XIV. Property

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Several judicial and statutory developments involving property rights occurred in Indiana during the survey period. The discussion of the most significant cases and statutes will be presented under the following general headings: (1) landlord-tenant relationships, (2) adverse possession and partition, (3) real estate contracts, (4) survivorship rights, (5) easements, (6) covenants, (7) condemnation, and (8) horizontal property law. Other cases that are not discussed in detail in this Article and do not fall into the above categories involved: surface water,[1] oil and gas leases,[2] zoning,[3] deeds and equitable

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[1]In Cloverleaf Farms, Inc. v. Surratt, 349 N.E.2d 731 (Ind. Ct. App. 1976), the court reapplied the rule that a *lower* property owner may dam against surface water to prevent it from entering his land and is not liable for damages resulting to the upper property owner from any accumulation or changed flow of water above the obstruction so long as he does not collect the water in a body and discharge it on another's land.

[2]In Citizens By-Prods. Coal Co. v. Arthalony, 351 N.E.2d 57 (Ind. Ct. App. 1976), the court of appeals ruled that the fixed one-year term of an oil and gas lease could not be extended by a dry hole clause that was rendered meaningless by deletion of all provisions for delay rental. *Accord*, Freeland v. Edwards, 11 Ill. 2d 395, 142 N.E.2d 701 (1957).

[3]In Metropolitan Bd. of Zoning Appeals v. Graves, 360 N.E.2d 848 (Ind. Ct. App. 1977), the court of appeals held that the trial court may reverse the Board's denial of a use variance only if each of the five statutory prerequisites has been established as a matter of law by evidence "such that no reasonable man could fail to accept that prerequisite as proved." *Id.* at 851. The trial court had erroneously reversed the denial on its finding of "substantial evidence of probative value" establishing the five prerequisites. The function of the trial court is to ascertain whether there is "substantial evidence of probative value" to *support* the Board's findings. *See* Fail v. LaPorte County Bd. of Zoning Appeals, 355 N.E.2d 455 (Ind. Ct. App. 1976) (also holding that a hardship claim is available to a purchaser with knowledge of the zoning requirements).

In Minton v. State, 349 N.E.2d 741 (Ind. Ct. App. 1976), the appellate court held that denial of an application for a building permit is a determination properly reviewable by the Board of Zoning Appeals pursuant to IND. CODE § 18-7-5-82 (1976), and the Board's decision is reviewable by certiorari if the statutory procedures of section 18-7-5-88 are complied with. However, since property owners who appeared before the Board in opposition to the applicants were not served with notice of the petition for writ of certiorari, the trial court was without jurisdiction of the case. Section 18-7-5-88 clearly makes the opponents necessary and indispensable parties in a certiorari proceeding.

mortgages,[4] and the right to access to public streets.[5]

A. Landlord-Tenant Relationships

From 1975 until mid-1977, it seemed that Indiana courts were moving consistently and steadily in the direction of the acceptance of contract principles in the landlord-tenant situation. In 1975, the First District Court of Appeals applied the contract doctrine of mitigation of damages in the landlord-tenant context.[6] However, this year the same court, in *Roberts v. Watson*,[7] did not take the opportunity to adopt the anticipatory repudiation doctrine. The *Roberts* court, citing *Booher v. Richmond Square, Inc.*,[8] held that in an action

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[4]In Guido v. Baldwin, 360 N.E.2d 842 (Ind. Ct. App. 1977), the trial court determined that grantors, who reserved a "small cottage and a half acre garden plot" out of an eighty acre tract, owned approximately an acre of the tract. The court of appeals affirmed, holding that (1) ambiguous reservations in deeds are construed against the grantor only if the evidence establishes that the deed was drafted by the grantor, and (2) deeds "will be construed in the light of all surrounding circumstances as well as the subsequent acts of the parties to the conveyance by which they construed it themselves." *Id.* at 847. A letter written by the grantor subsequent to the deed was a subsequent act of a party to the deed evidencing the grantor's intent, even though arguably the letter was a self-serving statement.

In Moore v. Linville, 352 N.E.2d 846 (Ind. Ct. App. 1976), the court reviewed the factors that indicate an intent to create an equitable mortgage: for example, the fact that grantor is indebted to grantee, grantor is given the right to redeem, grantee paid inadequate consideration, grantor paid interest to grantee, grantor retained possession without paying rent, grantor improved the real estate, or grantee exercised no control over the property. In *Moore*, although consideration of all the factors indicated the intent to create an equitable mortgage, the trial court could have found that the grantor lost his right to redeem by failing to "do equity." The grantor did not insure the property, pay taxes and assessments as agreed, or repay the grantees.

[5]In City of Muncie v. Pizza Hut, Inc., 357 N.E.2d 735 (Ind. Ct. App. 1976), the court of appeals held that the trial court did not abuse its discretion when it mandated the city to allow Pizza Hut ingress and egress to its property from an abutting public street, even though Pizza Hut had access from another abutting public street. An owner of a lot abutting a street has an interest in having access to the street, which cannot be denied by the exercise of police power unless "public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, [or] order." *Id.* at 737 (quoting Chicago, Terre Haute, & Se. Ry. v. Anderson, 182 Ind. 140, 143, 105 N.E. 49, 51 (1914)).

[6]Hirsch v. Merchants Nat'l Bank & Trust Co., 336 N.E.2d 833 (Ind. Ct. App. 1975), *noted in* Polston, *Property, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 297, 302 (1976). *See also* State v. Boyle, 344 N.E.2d 302 (Ind. Ct. App. 1976) (landlord must use reasonable diligence to relet the premises in mitigation of damages upon abandonment by the lessee).

[7]359 N.E.2d 615 (Ind. Ct. App. 1977).

[8]310 N.E.2d 89 (Ind. Ct. App. 1974), *noted in* Polston, *Property, 1976 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 228, 228 (1974). The *Booher* court, in denying tenant's res judicata defense, held that the landlord may bring successive actions for rent as it comes due.

for rent the landlord may recover the rent due and unpaid, but not rent not alleged to be due at the time the action is brought.[9] Thus, the landlord must either wait until the end of the lease term to sue or bring successive actions for the difference between the rent agreed upon and the fair rental value or rent received in the effort to mitigate.[10] If the *Roberts* court had remanded the case with instructions that the trial court consider as damages all rent reserved under the lease less fair rental value or rent received from any reletting, it would have established Indiana's commitment to the application of contract principles in the landlord-tenant relationship.[11]

In 1976, Judge Buchanan of the Second District Court of Appeals wrote the landmark decision of *Old Town Development Co. v. Langford*,[12] holding that residential apartment leases are contracts consisting of mutually dependent covenants including a two-part implied warranty of habitability.[13] A petition was filed to transfer the

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[9]359 N.E.2d at 621. In *Roberts*, when the landlord brought the action in October 1973, lessee had paid only the first month's rent (July 1973). The most the landlord could have been awarded, said the appellate court, was $833.32, the due but unpaid rent for August and September. The trial court had awarded $16,531 in damages for breach of the five-year lease.

[10]If the landlord makes a reasonable good faith effort to relet, he should recover the reserved rent until he is able to relet. When the landiord does relet the premises, the rent received should be taken as the fair rental value of the premises in ordinary circumstances. *See* Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 640 (1977).

[11]In *Roberts*, landlord's actions in October 1973 in taking possession and using the premises may have been "so inconsistent with the subsisting relationship of landlord and tenant, that it may be implied that both lessor and lessee have agreed to consider the lease as ended." Northern Ind. Steel Supply Co. v. Chrisman, 139 Ind. App. 27, 33, 204 N.E.2d 668, 671 (1965). The question of implied termination is one for the trier of fact. If an implied termination had occurred, landlord could only recover rent reserved less fair rental value or rent received until the time of the implied termination.

[12]349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977). This decision received extensive review in recent issues of the *Indiana Law Review*. *See* Krieger & Shurn, *supra* note 10; Polston, *supra* note 6, at 304. Judge Sullivan specially concurred, and Judge White dissented.

[13]The first part of the "bifurcated" implied warranty of habitability consists of the landlord's warranty that the leased premises are free from latent defects rendering them uninhabitable for residential purposes. The second part of the warranty consists of a promise by the landlord that the premises will remain reasonably fit for residential purposes during the entire term of the lease. Necessarily this promise carries with it an implied duty to repair. Upon breach of the implied warranty, the landlord is liable to his tenant for all traditional contract damages arising from breach. The landlord is also liable under traditional negligence principles for any personal injury or property damage.

The recognition of an implied warranty of habitability in residential leases has occurred in several jurisdictions as a result of a reevaluation of common law doctrines (*e.g.*, caveat lessee, independent covenants in leases, tort immunity of landlords) in light of contemporary social and economic conditions. *See, e.g.*, Javins v. First Nat'l

case to the Indiana Supreme Court for review, but subsequently the parties settled the lawsuit and filed a petition for stipulation of dismissal of the petition to transfer. In November 1977, the Indiana Supreme Court granted the petition to transfer and then dismissed the case as moot because of the settlement.[14] By granting the petition to transfer, the Indiana Supreme Court has erased the court of appeals decision from the books. Technically, *Old Town* does not exist or have any precedential effect;[15] and the supreme court, by summarily dismissing the case after granting transfer, has left nothing in its place. For the present, then, Indiana tenants, landlords, lawyers, and trial courts must deal with pre-*Old Town* cases which apply and embrace the common law doctrines of caveat lessee,[16] independent covenants,[17] and the landlord's general tort immunity.[18]

In another landlord-tenant case, *Indiana State Highway Commission v. Pappas*,[19] the law appears harsh in its application.[20] Pappas operated a business on land that the Indiana State Highway Commission sought to condemn. In 1968, Pappas deeded the land to the state in return for $12,600. He was later told by a representative of the Commission that he could pay rent and remain on the land until he found replacement property. Pappas signed a one-year lease, but at the end of the year, in spite of diligent efforts, he had not found replacement property and in fact did not find such property until

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Realty Corp., 428 F.2d 1071 (1970), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

[14]Old Town Development Co. v. Langford, 369 N.E.2d 404 (1977).

[15]The effect of granting a petition to transfer is that the court of appeals decision is "vacated and held for naught." IND. R. APP. P. 11(B)(3). Practically, however, *Old Town* does indicate how the three judges of the Second District Court of Appeals will respond in another case raising the same issues.

[16]*E.g.*, Anderson Drive-In Theatre, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953). *But see* Weaver v. American Oil Co., 257 Ind. 458, 463-64, 276 N.E.2d 144, 147-48 (1972) (dicta) ("Caveat lessee is no more the current law than caveat emptor."); Theis v. Heuer, 149 Ind. App. 52, 62 n.1, 280 N.E.2d 300, 305 n.1 (1972) (dicta) ("Modern case law is now finding an implied warranty of habitability by a landlord to his tenant.").

[17]This doctrine stems from the conception of a lease as a conveyance rather than a contract.

[18]*E.g.*, Hanson v. Cruse, 155 Ind. 176, 57 N.E. 904 (1900); Anderson Drive-In Theatre, Inc. v. Kirkpatrick, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

[19]349 N.E.2d 808 (Ind. Ct. App. 1976), *transfer denied*, 360 N.E.2d 1 (Ind. 1977).

[20]A justice of the Indiana Supreme Court, in dissenting to denial of transfer of the case, stated: "The treatment of this condemnee [lessee] by the state exercising its power of eminent domain has been nothing short of scurrilous." 360 N.E.2d at 1 (Hunter, J., dissenting).

1972. At the end of the lease year and monthly thereafter until 1972, Pappas talked to representatives of the Commission about his problems in finding property, and the Commission each time allowed him to remain in possession for an additional thirty days.

In 1970, the Commission cut lines carrying special electrical service to Pappas' machine shop, and consequently Pappas was unable to operate his business for more than two years. The trial court awarded Pappas damages of $30,000, including $18,000 for the replacement cost of the electrical service[21] and $12,000 for lost earnings for the entire two and one-third year period. The Indiana Court of Appeals agreed that the Commission was liable to Pappas for termination of the electrical service, but held that damages were erroneously assessed for a period longer than the unexpired term of the leasehold. At the time of the landlord's tort, Pappas was a tenant at sufferance[22] with permission to remain on the premises for only thirty days from the last prior extension by the Commission. Pappas could recover loss of value of the use of his shop only for the duration of that thirty-day period.

B. Adverse Possession and Partition

Of the adverse possession cases decided during the survey period,[23] the most significant was the Indiana Court of Appeals'

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[21]The court of appeals held that the $18,000 awarded for the replacement cost of wiring was inappropriate because Pappas was not forced to install wiring in the replacement property as a consequence of the Commission's tortious cutting of wires at his original shop. 349 N.E.2d at 813.

[22]After the expiration of the one-year lease term, the Commission refused to accept rent for Pappas' use of the premises. *See* Cargar v. Fee, 140 Ind. 372, 39 N.E. 93 (1894) (permission to use land without any provision for rent, at most, amounts to tenancy at sufferance).

[23]In Indiana, an adverse possessor's conduct in using and occupying the land is sufficient to show the requisite intent to adversely claim the land, and it matters not whether the possessor actually intended only to occupy his own land or intended to occupy the land of another. This proposition was settled in the leading case of Cooper v. Tarpley, 112 Ind. App. 1, 41 N.E.2d 640 (1942), and was followed in the two recent boundary dispute cases of Colley v. Carpenter, 362 N.E.2d 163 (Ind. Ct. App. 1977), and Penn Cent. Transp. Co. v. Martin, 353 N.E.2d 474 (Ind. Ct. App. 1976). *Contra, e.g.*, Preble v. Maine Cent. R.R., 85 Me. 260, 27 A. 149 (1893) (one who intends to claim only his own land does not possess the hostile intent required for adverse possession).

In *Colley* and *Penn Central*, the courts also restated settled rules regarding the adverse possessor's payment of "all taxes falling due on the land" as required by IND. CODE § 32-1-2-1 (1976). In *Colley*, since no taxes were assessed on the disputed strip, no taxes were required to be paid. *See* Langabaugh v. Johnson, 321 N.E.2d 865 (Ind. Ct. App. 1975). In *Penn Central*, the adverse possessors' payment of taxes on improvements located on the land was sufficient to satisfy the statute.

In Criss v. Johnson, 348 N.E.2d 63 (Ind. Ct. App. 1976), the court of appeals discussed the effect of a legal survey made pursuant to IND. CODE § 17-3-63-3 (1976).

decision in *Piel v. Dewitt*,[24] discussing the kind of notice required to start the ten-year statute of limitations[25] running against a remainderman. In 1962, the life tenant executed a warranty deed to defendant Piel in which she purported to convey fee simple ownership to an eighty-acre tract of land. In fact, at the time of the conveyance, the life tenant owned only an undivided one-half interest in the tract and a life estate in the other undivided one-half interest. The warranty deed was recorded together with an "affidavit of transfer" in which the life tenant stated she was the owner of the entire tract. Piel took possession of the land immediately after the conveyance to him and remained in possession and paid taxes thereafter. The life tenant died in 1973, and immediately after her death the remaindermen sought a judicial declaration to their fee simple ownership of one-half the property. The trial court upheld the remaindermen's contentions, and Piel appealed, arguing that he had gained title to the entire eighty-acre tract by adverse possession.

The general rule is that the statute of limitations barring actions to recover possession does not run against a remainderman until the termination of the intervening life estate.[26] Death of the life tenant is the customary way of ending a life estate, but the life tenant may cause a premature termination by claiming a larger estate and properly notifying the remainderman, thereby repudiating the life estate.[27] The court of appeals rejected the view that constructive notice by recordation is sufficient to alert the remainderman of the life tenant's repudiation.[28] The court of appeals decided that the

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The statute provides: "The lines, as . . . located and established [by the survey], shall be binding upon all landowners affected, their heirs and assigns, unless an appeal is taken as provided for by [§ 17-3-58-5]." *Id.* § 17-3-63-3(f). The court held that although the survey establishes the accuracy of the line surveyed, it does not establish or defeat title. Thus, after the time for appealing the legal survey, one asserting title by adverse possession to a line other than the surveyed line may bring a quiet title action.

[24]351 N.E.2d 48 (Ind. Ct. App. 1976).

[25]IND. CODE § 34-1-2-2 (1976) bars actions to recover possession of real estate 10 years after the cause of action to recover possession accrues.

[26]Since the remainderman has no right to possession until the life estate ends, the remainderman's cause of action to recover possession cannot accrue until that time. *E.g.*, Chambers v. Chambers, 139 Ind. 111, 38 N.E. 334 (1894).

[27]351 N.E.2d at 53 (citing 3 AM. JUR. 2d *Adverse Possession* § 226 (1962)). When the life estate is prematurely terminated by repudiation, the remainderman's right to possession is accelerated, and the statute of limitations may run against him.

[28]Remaindermen are not required to constantly inspect recorded documents to preserve their interest. Recording acts protect subsequent purchasers from a common grantor and impart no notice to those whose interests are established prior to the recording. *See, e.g.*, Lincoln Nat'l Bank & Trust Co. v. Nathan, 215 Ind. 178, 19 N.E.2d 243 (1939). *But see* Commonwealth v. Clark, 119 Ky. 85, 83 S.W. 100 (Ky. Ct. App. 1904) (recording of life tenant's invalid deed claiming title to the fee simple held to constitute notice to the remainderman of the life tenant's adverse possession where the state was the remainderman).

adverse possessor must prove that the remainderman was given actual notice of the life tenant's repudiation.[29] Neither the recording of the life tenant's deed and affidavit nor Piel's actual possession of the entire tract, which presumably is "in deference to the remainderman's future interest" until the "remainderman attains actual notice to the contrary,"[30] was adequate notice to the remainderman of an adverse claim during the lifetime of the tenant. What is adequate notice remains to be decided in a subsequent case.[31]

The *Piel* court also discussed the distinction between "when a right to partition exists and when the statute of limitations begins to run against the asserter of that right."[32] A tenant in common or joint tenant, pursuant to Indiana Code section 32-4-5-1,[33] has the right to partition throughout the cotenancy; but the fifteen-year statute of limitations on the assertion of that right does not begin to run until there is an ouster of the asserter by his co-tenant.[34] The *Piel* court stated that the ouster rule "would seem logically to apply with equal force between a tenant in possession and a remainderman given the right . . . to bring an action for partition"[35] pursuant to Indiana Code section 32-4-6-1.[36] The *Piel* court was not required to

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[29]The court characterized this as the majority view. The court mentioned a closely related view that the adverse possessor must prove the remainderman's actual knowledge of the life tenant's repudiation. A review of the cases cited by the *Piel* court suggests that there is little, if any, real difference between the notice view and the knowledge view. *Compare* Copenhauer v. Copenhauer, 317 P.2d 756 (Okla. 1957), *and* Quarles v. Aruther, 33 Tenn. App. 291, 231 S.W.2d 589 (1950) (notice), *with* Bretschneider v. Farmers' Nat'l Bank, 131 Neb. 495, 268 N.W. 278 (1936), *and* Maurer v. Reifschneider, 132 N.W. 197 (Neb. 1911) (knowledge).

[30]351 N.E.2d at 55.

[31]*See* Annot., 58 A.L.R.2d 291 (1958), for a compilation of cases addressing the question.

[32]351 N.E.2d at 56.

[33]IND. CODE § 32-4-5-1 (1976) provides:

> 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 in the manner provided in this act. An administrator or executor may also compel partition as a tenant-in-common or joint tenant may do, whenever, in the discharge of his duties as such, it shall be necessary for him to sell the estate of the decedent therein. Trustees, administrators and executors may also be made defendants in actions for the partition of real estate to answer as to any interest they may have in the same.

[34]*E.g.*, Hare v. Chisman, 230 Ind. 333, 101 N.E.2d 268 (1951). A partition action may be barred by the running of the fifteen-year "catch-all" statute of limitations of IND. CODE § 34-1-2-3 (1976). *See, e.g.*, Nutter v. Hawkins, 93 Ind. 260 (1884).

[35]351 N.E.2d at 56.

[36]IND. CODE § 32-4-6-1 (1976) provides:

> When any person shall own an undivided interest in fee simple in any lands, and, at the same time, shall own a life estate in the remaining portion of any such lands, or any part thereof, then, in any such case, such person so

decide whether the life tenant's deed and affidavit in 1962 were sufficient "ouster" to start the statute running, because the partition action was brought within fifteen years of the deed and affidavit. Consequently, the determination of what is sufficient ouster to start the statute of limitations running in the life tenant-remainderman situation must await an appropriate case.

The fact that a life tenant or remainderman is given the statutory right to partition when one remainderman also owns a portion of the life estate led the Indiana Court of Appeals in *Hurwich v. Zoss*[37] to the conclusion that possession or the right to immediate possession is required to maintain an action for partition under section 32-4-5-1. The court reasoned that if the legislature had intended to abrogate the common law possession requirement in its enactment of section 32-4-5-1, then the subsequent enactment of the life tenant-remainderman partition statute would have been meaningless and unnecessary.[38]

C. Real Estate Contracts

In *McMahan Construction Co. v. Wegehoft Brothers, Inc.*,[39] the First District Court of Appeals affirmed the trial court's decree ordering specific performance of an option contract for the sale of real estate. The 1964 agreement was that Wegehoft would sell dirt and gravel from its land to McMahan on the condition that McMahan sell Wegehoft a neighboring parcel of property. The oral agreement was evidenced by a handwritten memorandum signed by representatives of both parties, which referred to Wegehoft's right to purchase McMahan's land as an option to purchase, exercisable before March 30, 1966. Although on several occasions between 1964 and 1968 Wegehoft inquired as to when it would receive a deed to the McMahan property, Wegehoft apparently did not realize that it held only an option to purchase and consequently did not give McMahan any specific notice of its intent to exercise the option. The facts recited by the appellate court indicate, however, that in 1967, after the option was required to be exercised, McMahan representatives believed that the Wegehofts "were going to purchase the property."[40]

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owning such fee and life estate, or the person or persons owning the fee in such lands subject to such undivided interest in fee and such life estate in any such lands, may compel partition thereof and have such fee simple interest in any such lands so held, set off and determined in the same manner as lands are now partitioned by law.

[37]353 N.E.2d 549 (Ind. Ct. App. 1976).

[38]351 N.E.2d at 56. The statutes are reprinted in notes 33 & 36 *supra*.

[39]354 N.E.2d 278 (Ind. Ct. App. 1976).

[40]*Id.* at 280.

The memorandum provided that McMahan would apply payments for dirt and gravel as a credit against the $5000 purchase price of the land if Wegehoft so desired. Although McMahan removed dirt and gravel from 1964 until 1968, McMahan paid Wegehoft nothing until 1968, when McMahan tendered a check to Wegehoft for the value of the materials removed according to McMahan's records. Wegehoft refused to accept the check, tendered instead the difference between McMahan's check and the $5000 purchase price, and demanded a deed to the property. When McMahan refused to convey, Wegehoft sued for specific performance of the contract of sale.

The court of appeals ruled that the trial court's decree of specific performance was supported by sufficient evidence to establish that an option contract had been created.[41] The appellate court also decided that the written memorandum of the contract was sufficient to satisfy the statute of frauds.[42] However, the court next had to deal with the fact that Wegehoft had not specifically indicated its intent to exercise the option. The general rule is that the optionee's election to exercise an option must be communicated to the optionor within the designated time, unless the optionor has prevented the optionee's timely exercise or has expressly or impliedly waived the time limit by his conduct.[43] Thus, the appellate court might have considered whether Wegehoft timely, albeit orally, indicated its intent to exercise the option, or whether McMahan, by its conduct, impliedly waived the time limit. Instead, however, the appellate court talked about the doctrine of part performance and affirmed the trial court's ruling that there was sufficient part performance to remove the "transaction" from within the operation of the statute of frauds. The court stated: "In the instant case we are concerned with partial performance being sufficient to exercise a written option contract."[44]

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[41]Various contentions, including no meeting of the minds and lack of specificity, were raised by McMahan and summarily disposed of by the appellate court.

[42]The statute of frauds is codified at IND. CODE § 32-2-1-1 (1976). The *McMahan* court, following Block v. Sherman, 109 Ind. App. 330, 34 N.E.2d 951 (1941), applied the RESTATEMENT OF CONTRACTS § 207 (1932) to determine the sufficiency of the memorandum. It should be noted that § 207 has been changed by the drafters of the RESTATEMENT (SECOND) OF CONTRACTS (1972). The crucial difference between the two sections is that the Restatement (Second) requires that the memorandum state "with reasonable certainty the *essential terms and conditions of the unperformed promises* in the contract," while the original Restatement requires a statement of "the *terms and conditions of all the promises* constituting the contract and by whom and to whom the promises are made." (Emphasis added).

[43]*See, e.g.*, Guyer v. Warren, 175 Ill. 328, 51 N.E. 580 (1898); Warren v. Cary-Glendon Coal Co., 313 Ky. 178, 230 S.W.2d 638 (1950); O'Toole & Nedeau Co. v. Boelkins, 254 Mich. 44, 235 N.W. 820 (1931).

[44]354 N.E.2d at 282.

The appellate court's reliance on the part performance doctrine to resolve the issue of whether the option was exercised is misplaced. Part performance may remove an oral contract from within the operation of the statute of frauds.[45] In *McMahan*, however, the statute of frauds was satisfied by the written memorandum of the contract. The real issues that should have been put before and resolved by the trial and appellate courts were (1) whether the option could have been and was exercised in a timely manner, either orally or by Wegehoft's conduct,[46] and (2) if Wegehoft's exercise was not timely, whether McMahan impliedly or expressly waived the time for exercise of the option.

In *Blakely v. Currence*,[47] the Indiana Court of Appeals considered a provision in a real estate contract making purchasers' obligation to pay the purchase price "subject to loan approval." The court held that the clause required actual procurement of final loan approval as a condition precedent to purchasers' duty to perform the contract. The court did not address the question of whether purchasers made or were required to make a good faith effort to obtain final loan approval. The language used by the court suggests, however, that a purchaser is not required to make a good faith effort when the phrase "subject to loan approval" is used in the contract. If no good faith effort is required, however, then purchasers' promise to purchase the property would be an illusory promise and the contract would be a nullity.[48]

D. Survivorship Rights

In *Anuszkiewicz v. Anuszkiewicz*,[49] a majority of the Third District Court of Appeals appeared willing to recognize the existence of a tenancy by the entireties relationship as to the proceeds of a sale of entireties real estate if, and so long as, the "marital partners so intend by appropriate action."[50] The *Anuszkiewicz* court

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[45]*See, e.g.*, Genda v. Hall, 129 Ind. App. 643, 154 N.E.2d 527 (1959).

[46]It has been held that oral acceptance is sufficient if the option does not require written acceptance. *E.g.*, Hunt v. Ziegler, 350 Mich. 309, 86 N.W.2d 345 (1957). The *McMahan* court deemed it "unnecessary to confront the oral exercise issue" in light of its resolution of the part performance question. 354 N.E.2d at 282.

[47]361 N.E.2d 921 (Ind. Ct. App. 1977) (in banc).

[48]*See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 70 (1970).

[49]360 N.E.2d 230 (Ind. Ct. App. 1977). Judge Staton concurred with the result.

[50]*Id.* at 233. The full text surrounding this quotation is as follows: "We therefore conclude that the proceeds from the sale of real estate held by the entireties only retain their *character of survivorship* when the marital partners so intend by appropriate action." (Emphasis added). Admittedly, retention of survivorship character is not the same as retention of entireties character. One spouse's interest in entireties property cannot be conveyed by one cotenant, nor can it be reached by the creditors of

found, however, that the marital partners did not so intend. Plaintiff's husband had deposited nearly one-half of the proceeds in a certificate of deposit in the joint names of himself and his son. After her husband's death, since these proceeds were still in existence and intact in another certificate of deposit,[51] plaintiff asserted ownership in the proceeds as the surviving tenant by the entireties. The court of appeals affirmed the trial court's judgment denying the wife's claim. There was no showing of fraud, so the court of appeals presumed that the wife acquiesced in her husband's disposition of the proceeds. The husband, by his actions, and the wife, by her silent acquiescence, manifested an intent to destroy the survivorship feature of the entireties relationship.

Indiana's statutory provision regarding cotenancies between husband and wife in personalty has once again been amended, effective August 29, 1977, to provide:

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one cotenant during the existence of the entireties relationship. Joint action is required. The survivorship feature of joint tenancy with right of survivorship is not so impregnable. One joint tenant may sever the survivorship relationship by conveyance, and a creditor of one joint tenant can compel severance. Although the *Anuszkiewicz* court's above-quoted holding, standing alone, does not make it clear that the court is recognizing an entireties relationship in the proceeds of a sale of entireties property, other portions of the opinion do clarify this point. First, the court based its decision that the marital partners no longer intended to hold the proceeds with right of survivorship upon a finding of acquiescence by the wife in their disposition. The joint tenancy survivorship feature can be destroyed by one of the cotenants acting alone, regardless of the consent or acquiescence of the other cotenant. Only the entireties survivorship aspect requires mutual assent to its destruction. Second, the court stated, "[A]fter the balance of the purchase price for the property was paid . . . , it was deposited by the [husband] before he died to a certificate of deposit in the joint names of [himself and his son]. Appellant's husband *thereby changed the character of the proceeds from entirety property* to personalty held in joint tenancy." *Id.* at 233 (emphasis added). If the husband's action in disposing of the proceeds changed their character from entireties property, the proceeds must have retained their entireties character after they were received and until he acted to dispose of them.

The idea of holding proceeds from entireties real estate in an entireties relationship is not without support in Indiana cases. *See* Whitlock v. Public Serv. Co., 239 Ind. 680, 688, 159 N.E.2d 280, 284-85 (1959) (dicta) (although normally there is no tenancy by entireties in personal property, proceeds from entireties land have the "characteristic of a tenancy by entireties . . . so long as the proceeds are intact and have not been divided or disbursed"). *See also* Koehring v. Bowman, 194 Ind. 433, 437, 142 N.E. 117, 118 (1924) (dicta) (tenancy by entireties does not exist in personal property except when property is "directly derived" from entireties land, such as crops or proceeds of sale); Patton v. Rankin, 68 Ind. 245 (1879) (crop raised on entireties land is held by entireties); Mercer v. Coomler, 32 Ind. App. 533, 69 N.E. 202 (1903) (applies *Patton* to judgments on entireties land).

[51]After his father's death and pursuant to his father's request, the son transferred the proceeds to another certificate of deposit in the joint names of himself and another.

> Personal property, other than an account, which is owned by two (2) or more persons is owned by them as tenants in common unless expressed otherwise in an instrument or written agreement. However, household goods acquired during coverture and in the possession of both husband and wife *and any promissory note, bond, certificate of title to a motor vehicle, certificate of deposit or any other written or printed instrument evidencing an interest in tangible or intangible personal property in the name of both husband and wife,* shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument . . . .[52]

The italicized language was added by this most recent amendment. A simple, albeit improbable, example illustrates that the confusion caused by frequent amendment of this cotenancy statute may plague lawyers for years to come. Assume that *H* and *W* purchased several motor vehicles at various times during their marriage, all of which they still owned in October 1977, when *H* died. All the certificates of title merely name "*H* and *W*" as titleholders, with no indication of a right of survivorship. Cars purchased between 1949 and 1971 would be owned by *H* and *W* as tenants in common;[53] cars purchased between 1971 and January 1, 1976, would be owned by *H* and *W* as joint tenants with right of survivorship;[54] cars purchased between January 1, 1976, and January 1, 1977, presumably would also be owned as joint tenants with right of survivorship;[55] cars purchased tween January 1, 1977, and August 28, 1977, would be owned as tenants in common;[56] and cars purchased after August 28, 1977,

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[52]IND. CODE § 32-4-1.5-15 (Supp. 1977) (emphasis added).

[53]The then effective statute presumed, unless otherwise expressed in the instrument of title, tenancy in common to exist as to all personalty, except obligations of the United States Government held in joint names. Ch. 145, § 1, 1949 Ind. Acts 383. This statute was effective until amended in 1971. Actually, the 1949 to 1971 period was preceded by two other periods in the history of cotenancies in personalty. Before 1852, the common law favored joint tenancy with right of survivorship. Between 1852 and 1949, by statute, tenancy in common was presumed as to all personalty unless otherwise expressed in the instrument of title. Ch. 9, § 4, 2 Ind. Rev. Stat. 245 (1852).

[54]As to personalty owned by husband and wife, the 1971 statutory language is identical to the language of the present version. Pub. L. No. 422, § 1, 1971 Ind. Acts 1969.

[55]No statute was in effect during this period, so presumably the common law presumption of joint tenancy with right of survivorship prevailed. *See* Grimes, *Aunt Minnie's Portrait,* 10 IND. L. REV. 675, 685 (1977); Poland, *Trusts and Decedents' Estates, 1975 Survey of Recent Developments in Indiana Law,* 9 IND. L. REV. 371, 373 (1975).

[56]The effective statute was the present version quoted in the text accompanying note 52 *supra,* minus the italicized language. Pub. L. No. 123, sec. 2, § 15, 1976 Ind. Acts 597, 605.

would be owned as joint tenants with right of survivorship under present statutory language. After *H*'s death, his executor must determine when the cars were acquired, because *H*'s interest in tenancy in common property is an asset of *H*'s estate, while survivorship property is not.[57]

In *Hughes v. Hughes*,[58] the Indiana Court of Appeals held that those who own real estate as joint tenants with right of survivorship hold the right to the proceeds under a contract to sell the real estate as joint tenants with right of survivorship, unless they express a contrary intent. The joint tenancy relationship, once created, is not severed by a jointly executed contract, unless the contract manifests an intent to change the relationship.[59] Thus, when one of the joint tenant sellers died prior to the receipt of the entire proceeds under an installment land sales contract, the deceased seller's interest in the proceeds was extinguished in favor of the surviving joint tenants.

E. Easements

In *Brown v. Heidersbach*,[60] plaintiffs' predecessors in title, who were owners of several platted lots in Kopekanee Beach subdivision, had been granted rights to an easement to the shore of Lake George.[61] Plaintiffs and their predecessors used this easement exclusively and constructed and used a pier attached to the easement for boat docking until 1973, when defendants subdivided other land, granted rights to use the easement to the other landowners, and removed plaintiffs' pier. Plaintiffs sought to enjoin defendants from

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[57]The assumption is that the amended statute has no retroactive effect and that ownership rights are determined by the law in effect at the time of the acquisition of the property. Any other assumption, it seems, would involve a statutory modification of property rights without due process of law.

[58]356 N.E.2d 225 (Ind. Ct. App. 1976).

[59]In *Hughes*, the contract expressly stated that the sellers were contracting "as joint tenants with right of survivorship and not as tenants in common." *Id.* at 227. However, the appellate court's statements, citations, and quotations make it clear that this contractual expression was unnecessary.

[60]360 N.E.2d 614 (Ind. Ct. App. 1977).

[61]Plaintiffs Smith and Heidersbach joined in bringing an action against defendant Brown. Brown's predecessor in title had conveyed land to Heidersbach's predecessor in title in 1949 by a deed that contained the following clause: "Also, an easement to the shore of Lake George, over the east twenty (20) feet of lot Numbered 48 in the Original Plat of Kopekanee Beach, which easement is to be used in common with other lot owners." *Id.* at 616. Subsequently, in 1950, Brown's predecessor in title conveyed other land to Smith's predecessor in title by deed containing the following language: "Right of way to the lake is hereby given over a 20 foot easement located in Kopekanee Beach, First Addition." *Id.* The two granted easements were over the east 20 feet of lot 48, which was later conveyed to defendant Brown. *Id.*

expanding the number of persons entitled to use the easement and from removing any future piers. The trial court granted the injunction,[62] but the Indiana Court of Appeals reversed.

In an opinion that extensively reviewed general principles of the law of easements, the court of appeals decided, for the first time in Indiana, that riparian rights are not rights incident to an easement allowing access to the shore of a lake. Riparian rights (to dock boats at an attached pier) "rest entirely upon the fact of title in the fee to the shore land";[63] and the fee owner, absent an express grant of his rights as a riparian owner, will not be held to have granted such rights incident to the grant of an access easement. Plaintiffs held only an access easement and therefore had no right to maintain a pier attached to the easement. The fact that defendants permitted plaintiffs to construct and use the pier did not support a finding that plaintiffs acquired prescriptive rights to use the pier.[64]

The court of appeals also discussed plaintiffs' right to exclusively use the easement. Since no exclusive right was evidenced in the easement grants[65] and since defendents' action in granting others the right to use the easement did not "materially impair or unreasonably interfere" with plaintiffs' use of the easement,[66] the only way the judgment could be affirmed was for the court of appeals to find that exclusivity was acquired by prescription. However, plaintiffs' use of the easement, although exclusive in fact because no one else had used it, was not openly, notoriously, and adversely exclusive, so no exclusive rights were gained by prescription.

In *GTA v. Shell Oil Co.*,[67] Shell was granted a determinable easement for ingress and egress "[s]o long as the [leasehold] premises [were] used as an automobile service station."[68] Shell temporarily closed its service station,[69] and GTA argued that this terminated Shell's easement. The court of appeals upheld the trial court's determination that temporary nonuse of the premises, without an actual change of use, would not "constitute the intended limiting event."[70]

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[62]The trial court also ordered defendants to replace the pier or pay damages. *Id.* at 617-18.

[63]*Id.* at 619 (quoting Thompson v. Enz, 379 Mich. 667, 683-84, 154 N.W.2d 473, 482 (1967)).

[64]So long as use is permissive, it cannot ripen into a prescriptive right. Nowlin v. Whipple, 120 Ind. 596, 22 N.E. 669 (1889).

[65]*See* note 61 *supra.*

[66]360 N.E.2d at 620. If no exclusive right is granted, the servient tenant "may make any use of the easement which would not materially impair or unreasonably interfere with the use of the easement by the dominant [tenant]." *Id.*

[67]358 N.E.2d 750 (Ind. Ct. App. 1977).

[68]*Id.* at 751.

[69]*Id.* During the eighteen-month period that the service station was closed, Shell negotiated with potential sublessees for the construction of a fast-food restaurant on the leasehold premises. Representatives of the fast-food chain removed gasoline islands and pumps on one side of the service station and replaced them with the foundation for the restaurant. No sublease was signed, and no actual change in use occurred.

[70]*Id.* at 753.

The court stated: "Before an easement will be terminated through nonuse, the requirement of uninterrupted use must be clearly stated and reasonably inferred from the intentions of the parties."[71]

F. Covenants

In *Howard D. Johnson Co. v. Parkside Development Co.*,[72] the Indiana Court of Appeals discussed the recording of non-competition covenants. In 1965, Johnson, as lessee, and Parkside, as lessor, entered into a lease that contained a covenant prohibiting the establishment of a restaurant on any Parkside land within 1500 feet of the Johnson leasehold premises. In 1974, Parkside leased land adjoining the Johnson leasehold to Franchise Realty Corporation for the construction of a McDonald's restaurant. Johnson did not learn of the Franchise lease until after the start of construction of the McDonald's restaurant, which was within 275 feet of Johnson's building. When Parkside and Franchise failed to halt construction on Johnson's demand, Johnson obtained a temporary restraining order and a preliminary injunction. The trial court, however, denied Johnson's request for a permanent injunction and concluded that Johnson's remedy, if any, was at law against Parkside. The court of appeals affirmed.

In seeking to enjoin construction of the McDonald's restaurant, Johnson argued that when Franchise executed the lease with Parkside, Franchise had notice of the existence of the covenant and was bound by it,[73] based on Franchise's actual notice, by way of a title search, of a recorded memorandum of the Parkside-Johnson lease.[74] Johnson argued that Franchise was therefore bound to inquire as to the provisions of the unrecorded lease and was charged

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[71] *Id.*

[72] 348 N.E.2d 656 (Ind. Ct. App. 1976).

[73] The court of appeals assumed, without expressly deciding, that non-competition covenants are enforceable when the subsequent lessee of a common lessor has prior actual or implied knowledge or actual or constructive notice of the covenant. In a very early case, Taylor v. Owen, 2 Blackf. 301 (Ind. 1830), the Indiana Supreme Court held that non-competition covenants are personal and do not run with the land. The *Taylor* case has never been expressly overruled but apparently has little practical significance. *See* Jos. Guidone's Food Palace, Inc. v. Palace Pharmacy, Inc., 252 Ind. 400, 248 N.E.2d 354 (1969). The modern view is that non-competition covenants in commercial leases are enforceable if positively expressed and are capable of running with the land. *See* Pollack, *Shopping Center Leases*, 9 KAN. L. REV. 379 (1961); Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067 (1942).

[74] The recorded memorandum of lease contained the following language:

> That said lease itself contains the entire contract between the parties, including the amount of rent, times when rent shall be paid, and other provisions and covenants as regulated and govern the relationship of landlord and tenant between the parties; and all persons are hereby put on notice of the existence of such lease and are referred to the said lease itself for its terms and conditions.

348 N.E.2d at 658.

with constructive notice of those lease provisions. The court of appeals agreed that Franchise was charged with knowledge of all information contained in the recorded conveyances of Parkside.[75] However, the court concluded that Franchise's knowledge of the existence of the unrecorded Johnson-Parkside lease did not impose a duty on Franchise to pursue an inquiry concerning the provisions in that lease.[76] The recorded document was not within Franchise's chain of title; it did not describe any real estate other than the Johnson leasehold; and it did not specifically refer to the existence of a servitude on the adjoining property.[77]

Lessees who want to be certain of the enforceability of non-competition covenants should carefully review the *Howard Johnson* opinion. Any recorded memorandum of the lease should be "calculated to inform"[78] title searchers of a restriction on adjoining property. The memorandum should include a legal description of the adjoining land and should specifically refer to the existence of a servitude on that land. If the memorandum of lease is properly drafted and recorded, then the lessee need not rely on his lessor's willingness to disclose the restriction to prospective lessees and purchasers of the restricted land.

G. Condemnation

Indiana courts were very active in the condemnation area during the survey period.[79] In two cases, the Indiana Court of Appeals

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[75]*Id.* at 660-61. A grantee is charged with notice of information contained in all prior conveyances by his grantor. Hazlett v. Sinclair, 76 Ind. 488 (1881).

[76]348 N.E.2d at 661-62. It should be noted that Franchise actually asked Parkside if any restrictions existed on the Franchise lease. Parkside replied in the negative.

[77]If the memorandum had been within the chain of title to the Franchise leasehold, Franchise would have had a duty to pursue any inquiry "reasonably suggested" by the document. *Id.* at 661.

Johnson also argued that the following circumstances imposed a duty upon Franchise to inquire about the existence of a non-competition covenant: (1) custom in the industry as to the use of such covenants, (2) Franchise's observance of the existing Howard Johnson restaurant on neighboring land, and (3) Parkside's development of the property according to a common plan or scheme. The court of appeals concluded that none of these factors, either separately or in combination, imparted notice of the covenant or imposed a duty to inquire further. Any alleged custom imposed a duty to do no more than Franchise had done when it searched title and made a general inquiry of Parkside. Knowledge of the existing Howard Johnson restaurant on adjoining land imposed no duty on Franchise. Johnson relied on two cases in support of this argument, but in both cases, unlike the present case, there was a condition or activity on the land that was about to be acquired by the subsequent purchaser, which imposed a duty on that purchaser to inquire. Smith v. Schweigerer, 129 Ind. 363, 28 N.E. 696 (1891) (recently erected mill); Smith v. Mesel, 119 Ind. App. 323, 84 N.E.2d 477 (1949) (recently drilled oil well). The covenant was not integral to any common plan or scheme of development so knowledge of the common plan or scheme imparted no notice or duty to inquire.

[78]348 N.E.2d at 661.

[79]Thirteen condemnation cases were decided. Cases not mentioned in the above textual discussion include: Chambers v. Public Serv. Co., 355 N.E.2d 781 (Ind. 1976)

discussed factors that may properly be considered by the jury in determining the fair market value[80] of the condemned real estate. It is settled that the jury may properly consider not only the pre-existing use of the property, but also higher and better uses to which the condemned property might reasonably be adapted.[81] The jury may also consider adaptable uses that can be made only in combination with other parcels not owned by the condemnee, "if the possibility of such combination is reasonably sufficient to affect the market value" of the condemned land.[82] Thus, in *City of Indianapolis v. Heeter*,[83] the trial court correctly refused the city's tendered instruction, which would have told the jury that "artificially created" assemblage adaptability is "too remote and speculative to be considered in fixing valuation."[84]

When the condemned land is a portion of a larger tract owned by the condemnee, the condemnor must compensate the condemnee not only for the fair market value of the portion appropriated, but also for damage to the residue owned by the condemnee.[85] In *State v. Church of the Nazarene*,[86] the court of appeals reviewed the

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(discussing admissible evidence in light of a claim that the trial court abused its discretion in refusing to order PSC to answer interrogatories); Rhoda v. Northern Ind. Pub. Serv. Co., 357 N.E.2d 287 (Ind. Ct. App. 1976) (no fraud by condemnor); City of Gary v. Ruberto, 354 N.E.2d 786 (Ind. Ct. App. 1976) (insufficient evidence to support claim of inverse condemnation); State v. City of Terre Haute, 352 N.E.2d 542 (Ind. Ct. App. 1976) (in spite of delays, the state is entitled to trial by jury); Dubois Rural Elec. Coop. v. Civil City of Jasper, 348 N.E.2d 663 (Ind. Ct. App. 1976) (discussing the sufficiency of the description of the condemned land and contractual waiver of the right to exercise the power of eminent domain).

[80]Fair market value is "a determination of what the land may be sold for on the date of the taking if the owner were willing to sell." Southern Ind. Gas & Elec. Co. v. Gerhardt, 241 Ind. 389, 393, 172 N.E.2d 204, 205 (1961).

[81]*E.g.*, State v. Tibbles, 234 Ind. 47, 123 N.E.2d 170 (1954). The jury may not, however, consider an intended specific future use. *See* State v. City of Terre Haute, 250 Ind. 613, 238 N.E.2d 459 (1968).

[82]City of Indianapolis v. Heeter, 355 N.E.2d 429, 434 (Ind. Ct. App. 1976).

[83]355 N.E.2d 429 (Ind. Ct. App. 1976).

[84]*Id.* at 434. The city argued on appeal that the evidence was insufficient to show that a combination was a reasonable possibility. The court of appeals replied that it was the jury's function to determine the possibility of assemblage adaptability of the land. The *Heeter* court also reviewed the rule that it is within the discretion of the trial court whether to admit evidence as to the value of "comparable" properties. *Id.* at 436-37 (quoting Beyer v. State, 258 Ind. 227, 280 N.E.2d 604 (1972)). Furthermore, the court discussed the general rule that the condemnor's intended future use may not be considered in determining fair market value. 355 N.E.2d at 440 (quoting and distinguishing State v. Sovich, 253 Ind. 224, 252 N.E.2d 582 (1969)).

[85]Severance damages may be awarded if there is unity of title, unity of use, and contiguity. *See* State v. Heslar, 257 Ind. 307, 274 N.E.2d 261 (1971). Severance damages are determined by computing the diminished value per acre of the residue tract. Glendenning v. Stahley, 173 Ind. 674, 682, 91 N.E. 234, 237 (1910).

[86]354 N.E.2d 320 (Ind. Ct. App. 1976).

testimony of the condemnee's expert witness and computed the maximum fair market value and severance damages that could have been awarded based on that testimony. The jury's award, which was substantially higher than the maximum damages allowable by the court's computation, was reversed.[87]

When a franchised utility serving a municipality condemns property used by another utility that serves areas annexed by the municipality, the condemnor is required to compensate the condemnee for property "owned by [the condemnee] within the annexed territory and used and useful by [the condemnee] in or in connection with the rendering of electric utility service therein."[88] In *Public Service Co. v. Morgan County Rural Electric Membership Corp.*,[89] the parties agreed that "used and useful" embraces not only "the value of the tangible, physical assets used by [the condemnee] in the condemned area," but also "the intangible loss represented by the 'going concern value' of those assets."[90] The parties, however, did not agree upon a satisfactory method of calculating "going concern value." The condemnee (REMC) used a "discounted net cash flow" method to arrive at a going concern value of $33,645.33. The condemnor (PSC) arrived at a value of $230 by taking an arbitrary ten percent of the appraised value of the condemned physical property. The court of appeals, in reversing the jury's award of $36,522, disapproved of the "discounted net cash flow" method of computing going concern value. The "discounted net cash flow" method is objectionable because it uses a future period of reference and takes into account noncompensable damages for lost profits and speculative future development. Although the court did not adopt or approve of a specific method of calculating going concern value, the court ap-

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[87]The jury's award could be supported only by testimony which computed the condemnee's damages by subtracting the fair market value of the residue from the replacement cost of the entire tract. Apparently, the fair market value of the church property was computed by taking one-half of the replacement cost of the structures. The attempt to estimate damages by considering the full replacement cost of the structures was characterized by the court as an attempt to apply a substitution measure of damages. Substitution damages (the cost of purchasing an equivalent substitute for the property taken) cannot be recovered in an eminent domain proceeding. *See* State v. Lincoln Memory Gardens, Inc., 242 Ind. 206, 177 N.E.2d 655 (1961). The *Nazarene* court reversed the jury award and ordered a remittitur.

[88]IND. CODE § 8-1-13-19 (1976).

[89]360 N.E.2d 1022 (Ind. Ct. App. 1977).

[90]*Id.* at 1025. The court noted that going concern value has been at least impliedly recognized as a valuation factor in Indiana cases. *See* Public Serv. Co. v. City of Lebanon, 219 Ind. 62, 34 N.E.2d 20 (1941); Hendricks County Rural Elec. Membership Corp. v. Public Serv. Co., 150 Ind. App. 503, 276 N.E.2d 852 (1971).

parently would have affirmed a valuation based on an arbitrary percentage of physical plant lost.[91]

A condemnee is not entitled to attorney's fees in an eminent domain proceeding.[92] By statute in certain circumstances, a condemnee is entitled to interest on the damages award from the date the condemnor takes possession of the property.[93] The question of whether and how much interest should be allowed under the statute was the subject of two appeals during the survey period.[94]

H. Horizontal Property Law

The Indiana Horizontal Property Act[95] was substantially amended during the survey period. Significant changes were made in provisions regarding insurance of common areas and facilities,[96] compulsory and permissible reconstruction of destroyed or damaged condominium units,[97] and methods of determining the co-owners'

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[91]The court stated:

> One way out of the dilemma of determining the "going concern value," which should be included within the "used and useful" concept, without reference to future factors, is to arbitrarily allocate to "going concern value" a percentage of physical plant. There is "a long line of authority accepting the percent method of calculating going concern value . . . ten percent . . . [being] the most prevalent figure . . . ."

360 N.E.2d at 1026 (quoting Kashman, *Going-Concern Value of a Public Utility in Condemnation by a Municipality*, 6 ARIZ. L. REV. 92, 99-100 (1964)).

[92]In Divine v. State *ex rel.* Dep't of Natural Resources, 354 N.E.2d 245 (Ind. 1976), two Indiana Supreme Court justices, dissenting to the denial of transfer of a case in which attorneys' fees were disallowed, disagreed with this inflexible rule. The rule is set forth in State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973), and Harding v. State *ex rel.* Dep't of Natural Resources, 337 N.E.2d 149 (Ind. Ct. App. 1975).

[93]IND. CODE § 32-11-1-8 (1976). When funds are deposited by the condemnor with the clerk of court and the condemnee withdraws or is able to withdraw the funds without posting bond, no interest is allowed.

[94]State v. Reuter, 352 N.E.2d 806 (Ind. Ct. App. 1976); State v. Simley Corp., 351 N.E.2d 41 (Ind. Ct. App. 1976) (interest allowed on entire award because condemnee would have been required to post bond to withdraw funds).

[95]IND. CODE §§ 32-1-6-1 to -31 (Supp. 1977). One of the amendments changed the title of the Act to the "Horizontal Property Law." *Id.* § 32-1-6-1. Also, throughout the text, other terminology was changed so that, for example, an "apartment" is now called a "condominium unit." *Id.* § 32-1-6-2. The rental connotations of the term "apartment" did not coincide with the concept of condominium ownership.

[96]The co-owners' association must purchase a master policy affording fire and extended coverage for the full replacement value of the improvements "that in whole or in part comprise the common areas and facilities," and must also obtain a master liability policy. *Id.* § 32-1-6-18(a). Under prior law, purchase of insurance by the association was required only upon resolution of a majority of the co-owners. *Id.* § 32-1-6-18 (1976) (repealed 1977).

[97]Improvements must be reconstructed unless there is "complete destruction of all the buildings containing condominium units." Two-thirds of the co-owners may decide to compel reconstruction even in the event of total destruction. *Id.* § 32-1-6-19

percentage interests.[98] New sections were added to provide for changes to the co-owners' percentage interests when the declarant-developer desires to add additional land to the condominium,[99] and to provide for withdrawal of committed land from the condominium.[100] Other amendments include a new section specifying what the declarant must do to reserve the right to maintain a sales office or model home in the condominium,[101] and a new requirement that each deed of conveyance of a condominium unit include a statement of the amount of unpaid current or delinquent assessments of common expenses.[102]

(Supp. 1977). *See also id.* § 32-1-6-20 regarding assessments to cover the cost of rebuilding when the property is not insured. Under prior law, reconstruction was not compulsory when more than two-thirds of a building was destroyed. *Id.* § 32-1-6-19.

[98]The amended Act specifies that the co-owners may be assigned either equal percentage interests in the common property or percentage interests based on the size or the value of the unit in relation to the size or value of all units in the condominium. *Id.* § 32-1-6-7. Equal interests will be assigned if the declaration does not specify another method. Under prior law, declarants were free to establish any method of determining percentage interests, and the value method was assumed if the declaration did not provide otherwise. *Id.* § 32-1-6-7 (1976) (repealed 1977).

[99]*Id.* §§ 32-1-6-2(d), -7, -12.1, -15.1, -15.2 (Supp. 1977). A developer may commit land to and build the condominium in phases by using the new expandable condominium approach. The declaration of expandable condominium must contain a general plan of development showing the maximum number of condominium units that may be added in subsequent phases, a schedule or formula for determining percentage interests in the common areas as each phase is added, and a time limit not to exceed 10 years within which the additional phases will be developed. *Id.* § 32-1-6-12.1. If the declaration conforms to these requirements, it is presumed that an owner of a condominium unit in the declared regime has consented to the changes in this percentage interest. *Id.* § 32-1-6-15.2.

[100]A declarant may reserve an option to withdraw committed land from a condominium if the declaration contains an explicit reservation of the option to contract, a legally sufficient description of all withdrawable land, a statement as to whether portions may be withdrawn at different times, and a time limit not to exceed 10 years upon which the option to contract will expire. *Id.* §§ 32-1-6-2(m), -12.2.

[101]*Id.* § 32-2-6-15.6.

[102]*Id.* § 32-1-6-14(a)(3). Within 5 days of any request, an officer of the co-owners' association must provide a statement of the amount of current and delinquent common expenses assessments to the owner, a prospective grantee, a title insurance company, or a mortgagee. *Id.* § 32-1-6-14(b).