XIV. Property

*Debra A. Falender**

During the survey period, Indiana appellate courts were confronted with a variety of interesting and sometimes factually complex disputes containing property law issues. In several cases, the central issue was the interpretation and construction of ambiguous or incomplete written instruments.[1] In the following discussion, the cases[2] are arranged to reflect whether the underlying transactions or events primarily involved: (1) landlord and tenant relationships, (2) land transfer agreements, (3) land ownership in general, (4) easements, (5) adverse possession, (6) zoning, or (7) ownership of personal property.[3] Many of the cases are merely summarized without criticism or approbation because the decisions were not particularly earthshaking or particularly troublesome. In fact, as a whole, the decisions rendered in the property area during the survey period were thoughtful and well-reasoned.

A. Landlord-Tenant Relationships

Three noteworthy cases in the landlord-tenant area involved interpretation of ambigious lease agreements. Litigation in each case might have been avoided by more precise drafting. In *Woodruff v. Wilson Oil Co.*,[4] the lessors sued the lessee, alleging that a building

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*Associate Professor of Law, Indiana University School of Law—Indianapolis. A.B., Mount Holyoke College, 1970; J.D., Indiana University School of Law—Indianapolis, 1975.

[1]One of these construction and interpretation cases presents a thorough analysis of the processes the trial court may utilize in construing an ambiguous writing. *See* Indiana Broadcasting Corp. v. Star Stations, 388 N.E.2d 568 (Ind. Ct. App. 1979), *discussed in* notes 67-73 *infra* and accompanying text. A careful reading of this case in encouraged.

[2]No significant statutory developments occurred during the survey period.

[3]Less significant cases will be mentioned in the footnotes within the related area. A few other cases, which do not fall within these listed topics, may be of interest: Prell v. Trustees of Baird & Warner Mortgage & Realty Investors, 386 N.E.2d 1221 (Ind. Ct. App. 1979) (vendor's lien compared to equitable mortgage; perfection, notice, and waiver of equitable mortgage); City of Evansville v. Rieber, 385 N.E.2d 217 (Ind. Ct. App. 1979) (proper measure of damages for injury to real estate); State v. Cox, 377 N.E.2d 1389 (Ind. Ct. App. 1978) (judgment docket as constructive notice).

[4]382 N.E.2d 1009 (Ind. Ct. App. 1978). Another recent decision involving interpretation of a lease is Burgdorf v. Southern Ind. Gas & Elec. Co., 375 N.E.2d 670 (Ind. Ct. App. 1978) (lease provision allowing construction of "road" included power to construct "railroad"). Other recent cases in the landlord-tenant area are: Malbin & Bullock, Inc. v. Hilton, 387 N.E.2d 1332 (Ind. Ct. App. 1979) (reiterating well-settled Indiana and majority rule that, without an express agreement, a tenant cannot recover for improvements made to leased property); and City of Michigan City v. Washington

on the leased premises had been destroyed by fire as a result of the lessee's negligence.[5] The court of appeals held that summary judgment for the lessee was properly granted.[6] In one paragraph of the *Woodruff* lease agreement, the lessors agreed to pay " 'the costs of fire and extended coverage insurance on the premises during the term of [the] lease.' "[7] In another paragraph, the lessors agreed to repair at their expense any buildings and other improvements on the leased premises in the event of destruction " 'by fire or by the elements' " and " '[i]n this regard, . . . to keep in existence during the term of [the] lease such fire and extended coverage insurance in such amount as will insure the replacement of said buildings and improvements.' "[8]

When a lessor is required to insure the leased premises for the benefit of both the lessor and the lessee, the lessor may not seek reimbursement for the insured loss from the lessee, even if the loss was caused by the lessee's negligence.[9] In *Woodruff*, the court of appeals reasoned that the lease provisions must have been intended to require that the lessors provide insurance for the benefit of both parties because a lessor always has the right to insure the leased property for his own benefit.[10] Thus, the lessors were entitled only to the insurance proceeds as reimbursement for the insured loss.

The *Woodruff* court's conclusion about the intended beneficiaries of the insurance is a reasonable one.[11] The effect of this

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Park Amusement Corp., 384 N.E.2d 1063 (Ind. Ct. App. 1979) (Staton, J., dissented) (regarding municipal lease and subsequent void buy-sell agreement between municipal landlord and private tenant). *Washington Park* should be read by anyone involved in a landlord-tenant or vendor-purchaser relationship with a municipal corporation.

[5]The question of a lessor's liability in negligence for injuries suffered by a lessee arose in two recent cases. Orth v. Smedley, 378 N.E.2d 20 (Ind. Ct. App. 1978); Meadowlark Farms, Inc. v. Warken, 376 N.E.2d 122 (Ind. Ct. App. 1978).

[6]382 N.E.2d at 1010.

[7]*Id.*

[8]*Id.*

[9]*See id.* at 1010-11. If a lessor and lessee intend that the proceeds of an insurance policy are to protect both of them against a loss, then allowing one of them to place the ultimate burden of the loss on the other would defeat their contractual intention.

[10]*Id.* at 1011. The court applied the rule of construction that "no part of a contract should be treated as surplusage if it can be given a meaning reasonably consistent with the other parts of the contract." *Id.* The lessors argued that the lease provisions were not intended to obligate the lessor to obtain insurance for the benefit of the lessee but were included "to assure the availability of money with which the [required] restoration might be accomplished." *Id.* The court responded that if the parties intended to guarantee the availability of funds, then the separate agreement to pay the cost of insurance would be mere surplusage. *Id.* Thus, in affirming the summary judgment, the court of appeals relied on the existence of two separate obligations of lessors: one to pay the cost of insurance and the other to repair and insure.

[11]Other courts might have easily resolved this interpretation question. For example, in Liberty Mutual Fire Ins. Co. v. Auto Spring Supply Co., 59 Cal. App. 3d 860,

conclusion is to prevent the lessor's insurance carrier from shifting the risk of loss to the lessee.

In *Tarrant v. Self*,[12], the lessee Tarrant had an option to purchase the leased property for the fixed price of $25,000 " '*after the first Fifteen (15) years of the term*' " of the lease.[13] Tarrant also had a " 'first option to purchase or lease the demised premises within thirty days after . . . notice on the same terms ' " as any bona fide offer received by the lessors at any time during the primary term or any renewal term of the lease.[14] The primary term of the *Tarrant* lease was fifteen years, beginning August 1, 1959, and ending July 31, 1974. Tarrant had two five-year options to renew the lease.[15]

On June 10, 1974, which was fifty-one days prior to the expiration of the fifteen-year primary term of the lease, Tarrant notified the lessors of his intent to exercise the $25,000 fixed-price option to

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131 Cal. Rptr. 211 (1976), the court stated:

> Whenever a building is leased or subleased for business purposes, it is customary to require in the various lease and sublease documents executed between the parties that some party to the lease or sublease provide protection from fire damage to the building and a source of funds for the alleviation of that damage by obtaining and maintaining adequate fire insurance on the building. Such a provision is for the implied benefit of all persons either owning or making primary use of the building. To construe otherwise, the scope of the protection so provided would be both unrealistic and unfair.

Id. at 865-66, 131 Cal. Rptr. at 214-15. The California court would regard a lessee in a case like *Woodruff* as "an implied in law co-insured of [the lessor], absent an express agreement between them to the contrary." *Id.* at 865, 131 Cal. Rptr. at 214. *See also, e.g.*, General Mills v. Goldman, 184 F.2d 359 (8th Cir. 1950), *cert. denied*, 340 U.S. 947 (1951). *See generally* J. APPLEMAN, 6A INSURANCE LAW AND PRACTICE § 4055 (1972 & Supp. 1979).

[12]387 N.E.2d 1349 (Ind. Ct. App. 1979).

[13]*Id.* at 1351 (emphasis by the court). This will be referred to as the fixed price option. The case was complicated because two leases for adjoining properties were negotiated at the same time. The provisions of the leases were similar in many respects but not identical. Phillips Petroleum Company was the lessee under one lease (parcel one), and Tarrant was the lessee under the other (parcel two). Each lease was for a primary term of fifteen years, beginning August 1, 1959. Phillips had a fixed-price option to purchase parcel one for $25,000 " 'at the end of the first Fifteen (15) years of the term' " of the lease. *Id.* at 1350. Tarrant's fixed-price option was an option to purchase both parcels for $25,000 " 'if Phillips Petroleum Company . . . [did] not exercise its option to purchase [parcel one].' " *Id.* at 1351. If Phillips exercised its option to purchase parcel one, then Tarrant could purchase parcel two for one dollar. Phillips assigned its lease of parcel one to Tarrant on March 20, 1974. Although Tarrant apparently could have elected to purchase both parcels for $25,000, Tarrant's notice to the lessor on June 10, 1974, prepared by Tarrant's attorney, indicated that Tarrant desired to exercise the option to purchase only parcel two for $25,000. *See* text at note 16 *infra*. The court, therefore, interpreted the option provisions in the lease of parcel two and ignored the option provisions in the lease of parcel one.

[14]*Id.* at 1352.

[15]To exercise the option to renew, the lessee was required to give the lessor notice in writing at least 30 days before the expiration of the prior term. *Id.* at 1352.

purchase.[16] Later, on July 29, 1974, and July 31, 1974, the lessors informed Tarrant of two bona fide offers to purchase the leased premises: one for $40,000 and one for $65,000. Tarrant did not indicate his intent to match the July offers within thirty days. Furthermore, Tarrant did not exercise his option to renew the lease. Nevertheless, Tarrant remained in possession of the leased premises, paying no rent after July 1974.

Tarrant sued the lessors for specific performance of what he believed to be an enforceable contract to purchase the property for $25,000. The court of appeals affirmed the trial court's denial of specific performance.[17] The trial court held that the lessee's fixed-price option to purchase did not exist under the terms of the lease until July 31, 1974, and therefore could not have been exercised unless the lessee first exercised his option to renew the lease for at least one five-year term.[18] The court of appeals agreed that a literal reading of the lease provisions supported the trial court's holding. The court of appeals held for the first time:

> Where . . . the lease does not prescribe which provision [the fixed-price or the right of first refusal] takes precedence over the other, if, before the lessee exercises . . . [the fixed-price option] *or before such option* comes into existence, whichever is later, the lessor properly notifies the lessee of a bona fide offer to purchase the leased premises, and the lessee refuses to exercise his option to purchase the property under the terms of such offer, then the lessee forfeits his right to purchase under the fixed-price option.[19]

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[16]*See* note 13 *supra.*

[17]387 N.E.2d at 1352. The court of appeals also affirmed the trial court's order that the lessee pay back rent and relinquish possession of the leased property to the lessors. *Id.*

[18]*Id.* at 1353. The parties' intent is impossible to discern precisely. The court's interpretation was a reasonable one because the lessors may have wanted fifteen years (the entire primary lease term) to find a buyer at a price higher than $25,000. One provision in the Phillips lease indicates an intent to preserve the fixed price option:

> Failure of Lessee to elect to purchase or to lease under . . . [the paragraph describing the right of first refusal,] shall in no way limit or affect Lessee's rights under . . . [the paragraphs describing the fixed price option and the option to renew the lease,] and any sale or further leasing by Lessor, its successors or assigns to a third person shall in all respects be subject to this lease.

Id. at 1351. No similar provision was included in the Tarrant lease. The Tarrant lease merely provided that the " 'failure of Lessee to elect to lease under . . . [the paragraph describing the right of refusal] shall in no way limit or affect Lessee's rights under . . . [the paragraph describing the right of renewal].' " *Id.* at 1352. Even so, by the court's view, the fixed-price option did not exist under either lease unless and until the lease was renewed for one renewal term, and the exercise of the option on June 10 was not an exercise of an existing option.

[19]*Id.* at 1353. The court cited cases from other jurisdictions. None of the cited

In essence, the rights of the parties are established when either party properly exercises an existing option. In *Tarrant*, the lessee's option to purchase at the fixed price did not exist when the lessee attempted to exercise it. The lessors exercised their rights under an existing option before the lessee exercised his. Because Tarrant failed to indicate his intent to match the lessors' presumably bona fide offers[20] and also failed to renew his lease,[21] Tarrant had no right to purchase or to continue to lease the property.

In *Madison Plaza, Inc. v. Shapiro Corp.*,[22] the court of appeals held that the trial court did not abuse its discretion in denying an injunction that would have required the lessee to continue operating its store in the lessor's shopping center. Denial of specific relief, when a decree of performance would require court supervision for an extended time, is not in itself noteworthy.[23] *Madison Plaza* is interesting because of the appellate court's interpretation of a lease provision which required that the lessee " 'keep the premises open and available for business activity *except when prevented by* strikes, fire, casualty or *other causes beyond Tenant's reasonable control.*' "[24] The trial court had decided that the lessee was not required to operate its store on the leased premises because " 'the store lost very substantial sums of money in its operation [despite the lessee's efforts] and thus its successful, i.e. profitable, operation was beyond the reasonable control of the [lessee].' "[25] The court of appeals, however, sensibly held that the lessee's inability to operate profitably was not a cause beyond the lessee's control, excusing the

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cases, however, dealt with the question of an attempted exercise of an option before that option had come into existence.

[20]Because of the confusion as to whose rights were superior, it is insignificant that the lessor actually did not sell the property to one of the third party offerors. The lessee did not argue that the offers were not bona fide.

[21]If Tarrant had properly renewed his lease, Tarrant's premature exercise of the fixed-price option presumably would not have established his right to purchase. Tarrant would have been required to match one of the two bona fide third-party offers in order to purchase the property. Even if Tarrant had refused or failed to match one of the offers, he could have continued to lease the parcel(s) for the entire renewal term. Any sale to a third party would have been subject to Tarrant's rights under the lease. *See* note 18 *supra.*

[22]387 N.E.2d 483 (Ind. Ct. App. 1979).

[23]The decision to grant or deny specific performance is clearly within the sound discretion of the trial court. 387 N.E.2d at 486 (citing Risk v. Thompson, 237 Ind. 642, 147 N.E.2d 540 (1958); Neel v. The Cass County Fair Ass'n, 143 Ind. App. 339, 240 N.E.2d 546 (1968)).

[24]387 N.E.2d at 485 (emphasis in original).

[25]*Id.* The lessor expressly promised to " 'continuously use the demised premises for the purpose stated in this lease, carrying on therein Tenant's business undertaking diligently, assiduously and energetically.' " *Id.* The lessee also agreed not to vacate the leased premises without the written approval of the lessor. *Id.*

lessee's obligation to carry on its business on the demised premises.[26] The appellate court decided that the trial court erroneously placed the risk of the lessee's unprofitability on the lessor.[27]

Residential landlords should review *Churchwell v. Coller & Stoner Building Co.*,[28] which is the first decision in Indiana to uphold a forfeiture upon a lessee's material breach of a lease provision prohibiting pets.[29] The lessee knew of the lease prohibition but did not attempt to secure a separate pet agreement covering its cat. Immediately upon discovering the cat, the landlord gave notice to vacate, and one day after the required vacation date the landlord commenced legal proceedings. The landlord's prompt insistence on its rights under the lease not only precluded a finding of wavier but also strengthened its argument that the breach was material.[30]

B. Land Transfer Agreements

Blake v. Hosford[31] concerned an alleged oral agreement between divorcing spouses for the disposition of a parcel of Indiana real estate.[32] The real estate initially was owned by Janet Blake and Charles Hosford as tenants by the entireties. Prior to the dissolution of their marriage by an Arizona court, Janet allegedly agreed to release her interest in the farm to Charles in exchange for his promise to give the farm to their children on his death.[33] The only written confirmation of the oral agreement was a letter written by Janet to Charles' parents as follows: " 'I gave up any money or support for myself. He is only caring for the kids. I will take the furniture from here. The farm is to go to Roger, Clint, & Rena upon Bud's [Charles'] death.' "[34]

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[26]*Id.*

[27]*Id.*

[28]385 N.E.2d 492 (Ind. Ct. App. 1979).

[29]*Id.* at 494-95. The court stated that no-pet provisions are reasonable and enforceable. The court quoted the RESTATEMENT OF CONTRACTS § 275 (1932), regarding the factors to be considered in determining materiality of a breach. The RESTATEMENT factors were adopted in Ogle v. Wright, 360 N.E.2d 240, 244 (Ind. Ct. App. 1977), *discussed in* 385 N.E.2d at 495.

[30]Citing a similar case in which a landlord promptly asserted its rights, the *Churchwell* court specifically noted: "In *Riverbay Corp.*, the lessee was advised orally to dispose of the pet the day after moving in. Three days later he received a written demand and was the subject of legal action twenty-three days later." 385 N.E.2d at 494 (citing Riverbay Corp. v. Klinghoffer, 34 App. Div. 2d 630, 309 N.Y.S.2d 472 (1970)).

[31]387 N.E.2d 1335 (Ind. Ct. App. 1979).

[32]Although the plaintiff wife claimed that the parties agreed to the disposition of certain personal property located in Indiana, the court of appeals did not find sufficient evidence of such an agreement. *Id.* at 1339.

[33]*Id.* The court of appeals found sufficient evidence to support the trial court's conclusion that such an agreement had been reached. *Id.*

[34]*Id.* at 1338.

Although the trial court found that Janet "voluntarily and intentionally relinquished any interest that she may have had in the real estate,"[35] the court of appeals disagreed, holding that the Statute of Frauds[36] rendered the alleged oral agreement unenforceable.[37] The court paraphrased *Restatement of Contracts* section 207[38] regarding the sufficiency of a memorandum to satisfy the Statute of Frauds:

> In order that an agreement or contract to convey land may be enforced, it must be evidenced by some writing: (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent, (2) which describes with reasonable certainty each party and the land, and (3) which states with reasonable certainty the terms and conditions of the promises and by whom and to whom promises were made.[39]

Although Janet, the party to be charged, signed the letter and the letter described the real estate with sufficient certainty,[40] the memorandum did not establish the promise to be performed by Janet. The court explained: "In the instant case, the Husband alleged that the Wife promised to convey her interest in the farm to him. However, the letter did not contain any such promise. It merely stated that the farm will go to the children upon the Husband's death."[41] The court would be stretching the sparse language of the letter beyond its reasonable limits to hold otherwise. The phrase stating that the "farm is to go to Roger, Clint, & Rena upon Bud's death" does not indicate with reasonable certainty that Janet agreed to relinquish all legal interests in the real estate in exchange for her ex-husband's promise to give it to their children. Janet might be expressing her intent as to the disposition of her interest in the farm on Charles' death.

Because Janet did not relinquish her interest in the real estate, Janet and Charles held the entireties property in equal shares as tenants in common after the divorce.[42]

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[35] *Id.*

[36] IND. CODE § 32-2-1-1 (1976).

[37] 387 N.E.2d at 1341. The court also found no evidence of detrimental reliance by Charles sufficient to estop Janet from asserting the Statute of Frauds defense. *Id. See* Lawshe v. Glen Park Lumber Co., 375 N.E.2d 275, 278 (Ind. Ct. App. 1978) (dicta regarding the doctrine of equitable estoppel).

[38] RESTATEMENT OF CONTRACTS § 207 (1932).

[39] 387 N.E.2d at 1340.

[40] "The farm" furnished a sufficient means of identifying the property and could properly be supplemented by parol evidence. *Id.*

[41] *Id.* at 1341.

[42] IND. CODE § 31-1-12-17 (1971) (repealed 1973), provided in part:

Any property, real, personal or mixed, owned as joint tenants or as tenants

In *Frash v. Eisenhower*,[43] a judgment awarding a broker's commission was reversed by the court of appeals. The only written evidence of the landowner's agreement to pay a commission was a paragraph included in the broker's standard proposition form, which was signed by the landowner when he accepted the prospective purchaser's offer.[44] After the proposition was accepted, the purchaser told the broker that he could not secure financing. The broker returned the purchaser's earnest money and informed the landowner that the deal was cancelled.[45] Although the broker did not

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> by the entireties by the parties to the divorce action which shall not be expressly included in and covered by the decree of divorce shall, upon the rendition of such decree, vest in such parties equally as tenants in common.

In the present Dissolution of Marriage Act, IND. CODE §§ 31-1-11.5-1 to -24 (1976 & Supp. 1979), no similar provision exists. Indiana courts might take one of two approaches when entireties property is not expressly included in the divorce decree. Courts could construe IND. CODE § 31-1-11.5-1 (Supp. 1979) as giving a broad authority to divide the property "in a just and reasonable manner." *Id.* Thus, unequal division might be proper. The problem with this construction is that the statute specifically states that it is applicable only in actions "pursuant to section 3(a)," namely, actions for dissolution of marriage pursuant to *id.* § 31-1-11.5-3(a). Indiana courts are more likely to hold that, as a matter of common law, divorce severs a tenancy by the entireties and creates an *equal* tenancy in common shares. *See* National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957). The *Bledsoe* court stated: "[W]here the operation of a tenancy by entireties has been thwarted by a divorce or otherwise, the common law of the state divides the property equally between the original owners." *Id.* at 140, 144 N.E.2d at 715. Other courts have held that only a presumption of equal ownership exists:

> This presumption may be rebutted by evidence showing the source of the actual cash outlay at the time of acquisition, the intent of the cotenant creating the joint tenancy to make a gift of the half-interest to the other cotenant, unequal contribution by way of money or services, unequal expenditures in improving the property or freeing it from encumbrances and clouds, or other evidence raising inferences contrary to the idea of equal interest in the joint estate.

Jezo v. Jezo, 23 Wis.2d 399, 406, 127 N.W.2d 246, 250 (1964).

[43]376 N.E.2d 1201 (Ind. Ct. App. 1978).

[44]The paragraph provided in part: " 'As the owner of the property described herein I hereby accept *this proposition* . . . and I agree to pay to . . . Broker the sum of Five thousand dollars ($5,000.00) Dollars commission *for services rendered in this transaction.*' " *Id.* at 1203 (emphasis added).

[45]The broker returned the earnest money without advising the landowner and apparently without investigating what efforts were made or might have been made to secure the financing. Presumably, the proposition form used in this transaction contained the typical clause making the purchaser's obligation to purchase conditional on his obtaining financing. Such a clause imposes an implied obligation on the purchaser to make a good faith effort to obtain financing. Billman v. Hensel, 391 N.E.2d 671, 673 (Ind. Ct. App. 1979). If the purchaser fails to make a good faith effort, he cannot rely on the financing condition to excuse his obligation to perform. Thus, the landowner may have had a right to retain the earnest money as damages and, if so, the broker acted improperly in returning the money to the purchaser.

have further communication with the prospective purchaser, the broker sued the landowner for the commission when he learned that the landowner had conveyed the property to that purchaser.[46] Construing the written commission agreement against the drafting broker, the court of appeals decided that the broker was entitled to the commission only if the property was sold to that purchaser under the terms described in the written proposition.[47] The broker failed to prove that the ultimate sale was on the terms specified in the offer.[48]

The Indiana Supreme Court, in *Morris v. Weigle*,[49] discussed and refined the equitable principles established in *Skendzel v. Marshall*,[50] regarding whether forfeiture or foreclosure is the appropriate remedy against a defaulting vendee under a conditional land sale contract. The distressing aspect of *Morris* is that two dissenting justices recommended that *Skendzel* be overruled as an unwarranted judicial interference with private contractual arrangements.[51]

C. *Land Ownership In General*

In *Knightstown Lake Property Owners Association v. Big Blue River Conservancy District*,[52] the court of appeals affirmed the trial

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[46]376 N.E.2d at 1203. The record contained no evidence of the exact time or terms of the transfer.

[47]*Id.* at 1204. IND. CODE § 32-2-2-1 (1976) (the so-called broker's Statute of Frauds) renders oral contracts for the payment of the real estate commissions unenforceable. The court of appeals held that the written commission agreement was "neither a general contract to pay a commission on the sale of the land to any person . . . procured by [the broker] nor a contract to pay a commission upon the sale of the land to Jones [the purchaser procured by the broker] upon any other terms." 376 N.E.2d at 1204.

[48]376 N.E.2d at 1204. A landowner cannot use the Statute of Frauds to perpetrate a fraud. Hatfield v. Thurston, 87 Ind. App. 541, 161 N.E. 568 (1928). In *Frash*, however, the broker failed to show that the landowner fraudulently prevented the broker's negotiation of a satisfactory and successful sale. In fact, the broker himself "abandoned Jones as a prospective purchaser." 376 N.E.2d at 1204.

[49]383 N.E.2d 341 (Ind. 1978) (3-2 decision), *discussed in* Townsend, *Creditor's Rights and Secured Transactions, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 374 (1980).

[50]261 Ind. 226, 301 N.E.2d 641 (1973).

[51]Justice Pivarnik wrote: "[A]ppeals courts should honor contracts as they were made by the parties and enforce them regardless of where the chips may appear to fall from this perspective." 383 N.E.2d at 346 (Pivarnik, J., dissenting; Givan, C.J., concurring in dissent).

[52]383 N.E.2d 361 (Ind. Ct. App. 1978). For another discussion of this case, see Galanti, *Corporations 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 155-57 (1980). In another recent case involving land ownership, Bruch v. Centerview Community Church, Inc., 379 N.E.2d 508 (Ind. Ct. App. 1978), the court of appeals approved the trial court's jury instruction describing the fee simple determinable created by arguably ambiguous language in a deed. The grantor conveyed to the grantee

court's finding that lot owners of the Knightstown subdivision were beneficial owners of certain condemned streets, lakes, parks, and other common areas and therefore were entitled to the proceeds of the condemnation award.[53] The Knightstown Lake Property Owners Association, a not-for-profit corporation, held title to the condemned property by a recorded deed dated May 23, 1932. Knightstown, however, ceased to function sometime thereafter. Pioneer Village Lot Owners Association, another not-for-profit corporation, attempted unsuccessfully to establish itself as Knightstown's successor.[54] In the absence of a successor to Knightstown, the trial court held, and the appellate court agreed, that the grantors intended the owners of subdivision lots to have beneficial ownership.[55]

The trial court concluded that Pioneer's only claim was for reimbursement for real estate taxes it had paid on the property from 1965 until the time of trial.[56] The court of appeals, however, observed "without comment" that a " 'payment of taxes by a stranger, a mere volunteer, cannot be made the foundation of any right or claim on the part of such person.' "[57] Because the parties failed to appeal the trial court's determination that Pioneer was entitled to reimbursement, Pioneer apparently can recover the taxes paid, although it arguably was a mere volunteer.[58]

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church "as long as used for church purposes, when not used for church purposes said property reverts back to [grantor]." *Id.* at 509. Applying the general rule that ambiguous language in a deed should be strictly construed against the drafting grantor, the court held that the jury instruction correctly stated that "no reversion would occur unless and until said real estate is no longer used for church purposes by [the original grantee] or another orthodox church." *Id.* at 510. Fee simples determinable are discussed generally in 4 G. THOMPSON, THE MODERN LAW OF REAL PROPERTY § 1871, at 528-45 (J. Grimes repl. 1979).

In the recent case of Homemakers Fin. Serv., Inc. v. Ellsworth, 380 N.E.2d 1285 (Ind. Ct. App. 1978), the court of appeals applied the accepted rule of deed construction that "a court will construe a recital as a covenant, rather than a condition, whenever such a construction is possible." *Id.* at 1287. *See generally* 4 G. THOMPSON, *supra* § 1874, at 557-64 (discussing the consequences of deciding that deed language creates a condition).

[53]383 N.E.2d at 368.

[54]Pioneer had the affirmative burden of proving its ownership interest. *Id.* at 366. Pioneer attempted to show that it was Knightstown's successor by reason of a de facto merger in 1965 and by reason of a statutory merger in 1976. *Id.* at 366-67. Because neither merger was properly established in the record as being in compliance with the Indiana Not-For-Profit Corporations Act, IND. CODE §§ 23-7-1.1-1 to -47 (1976 & Supp. 1979), Pioneer failed to meet its burden of proof. 383 N.E.2d at 367.

[55]383 N.E.2d at 367.

[56]Knightstown paid real estate taxes from 1932 until 1965; Pioneer paid taxes from 1965 until the time of trial.

[57]383 N.E.2d at 367 (quoting 27 I.L.E. *Taxation* § 163 (1960)). *See* Federal Land Bank of Louisville v. Dorman, 112 Ind. App. 111, 41 N.E.2d 661 (1942).

[58]The trial court's judgment stated: "Pioneer Village Lot Owners Association, Inc., has no standing in this action, and is not entitled to participate in the proceeds

D. Easements

1. Express Easements.—In *Jeffers v. Toschlog*,[59] the court of appeals discussed several basic principles involved in the creation, transfer, and termination of express easements. The court of appeals affirmed the trial court's judgment recognizing an easement across the Jeffers' property, the servient estate, for the benefit of the Toschlogs' property, the dominant estate. The easement was created by the following provision in a 1907 deed: " 'Said Jessee Horney [Jeffers' predecessor] hereby conveys to Wayne County Lumber Company [Toschlogs' predecessor] the right of ingress and egress for teams and wagons in conducting their business through an open driveway along the South line [of Horney's property] to South Main Street.' "[60] The Jeffers argued that the language created an easement in gross, which is a nontransferable right personal to the grantee lumber company. The trial court decided that the language created an easement appurtenant for ingress and egress to the dominant estate, and the court of appeals found sufficient evidence to support that conclusion.[61] Because a conveyance of the dominant estate also conveys the easement, whether the easement is mentioned or not, Toschlogs had the right to use the easement.[62]

The width of the easement was not mentioned in the conveyance creating it. The evidence revealed that a fence had been built on the

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derived from this action, or to any share in the award of damages herein, except to reimbursement for taxes paid on the subject real estate." 383 N.E.2d at 365. The trial court found, however:

> Pioneer Village Lot Owners Association, Inc. has paid taxes on the real estate involved in this action since sometime after its incorporation and through May 10, 1976, and is entitled to be reimbursed for the payment of such taxes as it has paid on the real estate subject to this action.

Id. The trial court's judgment is apparently final as to Pioneer's right to reimbursement.

[59]383 N.E.2d 457 (Ind. Ct. App. 1978). Other easement cases decided during the survey period include: Rees v. Panhandle E. Pipe Line Co., 377 N.E.2d 640 (Ind. Ct. App. 1978) (propriety of issuance of preliminary injunction preventing interference with easement holder's right to clear trees and brush from and to inspect its right of way easement); Daviess-Martin County REMC v. Meadows, 386 N.E.2d 1000 (Ind. Ct. App. 1979) (changing route of easement is a taking for public use) (servient owners must be compensated unless they agreed to change of route).

[60]383 N.E.2d at 458. Similar language appeared in three subsequent deeds: one in 1930, in which Wayne quitclaimed the dominant estate to Green's Fork Lumber Company; another in 1946, in which Horney's successor quitclaimed the easement to Greens Fork; and one in 1943, in which Greens Fork conveyed the dominant estate to Cambridge Lumber Company.

[61]*Id.* at 459.

[62]*Id.* The court of appeals also held that the evidence was sufficient to support the alternative finding that the Toschlogs and their predecessors had established an easement by prescription. *Id.* at 460.

Jeffers' property "six feet from the Jeffers' property line and had been there for *forty* years."[63] Without discussing the Jeffers' contention that they had acquired by adverse possession any part of the easement beyond the six foot width,[64] the court of appeals affirmed the trial court's decree that the Toschlogs "could move the fence . . . so that the easement would be eleven feet wide."[65] The court stated:

> The easement was created for the purpose of permitting vehicles to pass through the driveway. No width of the easement was stated. The trial court had authority to construe the easement provision in a manner which would carry out the intentions of the parties. The trial court determined that the easement would have to be eleven feet wide in order to permit the passage of vehicles. The trial court did not err.[66]

In *Indiana Broadcasting Corp. v. Star Stations*,[67] Indiana Broadcasting (IBC) granted Star Stations (Star) an easement for location of FM broadcasting equipment on a television tower owned by IBC.[68] When Star lost its FM broadcasting license, IBC asserted that Star's easement was terminated automatically by the operation of the following clause in the document granting the easement: " 'The easements and rights hereby granted shall continue so long as necessary to the respective radio transmission operations of the Grantee [Star] and the television broadcast transmission operations of the Grantor [IBC] . . . .' "[69]

Affirming the trial court's judgment that Star's easement was not terminated automatically when Star lost its broadcasting license, the court of appeals applied the rule that any "qualification

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[63]*Id.* at 460 (emphasis added).

[64]If the fence ran parallel to the Jeffers' property line for the length of the easement, the Jeffers should have prevailed on a theory of adverse possession. *See* Kline v. Kramer, 386 N.E.2d 982 (Ind. Ct. App. 1979), *discussed in* notes 103-11 *infra* and accompanying text. Jeffers' failure to prevail may have resulted because the fence was perpendicular to the easement or because they failed to make or preserve their adverse possession arguments. The Jeffers argued that the entire easement had been abandoned by the dominant owners, but the court of appeals affirmed the trial court's determination, based on conflicting evidence, that the easement had not been abandoned. 383 N.E.2d at 459. Perhaps the Jeffers took an "all-or-nothing approach" at trial, hoping that the trial court would decide that the right to use any easement, six feet wide or wider, did not exist. Regardless, the appellate court's cursory discussion of the adverse possession theory is slightly troublesome. This reader would appreciate a statement that the trial court's decision, based on conflicting evidence, must be upheld.

[65]383 N.E.2d at 460.

[66]*Id.*

[67]388 N.E.2d 568 (Ind. Ct. App. 1979).

[68]*Id.* at 569. The grant of the easement occurred as part of IBC's sale to Star of certain assets connected with the operation of one AM and one FM radio station. *Id.*

[69]*Id.* at 569-70. Other determining events were described in the document granting the easement, but the occurrence of the other events was not at issue on appeal.

in the nature of a limitation which would terminate an easement must be clearly established."[70] The court of appeals noted that undefined and flexible words were used in the clause to describe the determining event:[71] termination of the easement would occur when the easement was no longer " 'necessary to . . . [Star's] radio transmission operations.' "[72] Star's loss of license was not clearly established as a determining event.[73]

The most interesting aspect of *Indiana Broadcasting* is the court's detailed analysis of the two processes that might have been used in construing the termination clause. The trial court could have resolved the construction issue as a question of law or as a mixed question of law and fact. The appellate court carefully explained how the clear establishment rule would have been applied under either process. The case, therefore, has value for anyone who has not recently pondered the processes of construction and interpretation of written instruments.

2. Implied Easements.—State v. Innkeepers of New Castle, Inc.,[74] was a condemnation action in which the State appropriated access rights and a portion of Innkeeper's land abutting a state highway to convert the highway into a limited access thoroughfare. The action focused on the question of whether the State's appropriation rendered the remainder of Innkeeper's parcel "landlocked and inaccessible to the public."[75] The State claimed that the parcel was not inaccessible because Innkeeper had an implied easement over the grantor's land. Ordinarily, a way of necessity will be implied over the land of the grantor (or grantee) only if a large parcel of land is divided and part "conveyed in such a manner so as to leave the grantee [or grantor] completely landlocked."[76]

In 1966, Tabor, who represented a proposed Holiday Inn Motel, attempted to obtain a curb cut onto the state highway adjoining his parcel of land. The Indiana State Highway Commission refused

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[70]*Id.* at 573 (citing GTA v. Shell Oil Co., 358 N.E.2d 750 (Ind. Ct. App. 1977), *noted in* Falender, *Property, 1978 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 232, 245-46 (1979)).

[71]388 N.E.2d at 573.

[72]*Id.* at 569. The court noted that the trial court could have broadly interpreted the quoted words by following the rule of construction that doubt or uncertainty of language will be resolved in favor of the grantee. *Id.* at 573. Under this rule, the court could have concluded that the easement continued to be "necessary" (meaning convenient or beneficial) to Star's "radio transmission operations," even if Star had no broadcasting license. *Id.*

[73]*Id.* The parties admitted that they did not consider the matter when the language was chosen. *Id.* at 572 n.6.

[74]392 N.E.2d 459 (Ind. 1979).

[75]State v. Innkeepers of New Castle, Inc., 375 N.E.2d 1129, 1131 (Ind. Ct. App. 1978), *vacated*, 392 N.E.2d 459 (Ind. 1979).

[76]375 N.E.2d at 1131.

Tabor's curb cut application because of plans to make the highway a limited access highway. In April 1969, the State attempted to buy a portion of land abutting the highway as well as access rights from Tabor to accomplish its limited access plans. Tabor refused. In the following month, Tabor sold a part of the land abutting the highway to Innkeeper. Although Tabor retained land on each side of Innkeeper's property, which adjoined the state highway on one side and a county road on the other, the land sold to Innkeeper was accessible only by the state highway.[77]

In December 1969, the State, which was unaware of the transfer from Tabor to Innkeeper, brought a condemnation action against Tabor to secure the parcel that the State previously had offered to purchase. After Innkeeper was joined as a party, the trial court tried the issue of damages sustained by Innkeeper from the condemnation of its property and excluded evidence offered by the State to show an implied way of necessity.[78] On an appeal brought by the State, the court of appeals held that the evidence concerning the implied easement was improperly excluded.[79]

Disputing the court of appeals decision, Innkeeper argued that an implied easement could not be found at the proffered evidence because the transfer from Tabor to Innkeeper did not render Innkeeper's property inaccessible. Innkeeper had access to its property by the state highway at the time of the conveyance.

The Indiana Supreme Court agreed with Innkeeper by holding that the State could not lawfully deny curb cut applications because of future plans to construct a limited access highway.[80] Thus, Innkeeper held a right of access by way of the state highway at the

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[77] *Id.* at 1130.

[78] *Id.* at 1131.

[79] *Id.* The court of appeals explained:

> Although it is true that the actual conveyance from the Tabors to Innkeepers did not landlock the Holiday Inn, the State's evidence tended to prove that (1) the Tabors had been the common owners of all the land; (2) Andrew Tabor was the major shareholder, a director and a chief executive officer of Innkeeper; (3) Tabor, both individually and as agent for Innkeeper, knew that all access rights to State Road 3 were to be appropriated by the State in the near future; and (4) the conveyance from the Tabors to Innkeeper occurred only a very short time prior to the commencement of the proceedings to condemn the access rights to State Road 3. Under the facts of this case, the above evidence would have been sufficient to have allowed the jury to find an implied easement of necessity over the Tabor's other properties. In addition to this, the appraisers for the State attempted to testify that an access road across the Tabor's land was already in use, which could have further strengthened the State's argument that an implied easement presently existed.

Id. at 1132.

[80] 392 N.E.2d at 464.

time of conveyance and at the time of the condemnation.[81] The trial court, therefore, properly excluded the State's evidence.

3. Easements by Private Eminent Domain.—Continental Enterprises, Inc. v. Cain[82] was an appeal taken from Continental's second attempt to obtain an easement over Cain's adjoining property. Continental owned a peninsula of land formed when the state dammed the Little Elkhart River in 1838. Continental attempted in the first action to establish its right to an easement by way of necessity over Cain's land, which constituted the "only unsubmerged land adjoining" Continental's peninsula.[83] Continental failed in the earlier action because the two parcels had never been under common ownership.[84] In the present action, Continental relied on Indiana Code section 32-5-3-1, which provides in part:

> In all cases where, heretofore or hereafter, the lands belonging to a landowner or to landowners in this state, shall have been shut off from public highway . . . *by the erection of any dam constructed by the state of Indiana or the United States or any of their agencies or political subdivisions under the laws of the state of Indiana*, and in case the owner or owners of lands thus affected cannot secure an easement or right-of-way on and over the lands adjacent thereto, and intervening between such lands and the public highways most convenient thereto, either because the adjacent and intervening landowner or landowners refuse to grant such easement, or because the interested parties cannot agree upon the consideration to be paid by the landowner or landowners so deprived of such access to the highway, he or they shall have such right of easement established as a way of necessity under the provisions of [Indiana Code chapter] 32-11-1.[85]

The trial court denied relief to Continental on constitutional grounds. The trial court found that Continental's efforts to secure an easement for private purposes did not violate the Indiana constitutional provision that "[n]o man's property shall be taken away

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[81] *See id.* at 464-65; Gradison v. State, 260 Ind. 688, 300 N.E.2d 67 (1973).

[82] 387 N.E.2d 86 (Ind. Ct. App. 1979).

[83] *Id.* at 88.

[84] *See* Continental Enterprises, Inc. v. Cain, 156 Ind. App. 305, 296 N.E.2d 170 (1973), *noted in* Polston, *Property, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 228, 232-34 (1974).

[85] IND. CODE § 32-5-3-1 (1976) (emphasis added). Apparently, the italicized language was inserted by an amendment to the statute, secured at Continental's urging after its first unsuccessful lawsuit.

by law, without just compensation."[86] The court of appeals observed that "this language has been held to mean not only that compensation must be given for a condemnation for a public purpose, but also that private property may not be taken for a private purpose."[87] Continental did not allege or prove that it sought to condemn an easement for a public purpose.[88] Making property "accessible for its fullest use" is not a public purpose.[89] Potential use as a "church site or something of that nature"[90] is not a public purpose.[91] The possibility that the public might have access to Continental's beaches does not establish a public purpose.[92] The *Continental* court applied the traditional test for establishing public use: " '[W]hether a public trust is imposed upon the property, whether the public had a legal right to the use, which cannot be gainsaid, or denied, or withdrawn at the pleasure of the owner.' "[93] Continental's obvious desire to acquire "easy access to its land" effectively negated any suggested public purpose.[94] Thus, Continental could not constitutionally use the statute to condemn an easement over Cain's land.

Continental insisted that its plight resembled the situation of a property owner deprived of access because of the construction of a limited access highway.[95] If the state may take another's land to provide access for the private benefit of the deprived landowner as an incident to the "larger state undertaking" of condemning a public highway,[96] the same theory should allow a landowner an easement as

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[86]IND. CONST. art. 1, § 21. The trial court also denied relief on the ground that the legislature intended the statutory relief to be "available only to those who held title to affected land at the time it was deprived of access by the state, and that to construe the statute to allow a taking by subsequent owner would sanction a taking for a private purpose in violation of the Indiana Constitution." 387 N.E.2d at 89. The court of appeals agreed that the trial court "was correct in attempting to determine the legislature's intent within the confines of the constitution." *Id.*

[87]387 N.E.2d at 90 (citing Great W. Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 577, 66 N.E. 765 (1903)). The *Continental* court also pointed out that IND. CODE § 32-5-3-1 (1976) refers to the general eminent domain act, *id.* § 32-11-1-1, which applies to anyone "having the right to exercise the power of eminent domain for any *public use.*" 387 N.E.2d at 90 n.2. *See also* Foltz v. City of Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955).

[88]Continental unsuccessfully attempted to amend its complaint after the trial court decision to allege a public purpose. The court of appeals held that the trial court's rejection of the amendment was proper because the evidence did not demonstrate a public purpose. 387 N.E.2d at 90.

[89]*Id.*

[90]*Id.* (testimony of Continental's president as to possible public purposes).

[91]*Id.* (citing Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927)).

[92]387 N.E.2d at 90.

[93]*Id.* at 91 (quoting 199 Ind. at 111, 155 N.E. at 470).

[94]387 N.E.2d at 92.

[95]*Id.*

[96]*Id.* (citing Andrews v. State, 248 Ind. 525, 299 N.E.2d 806 (1967)).

an incident to the "larger public purpose" of constructing a dam.[97] The court of appeals agreed in principle but stated that the intervening 150 years since the construction of the dam eliminated any possibility that a condemnation might be considered an "incident to" the prior condemnation.[98] Furthermore, Continental was not the owner at the time of the 1838 taking.

Some jurisdictions have found a public purpose when land is made accessible for its fullest use, even though the sole beneficiary of a condemnation is the private owner who gains access to his land.[99] In some states, taking for private use is constitutionally permitted.[100] In other states, the "public use requirement, if not discarded, is at least overlooked . . . ."[101] In Indiana, however, the public purpose requirement remains alive. Indiana requires that a specific dedication to an activity be "affected with a public interest"[102] before a condemnation is constitutionally permitted. Although the *Continental* court did not strike down Indiana Code section 32-5-3-1 as unconstitutional, its decision cripples the statute's effectiveness in providing remedies for landlocked owners.

E. Adverse Possession

Kline v. Kramer[103] involved a "classic boundary line dispute between neighbors,"[104] in which adjoining property owners each claimed title to a narrow strip of land along the southern border of the Kline property and the nothern border of the Kramer property.[105] The Klines claimed title on the basis of their deed, whereas the Kramers based their ownership on the adverse possession of their predecessors in title. When the Kramers' predecessor, Harry Britt, purchased the Britt-Kramer property in 1947, a fence existed along the northern boundary, enclosing the disputed strip as part of the Britt-Kramer parcel. The fence remained in the same location throughout Britt's and the Kramers' ownership.[106]

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[97]387 N.E.2d at 92.

[98]*Id.*

[99]*See* Latah County v. Peterson, 3 Idaho 398, 29 P. 1089 (1892).

[100]*See* Tomten v. Thomas, 125 Mont. 159, 232 P.2d 723 (1951), *overruled on other grounds*, Callant v. Federal Land Bank of Spokane, 593 P.2d 1036 (Mont. 1979).

[101]Note, *Eminent Domain in Tennessee: Public Use, Just Compensation and the Landowner*, 3 MEM. ST. U.L. REV. 65, 68 (1972). *See e.g.*, Draper v. Webb, 57 Tenn. App. 394, 418 S.W.2d 775 (1967); Swicegood v. Feezell, 29 Tenn. App. 348, 196 S.W.2d 712 (1946).

[102]Foltz v. City of Indianapolis, 234 Ind. 656, 664, 130 N.E.2d 650, 654 (1955).

[103]386 N.E.2d 982 (Ind. Ct. App. 1979).

[104]*Id.* at 985.

[105]The strip was approximately 1 to 4 feet wide and 309 feet long. *Id.*

[106]After Kramer purchased the property from Britt, Kramer accidentally knocked out a portion of the fence. Kramer repaired the fence, placing it in the prior location.

The trial court entered summary judgment quieting title to the strip in the Kramers. On appeal, Kline questioned whether the possession of the Kramers and their predecessors satisfied the elements of adverse possession. Adverse possession requires that possession be adverse, hostile, and under a claim of ownership.[107] Kline asserted that Britt's possession lacked the necessary adversity because Britt "testified that he never contemplated that he was claiming land that belonged to his neighbor."[108] Britt also testified, however, that "he felt that he owned the property up to the fence line and . . . used it to plant crops and pasture cattle."[109] Claimants commonly assert ownership of land in boundary line disputes and simultaneously admit that they did not intend to claim ownership beyond the true line.[110] The Indiana court reiterated the majority view that the adversity required to establish title by adverse possession does not require an intent to claim land that belongs to another.[111] Adversity is established if the claimant asserts his right to possession without acknowledging that his possession is without right or is subservient to the actual owner.[112] Britt exhibited the req-

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Based on this incident, the Klines asserted that the doctrine of equitable estoppel should bar the Kramers' equitable quiet title relief. The Klines claimed that after Kramer knocked down the fence, Kramer acknowledged surveyor stakes showing the true boundary. The Klines also asserted that Kramer remained silent as to his intent to claim title to the strip. Regardless, the Kramers had already obtained title by adverse possession for the required 10-year period. *See* IND. CODE § 34-1-2-2 (1976). Title would not have been divested even if Kramer had affirmatively indicated satisfaction with the position of the surveyor's stakes. *See* Fatic v. Meyer, 163 Ind. 401, 72 N.E. 142 (1904); Grim v. Johns, 61 Ind. App. 514, 112 N.E. 13 (1916).

[107]Adverse and hostile are synonymous. 386 N.E.2d at 988. Claim of ownership (or claim of right) is discussed in *Kramer* and other cases which distinguish the claim of right element from the requirement that the possession be adverse. *See, e.g.*, Rennert v. Shirk, 163 Ind. 542, 546-48, 72 N.E. 546, 547-48 (1904); Penn Cent. Transp. Co. v. Martin, 353 N.E.2d 474, 477 (Ind. Ct. App. 1976); Cooper v. Tarpley, 112 Ind. App. 1, 7-8, 41 N.E.2d 640, 642-43 (1942). Nevertheless, adversity and claim of right seem to be synonymous. Both are inferred if the possessor acts as a true owner. *Id.* Both are negated if the possessor's acts, or other unequivocal expressions, indicate that his possession was permissive or trespassory. *E.g.*, 163 Ind. at 548, 72 N.E. at 548. In *Kramer*, the court stated that the claim of ownership requirement "is satisfied by entering upon and occupying the land with the intent to hold the land as one's own." 386 N.E.2d at 988. The same statement summarizes the essence of the adversity requirement. *See* notes 108-13 *infra* and accompanying text.

[108]386 N.E.2d at 985.

[109]*Id.*

[110]Kotze v. Sullivan, 210 Iowa 600, 602, 231 N.W. 339, 340 (1930). *See e.g.*, Ridgely v. Lewis, 204 Md. 563, 105 A.2d 212 (App. Div. 1954); Van Allen v. Sweet, 239 Mass. 571, 132 N.E. 348 (1921); Burns v. Foster, 348 Mich. 8, 81 N.W.2d 386 (1957); Predham v. Holfester, 32 N.J. Super. 419, 108 A.2d 458 (1954); Beck v. Loveland, 37 Wash. 2d 249, 222 P.2d 1066 (1950).

[111]*See* 386 N.E.2d at 988.

[112]*Id.*; Penn Cent. Transp. Co. v. Martin, 353 N.E.2d 474 (Ind. Ct. App. 1976).

uisite adversity by acting as the sole owner of the disputed strip.[113]

The Klines also contended that the Kramers and their predecessors had not complied with the statute requiring payment of taxes by the adverse possessor.[114] Following *Echterling v. Kalvaitis*,[115] the court of appeals held that the "supplementary" tax payment statute is inapplicable in boundary disputes.[116]

A public highway may be established by continuous public use under a claim of right for a period of twenty years.[117] In *Smolek v. Board of County Commissioners*,[118] the court of appeals found sufficient evidence to support a conclusion that a highway was established by continuous adverse use.[119] In 1926, the county commissioners attempted to establish the highway pursuant to a statutory grant of authority, but lacked jurisdiction because they had failed to notify the public of the proposed roadway. Although the public use was clearly shown to be adverse under a claim of right because of the commissioners' action, ordinarily "continuous use for twenty years or more, unexplained, will be presumed to be under claim of right, and therefore adverse."[120]

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[113]Britt's mistaken belief that he was "merely acting in a manner consistent with [his] ownership rights . . . does not negate the conclusion that [his] possession was adverse." 386 N.E.2d at 988.

[114]*Id.* at 986; *see* IND. CODE § 32-1-20-1 (1976).

[115]235 Ind. 141, 126 N.E.2d 573 (1955), *cited in* 386 N.E.2d at 989-90.

[116]386 N.E.2d at 990. Judge Hoffman dissented, stating that *Echterling* "should be overruled and the plain and unambiguous meaning of the statute returned to it as was contemplated by the Legislature which adopted it." *Id.* (Hoffman, J., dissenting). The majority held:

> [D]escriptions on tax statements may not be sufficient in all cases to serve as notice to the recorded titleholder that there is an adverse claimant who is claiming an interest adverse to his interest. Where the payment of taxes will not serve as notice to the recorded titleholder that someone is in possession of his land and claiming an interest adverse to his interest in the land, the statute requiring the payment of taxes is not a supplementary element of adverse possession. Boundary disputes as in *Echterling* . . . are typical circumstances where a tax statement does not serve notice of an adverse interest.

Id. at 989.

[117]IND. CODE § 8-20-1-15 (1976); Cozy Home Realty Co. v. Ralston, 214 Ind. 149, 14 N.E.2d 917 (1938). Public highways may also be created by an owner's parol declaration or conduct indicating a dedication, if the statements or conduct are accompanied by public use. The recent case of Cook v. Rosebank Dev. Corp., 376 N.E.2d 1196 (Ind. Ct. App. 1978), held that a road had been so dedicated.

[118]386 N.E.2d 997 (Ind. Ct. App. 1979).

[119]*Id.* at 998.

[120]Cozy Home Realty Co. v. Ralston, 214 Ind. 149, 152, 14 N.E.2d 917, 918 (1938) (citing Southern Ind. Ry. v. Norman, 165 Ind. 126, 72 N.E.2d 896 (1905)). The quote from *Cozy* is further indication that adversity and claim of right are synonymous. *See* note 107 *supra*.

F. Zoning

Every year, trial courts need to be reminded of the applicable standard for reviewing a zoning board's decision granting or denying a use variance. This year was no exception. In *Speedway Board of Zoning Appeals v. Popcheff*,[121] and *Metropolitan Board of Zoning Appeals v. Zaphiriou*,[122] the trial courts reversed the boards' denial of use variances, and in each case the court of appeals reversed the trial court. To overturn a board's denial of a variance, the trial court must find that ' "each of the five statutory prerequisites has been established as a matter of law, giving wide construction to the total evidence and resolving all doubts in favor of the board's determination.' "[123] The *Popcheff* court noted:

> This is obviously a formidable burden for a petitioner to carry. So long as the controlling legislation continues to require establishment of five very restrictive prerequisites before a Board can grant a variance, courts which review a negative determination by such Board are virtually powerless to overturn such determination. This significantly limited scope of review is exemplified by the plethora of appellate decisions which overturn reviewing court's reversals of Board denials. Indeed, only in the most rare case would a petitioner be able to establish each of the statutory elements *as a matter of law*.[124]

Although a board's decision denying a variance will rarely be overturned when review is founded on statutory guidelines, the decision may be overturned when review is based on constitutional grounds.[125] In *Popcheff* and *Zaphiriou*, however, the constitutional arguments supporting the trial courts' decisions to overturn the variance denials were unsuccessful. The court of appeals in

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[121]385 N.E.2d 1179 (Ind. Ct. App. 1979).

[122]376 N.E.2d 110 (Ind. Ct. App. 1978).

[123]*Id.* at 113 (quoting Metropolitan Bd. of Zoning Appeals v. Standard Life Ins. Co., 145 Ind. App. 363, 366, 251 N.E.2d 60, 61 (1969)). The statutory guidelines referred to are found in IND. CODE § 18-7-2-71 (1976) (for granting variances in first class cities and counties). *Cf. id.* § 18-7-4-78 (four statutory prerequisites for other cities and counties). The standard of review of a board's decision to *grant* a variance is whether there is substantial evidence of probative value to support the board's decision. *See, e.g.*, 145 Ind. App. 363, 251 N.E.2d 60. *See generally* LeMond, *Where is Indiana Zoning Headed?*, 8 IND. L. REV. 976 (1974).

[124]385 N.E.2d at 1181 n.2 (citation omitted).

[125]*See, e.g.*, Metropolitan Bd. of Zoning Appeals v. Sheehan Constr. Co., 160 Ind. App. 520, 313 N.E.2d 78 (1974). When a review is founded on constitutional guidelines, "the trial court may consider the evidence de novo, and the appellate court must consider all evidence in the light most favorable" to the decision of the trial court. LeMond, *supra* note 123, at 987-88.

Zaphiriou held that the denial of a variance for location of a retail "adult" bookstore was not a prior restraint on protected speech under the first amendment.[126] In *Popcheff*, the court of appeals held that the board's decision was not arbitrary and capricious and that the petitioner received a "full and fair hearing free of improper considerations on his request for the variance.[127]

A constitutional argument in *English v. City of Carmel*[128] was raised prematurely in a direct action to the trial court after the landowners' rezoning request was denied by the Carmel Town Trustees. The landowners asserted that the town trustees' action was "arbitrary and capricious and constituted an unconstitutional taking of property."[129] The owners' complaint was dismissed properly by the trial court. Because the landowners claimed that the trustees' refusal to rezone was unconstitutional as applied to them, the court stated that the landowners must first ask the board of zoning appeals for a variance to relieve the hardship and then, if relief is not granted, seek a review in the trial court by way of certiorari.[130]

The zoning appeals board is required to make special findings of fact in support of its determination.[131] The reviewing court must re-

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[126]376 N.E.2d at 113-14. *Cf.* Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954) (free exercise of religion). The trial court in *Jehovah's Witnesses* reversed the board's denial of a use variance for location of a church in a residential neighborhood because the interest in land use control did not outweigh the opposing constitutional right of freedom of worship.

[127]385 N.E.2d at 1182. A petitioner is entitled to a fair hearing. A decision by the board of zoning appeals is illegal if minimum requirements for due process are not met. *See* Marion County Bd. of Zoning Appeals v. Sheffer & Clark, Inc., 139 Ind. App. 451, 220 N.E.2d 543 (1966). These minimum due process requirements are flexible, however, given the nature of a zoning board hearing. The *Popcheff* court stated:

> [W]e are reluctant to interject the procedural and evidentiary formalities of trial into [a] hearing before Zoning Boards. Citizen remonstrators typically testify in these hearings without the assistance of counsel. For those citizens to lose their case on the basis of chance utterances would be to insert an unnecessary clog in the variance granting system.

385 N.E.2d at 1182.

[128]381 N.E.2d 540 (Ind. Ct. App. 1978).

[129]*Id.* at 541.

[130]*Id.* at 542. *Accord, e.g.*, Town of Homecroft v. Macbeth, 238 Ind. 57, 148 N.E.2d 563 (1958); City of East Chicago v. Sinclair Ref. Co., 232 Ind. 295, 111 N.E.2d 459 (1953); City of South Bend v. Marckle, 215 Ind. 74, 18 N.E.2d 764 (1939).

In the recent case of Uhl v. Liters' Quarry, Inc., 384 N.E.2d 1099 (Ind. Ct. App. 1979), a constitutional challenge by a county resident, alleging that a zoning ordinance established invalid classification schemes which denied equal protection of the law, was properly raised by direct action in the trial court. *Id.* at 1102-03. *Accord*, 215 Ind. at 82, 18 N.E.2d at 767 (due process claim).

[131]Prior to 1951, this was an express statutory requirement. As stated thereafter in Carlton v. Board of Zoning Appeals, 252 Ind. 56, 64, 245 N.E.2d 337, 343 (1969), the board is required to make findings of fact for reasons apart from the statute to insure "an adequate judicial review of the administrative decision."

mand to the board if findings of fact are not made. In *Bridge v. Board of Zoning Appeals*,[132] the petitioner applied for a special use permit, which the board granted. The board had granted a similar special use variance three years earlier; however, the trial court held on appeal that the evidence was insufficient to sustain the variance grant. The trial court's judgment was final, and no further appeal was taken. Ordinarily, the judgment would bar relitigation of the same issue. When the petitioner applied for the second special use variance, the remonstrators claimed that the doctrine of res judicata precluded the board from granting the variance.[133] The board made no findings of fact regarding the res judicata issue. The reviewing court improperly usurped the board's fact finding function by determining that a change of circumstances had removed the bar of the prior judgment.[134] Consequently, the court of appeals reversed the trial court and remanded the case to the board for consideration of the res judicata question.[135]

G. Ownership of Personal Property

In *Moore v. Bowyer*,[136] the court of appeals reversed the trial court's judgment declaring that certain certificates of deposit held by Iva Kinnamon and her son Clarence Moore as joint tenants with right of survivorship were assets of Iva's estate even though Moore survived Iva.[137] All the funds in the accounts initially belonged to Iva. On the basis of *In re Estate of Fanning*,[138] the trial court concluded that the unambiguous terms of the signature card created "a rebuttable presumption that Iva intended the funds to be a gift to Moore."[139] The trial court, however, decided that Iva's failure to examine the card's terms rebutted the presumption of donative intent. The court of appeals disagreed, holding that Iva's failure to read the card would not by itself overcome the presumption.[140] Because Iva "had the opportunity and the capability to read the signature card," ordinary contract rules prevent relief from the terms of the

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[132]387 N.E.2d 99 (Ind. Ct. App. 1979).

[133]*Id.* at 100.

[134]*Id.* at 101.

[135]*Id.*

[136]388 N.E.2d 611 (Ind. Ct. App. 1979). Another recent case discussing personal property ownership was Hayes v. Second Nat'l Bank, 375 N.E.2d 647 (Ind. Ct. App. 1978) (despite preference for early vesting, trust provision a clear expression of settlor's intent to create alternative contingent remainders as to trust residue).

[137]*Id.* at 612-13.

[138]263 Ind. 414, 333 N.E.2d 80 (1975).

[139]388 N.E.2d at 612.

[140]*Id.* The *Fanning* court held that a certificate of deposit creating a joint account with rights of survivorship establishes a rebuttable presumption of donative intent. 263 Ind. at 421, 333 N.E.2d at 85.

signature card contract unless, fraud, misrepresentation, undue influence, duress, or breach of confidence existed.[141] Although Moore apparently occupied a position of confidence as manager of Iva's financial affairs and as Iva's attorney-in-fact and although Moore obtained the signature cards from the financial institution, the "trial court did not attribute any misleading or offensive acts to Moore."[142] Thus, the sole reason for rebutting the presumption of a gift was Iva's failure to read the card, and this "mistake of fact" alone would not invalidate the clear terms of the account contract.[143]

The *Moore* court did not mention the Non-Probate Transfers Act,[144] probably because Iva died prior to the effective date of the statute.[145] Under the Act, the result would be the same: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."[146]

In *Kratkoczki v. Regan*,[147] the court of appeals dismissed an appeal from a trial court judgment holding that the appellant and decedent held a certificate of deposit account as tenants in common.[148] Dissenting, Judge Garrard considered the merits of the

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[141]388 N.E.2d at 612.

[142]*Id.*

[143]*Id.*

[144]IND. CODE §§ 32-4-1.5-1 to -15 (1976 & Supp. 1979).

[145]The *Moore* court did not disclose the dates of the deposits or the date of Iva's death. If the deposits were made before January 1, 1977 (the effective date of the statute), and Iva died after January 1, 1977, the statute should have been applied. The comments to the UNIFORM PROBATE CODE, from which IND. CODE § 32-4-1.5-4(a) (1976) was taken, indicate that the statute is intended to apply to accounts in existence when the statute is enacted. For example, the comment to UNIFORM PROBATE CODE § 6-104 states in part:

> The section also is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn nonsurvivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of multiple name account would not want survivorship rights to attach. Secondly, the survivorship incidents described by this section may be shown to have been against the intention of the parties. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers advising them that review of their accounts may be desirable because of the legislation.

UNIFORM PROBATE CODE § 6-104, Comment.

[146]IND. CODE § 32-4-1.5-4(a) (1976). Failure to read the signature card would probably not be "clear and convincing evidence of a different intention." *Id. See also* Gaunt v. Peoples Trust Bank, 379 N.E.2d 495 (Ind. Ct. App. 1978) (bank had no duty to explain the legal consequences of joint account).

[147]381 N.E.2d 1077 (Ind. Ct. App. 1978).

[148]*Id.* at 1079. The trial court dismissed the judgment, holding that the appellant and decedent held a certificate of deposit account as tenants in common.

case and stated that the signature card demonstrated the intent to create a joint tenancy with the right of survivorship and not a tenancy in common, although the actual certificate did not specify a right of survivorship.[149] Judge Garrard's conclusion would have been the same under the Non-Probate Transfers Act,[150] which presumes that an account in the names of two or more parties is owned with the right of survivorship regardless of whether "mention is made of any right of survivorship."[151]

A recent torts case provides an unusual conclusion for this survey of recent property developments. The court of appeals in *Noble v. Moistner*,[152] which was an action in conversion to recover the value of property seized from the plaintiff's garage during a valid police search, cited the famous property case of *Armory v. Delamirie*.[153] *Armory* established the rule that "possession is title against all the world but the true owner."[154] Under the *Armory* rule, a defendant in a conversion action "cannot question the plaintiff's title or show title in a third party except to justify his seizure by authority of that title."[155] Thus, even a thief may be assured of peaceable possession against all but the true owner.

The court held that in Indiana the plaintiff in a conversion action has the burden of proving superior title.[156] Peaceful possession is "*prima facie* evidence of ownership which may be rebutted."[157] Therefore, defendants may show superior title in a third party as a defense to conversion actions. This Indiana rule may be historically justifiable,[158] but its ramifications are appalling. Persons who cannot ultimately show superior title to the property they possess are not

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[149]*Id.* at 1081 (Garrard, J., dissenting).

[150]IND. CODE § 32-4-1.5-1(4) (1976). Even if the court had reached the merits, the court could not have applied the Non-Probate Transfers Act because the decedent died prior to the effective date of the Act. *See* note 145 *supra*.

[151]IND. CODE § 32-4-1.5-1(4) (1976).

[152]388 N.E.2d 620 (Ind. Ct. App. 1979).

[153]1 Strange 505 (1722) (action by a chimney sweep against a jeweler to recover the value of a jewel found by the sweep and given to the jewler for appraisal), *cited in* 388 N.E.2d at 622.

[154]388 N.E.2d at 622.

[155]*Id.*

[156]The *Noble* court stated: "The essential elements to be proved by the plaintiff are 'an immediate, unqualified right to possession resting on a superior claim of title.'" 388 N.E.2d at 620 (quoting Yoder Feed Serv. v. Allied Pullets, Inc., 359 N.E.2d 602, 604 (Ind. Ct. App. 1977)). The *Noble* court also stated: " 'In actions for conversion the plaintiff must recover on the strength of his own title and not upon the weakness of his adversary.' " 388 N.E.2d at 621 (quoting Foudy v. Daugherty, 118 Ind. App. 68, 76, 76 N.E.2d 268, 271-72 (1947)).

[157]388 N.E.2d at 622.

[158]*See* cases cited in 388 N.E.2d at 621-22.

guaranteed peaceable possession. Indeed, the Indiana rule encourages an endless succession of thefts once property comes into the possession of one who cannot prove his superior right to retain it.