XII. Property

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A. Adverse Possession

The requirement that the possession necessary to acquire title by adverse possession[1] be "hostile"[2] was at issue in *Poole v. Corwin*.[3] In *Poole* the Indiana Court of Appeals interpreted a provision in a deed, declaring that the deed would be void and the property would revert to the grantor or his heirs if the grantee railroad should ever fail to maintain a passenger depot on the adjoining tract of land, to create a fee simple determinable in the railroad with a possibility of reverter.[4] A passenger depot had not been maintained on the adjoining tract of land since 1957; and in 1980, the Penn Central Railroad Corporation, the grantee's successor in interest, sold the property to Poole. Poole brought an action to quiet title based on adverse possession, but the trial court granted summary judgment for Corwin's descendants. On appeal, Corwin argued that the possession by Penn Central after the depot was closed on the adjoining property, and, therefore, the possession of Poole, was not "hostile" since the initial entry was subservient to Corwin's possibility of reverter, and that the possession could not become hostile until Corwin was given actual notice that the possession was no

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[1]To acquire title by adverse possession the possession must be: (1) actual, (2) visible, (3) open, (4) notorious, (5) exclusive, (6) under a claim of ownership, (7) hostile, and (8) continuous for the statutory period of limitations. Piel v. Dewitt, 170 Ind. App. 63, 69, 351 N.E.2d 48, 53 (1976). In Indiana, the statutory period necessary to acquire title by adverse possession is 10 years. IND. CODE § 34-1-2-2 (1982). The adverse possessor must also pay all taxes on the property. IND. CODE § 32-1-20-1 (1982). However, in boundary line disputes where the payment of taxes will not serve as notice to the record titleholder, the statute requiring the payment of taxes is not a supplementary element of adverse possession. Echterling v. Kalvaitis, 235 Ind. 141, 126 N.E.2d 573 (1955); Klein v. Kramer, 179 Ind. App. 592, 386 N.E.2d 982 (1979).

[2]Where a life tenant, co-owner, tenant, purchaser under contract, or member of the owner's family takes possession of the property, such possession is not inconsistent with or adverse to the title of the remainderman, co-owner, landlord, vendor, or owner. *See* 3 AMERICAN LAW OF PROPERTY § 15.4a (Supp. 1976). In order to make such possession hostile, and thus begin the running of the statute of limitations, the possessor must give notice to the owner that he is acting adversely. Piel v. DeWitt, 170 Ind. App. 63, 351 N.E.2d 48 (1976).

[3]447 N.E.2d 1150 (Ind. Ct. App. 1983).

[4]*Id.* at 1151.

longer subservient to his title.[5] The court agreed that "where entry upon the land [is subordinate] to the title of another, the statutory period for adverse possession does not begin to run until the occupant clearly disclaims and disavows the title of the true owner."[6] The court did not agree, however, that "actual notice" to the owner was required, finding that "constructive notice" is sufficient "[w]hen hostile acts are so manifest and notorious that a reasonable owner should have been aware of them."[7] The court concluded that because it was common knowledge that the railroad no longer maintained a passenger depot on the adjoining land, the railroad and Poole's possession was hostile, and Poole acquired title by adverse possession.[8]

Although the court did not cite *Piel v. DeWitt*[9] which held that actual notice was required to begin the period of adverse possession running against a remainderman, had it done so, it could have easily distinguished the *Piel* notice requirement. In *Piel*, the life tenant, believing herself to be the owner of the fee, executed a warranty deed to the grantee purporting to convey a fee simple absolute title. The deed, together with an affidavit of transfer, was properly recorded, and the grantee took possession and paid the taxes on the property for the period of time necessary to acquire title by adverse possession. Nevertheless, the court held that the possession was not adverse to the remainderman since "[a]bsent actual notice, the life tenant cannot possess the land adverse to the remainderman."[10] A remainderman would have no reason to suspect that a life tenant was acting adverse to his interest, and in *Piel* the court held that the remainderman had no duty to search the public records to see if the life tenant had attempted to wrongfully convey his interest.[11] One could make a strong argument that the possession by the holder of a fee simple determinable is less subservient to the title of the holder of the possibility of reverter than is the possession of a life tenant to the interest of the remainderman, and therefore, the holder of the possibility of reverter should be required to inspect the land to ensure the condition (special limitation) has not been violated. The scant authority on point supports the position taken by the court, requiring "constructive notice" to the holder of the possibility of reverter.[12] Since the court concluded that an "open and notorious" act can

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[5]*Id.* at 1152.

[6]*Id.* (citation omitted).

[7]*Id.*

[8]*Id.* at 1152-53.

[9]170 Ind. App. 63, 351 N.E.2d 48 (1976).

[10]*Id.* at 67, 351 N.E.2d at 52.

[11]*Id.* at 72-73, 351 N.E.2d at 55. A similar result would follow in the case of cotenants. *See* Hare v. Chisman, 230 Ind. 333, 342, 101 N.E.2d 268, 279 (1951).

[12]School Dist. Township of Richland v. Hanson, 186 Iowa 1314, 173 N.W. 873 (1919).

constitute constructive notice, however, the notice requirement in such cases does not appear to place an undue burden on the party claiming title by adverse possession.

B. Concurrent Estates and Partition

Generally speaking, a tenant in common or a joint tenant can force a partition of the land.[13] Traditionally, however, the party seeking the partition must have a present possessory interest, either actual possession or the right to immediate possession of the property.[14] Today, a number of states have enacted statutes which permit partition by co-owners of future interests.[15]

Whether a present possessory interest is required to partition land in Indiana was raised in *Bronson v. Bronson*.[16] In *Bronson* the decree dissolving the marriage of Eleanor and Stephen Bronson provided that the family home was to be owned by the parties as tenants in common, but that Eleanor was to have exclusive possession of the home "'until she remarries or does not occupy same as her principal residence, or until both parties agree to sell.'"[17] Subsequently, Stephen sought to partition the home. The trial court dismissed the petition and the plaintiff appealed.

On appeal, the court noted that while it is often stated that joint tenants and tenants in common have the right to partition property, either actual possession or the right to immediate possession is required.[18] The Indiana statute governing the right to partition states only: "Any person holding lands as joint tenant or tenant in common, whether in his own right or as executor or trustee, may compel partition thereof . . . ."[19] The cases interpreting this statute, however, have held that it was not intended to change the common law requirement that the party seeking the partition must have a possessory interest.[20] There is, however,

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[13]J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 96 (2d ed. 1975); 4 G. THOMPSON, REAL PROPERTY § 1822 (1979 Replacement). A tenancy by the entirety cannot be partitioned without the consent of both parties since neither owns an individual share.

[14]2 R. POWELL, REAL PROPERTY § 289 n.8 (P. Rohan rev. ed. 1968); 4 G. THOMPSON, *supra* note 13, at § 1823.

[15]2 R. POWELL, *supra* note 14, at § 290.

[16]448 N.E.2d 1231 (Ind. Ct. App. 1983).

[17]*Id.* at 1232 (quoting the property settlement agreement).

[18]*Id.* at 1233.

[19]IND. CODE § 32-4-5-1 (1982).

[20]Schori v. Stephens, 62 Ind. 441 (1878); Godfrey v. Godfrey, 17 Ind. 6 (1861); Hurwich v. Zoss, 170 Ind. App. 542, 353 N.E.2d 549 (1976); Brunner v. Tevman, 150 Ind. App. 139, 275 N.E.2d 553 (1971). Cases decided both prior and subsequent to the adoption of this statute have held that in order to sustain an action for partition, either legal or equitable title and the right to possession must be in the party maintaining the action. Mclure v. Raber, 106 Ind. App. 359, 19 N.E.2d 891 (1939); Weaver v. Gray, 37 Ind. App. 35, 76 N.E. 795 (1906).

as the court noted, one exception to the rule. Indiana Code, section 32-4-6-1 provides that a remainderman may force a partition of the land where one of the remaindermen also has a life estate in this land. If the decree were interpreted as giving Eleanor a life estate and Eleanor and Stephen the remainder, then a partition might have been possible. In his brief, however, Stephen conceded that the decree did not create a life estate in Eleanor.[21] Perhaps the appellants were too quick to concede that Eleanor's interest was not a life estate. While it is difficult to put a label on the estate created by the divorce decree, the language that Eleanor can live in the house "until she remarries or does not occupy same as her principal residence" is not unlike the language used to create a life estate determinable.[22] Another point which the court failed to consider is that if the interest is not a life estate, then the only alternative under traditional property law is a nonfreehold estate. In such a case, there is considerable authority that the co-owners of the reversionary interest following a nonfreehold estate may in fact partition their interest subject to the nonfreehold interest because seizing is in the reversion.[23] Yet even if the court had considered the issue and determined that the divorce decree created a life estate determinable in Eleanor, the court still might have refused to apply the statute allowing partition where one tenant in common also owns a life estate. Most likely, the court would have concluded from the language requiring both parties to agree to a sale prior to the happening of one of the conditions terminating Eleanor's right to possession that the property settlement incorporated into the divorce decree created an agreement not to partition. While co-tenants generally have the right to partition, courts recognize the right of the parties to agree not to partition, provided the agreement is reasonable.[24] Thus the court might well have reached the same result even if they had found Eleanor's interest to be a life estate.

C. *Deeds*

1. Deed in Escrow to be Delivered at Grantor's Death.—One of the essential elements necessary to convey property by deed is a valid delivery. It is very common in gifts of land to deliver the deed to a third party with instructions to deliver the deed to the grantee at some future time, often the death of the grantor.[25] Such a delivery is valid and effective

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[21]Appellants' Brief at 15, *Bronson*, 448 N.E.2d at 1233 n.1.

[22]R. CUNNINGHAM, W. STOEBUCH, & D. WHITMAN, THE LAW OF PROPERTY 73 (1984) [hereinafter cited as R. CUNNINGHAM]. Clearly, the interest of Eleanor could potentially have lasted for her lifetime if she did not remarry or cease to use the house as her principal residence.

[23]4 G. THOMPSON, *supra* note 13, § 1826.

[24]J. CRIBBET, *supra* note 13, at 106; R. CUNNINGHAM, *supra* note 22, at 231-32.

[25]Practically all states recognize that an effective delivery may be made to a third party with directions to hold the deed and deliver it to the grantee at the grantor's death. 23 AM. JUR. 2D *Deeds* § 144 (1983).

to transfer title to the grantee, provided the grantor intends the physical transfer of the deed to the third party to pass title to the grantee immediately[26] and the grantor retains no dominion and control over the deed or any right to recall it.[27] The fact that the deed is held by the agent until after the grantor's death does not affect the validity of the deed.[28] The courts treat the deed as passing a present interest when the deed is delivered to the escrow with the enjoyment postponed until the death of the grantor.[29] The use of the donative escrow in Indiana has been somewhat complicated by the use of the "relation doctrine."[30] This doctrine has been used extensively in commercial escrows where the deed is not delivered to the grantee until the conditions of the escrow agreement have been complied with. Until such compliance, title remains in the grantor and the escrow has no authority to deliver the deed to the grantee.[31] If circumstances change during the escrow period it is often necessary to resort to the use of the relation back theory to pass title to the grantee. For example, if the grantor dies before the escrow conditions are met, it may be necessary to use the doctrine of relation back for two reasons: (1) to avoid the grantor's spouse's claim to a dower interest or statutory share of the property, which would be the situation if the grantor still owned the property at the date of death; and (2) because there could be no delivery by the grantor after his death.[32] Many courts do not use relation back in the case of a valid donative escrow because the grantor must relinquish all dominion and control over the deed at the time of delivery to the escrow agent, and the escrow agent becomes the agent of the grantee.[33] Thus, title passes at once to the grantee in the donative escrow, and there is no need to

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[26]*E.g.*, Klingaman v. Burch, 216 Ind. 695, 25 N.E.2d 996 (1940); Spencer v. Robbins, 106 Ind. 580, 5 N.E. 726 (1886); Stevenson v. Nams, 124 Ind. App. 358, 118 N.E.2d 368 (1954).

[27]*E.g.*, Dickason v. Dickason, 219 Ind. 683, 40 N.E.2d 965 (1942); St. Clair v. Marquell, 161 Ind. 56, 67 N.E. 693 (1903); Osborne v. Eslinger, 155 Ind. 351, 58 N.E. 439 (1900); Scott v. Scott, 126 Ind. App. 3, 127 N.E.2d 110 (1955).

[28]*See, e.g.*, 23 Am. Jur. 2d *Deeds* § 139 (1983); Osborne v. Eslinger, 155 Ind. 351, 58 N.E. 439 (1900); Scott v. Scott, 126 Ind. App. 3, 127 N.E.2d 110 (1955).

[29]J. Cribbet, Principles of the Law of Property, 124-25 (2d ed. 1975); R. Cunningham, *supra* note 22, at 743; 8 G. Thompson, Real Property § 4232 (1979 Replacement).

[30]The doctrine is more commonly referred to as the doctrine of "relation back." Where the delivery is not completed when the deed is placed in the hands of the escrow, problems are presented when the escrow subsequently delivers to the grantee, since the grantor may have died or become incompetent before the second delivery. To avoid these and other problems the courts treat the delivery as relating back to the time of the first delivery from the grantor to the escrow. For an excellent discussion of the doctrine, see J. Cribbet, *supra* note 29, at 185-86.

[31]*Id.* at 184-85; R. Cunnningham, *supra* note 22, at 738-42.

[32]J. Cribbet, *supra* note 29, at 185 (citing Bucher v. Young, 94 Ind. App. 586, 158 N.E. 581 (1927)).

[33]23 Am. Jur. 2d *Deeds* § 149 (1983).

use relation back.[34] Nevertheless, the Indiana courts do use the doctrine of relation back in the donative escrow situation, under the theory that the gift is not complete until accepted by the donee and thus relation back is necessary to pass title at the time of the delivery to the escrow agent.[35] *Russell v. Walz*[36] is a classic example of why this area of the law is a source of confusion and litigation.

In *Russell*, Anton Walz (Anton) made an antenuptial agreement in which his second wife, Dorothy, agreed to accept one-third of Anton's net estate in full settlement of all claims against his estate. Five years after this marriage took place, Anton conveyed a one seventy-fifth interest in one of his farms, known as "Coldwater Farm," to each of his seven children. He repeated this action three months later, and six months after that, while in the Mayo Clinic and under some apprehension of death, he conveyed a one-seventh of his remaining interest in the farm to each of his seven children. At this point Dorothy became concerned that Anton might continue transferring his property to his children and "intimated" the possibility of a divorce unless some suitable agreement could be reached. The Walzes met with an attorney, and made a compromise whereby Anton conveyed to Dorothy a one-third interest in another farm. The deed was left in escrow with the attorney, to be delivered to Dorothy upon the first of two events: written authorization from Anton's attorney, or Anton's death.[37]

At this meeting Anton learned, to his surprise, that his children could evict him from the farm he had conveyed to them. A short time later, four of his children executed quitclaim deeds conveying back to Anton most of their interest in the farm. Shortly after that, Anton deposited with his attorney a warranty deed conveying all his interest in the farm to the four children who had conveyed back their interest. The attorney was authorized to deliver the deed to the children upon the first of the following two events: written authorization from Anton to his attorney, or upon the death of Anton.[38] On the same day Anton signed his will which made reference to this deed. The will stated that "'in no event shall any portion of my said Coldwater Road farm go to satisfy [Dorothy's 1/3 interest in the estate]'" and expressed his "'intent to give said above described farm on Coldwater Road near Fort

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[34]J. CRIBBET, *supra* note 29, at 124-25; R. CUNNINGHAM, *supra* note 22, at 743; 8 G. THOMPSON, *supra* note 29, at § 4232.

[35]*See, e.g.*, Osborne v. Eslinger, 155 Ind. 351, 58 N.E. 439 (1900); Scott v. Scott, 126 Ind. App. 3, 127 N.E.2d 110 (1955); Kokomo Trust Co. v. Hiler, 67 Ind. App. 611, 116 N.E. 332 (1917).

[36]458 N.E.2d 1172 (Ind. Ct. App. 1984). For a further discussion of this case, see Falender & Fruehwald, *Trusts and Decedents' Estates, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 435, 438-40 (1984).

[37]*Id.* at 1175.

[38]The provision actually reads, "'upon the first of the following two events to occur: written authorization from my attorney, John H. Logan, . . . or on my death.'" *Id.* at

Wayne, Indiana to my children.'"[39] After Anton's death, two of his children were appointed coexecutors of his estate. The estate received two offers to purchase the Coldwater Farm. Norbert, "[a]cting for the estate," agreed to sell the farm to Russell, who deposited $20,000 earnest money.[40] The contract for sale, made with the seven adult children of Anton Walz, contained a provision that the seller was to furnish an abstract of title showing marketable title in the seller. When Russell's attorney examined the abstract, he became concerned due to the "testamentary nature" of the escrow letter from Anton to his attorney and the reference in the will to the antenuptial agreement with Dorothy. Russell's attorney requested a quitclaim deed and other documents from Dorothy and the personal representative of Anton's estate. Because Dorothy refused to sign an affidavit declaring that she had no interest in the property, Russell declined to go through with the closing and requested a return of her earnest money deposit. When the money was not returned, Russell filed suit for the return of the money with interest, claiming the children did not have marketable title to the Coldwater Farm. The trial court found for the children, and Russell appealed.[41]

The issue presented on appeal was whether or not Dorothy had a potential claim to the Coldwater Farm which would render the children's title unmarketable.[42] The court noted that to be marketable

> a title must be free from reasonable doubt, and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.[43]

1176 (quoting the escrow letter). The wording appears to have been taken from the letter to Miller creating the escrow for Dorothy, which contains the identical language. *Id.* In the Miller letter the written authorization from Anton's attorney would in fact be authorization from Anton himself, but in the letter to Logan establishing the escrow for the children, why would Logan need written authorization from himself? It reads as if Logan can accelerate the delivery. The court, however, concluded that "[Anton] Walz retained the capacity to accelerate delivery by instructing his attorney to deliver the deed before Walz' death." *Id.* at 1182.

[39]*Id.* at 1176 (quoting Anton Walz' will).

[40]*Id.* at 1177. The fact that the co-executor of Anton's estate was negotiating the sale of the Coldwater Farm indicates that some, if not all, of the children were treating the portion of the farm reconveyed to Anton as an asset of the estate. If the September 5, 1980 deed was effective as an inter vivos transfer, the farm would not be part of the estate and Nobert Walz should not have entered into the agreement to sell the farm in his capacity as executor of the estate.

[41]*Id.* at 1177-78.

[42]*Id.* at 1178. The only other issue raised was whether or not there were Indiana inheritance and federal estate tax liens which rendered the title unmarketable. Because the court reversed on the first issue, it did not address this issue. *Id.* at 1178 n.1.

[43]*Id.* at 1178 (quoting Kenefick v. Schumaker, 64 Ind. App. 552, 563, 116 N.E. 319, 323 (1917)).

The court observed that Dorothy's potential claim must be based upon her antenuptial agreement, since she had surrendered her statutory election to take against the will.[44] In order for such a claim to be a cloud on the title, the court concluded, the "farm must have been either a part of Anton Walz' net estate or the object of a fraudulent inter vivos transfer designed to remove the farm from that estate and evade Dorothy Walz' rights under the antenuptial agreement."[45]

The court first sought to determine whether or not the farm was still part of the estate. If the deed passed no interest until the death of the grantor, it would be testamentary and part of Anton's estate. If, on the other hand, the deed passed an interest to the grantee during the grantor's lifetime, it was effective as an inter vivos conveyance and the property was removed "from Anton Walz' net estate, leaving Dorothy Walz with no claim to the farm under the terms of the antenuptial agreement."[46] In discussing this point, the court gave considerable weight to the fact that Anton, after discovering that his children could evict him from the Coldwater Farm after he had conveyed it to them, had four of the children reconvey a portion of their interest back to him. This, the court suggested, created "a reasonable inference" that Anton did not intend to divest himself of control over the property: "else why require that this interest be returned to be re-assigned?"[47] The answer seems rather obvious. In the earlier conveyance to his children, Anton had not retained a life estate which would have allowed him to remain on the property and collect the rents. No doubt the establishment of the escrow, whereby an undivided one-third interest in Anton's other farm would be held for Dorothy until Anton's death, suggested to Anton a way in which he could convey his interest in his Coldwater Farm to his children and still retain the use and enjoyment of the property until his death. It is not surprising, then, that a short time later he had the children reconvey their interests so that he might set up a similar escrow arrangement for the Coldwater Farm. The fact that the deed was not to be delivered to the children until Anton's death did not make the transfer testamentary. Placing a deed in escrow to be delivered at the grantor's death has the effect of creating a life estate in the grantor and immediately passing the remainder to the grantee.[48]

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[44]458 N.E.2d at 1179.

[45]*Id.* at 1180 (citation omitted).

[46]*Id.* at 1181.

[47]*Id.* at 1182.

[48]23 AM. JUR. 2D *Deeds* § 149 (1983); J. CRIBBET, *supra* note 29, at 124-25. For simplicity, scholars and jurists often describe the interest retained by the grantor as a life estate. Technically, it is more correct to say that the deed creates an executory limitation in the grantee and that the fee remains in the grantor until his death, at which time title springs up in the grantee by operation of the deed. R. CUNNINGHAM, *supra* note 22, at 743; 8 G. THOMPSON, *supra* note 29, at § 4232.

The court also found that the use of Anton's own attorney as the escrow agent was an indication that he had not relinquished dominion and control over the deed.[49] In order to be an effective delivery, the donative escrow must be the agent of the grantee and not the agent of the grantor.[50] If the agent is in fact the agent of the grantor, his authority ends with the grantor's death and there can be no subsequent delivery.[51] Courts have found, on occasion, that there was no delivery where the deed was placed in the hands of the grantor's attorney as the escrow agent.[52] Where there was no right to recall the deed, however, most courts allow the grantor's own attorney to act as an escrow agent for the donee since the grantor has no control over the deed.[53] In the case at bar the court implied that the grantor retained control over the deed because "the question arises as to whether the deed might have been recalled had Walz so chosen."[54] There is nothing in the facts to suggest that the grantor had an express right to recall the deed. Nevertheless, the court seems to have believed that because the grantor retained the right to accelerate delivery of the deed, he had not relinquished all dominion and control over the deed.[55]

A final factor which the court found indicated that the deed was not intended to pass any interest in the Coldwater Farm until after Anton's death was the wording of Anton's will, executed on the same day that the deed to the Coldwater Farm was deposited with Anton's attorney. The will, after mentioning the antenuptial agreement with Dorothy, declared: "'but in no event shall any portion of my said Coldwater Farm go to satisfy said obligation.'"[56] If Anton had already conveyed the property to his children by deed, then the property was no longer part of the estate, and there was no need for the directive

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[49]458 N.E.2d at 1182-83.

[50]23 Am. Jur. 2d *Deeds* § 146 (1983).

[51]Grant Trust & Sav. Co. v. Tucker, 49 Ind. App. 345, 96 N.E. 487 (1911).

[52]*E.g.*, Bickford v. Mattocks, 95 Me. 547, 50 A. 894 (1901); Gilmer v. Anderson, 34 Mich. App. 6, 190 N.W.2d 708 (1971); Bull v. Fenich, 34 Wash. App. 435, 661 P.2d 1012 (1983).

[53]*E.g.*, Hodges v. Lockhead, 217 Cal. App. 2d 199, 31 Cal. Rptr. 879 (1963); Van Epps v. Arbuckle, 332 Ill. 551, 164 N.E. 1 (1928); Huxley v. Liess, 226 Iowa 819, 285 N.W. 216 (1939); Osten-Sacken v. Steiner, 356 Mich. 468, 97 N.W.2d 37 (1959); Cappozzella v. Cappozzella, 213 Va. 820, 196 S.E.2d 67 (1973).

[54]458 N.E.2d at 1183.

[55]The court seems to imply that because "Walz retained the capacity to accelerate delivery by instructing his attorney to deliver the deed before Walz' death . . . " *id.* at 1182, the directive was somehow less certain than the directive contained in the *Loesch* case that the bank "shall deliver" the deeds at the grantor's death. *Id.* at 1183. In reality, the delivery was not uncertain, because if the grantor had not authorized the agent to deliver before his death, the second event under which the attorney was to deliver the deed, the death of the grantor, would have occurred.

[56]*Id.* at 1183 (quoting Anton Walz' will).

in the will. The court went to great lengths to distinguish *Wheeler v. Loesch*.[57] In *Loesch*, the court found that two deeds delivered to the bank to hold until the grantor's death effectively passed title to the property to the grantor's children. The deeds were delivered to the bank on the same day that the grantor executed his will, and the will referred to the deeds.[58] The *Russell* court found that *Loesch* was not controlling since the words in Loesch's will, "'I have this day deeded to my son Peter . . . and to my son, John, two tracts of land'" expressed a *fait accompli*, whereas the words in Anton's will are ambiguous.[59] In light of the above, and the fact that Dorothy refused to sign the release, the court concluded that there was "a threat of litigation sufficient to render title to Coldwater Farm unmarketable."[60]

The Walz children argued that the deed should be considered a valid intervivos transfer because of the doctrine of relation back. The court responded to this argument by pointing out that "relation back" can only be used where there is a valid delivery of the deed, and here there was a litigable issue concerning delivery.[61] At this point the court could have, and perhaps should have, stopped. Instead, the court went on to indicate a second reason why the doctrine of relation back might not apply. The court observed that the doctrine of relation back has been held not to apply so as to affect the claims of creditors, and that Dorothy might be a creditor of her husband's estate.[62] The court then elaborated on the status of the spouse as a creditor in its creation of a subissue as to whether, assuming arguendo that the deed was effective as an inter vivos transfer, the "transfer was voidable as a fraudulent transfer designed to remove property from Anton Walz' net estate and

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[57]51 Ind. App. 262, 99 N.E. 502 (1912).

[58]The court in *Loesch* noted:

> Where a will and deeds are executed at the same time, it may be requisite to look at all the instruments in order to ascertain the testator's intention, but this alone will not prevent the deeds from passing title to the property described therein, or make them a part of the will.

Id. at 265, 99 N.E. at 502 (citation omitted).

[59]458 N.E.2d at 1182 (quoting Wheeler v. Loesch, 51 Ind. App. 262, 263, 99 N.E. 502, 502 (1912) (quoting Jacob Loesch's will)).

[60]458 N.E.2d at 1183.

[61]*Id.* at 1183-84.

[62]*Id.* at 1184. It is clear from the authorities cited by the court that the doctrine of relation back will not be used to defeat the claims of creditors. Nevertheless, it is a major leap to conclude that Dorothy might be a creditor. There are several older decisions suggesting that relation back can be used to defeat the wife's claim to a dower interest in property conveyed by donative escrow. Smiley v. Smiley, 114 Ind. 258, 16 N.E. 585 (1887); Bucher v. Young, 94 Ind. App. 586, 158 N.E. 581 (1927). Presently, the surviving spouse to an elective share of the estate of the deceased spouse is dependent upon the property being part of the estate and is not a vested interest in the property as was dower. *See infra* notes 69-71 and accompanying text.

thereby defeat Dorothy Walz' rights under her antenuptial agreement.''[63] To support this approach, the court cited *Dubin v. Wise*,[64] an Illinois decision which held that the husband could not intentionally dissipate his assets in order to defeat the wife's antenuptial rights.

According to *Dubin*, the inter vivos transaction can be attacked on two grounds: (1) actual intent to subvert the antenuptial agreement; or (2) fraud implied from the disproportionate and unreasonable amount of the assets transferred in relation to the balance of the promisor's property.[65] The court concluded that an argument based on *Dubin* would raise a litigable issue as to the validity of the inter vivos transaction.[66] By raising the issue of the spouse's status as a creditor for purposes of relation back and by suggesting that the deed could be set aside even if it were effective to convey the property inter vivos, the court has opened Pandora's box. This portion of the decision appears to be in conflict with the spirit if not the letter of *Leazenby v. Clinton County Bank*.[67] In *Leazenby*, the spouse transferred most of her assets into an inter vivos trust over which she retained the right to the income for life, control over the actions of the trustee, and a power to revoke or amend the trust.[68] In rejecting the claim of the surviving spouse to any share of the trust property, the Indiana Court of Appeals remarked: ''This election interest is not absolutely vested as was the ancient dower interest; it is only an expectant interest, determined at the time of death, and dependent upon the contingency that the property to which the interest attaches becomes part of the decedent's estate.''[69] In rejecting the view that it was a fraud on the marital rights of the spouse, the court in *Leazenby* observed that because the spouse ''had no right or interest in the property of his deceased wife during her lifetime, a valid trust agreement could not be fraudulent, actually or constructively, as to her. 'One cannot be defrauded of that to which he has no right.'''[70] The *Leazenby* court emphasized the public policy considerations favoring free alienability of property inter vivos: ''It is no argument that because one cannot by testamentary disposition exclude a spouse's elective share, that one cannot accomplish the same result by a valid trust agreement.''[71] It is true that in *Leazenby* there was no antenuptial agreement, only the right of a spouse to an elective share of the estate. Nevertheless, it

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[63]458 N.E.2d at 1184.

[64]41 Ill. App. 3d 132, 354 N.E.2d 403 (1976).

[65]*Id.* at 138, 354 N.E.2d at 408-09.

[66]458 N.E.2d at 1185.

[67]171 Ind. App. 243, 355 N.E.2d 861 (1976).

[68]*Id.* at 245, 355 N.E.2d at 862.

[69]*Id.* at 247, 355 N.E.2d at 863 (citations omitted).

[70]*Id.* at 251, 355 N.E.2d at 865 (quoting in part Cherniack v. Home National Bank & Trust Company of Meriden, 151 Conn. 367, 369, 198 A.2d 58, 60 (1964)).

[71]171 Ind. App. at 254, 355 N.E.2d at 867 (citation omitted).

is hard to see how a "waiver" of the elective share and an agreement to take a different share of the estate could give the spouse a greater right than the elective share itself. In *Russell*, the court has reopened the question of the rights of a surviving spouse to the assets of the deceased spouse transferred by inter vivos conveyances.[72]

In light of this decision, there may be two alternatives to the use of the donative escrow to transfer property. The first alternative would be to place the condition in the deed rather than in the delivery by reserving a life estate property in the deed or stating in the deed that it is not to operate as a conveyance until the death of the grantor, and deliver the deed directly and at once to the grantee.[73] Thus, the grantor has the life estate or right to the rents and profits from the land, and the grantee has the remainder. There is no need for an escrow agent or use of the doctrine of relation back. The second alternative is the use of an inter vivos trust. Under the Indiana trust code, the settlor (grantor) can retain the right to the rents and profits or use of the property for life, as well as the power to revoke or amend the trust without the trust being considered testamentary.[74] There appears to be no reason, other than historical, why the grantor-donor cannot exercise any control over the property or recall the deed in a donative escrow, but the settlor of a modern inter vivos trust can exercise control over the operation of the trust and reserve the power to revoke or amend the trust. Nevertheless, the trust seems to avoid many of the problems encountered by the use of the donative escrow and should be given serious consideration as an alternative method of transferring property.

2. Construction of Deed's Language: Conveyance of Right of Way as Easement.—In *Richard S. Brunt Trust v. Plantz*,[75] the Indiana Court of Appeals determined that certain deeds granting a right of way over five parcels of land to the Terre Haute and Logansport Railroad (railroad)

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[72]For an excellent discussion of the rights of the surviving spouse in the property of the deceased spouse and the impact of the *Leazenby* decision, see Falender, *Protective Provisions for Surviving Spouses in Indiana: Consideration for a Legislative Response to* Leazenby, 11 IND. L. REV. 755 (1978).

[73]*See, e.g.*, Kelley v. Simer, 152 Ind. 290, 53 N.E. 233 (1899) (deed valid even though grantor reserved life estate); Wilson v. Carrico, 140 Ind. 533, 40 N.E. 50 (1895) (executed and recorded deed containing provision that "above obligation to be of none effect until after the death" of grantor held valid to pass future interest immediately to grantee even though enjoyment postponed until death of grantor); Cates v. Cates, 135 Ind. 272, 34 N.E. 957 (1893) (deed held valid even though grantor expressly reserved and excepted from the grant the use, occupation, rents, and proceeds to himself during his natural life).

[74]The Indiana Probate Code provides that inter vivos trusts need not be executed with the formalities of a testamentary instrument even though the settlor retains the power to revoke or amend the power to control investments, or the power to consume the principal. IND. CODE § 29-1-5-9 (1982). *See also* Leazenby v. Clinton County Bank, 171 Ind. App. 243, 252, 355 N.E.2d 861, 864 (1976).

[75]458 N.E.2d 251 (Ind. Ct. App. 1983).

in the late 1800's conveyed an easement only and not a fee to the right of way area. The right of way was subsequently conveyed to the Penn Central Corporation who, after it had abandoned railroad operations over the right of way, sold the right of way to the Richard S. Brunt Trust (Brunt). Brunt filed this action to recover damages and to enjoin neighboring landowners from cutting trees on the right of way. The landowners counterclaimed that the abandonment of railroad operations extinguished the easement and gave them the unrestricted fee simple title to the right of way area abutting their land. The trial court found for the landowners.[76]

On appeal, Brunt contended that the deeds conveyed the fee to the right of way area and that the title was not lost by the abandonment of railroad operations. All but one of the conveyances were on a preprinted form supplied by the railroad entitled "Release of Right of Way." The form deeds provided that the grantors released and quit-claimed "'the right of way, for railroad purposes only, . . . [a] strip of ground'" through the grantors' property.[77] Brunt argued that the phrase "the right of way for railroad purposes only" was a covenant which was satisfied by the use of the property for railroad purposes for ninety years.[78] The court did not agree, stating that a conveyance of a "right" usually conveys an easement, whereas a conveyance of the land without any statement as to the use or purpose for which it is conveyed passes the fee to the land.[79]

The court noted that in the past it had looked to a railroad's charter to determine whether a fee simple or a lesser estate was conveyed by the deeds, but observed that in this case the railroad's charter did not provide for the nature of the estate to be conveyed.[80] The court then examined the railroad's statutory authority to acquire land in 1881 and found that the corporation could purchase land "in fee simple or otherwise, as the parties may agree."[81] Earlier decisions interpreting this language found that just because they could have acquired a fee does not mean that they took such an estate since the parties could have contracted for a lesser estate than the law allowed. Here, the granting clause clearly stated a right of way was conveyed, which under Indiana law passes an easement and not the fee. The court also noted that nominal consideration or consideration which is simply the benefit to be derived by the grantor from the construction of the railroad suggests an easement. The consideration for the right of way stated in the

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[76] *Id.* at 252.
[77] *Id.* at 253 (quoting the Release of Right of Way agreement).
[78] *Id.* at 252.
[79] *Id.* at 253.
[80] *Id.* at 252 n.2.
[81] *Id.* at 254 (quoting the authorizing statute) (court's emphasis omitted).

preprinted form was "'the advantages which will accrue to me in particular and the public generally by the construction of a railroad.'"[82] Perhaps as important as any other rationale for the decision was the court's remark that "we do not wish to encourage parceling of land in narrow strips which runs [sic] randomly over Indiana land by reaching any other conclusion."[83]

Finally, the court addressed the one conveyance which was not on a preprinted form. This handwritten conveyance read much more like a conveyance of the land itself than a right of way: "[the grantors] convey and quit claim . . . for railroad purposes . . . the following real estate . . . ."[84] In rejecting the argument that a fee was conveyed, the court noted that there would have been no reason to state the purpose for which the land was to be used in the deed if it were conveying a fee simple. The court also observed that the surrounding circumstances demonstrated that the parties did not intend to convey a fee. The railroad had earlier acquired an easement over another section of the grantors' land; there was no reason to believe a greater interest was desired in the second transaction, and the grantors would have had no reason to believe a different interest was being conveyed.[85] Having concluded that only an easement was conveyed to the railroad by the right of way deeds, the court held the unrestricted fee simple reverted to the present landowners when Penn Central abandoned the railroad operations.[86]

D. Easements and Restrictive Covenants

1. Easements.[87]—Easements, like other interests in land, can be owned in common by two or more persons. The rights and obligations of such co-owners were discussed in *Litzelswope v. Mitchell.*[88] The Litzelswopes, Andersons, and Mitchells each acquired a common right of way easement for ingress and egress to and from their lots to a public roadway. While

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[82]*Id.* at 252-53 (quoting the Release of Right of Way agreement).

[83]*Id.* at 255 n.3.

[84]*Id.* at 255.

[85]*Id.* at 256. In a concurring opinion, Judge Garrard agreed that the preprinted form deeds conveyed only an easement, but found it unnecessary to determine the estate conveyed by the handwritten deed because the appellant waived the issue by presenting only one argument on the deeds. *Id.* (Garrard, J., concurring).

[86]*Id.*

[87]In this survey period there were two cases dealing with easements which are not discussed in this Article: Hagemeir v. Indiana & Michigan Elec. Co., 457 N.E.2d 590 (Ind. Ct. App. 1983) (power company's complaint for an easement insufficient to comply with Indiana's eminent domain statute. IND. CODE § 32-11-1-2 (1982)); Rees v. Panhandle Eastern Pipe Line Co., 452 N.E.2d 405 (Ind. Ct. App. 1983) (court upheld a trial court's determination of the width of a pipeline easement).

[88]451 N.E.2d 366 (Ind. Ct. App. 1983).

the easement was sixty feet wide, only a portion approximately twenty feet wide was used as a roadway. In order to construct a driveway across an open ditch running along the side of the easement, the Mitchells placed a culvert in the ditch and covered it with dirt; they also installed a railroad tie retaining wall east of the open ditch. Two years later, the Mitchells built a garage on their property, poured excess concrete into the bottom of the open ditch, and built wooden steps from their property to the driveway. The following year they installed bricks in the steps, extended the culvert to a catch basin which they installed in the untraveled portion of the roadway, covered the ditch with dirt, and seeded it. The driveway, retaining wall, steps, culvert and ditch were all within the easement, but outside the traveled portion.[89]

After these improvements were made, the Litzelswopes and Mitchells jointly commissioned a survey, which revealed that the improvements extended into the easement. The Litzelswopes and Andersons filed suit to compel the Mitchells to remove their encroachments from the easement.[90] The trial court enjoined the Mitchells from making any additional encroachments or from changing the character of the existing encroachments, such as by paving the driveway, but allowed them to keep the existing encroachments and to repair and maintain them.[91] The judgment further provided that the Mitchells should not acquire any prescriptive rights to the encroachments, and that if the easement should later be accepted as a public roadway and the appropriate agency so required, the Mitchells must remove the encroachments at their own expense.[92]

The court of appeals observed that the owner of an easement possesses all rights necessary and incidental to the use and enjoyment of the easement, and may make the repairs, improvements, and alterations reasonably necessary to make the grant of the easement effectual. While noting that the controversy in such situations normally arose between the dominant and servient owners, the court saw no reason why the same rules should not apply in disputes between co-owners of the easement. Where there are several owners, however, each owner may exercise such rights only so long as they do not hurt the rights of co-owners.[93] In other words, the owner in common of an easement "may not alter the land in such a manner as to render the easement appreciably less convenient and useful for one of his co-owners."[94]

The court examined the encroachments made by the Mitchells to see if they were reasonably necessary to their use of the easement. The

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[89]*Id.* at 368.
[90]*Id.* at 367.
[91]*Id.* at 368-69.
[92]*Id.* at 369.
[93]*Id.*
[94]*Id.* at 370 (citations omitted).

court found the driveway was necessary to their use of the easement so as to provide access to and from the garage to the traveled portion of the easement, and that the culvert was necessary to construct the driveway across the open ditch. Likewise, the steps were necessary to provide ingress to and egress from their property. Finally, the court found that the railroad tie retaining wall, the culvert, drain pipe, catch basin, and concrete poured into the ditch were all necessary to alleviate an erosion problem which had been worsening. Having found that the encroachments were reasonably necessary for the use and enjoyment of the easement, the court then considered whether or not they were an unreasonable interference with the Litzelswopes' use and enjoyment of the easement. The only claim of interference made by the Litzelswopes was that the catch basin required them to veer slightly to the left when approaching the easement from the roadway, a question of fact which the trial court decided against the defendants.[95]

2. Restrictive Covenants.—Unlike easements, restrictive convenants are enforced in equity, and a court of equity will not enforce a restrictive covenant where conditions in the restricted area have changed to such an extent that they have significantly reduced or eliminated any benefits sought to be realized by enforcement of the covenant.[96] The issue of what constitutes "changed conditions" sufficient to deny enforcement of a restrictive covenant was raised in *Burnett v. Heckelman*.[97] In 1955, the plaintiff, Mary Heckelman, her husband, and his parents purchased five lots in a subdivision, intending to build houses on them. Restrictive convenants prohibited the owners of any of the subdivision lots from using them for commercial purposes. Since 1955, the area surrounding the subdivision had become commercialized. There were some fifty commercial establishments in the immediate area, but within the subdivision there were neither commercial activities nor commercial structures.[98]

In 1969, in order to widen a state highway, the state condemned as much as fifty feet of the nine lots facing the highway, including the five lots owned by the plaintiff. The four houses built on the other lots

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[95]*Id.* Another issue raised on appeal by the Mitchells was acquiescence. Mr. Litzelswope was aware of the construction of the driveway, gave advice to Mr. Mitchell concerning the construction of the steps, furnished the railroad ties for the retaining wall, and suggested that Mitchell pour the concrete into the bottom of the ditch to prevent further erosion. From these facts, the court concluded that the trial court might have determined that the failure to object to the encroachments amounted to an implied consent or acquiescence, but that, since the trial court had also found the acts of the Mitchells did not exceed their rights to the use of the easement, it was not necessary to decide this issue.

[96]Bob Layne Contractor, Inc. v. Buennagel, 158 Ind. App. 43, 301 N.E.2d 671 (1973); 2 AMERICAN LAW OF PROPERTY § 9.39 (Supp. 1976). *See also* Krieger, *Property, 1981 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 459, 473 (1981).

[97]456 N.E.2d 1094 (Ind. Ct. App. 1983).

[98]*Id.* at 1096.

facing the highway had deteriorated. The plaintiff argued that these changes within the subdivision and the commercialization of the surrounding area had defeated the purpose of the covenant, making its enforcement inequitable.[99] Based on this evidence, the trial court modified the restrictive covenants pertaining to Heckelman's lots to permit her to use them for commercial activities, but ordered her to grant all the landowners in the subdivision a twenty foot easement across the rear portion of the lots, and to erect a fence and plant trees along the entire length of the easement so as to create a barrier between her property and the remainder of the subdivision. Dissatisfied with this arrangement, the remaining property owners were granted a stay of execution pending this appeal.[100]

The court of appeals noted that, in order to declare the restrictive covenant unenforceable, the change in the subdivision and the surrounding area must be so great that the purpose of the covenants can no longer be attained. While no hard and fast rule can be developed to cover all situations, the court concluded that more weight should be given to changes within the subdivision itself.[101]

In refusing to give as much weight to changes in the area immediately outside the subdivision, the court was attempting to avoid a "domino effect." As the court observed, there will always be a line where commercial and residential areas meet, and the residential property at this boundary line will be less valuable for residential purposes.[102] But to allow the lots along the line to become commercial would in turn create a new line where, once again, the owners of the lots along the line could make the argument that the property is less suited for residential purposes and more valuable for commercial activities. Thus, the line would continue moving into the interior of the residential area until all of the lots were affected.[103] In order to avoid this result, restrictive covenants should be enforced so long as they are still of benefit to the interior lots.[104] In this case, the court found that "there is no evidence [the] diminution in value [of the lots facing the highway] has altered the 'residential nature of life within' the subdivision."[105] The court noted

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[99]*Id.* at 1098. She also argued that the lots facing the highway would be more valuable if put to commercial use.

[100]*Id.* at 1096.

[101]*Id.* at 1098 (citing Cunningham v. Hiles, 182 Ind. App. 511, 517, 395 N.E.2d 851, 855 (1979)).

[102]456 N.E.2d at 1098.

[103]The trial court attempted to avoid this effect by the creation of a buffer zone. 456 N.E.2d at 1096.

[104]5 R. POWELL, THE LAW OF REAL PROPERTY 684 (1980); 2 AMERIAN LAW OF PROPERTY, *supra* note 96, at § 9.39.

[105]456 N.E.2d at 1099 (quoting in part Cunningham v. Hiles, 182 Ind. App. 511, 518, 395 N.E.2d 851, 1979)) (*Cunningham* court's emphasis omitted).

the similarity of the issues raised in this case and those in *Cunningham v. Hiles*,[106] where a landowner in a residential subdivision was attempting to build a commercial structure on his lot.[106] In *Cunningham*, traffic had increased around the subdivision, commercial activities were in the immediate area, lots near the major thoroughfare failed to attract residential buyers, and an office building erected on adjoining land actually protruded more than 100 feet into the subdivision. Nevertheless, the *Cunningham* court concluded that these changes had not affected the residential nature of life within the subdivision, and enforced the restrictive covenants against the landowner.[107]

In reversing the trial court's decision, the court of appeals was unsympathetic to the plaintiff's plight. She purchased with full knowledge of these restrictions, and to allow her now to disregard these covenants would be detrimental to the other owners who purchased their lots in reliance upon the restrictive coventant.[108] The *Burnett* decision points out once again that changed conditions sufficient to make a restrictive covenant unenforceable must be so radical in nature as to destroy the purpose of the restriction and neutralize its benefits.

E. Landlord-Tenant

During this survey period there were a number of interesting landlord-tenant cases. In *Keystone Square v. Marsh Supermarkets, Inc.*,[109] the court examined the rights and obligations of an "anchor tenant" under the provision of a shopping center lease. In this case, Marsh Supermarkets (Marsh) entered into a lease with the Keystone Shopping Center Company (Keystone) to operate a store in the Keystone Shopping Center. The lease provided for an annual rent plus one percent of the gross sales exceeding ten times the rent. Becuase of the store's success, Marsh attempted to renegotiate the lease and obtain additional floor space. These negotiations failed, and Marsh moved its store out of the shopping center to a new location near Keystone. The leased space in the shopping center was temporarily vacant and then reopened by Marsh as a Green Basket discount supermarket. Marsh filed for a declaratory judgment as to its rights and liabilities under the lease, and Keystone counterclaimed, alleging Marsh was in violation of the lease and guilty of fraud. The trial court entered a judgment for Marsh from which Keystone appealed.[110]

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[106]182 Ind. App. 511, 395 N.E.2d 851 (1979); *see also* Krieger, *supra* note 96, at 473 (extensively discussing the *Cunningham* case).

[107]182 Ind. App. at 518-59, 395 N.E.2d at 855-56.

[108]456 N.E.2d at 1099.

[109]459 N.E.2d 420 (Ind. Ct. App. 1984).

[110]*Id.* at 423.

The court of appeals, following the trend of decisions in other jurisdictions, found that there was no implied covenant requiring Marsh to continue operating a supermarket on the leased premises.[111] It is difficult to see how Keystone could have made this argument when the lease itself specifically permitted Marsh to assign or sublet the leased premises.[112] Keystone also argued that Marsh had underpaid the rent by understating the amount of sales, and by taking certain setoffs and deductions from the rent not allowed under the lease. As to the setoffs and deductions, the court found that they were allowed under the language of the lease. Keystone argued, however, that the court should also consider "lease data summaries" which were in direct conflict with the clear and unambiguous language in the lease. The court rejected this position, concluding that while generally the courts should consider separate writings executed at the same time as a whole, this rule should not be applied arbitrarily without regard for the realities of each case.[113] With regard to the understatement of the sales for 1976, the court noted that the lease provided that Keystone had to challenge any sales report within 120 days after it was submitted, and Keystone did not notify Marsh of its challenge until 1978.[114] Keystone also argued that the trial court judgment should not be enforced because of changed circumstances. The court noted that a declaratory judgment only fixes the rights and obligations of the parties at the time of the trial, and that while the changed circumstances might give rise to another cause of action, they did not affect the trial court's judgment.[115]

In another shopping center case, *Tucker v. Richey*,[116] the Indiana Court of Appeals and the Indiana Supreme Court both agreed that the provisions in a shopping center lease were clear and unambiguous, but reached opposite conclusions as to the meaning of the clear and unambiguous language.[117] The lease between the landlord of a shopping

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[111]*Id.* at 423 (citing Bastian v. Albertson's Inc., 102 Idaho 909, 643 P.2d 1079 (1982); Williams v. Safeway Stores, Inc., 198 Kan. 331, 424 P.2d 541 (1967); Stop & Shop, Inc. v. Gourm, 347 Mass. 697, 200 N.E.2d 248 (1964); Fuller Market Basket, Inc., v. Gillingham & Jones, Inc., 14 Wash. App. 128, 539 P.2d 868 (1975)).

[112]459 N.E.2d at 423.

[113]*Id.* at 425.

[114]*Id.*

[115]*Id.* at 425-26.

[116]448 N.E.2d 1206 (Ind. Ct. App. 1983), *vacated*, 460 N.E.2d 964 (Ind. 1984).

[117]The pertinent lease provisions are contained in paragraphs (1) and (15) of the lease. Paragraph (1) provides in part: "Landlord expressly reserves the right to change or modify the plans and facilities of the Shopping Center without the consent of the Tenant, but neither the Leased Premises nor the general character of the Shopping Center shall be changed without such consent." *Id.* at 1210-11 (quoting the lease agreement). Paragraph (15) reads in part:

> Tenants shall not use the Mall Common Area or the Open Common Area for any display or storage of merchandise or use such areas in any way which

mall and the subtenants who operated an ice cream shop in the mall provided that the landlord reserved the right "'to permit advertising displays, entertainment and educational displays, and events, and kiosks . . .'"[118] in the mall common area. The landlord allowed two kiosks to be erected in the mall common area near the ice cream store, and the subtenants complained. When the landlord did not have the kiosks removed, the subtenants filed suit for breach of the lease, and vacated the store.[119]

The trial court granted summary judgment for the subtenants without written findings of fact or conclusions of law.[120] The Indiana Court of Appeals found that the language in the lease was clear and unambiguous, and applied the "four corners rule": the express language found within the four corners of the lease, if unambiguous, determines the intent of the parties.[121] The landlord argued that the lease provision clearly reserved the right to erect kiosks in the mall. The court of appeals did not agree, pointing out that words should "be construed consistently with reference to the whole clause in which they are used and that the clause in which "kiosks" is used refers to things which are all of a temporary nature.[122] In addition, the court noted that the intent of the parties is determined from the language in the entire instrument. After examining the language in the lease, the court concluded that the trial court reasonably ascertained

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> would interfere with the use of such areas by other tenants, their employees and invitees, without the express written consent of Landlord and shall comply with all reasonable rules and regulations of Landlord with respect thereto. Landlord reserves the right to make charges (sic), additions, deletions, alterations, and improvements in and to such areas, and to permit advertising displays, entertainment, and educational displays and events, and kiosks thereon.

Id. at 1210.

[118]460 N.E.2d at 966 (quoting the lease agreement). "Kiosk" is defined as: "1. in Turkey and Persia, a summerhouse or pavilion of open construction 2. a somewhat similar small structure open at one or more sides, used as a newsstand, bandstand, entrance to a subway, etc." WEBSTER'S NEW WORLD DICTIONARY 777 (2d college ed. 1982), *quoted in*, Tucker v. Richey, 460 N.E.2d 964, 966 (Ind. 1984). The court also cited City and County of Honolulu v. Ambler, 1 Hawaii App. 589, 590, 623 P.2d 92, 93 (1981) for a judicial definition of "kiosk." That case defined "kiosk" "as a small structure used as a newsstand, entertainment booth or the like." 460 N.E.2d at 966 (citing the *Ambler* decision).

[119]The lease defined "mall common area" as being "'the enclosed common area as shown on the plot plan . . . with heated and air conditioned mall areas, corridors, fixtures and restrooms . . . .'" 460 N.E.2d at 965-66 (quoting the lease agreement).

[120]*Id.* at 966. The Indiana Supreme Court concluded that, evidently, the judgment was based on a conclusion that (1) the lease only permitted temporary advertising, entertainment, and educational kiosks, or (2) the erection of permanent retail kiosks in the common mall area changed the general character of the mall. *Id.* at 966-67.

[121]448 N.E.2d at 1209.

[122]*Id.* at 1210. *Noscitur a sociis* (one is known by his associates) is a rule of construction which limits or restricts the general meaning of a word by consideration of the accompanying words.

that the mall common area was to be open to all tenants, customers and invitees, and that the erection of a permanent kiosk would be prohibited. The court further concluded that "the general character" of a shopping mall is where retail stores face out onto an enclosed walkway system, containing rest benches, interior landscaping, and that erecting a retail kiosk would be altering this "general character" in violation of the lease without the consent of the tenant.[123] Judge Ratliff dissented, concluding that the language gave the landlord the right to erect kiosks subject only to the limitation that the general character of the mall not be changed. He concluded that anyone familiar with shopping malls was well aware that kiosks are not an unusual usage and are common attributes of such malls. Their construction would not change the "general character" of the mall.[124]

The Indiana Supreme Court vacated the decision of the court of appeals, incorporating Judge Ratliff's dissenting opinion verbatim into the majority opinion.[125] The court noted that the word "temporary" was not contained in the clause allowing the landlord to erect kiosks, and the word "kiosk" contemplates a structure of a permanent or at least semipermanent nature used for retail sales.[126] In a dissenting opinion, Justice DeBruler observed that the lease reserved the right of the landlord "to permit" the erection of kiosks and that the synonym for "permit" most favorable to the position of the landlord would be "license." Clearly, a lease is more than a license. A license could not permit the landlord to take exclusive possession of a part of the mall common area "and receive[] consideration from retailers in return for their exclusive occupancy."[127]

In *Lafayette Realty Corp. v. Vonnegut's Inc.*,[128] Vonnegut's Inc. (Vonnegut's) leased the premises it used as a hardware store from Lafayette Realty Corporation (Lafayette). The lease provided that Vonnegut's should keep the heating system in repair, but that Lafayette should make any necessary capital replacements. The lease further provided that if Lafayette should default in the performance of any conditions in the lease, Vonnegut's, at its option and after giving Lafayette thirty days written notice of such default, could make the repairs and deduct the cost of performance from the rent.[129] Another provision in the lease stated that its option remedies should not preclude either party from invoking any other remedy available to them by law.[130]

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[123] *Id.* at 1211.
[124] *Id.* at 1212 (Ratliff, J., dissenting).
[125] 460 N.E.2d at 967.
[126] *Id.* at 966.
[127] *Id.* at 967 (DeBruler, J., dissenting).
[128] 458 N.E.2d 689 (Ind. Ct. App. 1984).
[129] *Id.* at 690-91.
[130] *Id.* at 691.

A routine inspection of the store's heating plant led to the discovery that the heat exchanger had deteriorated, and Vonnegut's was advised not to use the system until the heat exchanger was replaced. Vonnegut's immediately notified Lafayette. Lafayette's maintenance employee and a private contractor inspected the heating plant at Lafayette's request; they advised Lafayette that the entire heating plant needed to be replaced.[131] After several attempts to contact Lafayette's president, Vonnegut's reached Lafayette's vice president, who proposed that Lafayette would pay half of the cost if Vonnegut's agreed to pay the other half. Vonnegut's general manager verbally rejected this offer and confirmed the rejection by letter. There was no further communication between the parties until Vonnegut's notified Lafayette that it had vacated the premises a little over a month later. After installing a new heating system, Lafayette advised Vonnegut's that it would be expected to comply with the terms of the lease. When Vonnegut's refused to resume possession of the store, Lafayette sued for breach of the lease. Vonnegut's raised the affirmative defense of constructive eviction, and the trial court rendered judgment for Vonnegut's. Lafayette appealed.[132]

The court of appeals concluded that Vonnegut's had been constructively evicted, based on evidence that temperatures in the store were at or near freezing for most of the month, forcing employees to wear winter clothing while at work, and that on several occasions the cold forced the store to close. The court found that this breach by the lessor was "'so substantial and permanent in character' as to effectively exclude the lessee from [the] beneficial use of the property."[133] The court noted that in order to assert the defense of constructive eviction the lessee must vacate the premises within a reasonable time or waive the defense, and what is a reasonable time can "only be made upon a consideration of the surrounding circumstances."[134] Under these circumstances, the court could not say the trial court was erroneous in determining that Vonnegut's had been constructively evicted.[135]

Lafayette argued that because Vonnegut's had the right (option) to make capital replacements when Lafayette refused to make them, and the lease did not state what was to happen if Vonnegut's refused to

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[131] *Id.*

[132] *Id.*

[133] *Id.* at 692 (citation omitted). Not every minor breach of the lease will constitute a constructive eviction. The act or omission of the lessor must materially deprive the lessee of the beneficial use or enjoyment of the leased property before the lessee may elect to abandon the property and avoid further obligations under the lease. Talbott v. Citizens National Bank of Evansville, 389 F.2d 207 (7th Cir. 1968); Talbott v. English, 156 Ind. 299, 59 N.E. 857 (1901); Sigsbee v. Swathwood, 419 N.E.2d 789 (Ind. Ct. App. 1981).

[134] 458 N.E.2d at 693 (citation omitted).

[135] *Id.* at 694.

make the replacements, there was an ambiguity in the lease and Vonnegut's was therefore required to give Lafayette thirty days notice if it chose not to make the capital replacement. The court found this argument absurd.[136] Vonnegut's had, in fact, exercised its option in the past and made major repairs to the store's air conditioning system and then deducted the cost from the rent, but the court reasoned that a prior exercise of its option did not require its exercise in all cases. The lease expressly stated that the specified option remedies did not preclude the invocation of any other remedy available to them by law. Since Vonnegut's could treat the failure to replace the heating system as a constructive eviction, the court of appeals affirmed the trial court's judgment.[137]

In *Waxman Industries v. Trustco Development Co.*,[138] the court addressed a number of interesting and important issues, including mitigation of damages following abandonment by the tenant, acceptance of surrender by the landlord, and the determination of "reasonable attorney fees" which the tenant agreed to pay in the event of his default.[139] Trustco Development Company (Trustco) leased a storeroom in a shopping center to Handi-Fix Stores of Indiana, Inc. (Handi-Fix), and Wax-

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[136]*Id.* at 693.

[137]*Id.* at 694.

[138]455 N.E.2d 376 (Ind. Ct. App. 1983).

[139]The issue of attorneys fees involved the lease provision that "upon default, 'Lessee shall pay all costs and reasonable attorney fees . . . . '" *Id.* at 379 (quoting the lease). Trustco's attorney testified that there was a contingent fee agreement between himself and his client, and that in such cases it is normal to receive one third of the amount collected, and where he might be forced to go to Ohio to enforce the judgment, as here, the fee should be 40% of the judgment. The issue on appeal was whether or not the obligor, who under the terms of an instrument has agreed to pay reasonable attorney fees, is bound by the contingent fee contract between the obligee and his attorney. After concluding that this was a case of first impression in Indiana, the court examined contingent fee contracts in general. The court found that such arrangements are generally binding between the attorney and his client, although they must be carefully scrutinized by the courts to ensure that no improper advantage is taken by the attorney. The court also concluded that while no Indiana authority exists, a contingent fee can never be implied but must be a matter expressly contracted for between the attorney and client. It followed, said the court, that the contingent fee contract of the obligee on the instrument with his attorney could not be enforced against the obligor who had merely agreed to pay a reasonable attorney fee in the instrument. *Id.* at 381 (citing with approval Olson v. Carter, 175 Mont. 105, 572 P.2d 1238 (1977) (holding that the agreement between an attorney and his client is not controlling in fixing the reasonable attorney fee to assess against the opposing party); Engebretson v. Putnam, 174 Mont. 409, 571 P.2d 368 (1977). The *Engebretson* court suggested that a reasonable fee be determined in accordance with the guidelines enumerated in the Code of Professional Responsibility DR 2-106(B). 174 Mont. at 413, 571 P.2d at 372. The *Waxman* court reversed as to the attorney fees, and directed the trial court to fix a reasonable attorney fee which did not take into consideration the contingent fee contract between the attorney and his client. 455 N.E.2d at 382. As the court noted, the contingent fee would normally be a much higher fixed fee to the obligor and such an arrangement is susceptible to abuse. *Id.*

man Industries, Inc. (Waxman) guaranteed the lease. For some unexplained reason, Handi-Fix vacated the premises a little over a year after entering the lease. Handi-Fix's attempts to sublet the storeroom were unsuccessful and its last rental payment was made nine months later. A year and a half after that, and a little over a year before Handi-Fix's five year lease expired, Trustco found a new tenant and relet the premises for a term of three years, at a monthly rental $325 over Handi-Fix's rent. Trustco then terminated Handi-Fix's lease, under a provision which provided that if the lessee defaulted in the payment of the rent, "'Lessor may thereupon take possession . . . and re-let the same without such action being deemed an acceptance of a surrender of this lease . . . or the Lessor at its own option may . . . terminate this lease.'"[140] Trustco then brought suit against Handi-Fix for breach of the lease, seeking the unpaid rent, damages, and attorney fees. Handi-Fix counterclaimed, seeking credit for a shortage in the square footage of the lease premises[141] and a credit for the additional rent per month from the new tenant for the remainder of the lease term.[142]

With regard to the shortage in the square footage, the court noted that it was "de minimus" and Handi-Fix failed to show how it was damaged by this insignificant difference in the dimensions. In addition, the court found that Handi-Fix had waived any breach by accepting the defective performance.[143] A more complex issue was raised by Handi-Fix's argument that the additional rent received by Trustco from the new tenant for the remainder of the term of the original lease should be credited to it. When a tenant abandons the leased premises this does not automatically terminate the tenant's obligations under the lease. The landlord can treat the lease as continuing, in which case he may relet the premises and hold the tenant liable for the difference between the rent received from the new tenant and the rent due under the lease.[144] Where the rent from the new tenant is less than the rent reserved under the lease, the landlord must be careful not to do anything which might

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[140]455 N.E.2d at 378 (quoting the lease).

[141]Two months after the beginning of the lease, Handi-Fix informed Trustco of eight defects in the leased premises, including a very minor shortage in the size of the premises. The court noted that the lease did not state whether the distances referred to were inside or outside measurements. There is nothing in the facts to suggest that Handi-Fix was attempting to treat the minor shortage in space as a constructive eviction. *Id.* at 377.

[142]*Id.* at 378.

[143]*Id.* at 378-79. One month after making a complaint about the shortage, Handi-Fix executed a document entitled "Acceptance of the Premises," which waived any defects in the premises.

[144]In Indiana, if the landlord wants to treat the lease as continuing and hold the tenant liable for the rent for the remainder of the term, he must mitigate his damages by making reasonable efforts to relet the premises. Sigsbee v. Swathwood, 419 N.E. 2d 789 (Ind. Ct. App. 1981); State v. Boyle, 168 Ind. App. 643, 344 N.E.2d 302 (1976); Hirsch v. Merchants National Bank Co. 166 Ind. App. 497, 336 N.E.2d 833 (1975).

suggest he is accepting the offer of surrender by the tenant.[145] Where the new rent is greater than the rent reserved under the lease, the landlord, as in this case, may decide to terminate the lease.[146]

Handi-Fix apparently made two separate arguments on this issue. First, Handi-Fix contended that, although it had abandoned the premises, it had not surrendered the premises and that it never consented to the termination of the lease. The court found this argument made little sense in view of Handi-Fix's nonpayment of rent and the clause in the lease granting the lessor the option to terminate upon default.[147] Second, Handi-Fix argued that because the landlord did not elect to terminate the lease prior to reletting the premises, Trustco had elected not to terminate the lease.[148] Thus, Trustco could not hold Handi-Fix liable for the full rent for the months the premises were vacant and then exercise its option to terminate the lease when it was able to relet for a higher rent. Unfortunately for Handi-Fix, there is an earlier Indiana decision directly on point. In *Trick v. Eckhouse*,[149] the court stated: "The fact that the appellee [lessor] was able to rent the property at an increased rental is no reason why she should not recover the rent for the two months the building was vacant . . . ."[150] Under this decision the landlord has the best of both worlds. If the tenant abandons the premises and the landlord, using reasonable efforts, is unable to relet the premises, or rents them for an amount less than the rent reserved in the lease, he may treat the lease as continuing, and hold the tenant liable for the difference between the rent received from the new tenant and the rent due under the lease. If, on the other hand, he is able to relet for a higher rent, he can terminate the lease upon reletting, and sue the tenant for the rent due and owing up to the time of the reletting

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[145]If the landlord accepts the offer to surrender, the lease comes to an end and, with it, the tenant's obligation to pay rent ends. Paxton Realty Corp. v. Peaker, 212 Ind. 480, 9 N.E.2d 96 (1937); Grueninger Travel Service, Inc., v. Lake County Trust Co., 413 N.E.2d 1034 (Ind. App. 1980); Donahoe v. Rich, 2 Ind. App. 540, 28 N.E. 1001 (1891).

[146]There appears to be general agreement that a tenant who abandons the premises is entitled to a rent credit for any proceeds gained by the landlord from reletting during the period of the original lease. Wanderer v. Plainfield Carton Corp., 40 Ill. App. 3d 552, 351 N.E.2d 630 (1976). The court in *Waxman* at least implied that if this company had not terminated the lease, Handi-Fix would have been entitled to a credit for the excess rent received from the new tenant. 455 N.E.2d at 379. However, even if the landlord had not terminated the lease, it is very unlikely that a court would require the landlord to return any of the excess rent over and above unpaid rent and damages to the tenant. Wanderer v. Plainfield Carton Corp., 40 Ill. App. 3d 552, 351 N.E.2d 630 (1976); Whitcomb v. Brant, 90 N.J.L. 245, 100 A. 175 (N.J. 1917). *But see* RESTATEMENT (SECOND) OF PROPERTY §12.1 comment i, at 391 (1977).

[147]455 N.E.2d at 379.

[148]*Id.*

[149]82 Ind. App. 196, 145 N.E.2d 587 (1924).

[150]*Id.* at 198, 145 N.E. at 588. The court in *Waxman* noted that this result was reached without any clause in the lease. 455 N.E.2d at 379.

with no duty to account for the excess rent. The decisions do not seem to find anything unjust or inequitable with this result.

In *Tippmann Refrigeration Construction v. Erie-Haven, Inc.*,[151] Tippman Refrigeration Construction (Tippmann) leased, with an option to purchase, a garage from Erie-Haven, Inc. and France Stone Co. (Erie-Haven). The lease required Erie-Haven "'to maintain fire and extended coverage insurance on the building being leased herein,' "[152] and allowed for the application of fifty percent of the rent paid to the purchase price if within twelve months from the effective date of the agreement Tippmann exercised its option to purchase. If Erie-Haven terminated the agreement before it expired, Tippmann was to recover a certain amount for some of the improvements made—other improvements were to be made at Tippmann's own risk.[153]

The building was destroyed by fire, and Erie-Haven terminated the lease "[p]ursuant to the lease-option provision on destruction of the premises."[154] When Tippmann then tried to exercise the option to purchase, Erie-Haven refused either to sell or to share the fire insurance proceeds, and Tippmann filed suit. The trial court granted summary judgment for Erie-Haven.[155]

The court of appeals examined the insurance clause and concluded that the provision was intended for the benefit of both parties.[156] Since the lessor is always free to carry insurance on the leased premises, the provision would be mere surplusage unless it was intended to benefit both parties. The court distinguished *Haney v. Denny*,[157] which held that the lessee with an unexercised option to purchase was not entitled to the condemnation proceeds. The court noted that in *Haney* there was no provision requiring the landlord to insure the premises. Thus, the trial court erred in granting summary judgment and the court remanded for a "determination of an appropriate division of insurance proceeds."[158]

Tippmann argued that the option to purchase was separate and divisible from the lease, and that it survived the termination of the lease. In support of this position, Tippmann argued that the provisions allowing credit for the rent and credit for the improvements against the purchase price constituted separate consideration. The court agreed that the usual

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[151] 459 N.E.2d 407 (Ind. Ct. App. 1984). For a further discussion of this case, see Arthur, *Insurance, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 265, 273-74 (1985).

[152] 459 N.E.2d at 409 (quoting the lease-option agreement).

[153] *Id.*

[154] *Id.* at 410.

[155] *Id.* at 409.

[156] *Id.* (citing South Tippecanoe School Building Corp. v. Shambaugh & Son, Inc., 182 Ind. App. 350, 395 N.E.2d 320 (1979); Morsches Lumber, Inc. v. Probst, 180 Ind. App. 202, 204, 206, 388 N.E.2d 284, 286-87 (1979); Woodruff v. Wilson Oil Company, Inc., 178 Ind. App. 428, 431, 382 N.E.2d 1009, 1011 (1978)).

[157] 135 Ind. App. 317, 193 N.E.2d 648 (1963).

[158] 459 N.E.2d at 410.

test of the severability of a contract is the divisibility of the consideration, but said that the wording of the contract did not support an interpretation that the consideration was separate but, rather, suggested that the agreement was entire and not severable.[159] While conceding that "[a] contract is not entire and indivisible simply because it is embraced in one instrument . . ."[160] and executed by the same parties, the court did consider this fact when it concluded, "We agree with Erie-Haven, further noting the option and lease are embraced in the same instrument, executed by the same parties on the same date."[161]

Tippmann also argued that Erie-Haven would be unjustly enriched because the value of the building which was destroyed was $12,000 and Erie-Haven had received approximately $75,000 in insurance proceeds, claiming this was an "independent equity" which supported extending the option beyond the termination of the lease. The court found that, although Indiana law did not preserve options when independent equities exist,[162] it need not address this issue since any alleged inequity would be removed by the division of the insurance proceeds.[163] The decision did not discuss how Tippmann would benefit from the exercise of the option since the building had been destroyed. Presumably, he would have argued that the seller now holds the insurance proceeds in trust for the purchaser.[164]

F. Real Estate Transactions

1. Real Estate Brokers.—In *Panos v. Prentiss*,[165] James Prentiss, a real estate broker, recovered a broker's commission for negotiating a

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[159]*Id.* at 410-11.

[160]*Id.* at 410.

[161]*Id.* (citation omitted).

[162]*Id.* at 411.

[163]*Id.* The court of appeals did not provide any guidance to the trial court as to how the proceeds were to be divided between the parties. Because the lease was terminated and the option could not be exercised, the lessee does not appear to have had any "interest" in the property. The court suggested, however, that the lease-option provision requiring the lessor to insure the building gave the lessee an "interest" in the insurance proceeds. The appellate court stated that the trial court could make "an appropriate division of insurance proceeds." *Id.* at 410.

[164]In the case of an enforceable contract for the sale of real estate, most courts have concluded that the seller holds any insurance proceeds in trust for the buyer. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 159 (2d ed. 1975); Annot., 64 A.L.R.2D 1402, 1406-12 (1959). Tippmann's exercise of the option would have turned the instrument into a contract for sale. However, without the insurance provision giving Tippmann an "interest" in the insurance, the general rule that the seller holds any insurance proceeds in trust for the buyer may not have applied, as the destruction occurred before Tippmann attempted to exercise the option. There is authority for the proposition that the lessee is not entitled to the proceeds from insurance carried by the owner where the loss occurs before the option is exercised. *See* Annot., 65 A.L.R.2D 989 (1959).

[165]460 N.E.2d 1014 (Ind. Ct. App. 1984).

purchase of certain property, despite the absence of a written contract. The defendant, Panos, had approached James' father and employee, Richard Prentiss, seeking assistance in acquiring certain property. Panos agreed to pay Richard a commission of three percent of the total purchase price. Richard met with the owner and Panos, but the initial meetings were unsuccessful. A few months later, Panos requested that Richard resume negotiations. Richard convinced the owner to lower his price to $200,000, but Panos was then willing to pay $195,000. At a meeting between the parties, Richard negotiated a mutually satisfactory sales price of $197,500 and a $5,000 commission. James drafted the contract for sale according to the agreement, but Panos' attorney changed the terms, and the owner refused to accept them. At a second meeting, the parties reached an agreement, but when it was reduced to writing, Panos' attorney once again changed the terms. Panos then refused to complete the transaction because he was interested in another property. James later discovered that Panos had purchased the property for $202,500.[166]

In his appeal of the trial court's judgment for Prentiss, Panos contended that the agreement was to pay Richard $5,000 if Richard could convince the owner to sell the property for $197,500 or less, and that the sale at this price was a condition precedent to the recovery of the commission. The court disagreed. The agreement was to pay Richard three percent of the purchase price, and no specific purchase price was stated in the agreement. The sales price of $197,500 and the commission figure of $5,000 were frist determined several months later as part of a negotiated agreement for the sale of the property.[167]

The court noted that the broker's agreement between Richard and Panos was oral, but observed that the provision of the statute of frauds requiring a writing for all employment contracts for the sale of real estate between the owners and their brokers does not apply to contracts between real estate purchasers and their brokers.[168] Likewise, the court observed that the parties never consummated the contract for sale,[169]

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[166]*Id.* at 1015-16. While Panos' subsequent purchase of the property from Dalton may have been what motivated James to file suit to recover his commission, the subsequent purchase of the property is not relevant to the issue of the broker's right to recover his commission. *See infra* text accompanying notes 169, 170.

[167]460 N.E.2d at 1016. Even if the court had found the purchase price of $197,500 to have been a condition precedent, Richard had convinced Dalton to sell the property for this amount and, as the court later remarked, "Panos's [sic] repeated refusals to complete the transaction . . . will not serve to relieve him from his duty to pay the Prentisses their broker's commission." *Id.* at 1016-17 (citations omitted).

[168]*Id.* at 1016. Had the parol contract been between the broker and the owner of the real estate for the sale of the property, the broker could not have recovered his commission or even the value of his services in quantum meruit. Zimmerman v. Zehendner, 164 Ind. 466, 73 N.E. 920 (1905); Gerardot v. Emenhiser, 173 Ind. App. 353, 363 N.E.2d 1072 (1977).

[169]460 N.E.2d at 1016. The Indiana statute of frauds provides that no action shall

but concluded that the broker's commission was not dependent upon the consummation of the sales contract: "a broker's right to compensation accrues upon completion of negotiations and upon the meeting of the minds of the principal and the customer procured . . . ."[170] Once Panos and the owner had agreed to all the terms, Richard was entitled to his commission:

> Where no purchase agreement has been consummated, a broker is entitled to his commission if he proves that he had secured a customer who was ready, willing, and able to sell or purchase the property upon the terms listed by the principal and the principal refused to complete the transaction.[171]

The fact that Panos refused to complete the transaction could not affect the broker's right to his commission.

2. Vendor and Purchaser.—In *Bond v. Peabody Coal Co.*,[172] Peabody Coal Co. (Peabody) obtained a four year option to purchase the coal beneath land owned by Richard and Janet Bond (the Bonds). The option contract provided that Peabody could renew the option each year for four years by paying one fourth of the balance due the Bonds under the option, and that all payments made under the option would be credited to the purchase price. Peabody made renewal payments for the first three years, and in the fourth gave notice that it was exercising its option. The agreement provided that when Peabody gave notice of its election to purchase the coal, the Bonds had thirty days to deliver an abstract of title. Peabody then would have a reasonable time to examine the abstract, and if it showed marketable title of record in the Bonds, Peabody must "'forthwith pay the purchase price.'"[173] Upon payment, the Bonds were required to deliver a warranty deed conveying the coal to Peabody.[174]

The Bonds claimed that payment was too long delayed, and therefore the option was void, both because Peabody had not complied with their request for payment by a specific date and because Peabody did not tender payment until seventy-six days after the abstract of title was delivered to its agent. The trial court found that Peabody did not comply

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be brought upon a contract or agreement for the sale of land unless it or some memorandum thereof shall be in writing and signed by the party to be charged. IND. CODE § 32-2-1-1 (1982). Since it does not appear that either party signed a written purchase agreement, the contract was unenforceable. But since it was the defendant who changed the terms orally agreed upon by the parties, and the seller appeared ready and willing to enter into a written agreement based upon the mutually agreed terms, the court found this sufficient to award the broker his commission. 460 N.E.2d at 1016.

[170] 460 N.E.2d at 1016.

[171] *Id.* (citations omitted).

[172] 450 N.E.2d 542 (Ind. Ct. App. 1983).

[173] *Id.* at 547 (quoting the real estate contract).

[174] *Id.*

with the contract's requirement that time be "of the essence," and granted summary judgment for the Bonds. The court also found, however, that because Peabody had paid seventy-five percent of the purchase price, the appropriate remedy shoud be foreclosure instead of forfeiture.[175]

The court of appeals found that it was apparent from the trial court's conclusions of law "that its holding as to reasonableness of the time period involved was based on its acceptance of Bonds' argument that the parties intended that time would be of the essence in the payment of the purchase price, which would be due on January 24, 1979."[176] Both the Bonds and the trial court seemed to have believed that the provision requiring the last option payment to be paid on or before January 24, 1979 also required the purchase price to have been paid on or before that date.[177] The court of appeals pointed out that there was nothing in the agreement which suggested that the payment of the purchase price was a condition precedent to the exercise of the option, and that the notice by Peabody to the Bonds of its election to purchase was the stipulated act constituting the exercise of the option.[178] Once the plaintiff exercised the option, it was turned into a contract for sale, and the subsequent performance of the contract would be governed by the law of vendor-purchaser. The court then looked to see if there were any terms in the instrument or evidence indicating that the parties intended time to be of the essence in the performance of the contract. The only provision in the agreement which the court discovered regarding the time of performance was the one that after an examination of the abstract shows marketable title in the Bonds, "'(Peabody) shall forthwith pay the purchase price to the (Bonds) . . . .'"[179] The court found that the word "forthwith," when used in a contract or statute, was not as nearly equivalent to "time is of the essence" as the trial court had found, but it means only that the act referred to should be performed within such convenient time as is reasonably requisite.[180] But, the court concluded, even if there had been a "time is of the essence" clause, such a contract provision is ineffective when no date for performance is specified in the contract.[181] In such a case, the sellers, after waiting what they consider to be a reasonable time for performance, can fix a date for performance

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[175]*Id.* at 545.

[176]*Id.* at 546.

[177]Some courts do require that the purchase price be paid within the option period. *See* Annot., 71 A.L.R.3D 1201 (1976) (citing Kritz v. Moon, 88 Ind. App. 5, 163 N.E. 112 (1928), for the proposition that payment of the purchase price is not a condition precedent to the exercise of the option. 71 A.L.R.3D at 1220).

[178]450 N.E.2d at 547 n.2.

[179]*Id.* at 547 (quoting the real estate contract).

[180]*Id.*

[181]*Id.* at 548.

and thereby limit the time of their liability under the contract, but they cannot unilaterally fix an unreasonable time for performance.[182]

Having concluded that Peabody had a reasonable time to perform the contract after the exercise of the option to purchase, the court observed that there were in fact two periods of time to consider: a reasonable period of time for Peabody's attorney to examine the abstract of title to see if the Bonds had marketable title of record, and a reasonable period of time after a favorable opinion to "forthwith pay the purchase price." Since Peabody offered to close only eight days after receiving the favorable title opinion, the court found that the only issue was whether or not the examination of the abstract was completed within a reasonable time. There was evidence by the Bonds that thirty or forty days was a reasonable time, but Peabody's attorney pointed out that the period of time at issue included the Christmas and New Year's holidays, and during this time Peabody's attorney was sick for a period of ten days, relocated his law offices, and was busy performing additional legal tasks. The court found that the question of whether or not the examination was performed within a reasonable time was a question of fact which precluded summary judgment on the issue.[183]

Finally, the court addressed the issue of the appropriate remedy, making it clear that it found a foreclosure action to be inappropriate. The court concluded that if the trial court found that the examination of the abstract was not performed within a reasonable time it should still "grant specific performance to Peabody, but provide additional relief, e.g. interest, to the Bonds in order to 'equalize any losses occasioned by the delay . . . .'"[184] This decision to reject "forfeiture" as an appropriate remedy seems well within the power of a court of equity.

G. Water Law

1. Surface Water.[185]—In 1982, the Indiana Supreme Court, in *Argyelan v. Haviland*,[186] reaffirmed Indiana's adherence to the "common

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[182]*Id.* at 549.

[183]*Id.* at 548-49.

[184]*Id.* at 500 (quoting North v. Newlin, 435 N.E.2d 314, 319 (Ind. Ct. App. 1982) (quoting Greenstone v. Claretian Theological Seminary, 173 Cal. App. 2d 21, 29, 343 P.2d 161, 165 (1959))).

[185]Surface water has been judicially defined as "[w]ater from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flow [sic] upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel." Capes v. Barger, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953) (citations omitted).

[186]435 N.E.2d 973 (Ind. 1982). In April of 1981, the Second District Indiana Court of Appeals, in Argyelan v. Haviland, 418 N.E.2d 569 (Ind. Ct. App. 1981), *vacated*, 435 N.E.2d 973 (Ind. 1982), applied the "common enemy" rule to a surface water case. In

enemy doctrine."[187] Surface water is a common enemy and "each landowner may deal with it in such manner as best suits his own convenience."[188] Generally, he will not be liable for any injury caused to his neighbor's land by such action.[189] While suggesting that Indiana would not permit a "malicious or wanton employment of one's drainage rights,"[190] the court recognized only one exception to the landowner's right to combat surface water: "one may not collect or concentrate surface water and cast it, in a body, upon his neighbor."[191]

During this survey period there were two surface water cases. In *Earth Construction & Engineering, Inc. v. DeMille*,[192] Earth Construction, during construction of a sanitary sewer line, cleared the vegetation and eliminated a small ditch from a field across the street from a house owned by the plaintiff (DeMille). As a result, the surface water which accumulated after a rainstorm damaged the plaintiff's house. The trial court awarded damages to the plaintiff, and Earth Construction appealed. The court of appeals concluded that the common enemy rule set forth in the *Argyelan* decision precluded recovery by the plaintiff.[193] Earth Construction, as the contractor, was entitled to stand in the shoes of its employer, the city of Fort Wayne, who would not be liable for damage caused by the alteration of the surface water drainage under the common enemy rule. The court did not appear to see any problem in extending to the city the landowner's right to change the flow of surface water, apparently reasoning that since the city would not be held to have made an unconstitutional taking of land if its grading of an area caused damage, it should not be held liable for consequential damages resulting from the alteration in the flow of surface water.[194]

December of 1981, however, the Third District Indiana Court of Appeals, in Rounds v. Hoelscher, 428 N.E.2d 1308 (Ind. Ct. App. 1981), rejected the "common enemy" rule in favor of a "reasonable use" test. The Indiana Supreme Court granted transfer in the *Argyelan* case to settle the conflict. 435 N.E.2d at 974.

[187]The court in *Argyelan* reaffirmed the statement in Taylor v. Fickas, 64 Ind. 167 (1878):

> "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit . . . by changing the surface . . . is not restricted . . . by the fact that . . . it will cause water, which may accumulate thereon by rains . . . to stand in unusual quantities on other adjacent lands, or pass into or over the same . . . .
>
> The obstruction of surface water or an alteration in the flow of it affords no cause of action . . . ."

Id. at 173 (quoting Gannon v. Hargadon, 92 Mass. 106 (1865)).

[188]435 N.E.2d at 975.

[189]*Id.* at 977.

[190]*Id.* at 976.

[191]*Id.* (citations omitted).

[192]460 N.E.2d 984 (Ind. Ct. App. 1984).

[193]*Id.* at 985.

[194]*Id.* at 986. In a footnote, the court indicated that the trees and shrubs were removed

In *Bell v. Northside Finance Corp.*,[195] the Indiana Supreme Court continued to follow the common enemy doctrine, but reversed a summary judgment in favor of the landowners who had changed the flow of surface water on the basis that the appellant had raised several material factual issues. This case applied the exception recognized in *Argyelan*, that a party may not collect surface water "and cast it, in a body, upon his neighbor,"[196] to a situation where the drainage system constructed by a corporation's plant discharged the water to an area with an elevation slightly higher than the neighboring property. The neighboring landowners introduced evidence at the hearing that the corporation had cut a trench through a natural ridge. According to the court, this evidence raised a material factual issue as to whether or not such a trench existed, making the trial court's grant of summary judgment improper. The court also reversed on another issue. There was evidence that an artificial drain existed on the Bell property, and that an artificial underground tile ran across the corporation's property and into adjacent property. This drain was excavated and obstructed. The court found that if a landowner collects surface water into an artificial channel and discharges it across the land of his neighbor for a sufficient length of time, he can acquire a prescriptive easement.[197] Similarly, if a person is given a license and expends money on the faith of the license, the license cannot be revoked until the licensee can be placed in status quo, and may impose a servitude upon one estate in favor of another.[198] Thus, the court seems to have recognized another exception to the common enemy rule: a landowner may combat surface water, but may not do so in such a manner as to interfere with another's easement or license to drain surface water.

2. Ground Water.[199]—In 1982, there were two conflicting court of appeals decisions involving the use of ground water. In *Wiggins v. Brazil Coal and Clay Corp.*,[200] the Indiana Court of Appeals, First District, held the owner of a strip mining pit liable for the loss of water in a lake caused by the pumping of ground water from the pit in order to continue mining operations. In doing so, the court adopted a "reasonable

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from the field at the request of the landowner. *Id.* at 986 n.3. The court did not indicate or suggest that this fact played any role in the decision.

[195]452 N.E.2d 951 (Ind. 1983).

[196]435 N.E.2d at 976 (citations omitted).

[197]452 N.E.2d at 954.

[198]*Id.*

[199]Ground water has been defined as "lost water that percolates the soil below the surface of the earth, in hidden recesses, without a known channel or course." Taylor v. Fickas, 64 Ind. 167, 172 (1878). Water which flows in an underground stream with a definite channel is not considered ground water, and is governed by the same laws that apply to surface streams. Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 696, 72 N.E. 849, 852 (1904).

[200]440 N.E.2d 495 (Ind. Ct. App. 1982).

use'' test advocated by the Restatement (Second) of Torts section 858.[201] The opinion discussed the two traditional positions regarding ground water, the English rule and the American rule. Under the English, or ''absolute ownership,'' rule, the owner of the land has an absolute right to use water beneath his land for any purpose.[202] The English rule has been rejected in most states and replaced with the American, or ''reasonable use,'' rule, which allows the owner of the surface to appropriate underground water for any use which is reasonably necessary for some beneficial purpose relating to the land.[203] If the use meets this test, however, the adjacent landowners' rights and interests are not considered.[204] Recently, courts in a few states have adopted the California, or ''correlative rights,'' rule, which ''holds that the rights of all landowners over a common aquifer are coequal'' and that the ''landowner cannot extract more than his share of the water even for use on his own land where others' rights are thereby injured.''[205] In rejecting the American rule, the *Wiggins* court did not apply the apportionment concept of the California rule, a rule which is better adapted to the needs of areas where water is scarce. Instead, the court recognized the ''reasonable use'' test formulated in the Restatement (Second) of Torts section 858 as a ''logical answer to this problem,''[206] despite the fact that the Indiana Supreme Court had just rejected the ''reasonable use'' rule with regard to surface water in *Argyelan v. Haviland*.[207] The court distinguished *Argyelan* on the basis that the opinion applied to surface water rather

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[201] *Id.* at 500-01. Section 858 provides:

> Liability for Use of Ground Water
>
> (1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
>
> (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,
>
> (b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or
>
> (c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.
>
> (2) The determination of liability under clauses (a), (b) and (c) of Subsection (1) is governed by the principles stated in §§ 850 to 857.

RESTATEMENT (SECOND) OF TORTS § 858 (1979).

[202] 440 N.E.2d at 497 (citing Finley v. Teeter Stone, 251 Md. 554, 559, 248 A.2d 106, 110 (1968)).

[203] 440 N.E.2d at 497 (citing Metropolitan Utils. Dist. v. Merritt Beach Co., 179 Neb. 783, 796, 140 N.W.2d 626, 637 (1966)).

[204] 440 N.E.2d at 499; R. CUNNINGHAM, W. STOEBUCK, & D. WHITMAN, THE LAW OF PROPERTY 428 (1984).

[205] 440 N.E.2d at 497 (citation omitted).

[206] *Id.* at 500.

[207] *See supra* text accompanying notes 186-91.

than ground water problems.[208] The appellate court went on to apply the Restatement position rather than the common law and held the mining company could be liable for the damage caused by its pumping operation, reasoning that the company could not shift the cost of doing business to neighbors, but must pass on the burdens and expenses of its operation to the consumer.[209]

The Indiana Court of Appeals, Second District, reached a conflicting conclusion in *Irving Materials, Inc. v. Carmody*,[210] holding that the owner of a gravel pit was not liable for injury to his neighbors when the pumping of water from the pit into a nearby stream caused several wells in the area to go dry. The trial court had awarded damages for the neighboring landowners' well digging expenses. In reversing the trial court's judgment, the court of appeals applied the American rule,[211] and held that the injury was not the result of a legal wrong; so long as the owner is making a reasonable use of the land, he has every right to use the ground water beneath his land without regard to its effect upon his neighbors.[212]

During this survey period, the Indiana Supreme Court resolved the conflict in its affirmance of the trial court's judgment in favor of Brazil Coal in *Wiggins*.[213] The court of appeals had relied in part upon the Federal Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act)[214] in reaching its decision to reject the common law rules governing the use of ground water.[215] The Indiana Supreme Court rather quickly disposed of the Surface Mining Act by noting that the statute did not directly govern the case.[216] In a somewhat confusing paragraph,

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[208]440 N.E.2d at 501.

[209]*Id.*

[210]436 N.E.2d 1163 (Ind. Ct. App. 1982).

[211]*See supra* text accomanying notes 229-30.

[212]436 N.E.2d at 1164.

[213]452 N.E.2d 958 (Ind. 1983). The court's opinion does not mention the *Irving* decision, presumably because it adheres to existing Indiana law.

[214]30 U.S.C. §§ 1201-1328 (1977).

[215]440 N.E.2d at 498-99.

[216]452 N.E.2d at 962. Justice Hunter, however, in his dissenting opinion, noted that the Surface Mining Act did not become effective until after the plaintiff's cause of action arose, and that the interim portion of the Act did not include the section which the court of appeals invoked. Nevertheless, Justice Hunter pointed out that Indiana had subsequently enacted the regulatory programs required by the Surface Mining Act, IND. CODE § 13-4.1-8-1 (1982), and that the decision would have been decided differently had the defendant's action occurred in Indiana today. 452 N.E.2d at 965 (Hunter, J., dissenting). IND. CODE § 13-4.1-8-1(25) (1982) would require the coal company to replace the water of an owner of land who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source which has been contaminated or interrupted by coal mining and reclamation operations. Justice Hunter seems to have assumed the statute would govern the loss of the water from the lake, but the facts indicate that the Wigginses had developed the land along the lake for recreational,

the court noted that the appellants cited "Indiana statutes relating to water resources" which "do not directly govern the issue presented" in an attempt "to persuade this tribunal that the public policy of the State is moving in the direction of recognizing that property in water should not be absolute in the owner of land where it is found."[217] The court concluded: "In light of their aforementioned use in this appeal, we have no cause to undertake that task here."[218] This is confusing because the only statute cited in the court of appeals decision was the Surface Mining Act; the court did not indicate which Indiana statutes the appellants cited, and the only "aforementioned use" of any statute in the majority opinion is the sentence stating: "The statutes cited to do not directly govern the issue presented."[219] Presumably, the supreme court was indicating that it was not going to examine the Indiana statutes relating to water law since none of them were directly controlling and that it was not going to use this occasion to formulate a public policy on the use of ground water.

The court cited four cases,[220] three more than one hundred years old and one more than eighty years old, for the rule that ground water belongs to the owner of the land beneath which it is found:

> The property in the lost water that percolates the soil below the surface of the earth . . . and property in the wild water that lies upon the surface . . . but without a channel . . . fall within the maxim that a man's land extends to the centre of the earth below the surface, and to the skies above, and are absolute in the owner of the land, as being a part of the land itself.[221]

The only exception to this rule recognized by the court was that "this right does not extend to causing injury gratuitously or maliciously to

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residential, and retirement homes and that the Stevenson tract was mainly soil bank land. There is no suggestion they were using the lake as a water supply, unless you interpret "other legitimate use" to include recreational use of the waters.

[217]452 N.E.2d at 962.

[218]*Id.*

[219]*Id.* While the "statutes" referred to are unclear, it would appear from the court of appeals decision and the dissenting opinion that the court is referring only to the Federal Surface Mining Act, 30 U.S.C. §§ 1201-1328 (1977), and the Indiana Surface Coal Mining and Reclamation Act, IND. CODE § 13-4.1-1-1 to -6 (1982). On the other hand, the court might be referring to a very substantial body of statutory law contained in Title 13 governing water conservation. Article 2, section 2 regulates the use of ground water. IND. CODE § 13-2-2-2 (1982) provides: "It is hereby declared a public policy of this state in the interest of the economy, health and welfare of the state and its citizens, to conserve and protect the ground water resources of the state. . . ." *Id.* However, many of the enforcement provisions of this section were added after the plaintiffs' cause of action arose. *See infra* note 233.

[220]The court cited Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N.E. 849 (1904); Taylor Admr. v. Fickas, 64 Ind. 167 (1878); City of Greencastle v. Hazelett, 23 Ind. 186 (1864); New Albany & Salem Railroad Co. v. Peterson, 14 Ind. 112 (1860).

[221]Taylor v. Fickas, 64 Ind. 167, 172 (1878) (citations omitted).

nearby lands and their owners."[222] Applying these rules to the case at bar, the court found that the mining was not done with the intent or purpose to injure the plaintiffs, and that the removal of the water was in connection with a beneficial use of the land and not done gratuitously.[223] Thus, the trial court's judgment in favor of the coal company was affirmed.

In a scholarly dissenting opinion, Justice Hunter noted that the majority opinion was in conflict with the Surface Mining Act, which, though not in effect at the time the cause of action arose, expressed the intent of Congress to protect the public and the environment from damages resulting from strip mining, and is in conflict with the present Indiana law.[224] While recognizing that judicial devotion to the doctrine of stare decisis is a noble and justifiable tradition, Justice Hunter argued that departure from the doctrine is necessary when the rationale for the existing rule of law no longer exists.[225] Justice Hunter agreed with the court of appeals that the rules governing ground water developed at a time when there was little knowledge of hydrology,[226] and that the concept of absolute ownership of property has diminished now that the landowner is subject to nuisance, pollution controls, zoning, and other laws affecting the use of his land.[227] In an argument similar to the one presented in his dissenting opinion in *Argyelan*,[228] Justice Hunter suggested that damages caused from the use of water should not be treated any differently than damages caused by other uses of land, such as noise and pollution. Under the maxim *sic utere tuo ut alienum non laedas* (use your property so as not to cause injury to the rights of others), the owner of land should be liable for the unreasonable harm caused to others by the use of his land.[229] There should be no difference between the right of a riparian owner to use the water in a stream, which is governed by the doctrine of reasonable use, and the right of an owner of land to use

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[222]452 N.E.2d at 964.

[223]*Id.*

[224]*Id.* at 965 (Hunter, J., dissenting).

[225]*Id.* at 966-67 (Hunter, J., dissenting).

[226]*Id.* at 966. The Governor's Commission on Water Rights defined the problem as follows:

> 3) The existing law of water rights (basically the common law) is inadequate to provide that legal basis and management framework within which human, social and economic needs for water may be satisfied in a timely and equitable manner. This conclusion is based on the finding that:
>
> (e) It provides no basis for recognition of the interrelated nature of the various components of the water resource and of the relative impacts of uses of the various components.

GOVERNOR'S WATER RIGHTS AND MANAGEMENT COMMISSION, STATE OF INDIANA, REPORT TO GOVERNOR ROBERT D. ORR 3 (1982).

[227]452 N.E.2d at 966 (Hunter, J., dissenting).

[228]435 N.E.2d 973, 989 (Hunter, J., dissenting).

[229]452 N.E.2d at 966-68 (Hunter, J., dissenting).

the water beneath his land.[230] Justice Hunter's opinion does not preclude the coal company from dewatering its pits, but it would prevent the coal company from forcing the plaintiff to pay a portion of its cost of doing business by denying them recovery for damages caused by the mining operations.[231]

The increasing statutory regulation of the use of Indiana water suggests that a public policy is being developed by the legislature.[232] Recently, the legislature responded to the potential harm to adjoining landowners in Jasper and Newton Counties caused by the use of ground water for extensive irrigation of farmland by enacting special legislation addressing the problem.[233] The court may have decided not to undertake the task of determining a public policy on the use of ground water in light of the legislative developments in this area.

3. Riparian Rights.[234]—In *Bath v. Courts*,[235] the court of appeals discussed the riparian rights of landowners abutting a "public freshwater

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[230]*Id.* at 966-67 (Hunter, J., dissenting).

[231]*Id.* at 965, 967 (Hunter, J., dissenting). *See also* the court of appeals decision, 440 N.E.2d at 501.

[232]*See supra* note 219.

[233]After the Prudential Insurance Company of America began irrigation of approximately 7,000 acres of its 23,000 acre Fair Oaks Farm in Jasper and Newton Counties, farmers in the area complained that their wells were going dry; there was an odor of hydrogen sulfide in the air and a loss of wildlife in the area. Prohosky v. Prudential Ins. Co. of America, 584 F. Supp. 1337 (N.D. Ind. 1984). Special legislation was enacted in 1982 giving the Department of Natural Resources the authority to declare an emergency in Jasper and Newton Counties when the water level in the aquifer fell below a certain level and the power to restrict the amount of ground water which can be extracted from any well with the capacity of producing more than 100,000 gallons of water per day. IND. CODE § 13-2-2.5-3 (1982). The statute also required the registration of all wells in Jasper and Newton Counties capable of producing more than 100,000 gallons per day. *Id.* § 13-2-2.5-4. In 1983, the legislature passed legislation creating a natural resource commission to inventory the state's water resources and to determine minimum flows of streams and minimum safe levels of ground water in aquifers. IND. CODE § 13-2-6.1-1 to -9 (Supp. 1984). There is also a provision requiring the registration of all facilities capable of withdrawing more than 100,000 gallons of ground water, surface water, or a combination thereof in one day. IND. CODE § 13-2-6.1-7 (Supp. 1984).

[234]"There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. These rights are common to all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land."

Thompson v. Enz, 379 Mich. 667, 683-84, 154 N.W.2d 473, 482 (1967); Brown v. Heidersbach, 172 Ind. App. 434, 440, 360 N.E.2d 614, 619 (1977) (quoting Thompson v. Enz, 379 Mich. 667, 683-84, 154 N.W.2d 473, 482 (1967) (The language quoted is originally found in Sanborn v. Peoples Ice Co., 82 Minn. 43, 50, 84 N.W. 641, 642 (1900)). Historically, the term "littoral rights" has been used to refer to the rights of the owner of lakeshore property, but today the term "riparian rights" is being used by most courts to describe the rights of an owner of land abutting both lakes and streams. Munro, *Public v. Private: The Status of Lakes*, 10 BUFFALO L. REV. 459, 467 (1961).

[235]459 N.E.2d 72 (Ind. Ct. App. 1984).

lake."[236] The parties to the case owned adjoining lakefront lots. The plaintiffs constructed a pier at an angle to avoid interference with a public pier, and in so doing crossed the defendants' "extended" property line.[237] The defendants built a pier parallel to the parties' common property boundary and so close to the plaintiffs' pier that it interfered with its use. The trial court granted the plaintiffs' an injunction for the removal of the defendants' pier, and allowed the plaintiffs to maintain their pier because it did not unreasonably interfere with either the defendants' riparian rights or the public's use of the lake.[238] On appeal, the defendants maintained that because their property line extended to the center of the lake, the plaintiffs had to remove their pier.

The court of appeals adopted the Wisconsin rule that "where the onshore property boundaries are perpendicular to the shore, the boundaries are determined by extending the onshore boundaries into the lake."[239] The court refused, however, to extend the onshore boundaries to the middle of the lake, citing an early Indiana Supreme Court decision which held that, in the case of a closed lake, as was this lake, the riparian owner does not own to the middle of the lake, because such a rule would exclude some owners from title to any of the waterbed.[240] The court observed that the nature of the owner's riparian rights in the early decisions turned on the status of the waters as navigable or nonnavigable,[241] but the court concluded that the determination of the "navigability" of the lake was unnecessary because the governing statute[242] made no distinction between navigable and nonnavigable "public freshwater lakes."[243] The court then concluded that riparian owners abutting

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[236]The statute in effect at the time of the suit defined public freshwater lakes as "all lakes which have been used by the public with the acquiescence of any or all riparian owners . . . [excluding Lake Michigan and any lake which lies in whole or in part within a city of the second class in Lake County]." IND. CODE § 13-2-14-2 (repealed 1982). The definition of public freshwater lake is now found in IND. CODE § 13-2-11.1-1 (1982).

[237]459 N.E.2d at 73. The court did not use the word "extended," but the facts clearly indicate the pier crossed the Baths' property at a point beyond the shore line and thus was on the Baths' property only if it extended into the lake.

[238]*Id.*

[239]*Id.* (citing Nosek v. Stryker, 103 Wis. 2d 633, 635, 309 N.W.2d 868, 870 (1981)).

[240]459 N.E.2d at 75 (citing Stoner v. Rice, 121 Ind. 51, 53-54, 22 N.E. 968, 969 (1889)).

[241]459 N.E.2d at 75. It should be noted that the cases cited by the court extending the onshore boundaries to the lands beneath the superjacent waters were decisions involving nonnavigable bodies of water. Indiana decisions have always held that the state holds title to the lands beneath navigable waters. *E.g.*, State v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950); Lake Sand Co. v. State, 68 Ind. App. 439, 120 N.E. 714 (1918).

[242]IND. CODE § 13-2-11-1 (repealed 1982) (similar version at IND. CODE §§ 13-2-11.1-1 to -14 (1982)).

[243]459 N.E.2d at 75. It is clear from a reading of the statute that public rights are not made to depend upon the navigability of the lake. *See* Waite, *Public Rights in Indiana Waters* 37 IND. L.J. 467, 483-85 (1962).

the lake had the right to build and maintain piers which did not interfere with others' use of the lake.[244]

Although the plaintiffs' pier unlawfully encroached upon the defendants' shorefront property, the court of appeals did not require it to be removed, but indicated that the pier need only be straightened so that it no longer encroached upon the neighboring property. The court of appeals agreed with the trial court that the defendants' only purpose in building their pier was to interfere with the plaintiffs' use of their pier, an unlawful purpose contrary to the statute allowing piers to be "maintained for commerce, navigation, and the owner's enjoyment."[245]

When one examines the decision closely, it appears the court of appeals was struggling in its attempt to determine the rights of riparian owners of public freshwater lakes. It is true, as the court points out, that the statute on public freshwater lakes makes no distinction between navigable and nonnavigable lakes, yet the cases cited by the court for extending the onshore boundaries into lakes and streams were cases involving nonnavigable bodies of water.[246] Likewise, the statute cited as authority for the right of a riparian owner to construct a pier applies only to landowners "bordering upon a navigable stream."[247] It is, therefore, difficult to comprehend how the court could reach the conclusion that "our statutory law renders such a determination [of navigability] unnecessary."[248] The statute on public freshwater lakes appears to be equally silent with regard to the ownership of the land beneath the public freshwater lakes or the right of the riparian owner to build a pier on such lakes. The only case which supports the position that the riparian owner abutting a public freshwater lake may construct a pier on the lake is *Brown v. Heiderbach*,[249] which presumes such a right without any discussion of the navigability of the lake or any reference to the public freshwater lake statute. The present statute on public freshwater lakes raises serious questions as to the rights of the riparian owners both to the lands beneath the waters and the waters themselves. While the statute does not directly address the ownership of the bed of such lakes, it does provide that the "natural resources and the natural scenic beauty of Indiana are a public right" and that the State of Indiana "holds and controls all of such lakes in trust for the use of all of its citizens."[250] The statute defines "natural resources" as "the water, fish, plantlife, and minerals in a public freshwater lake," and defines "natural scenic beauty" as "the natural condition as left by nature without

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[244]459 N.E.2d at 75-76 (citing IND. CODE § 13-2-4-5 (1982)).

[245]*Id.* at 76 (citing IND. CODE § 13-2-4-5 (1982)).

[246]*See supra* note 241.

[247]IND. CODE § 13-2-4-5 (1982).

[248]459 N.E.2d at 75 (footnote omitted).

[249]172 Ind. App. 434, 360 N.E.2d 614 (1977).

[250]IND. CODE § 13-2-11.1-2(a), (b) (1982).

manmade additions or alterations."[251] The landowner cannot change the water level or shoreline without a permit from the Department of Natural Resources,[252] nor will such a permit be issued authorizing the dredging or mining of a lake without first holding a public hearing.[253] The statutes would appear to raise some interesting constitutional issues. If the waters were nonnavigable before the enactment of the statutes, the landowner would not only have owned the bed beneath the waters but could have excluded others from using the superjacent waters.[254] Thus, the statute would appear to be a taking of property without due process of law.[255] One can see, therefore, why the court might wish, by slight of hand, to avoid opening this Pandora's box and instead decide the case on more traditional rules of water law.[256]

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[251]*Id.* § 13-2-11.1-1.

[252]*Id.* § 13-2-11.1-3.

[253]*Id.* § 13-2-11.1-6.

[254]Sanders v. DeRose, 207 Ind. 90, 191 N.E. 331 (1934); Patton Park Inc. v. Pollak, 115 Ind. App. 32, 55 N.E.2d 328 (1944).

[255]*Cf.* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (holding that a zoning ordinance prohibiting a landowner from filling in a nonnavigable wetland on his property was constitutional and not a taking of property without due process). For an interesting discussion of whether the freshwater lake statute would permit one of a group of riparian owners, by inviting a member of the public to use the lake, to change a private lake into a public lake, and if so whether the statute would be constitutional, see Waite, *supra* note 243, at 481-83.

[256]For a discussion of a zoning case decided during this survey period, see the discussion of *Ailes v. Decatur Area Planning Comm'n* in Macey, *Constitutional Law, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 129, 137 (1985).