them with a survey and title materials.[89] The court ruled that supplying the documents to the lender did not constitute a material breach of the contract where the documents were available to the purchasers for more than thirty days prior to closing, and where the purchasers failed to object after having been notified three days prior to the scheduled closing that the materials were in order and had been delivered to the purchasers.[90]

The court also upheld a liquidated damages provision in the contract which provided for damages of ten percent of the sale price plus seven percent of the price for a real estate commission.[91] The court noted that liquidated damages provisions are upheld when two conditions are met: (1) when the nature of the contract is such that damages are uncertain and difficult to ascertain, and (2) when the designated sum is not grossly disproportionate to the loss that might result.[92] The court upheld the pro-

---

[81] *Id.* at 643.
[82] *Id.* at 644.
[83] *Id.*
[84] *Id.* at 645.
[85] *Id.* (citing Billman v. Hensel, 391 N.E.2d 671 (Ind. Ct. App. 1979)).
[86] 439 N.E.2d at 645.
[87] 435 N.E.2d 74 (Ind. Ct. App. 1982).
[88] *Id.* at 75.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 77.
[92] *Id.* (citing General Bargain Center v. American Alarm Co., 430 N.E.2d 407, 411 (Ind. Ct. App. 1982)).

vision even though the "damages awarded seem[ed] rather high," and actual damages were apparently ascertainable and less than the amount of liquidated damages.[93]

In *South v. Colip*,[94] the purchase agreement contained a waiver clause stating that the "purchaser hereby releases the seller, brokers, REALTOR(S) and salespeople herein from any and all liability relating to any defect or deficiency affecting said real estate, which release shall survive the closing of the transaction."[95] The realtor told the purchasers that there was no need to worry about the property's condition, and made several other statements "to the effect that all the major systems and appliances were new or in good condition."[96] The realtor also informed the plaintiffs that they could make the "purchase contingent upon an independent professional inspection of the property."[97] After the purchasers took possession, they experienced several problems with the house and initiated an action for fraud, seeking $150,000 in damages.

The court reached two conclusions. First, the plaintiffs' action for fraud failed because the element of reasonable reliance by the plaintiffs on the misrepresentations of the defendant was missing.[98] Second, the court held that because there was no disparity in bargaining power, and because the realtor told the plaintiffs that they could make the contract contingent on an independent professional inspection, the waiver clause was not unconscionable.[99]

In *Dunfee v. Waite*,[100] the vendor sought foreclosure of a land sales contract when the purchasers failed to make timely payment of real estate taxes.[101] However, on the day of trial the purchasers paid the amount owed to the county on the tax obligation and paid to the vendor the amount they thought was owed to the vendor on the tax obligation.[102] The court of appeals upheld the trial court's verdict that the vendor was not entitled to foreclosure.[103]

The court of appeals found that the vendees were entitled to the defense of tender.[104] Although the defense of tender requires the defendant to bring full payment to the court at trial, a good faith mistake about the amount due the vendor, where the discrepancy between the

---

[93]435 N.E.2d at 78.
[94]437 N.E.2d 494 (Ind. Ct. App. 1982).
[95]*Id.* at 496.
[96]*Id.* at 495.
[97]*Id.* at 498.
[98]*Id.* at 499.
[99]*Id.*
[100]439 N.E.2d 664 (Ind. Ct. App. 1982).
[101]*Id.*
[102]*Id.* at 665.
[103]*Id.* at 666.
[104]*Id.*

amount due and the amount tendered was relatively small, did not affect the validity of the defense.[105] Tender after the institution of suit did not, however, avoid the assessment against the defendants of the plaintiff's attorneys fees, costs, and interest.[106]

In *Ridenour v. France*,[107] the vendor sought specific performance of a land sales contract. Prior to the execution of the contract, the vendees had rented the property from the vendors. Before the closing, the house on the property to be sold was destroyed by fire. The vendees had relied on the fact that the vendors had not refunded any of the July, 1978 rent, had used certain outbuildings rent-free, and had continued to insure the property;[108] thus, the vendees argued that the vendor retained equitable ownership and that the landlord-tenant relationship remained.[109] The court rejected this argument and found that, absent an agreement to the contrary, the risk of loss passed to the purchasers as equitable owners of the property, upon the formation of the contract of sale.[110] Therefore, the court ordered specific performance of the land sale contract.[111]

F. Water Law

In the United States, modern law with respect to surface water[112] has evolved from two diametrically opposed rules: the common enemy rule

---

[105]*Id.*

[106]*Id.* In Gorbett v. Estelle, 438 N.E.2d 766 (Ind. Ct. App. 1982), the court stated that where a vendor repeatedly accepts late payments, the vendor waives the right to terminate the contract for lateness of payment. *Id.* at 769. The court also noted that personal notice to the purchasers was required before the vendors could reinstate the term of the contract requiring that timely payments be made. *Id.*

[107]442 N.E.2d 716 (Ind. Ct. App. 1982).

[108]*Id.* at 717.

[109]*Id.*

[110]*Id.*

[111]*Id.* at 718. The court did not indicate whether the vendor recovered under the insurance policy. The court needed to address the issues of whether the insurance company should have been obligated to pay and whether the vendee should have been given an abatement. *Cf.* Indiana Ins. Co. v. Sentry Ins. Co., 437 N.E.2d 1381 (Ind. Ct. App. 1982) stating that:

> Although it is true that in an action between the vendee and the vendor the vendee would usually bear the risk of loss, this legal principle is irrelevant in the instant case. To hold otherwise would state that when the vendee bears the risk of loss (which is usually the case), the insurer of the vendor's interest would never pay for a loss even though it accepted the premiums from the vendor; the vendee would then become the insurer and the insurance company would be relieved of is role as insurer and allowed to reap the windfall of the premiums it collected from the vendor.

Id. at 1388 (footnote omitted).

[112]Indiana defines surface water as "[w]ater from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has

and the civil law rule.[113] Under the common enemy rule, surface water is treated as a common enemy with which every landowner may deal as he sees fit regardless of the consequences to any other property owners. Under the civil law rule, a landowner is precluded from altering or interfering with the natural flow of surface water. Both rules are based upon real property concepts and, in their purest form, both can lead to harsh results.[114] Due to this harshness, these rules have been modified in all jurisdictions in the United States.[115] While many states retain the common enemy rule or civil law rule with only minor modifications, a substantial number of states have adopted what has come to be known as the reasonable use rule,[116] which is based on tort concepts rather than property concepts.[117] The reasonable use rule allows each landowner "to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage."[118] Indiana initially adopted the common enemy doctrine[119] and has traditionally followed this rule with minor modifications.[120]

In December, 1981, the third district court of appeals adopted the reasonable use rule regarding surface water in *Rounds v. Hoelscher*.[121] The court in *Rounds* held that a landowner may not use his property so as to cause unnecessary injury to others.[122] Judge Hoffman, although concurring in the result, criticized the majority for not following the rule of precedent.[123] He noted that the reasonable use rule lacked predictability

---

no definite banks or channel." Capes v. Barger, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953) (citing Taylor v. Fickas, 64 Ind. 167 (1878); Ramsey v. Ketcham, 73 Ind. App. 200, 127 N.E. 204 (1920)).

[113]For a general discussion of surface water law, see 78 AM. JUR. 2D *Waters* §§ 119-22 (1975).

[114]Both rules have been the subjects of sharp criticism. *See* Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72 (1968).

[115]Argyelan v. Haviland, 435 N.E.2d 973, 975 (Ind. 1982).

[116]The reasonable use rule apparently was first adopted in Bassett v. Salisbury Mfg. Co., 43 N.H. 569 (1862). *See* Annot., 59 A.L.R.2D 421, 435 (1958).

[117]*See* RESTATEMENT (SECOND) OF TORTS § 833 (1979).

[118]Pendergrast v. Aiken, 293 N.C. 201, 219, 236 S.E.2d 787, 796 (1977).

[119]*See* Taylor v. Fickas, 64 Ind. 167 (1878); 29 I.L.E. *Waters* § 52 (1960).

[120]*See* Conner v. Woodfill, 126 Ind. 85, 25 N.E. 876 (1890) (landowners may not shed the water from their building so as to throw it upon lands of others); Davis v. City of Crawfordsville, 119 Ind. 1, 21 N.E. 449 (1889) (landowner may not collect the water in a volume and cast it upon land of another); Templeton v. Voshloe, 72 Ind. 134 (1880) (water may not be conducted by new channels in unusual quantities onto particular parts of the lower field).

[121]428 N.E.2d 1308 (Ind. Ct. App. 1981).

[122]*Id.* at 1315.

[123]*Id.* at 1316-18 (Hoffman, J., concurring).

and would prevent lawyers from being able to advise their clients with any degree of certainty.[124]

In April, 1981, the second district court of appeals had applied the common enemy rule to a surface water dispute in *Argyelan v. Haviland*.[125] The Indiana Supreme Court granted a petition to transfer in *Argyelan* to settle the split between the circuits and to clarify Indiana law.[126] In *Argyelan*, the defendants had acquired a tree and grass covered parcel adjacent to the plaintiffs' residential lot.[127] The defendants, after having their lot rezoned commercial, removed all the grass and trees, raised the level of the lot two to three feet, constructed two buildings and paved most of the remaining ground surface. As a result of these improvements, water from defendants' parcel drained into plaintiffs' lot. After a moderate rain, water accumulated three to four inches deep around the plaintiffs' garage and utility shed, and covered their garden and part of their driveway.

After postulating that Indiana would not allow a malicious or wanton exercise of drainage rights under the common enemy doctrine,[128] the supreme court found that in Indiana the only judicially recognized limitation on those rights "is that one may not collect or concentrate surface water and cast it, in a body, upon his neighbor."[129] Specifically overruling the *Rounds* decision, the court held that, except as modified by the cases prohibiting an artificial casting of surface water on a neighbor in unusual quantities,[130] the Indiana law regarding surface water remained as stated in *Taylor v. Fickas*:[131]

> "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of [an] adjoining owner that an alteration in the mode of its improvement or

---

[124]*Id.* at 1318.

[125]418 N.E.2d 569 (Ind. Ct. App. 1981), *vacated*, 435 N.E.2d 973 (Ind. 1982).

[126]435 N.E.2d 973 (Ind. 1982).

[127]The facts are taken from the dissenting opinion. *Id.* at 979-81 (Hunter, J., dissenting).

[128]The court defined the common enemy rule as follows:

> [S]urface water which does not flow in defined channels is a common enemy and . . . each landowner may deal with it in such manner as best suits his own convenience. Such sanctioned dealings include walling it out, walling it in and diverting or accelerating its flow by any means whatever.

435 N.E.2d at 975.

[129]*Id.* at 976 (citing Cloverleaf Farms, Inc. v. Surratt, 169 Ind. App. 554, 349 N.E.2d 731 (1976); Gene B. Glick Co. v. Marion Constr. Corp., 165 Ind. App. 72, 331 N.E.2d 26 (1975)).

[130]*See* case cited *supra* note 120.

[131]64 Ind. 167 (1878).

> occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow."[132]

In rejecting the reasonable use rule the court stated that while "courts should not be slow to respond to changing conditions, changes in the established law are not warranted simply because it is imperfect."[133] The court added that the examples of other states need not be followed until it is shown that theirs is the better way.[134] The court saw no need to adopt a rule which would remove the advantage from the owner of the highest ground and which, due to its lack of predictability, would make drainage commissions of already overburdened courts.[135]

In a well-reasoned dissenting opinion,[136] Justice Hunter, joined by Chief Justice Givan, criticized the majority for rejecting the reasonable use rule without examining the reasons for adopting it or addressing the strengths and weaknesses of the different positions.[137] Justice Hunter noted that modern technology, which can radically alter existing drainage patterns and natural surfaces, can produce surface water disputes for which the common enemy rule is inadequate.[138] In addition, Justice Hunter would have found this case indistinguishable from *Conner v. Woodfill*,[139] and thus within Indiana's modified common enemy doctrine.[140] In his view, the majority decision presented Indiana "with a rule of law and result so inimical to any sense of justice, be it lay or legal, that it offends our system of jurisprudence."[141]

The result in *Argyelan* not only establishes the common enemy doctrine as the law in Indiana regarding surface waters, but also suggests that any modifications to the doctrine are to be strictly construed. The strict construction of the modifications was shown in *Kramer v. Rager*.[142] In *Kramer*, the court of appeals found that the defendant's use of a drainpipe to divert water to a culvert, through which it passed onto a neighbor's

---

[132]435 N.E.2d at 976-77 (quoting *Taylor*, 64 Ind. at 173).

[133]435 N.E.2d at 977.

[134]*Id.*

[135]*Id.*

[136]*Id.* at 978 (Hunter, J., dissenting).

[137]*Id.* at 984.

[138]*Id.* at 987.

[139]126 Ind. 85, 25 N.E. 876 (1890). The majority distinguished *Conner* based on the nature of the flow of water entering the neighbor's property. 435 N.E.2d at 976.

[140]435 N.E.2d at 983 (Hunter, J., dissenting).

[141]*Id.* at 978.

[142]441 N.E.2d 700 (Ind. Ct. App. 1982).

land, was analogous to the use of downspouts in *Argyelan* and valid under the common enemy rule.[143]

G. Landlord and Tenant

The traditional legal maxim caveat emptor is slowly being replaced, making vendors and landlords responsible for the real estate they transfer under the theory of implied warranty of habitability. Since the late 1960's, many jurisdictions have adopted this theory either by legislative enactment or by judicial decision.[144]

The Indiana Court of Appeals has recognized an implied warranty of habitability although the boundaries of the doctrine remain largely undefined.[145] The first Indiana decision to declare an implied warranty of habitability in residential leases was *Old Town Development Co v. Langford*.[146] The implied warranty of habitability for residential leases has been defined as having two parts: (1) a warranty that the leasehold at the time of transfer is free from latent defects rendering the premises unsuitable for residential habitation; and (2) a promise that the leashold will remain suitable for residential habitation for the entire term, which includes an implied duty to repair.[147]

The implied warranty of habitability was recognized again in *Breezewood Management Co. v. Maltbie*.[148] In *Breezewood*, the plaintiff-landlord sued for rent due and the tenants counterclaimed for damages and rent abatement. A city inspection of the property revealed over fifty housing code violations, including eleven "life-safety" violations.[149] By law, the violated provisions of the city housing code had been incorporated into the lease because the code was in effect when the lease was executed.[150] The court concluded that the landlord had breached the implied warranty of habitability.[151] However, the court severely limited its holding by stating that it was within the parties' rights to rent or lease according to their reasonable expectations, and that where the parties enter into a lease not

---

[143]*Id.* at 706.

[144]For a list of statutes and decisions of forty states and the District of Columbia recognizing an implied warranty of habitability in residental leases, see Pugh v. Holmes, 486 Pa. 272, 281 n.2, 405 A.2d 897, 901 n.2 (1979).

[145]*See* Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 641-43 (1977).

[146]349 N.E.2d 744 (Ind. Ct. App. 1976), *cause dismissed*, 267 Ind. 176, 369 N.E.2d 404 (1977). The effect of this case was erased when the Indiana Supreme Court granted a petition to transfer but then dismissed without decision when the parties reached a settlement. *See* IND. R. APP. P. 11(b)(3).

[147]349 N.E.2d at 774.

[148]411 N.E.2d 670 (Ind. Ct. App. 1980).

[149]*Id.* at 671.

[150]*Id.* at 675.

[151]*Id.*

in violation of local housing codes and the premises are what they appear, no action for breach of implied warranty of habitability will lie.[152]

During the survey period, the same Indiana Court of Appeals that handed down the *Breezewood* decision refused to extend an implied warranty of habitability to the facts in *Zimmerman v. Moore*.[153] In *Zimmerman*, a tenant suffered injuries in a fall while attempting to climb the steps at the rear of her single-family residence. The tenant brought suit against the landlord on theories of negligence, breach of a covenant to repair, and breach of implied warranty of habitability.[154] After examining the history of implied warranties of habitability in Indiana regarding both leases and sales, the court of appeals reversed the trial court's award of damages and declined "to extend an implied warranty of habitability to the rental of a single-family, used dwelling."[155] The court noted that the cases cited by the plaintiff, which found implied warranties of habitability, dealt with large city apartment projects managed by professionals.[156] The justifications for those cases, the court explained, were that landlords have greater knowledge or expertise and are better able to absorb and spread the loss.[157] The court found neither justification applicable in *Zimmerman* which involved "a non-merchant lessor who casually rents a single-family dwelling."[158]

While the doctrine of implied warranty of habitability has been adopted by judicial decision, its exact boundaries are yet to be determined. Limited by the facts of the cases it reviews, the judiciary is not the best place to make the fine lines defining the limits of the doctrine. Instead the legislature should participate in the law making on this issue and enact a statute regarding this doctrine.

In *Crowell v. Septer*,[159] the landlord brought an action for eviction and the tenant counterclaimed for damages sustained from a fall on a wet floor caused by a roof leak. The tenant's action was based upon the landlord's breach of a promise to repair the roof.[160] The court of appeals stated that, even when a landlord has contracted to make repairs, where the cost of repair is minimal the tenant must mitigate his damages by making the repairs and deducting the cost from the rent.[161] The exception

---

[152] *Id.* at 675 n.2. It would appear that housing codes may provide the current standard for implied warranty of habitability.

[153] 441 N.E.2d 690 (Ind. Ct. App. 1982).

[154] *Id.* at 692.

[155] *Id.* at 696.

[156] *Id.* at 695.

[157] *Id.* at 695-96.

[158] *Id.* at 696. The court compared this case to Vetor v. Shockey, 414 N.E.2d 575 (Ind. Ct. App. 1980), where the court rejected the extension of the doctrine of implied warranty of habitability to the sale of used housing by non-builder vendors.

[159] 433 N.E.2d 803 (Ind. Ct. App. 1982).

[160] *Id.*

[161] *Id.* at 804-05.

to this rule is that the tenant may recover if the landlord, after covenanting to make repairs and receiving notice, has repeatedly promised to repair and the tenant in good faith has relied on the landlord's promises.[162]

H. Eminent Domain

The traditional formula for determining damages for a leasehold interest in land taken under eminent domain is the fair market rental value of the property for the remaining term of the lease less the amount of rent contracted to be paid.[163] However, in appropriate circumstances valuation of the leasehold interest may be determined by a capitalization of income method.[164] Under this method of valuation, an independent value is given to the land, then the value of the improvements, arrived at by capitalizing actual or reasonable income at a reasonable rate of return, are added to this value.[165] In *J.J. Newberry Co. v. City of East Chicago*,[166] the court of appeals recognized the capitalization of income method for determining leasehold value but upheld the trial court's valuation using the fair market value.[167]

J.J. Newberry Co. held a twenty-five year lease for a certain piece of real estate and the improvements thereon. Newberry operated a variety store on the premises until a fire completely destroyed the building. The land remained unimproved during years of litigation between Newberry and the lessors,[168] and eventually, in an effort to clean up blighted areas, the City of East Chicago condemned the property. A trial was held to determine the amounts to be awarded to the parties. The court concluded that the lessors were entitled to $44,240, while Newberry was entitled to $760. The trial court determined the value of Newberry's leasehold interest by the fair market value method. Newberry appealed, arguing that the court should have used the income capitalization method.[169]

While the court of appeals recognized that the capitalization method might be appropriate in certain circumstances, it agreed with the trial court that the capitalization method was not applicable here, where the building Newberry used to produce income had been completely destroyed.[170] Newberry also argued that the trial court misapplied Indiana law when

---

[162]*Id.* at 805.

[163]J.J. Newberry Co. v. City of East Chicago, 441 N.E.2d 39, 42 (Ind. Ct. App. 1982) (citing State v. Heslar, 257 Ind. 307, 274 N.E.2d 261 (1971)).

[164]J.J. Newberry Co. v. City of East Chicago, 441 N.E.2d 39, 42 (Ind. Ct. App. 1982) (citing State v. Nelson, 156 Ind. App. 399, 296 N.E.2d 908 (1973)).

[165]J.J. Newberry Co. v. City of East Chicago, 441 N.E.2d 39, 42 (Ind. Ct. App. 1982) (citing 4 SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.32(3)(c) (3d rev. ed. 1981)).

[166]441 N.E.2d 39 (Ind. Ct. App. 1982).

[167]*Id.* at 42.

[168]*Id.* at 41.

[169]*Id.*

[170]*Id.* at 42.

it concluded that the sum of the interests of the lessors and Newberry could not exceed the value of the premises as a whole. The court of appeals found the issue resolved by the Indiana Supreme Court in *State v. Montgomery Circuit Court*,[171] which stated that "[f]or the purposes of condemnation proceedings, the value of all the interests or estates in a single parcel of land cannot exceed the value of the property as a whole."[172] While Newberry classified the passage in *Montgomery* as dicta, the court of appeals refused to deviate from this rule, known as the "undivided fee rule," without action by the Indiana Supreme Court.[173]

---

[171]239 Ind. 337, 157 N.E.2d 577 (1959).

[172]*Id.* at 340 n.1, 157 N.E.2d at 578 n.1, *quoted in J.J. Newberry Co.*, 441 N.E.2d at 43.

[173]441 N.E.2d at 43.