XIV. Property

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Numerous cases involving the law of property were decided during the current survey year, and an unusually large number of these made important advances or changes in the law. Many involved interesting factual settings. These cases will be discussed under the following headings: (A) bailments, (B) easements and restrictive covenants, (C) joint ownership, (D) landlord and tenant relations, (E) land ownership in general, (F) lateral and subjacent support, (G) water law, and (H) real estate transactions. Topics not covered under these headings are: adverse possession,[1] conditional land sale contracts,[2] and mineral rights.[3] It is not possible to deal with every

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[1]Two adverse possession cases were decided during the the current survey period. Both Connors v. Augustine, 407 N.E.2d 1186 (Ind. Ct. App. 1980) and Ford v. Eckert, 406 N.E.2d 1209 (Ind. Ct. App. 1980) involved disputed boundary lines. In each of these cases a successor in interest was claiming to have acquired title to a strip of land abutting a misplaced fence which separated his or her property from a neighbor. In holding for the parties claiming title by adverse possession, both courts found that the general elements of adverse possession were satisfied. Both courts permitted the adverse possessor to tack his possession to that of a former owner to make up the statutory period. In addition, both courts held that in boundary disputes involving fences, the requirement that one pay taxes on property held adversely was inapplicable because the purpose of that requirement was to give notice of the adverse possession, and the erection of the fence satisfied that requirement. The one distinction between the cases is that the *Connors* court applied a ten year statutory period under the present statute, while the *Ford* court applied the period from an older statute.

[2]A number of cases involving conditional land sale contracts and the doctrine of Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641 (1973) were decided during the survey period. For a discussion of these cases, see Townsend, *Secured Transactions and Creditors' Rights, 1981 Survey of Recent Developments in Indiana Law*, 15 Ind. L. Rev. 367, 371 (1981).

[3]Two interesting mineral rights cases were decided during the survey period, both challenging the constitutionality of statutory enactments. State v. Andrus, 501 F. Supp. 452 (S.D. Ind. 1980), *reversed sub nom.* Hodel v. State, 49 U.S.L.W. 4667 (June 15, 1981) dealt with a challenge to the Federal Surface Mining Act, and Short v. Texaco, Inc., 406 N.E.2d 625 (Ind. 1980), *prob. jurisdiction noted*, 49 U.S.L.W. 3710 (March 23, 1981) dealt with a challenge to the Indiana Mineral Lapse Act. For a further discussion of these cases see Neff, *Constitutional Law, 1981 Survey of Recent Developments in Indiana Law*, 15 Ind. L. Rev. 125, 152 (1981).

property case decided, thus, some are treated only very briefly if at all.[4]

A. Bailments

Two cases during the survey period dealt with the issue of a bailee's liability for loss to property occuring during a bailment.[5] In both cases the court essentially made the bailees insurers of the bailed goods: in one case because of a written contract imposing liability for loss on the bailee and in the other case because of an oral agreement to the same effect.

In *Nimet Industries, Inc. v. Joy Manufacturing Co.*,[6] the plaintiff delivered pistons to the defendant bailee to undergo an anodizing treatment process. The pistons were destroyed in a fire at the defendant's plant and the plaintiff brought an action to recover their value. The trial court held for the plaintiff and the defendant appealed.[7] The court first stated the general rule that "[o]rdinarily, a bailee is not liable for the loss of property in his possession absent a finding that he was at fault or otherwise failed to exercise reasonable care."[8] The court went on, however, to say that the parties to a bailment agreement could, by contract, enlarge the bailee's legal responsibility for the bailed property.[9] The case turned on the risk of loss provision in the parties' contract, and the court interpreted the contract to make the bailee responsible for the loss of the plaintiff's pistons while in the defendant's control, regardless of the cause of such loss.[10]

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[4]There were no significant statutory developments during the survey period.

[5]Nimet Indus., Inc. v. Joy Mfg. Co., 419 N.E.2d 779 (Ind. Ct. App. 1981); Spencer v. Glover, 412 N.E.2d 870 (Ind. Ct. App. 1980).

[6]419 N.E.2d 779 (Ind. Ct. App. 1981).

[7]*Id.* at 780.

[8]*Id.* at 781. The fire in this case resulted from arson perpetrated to cover up a burglary; thus, there was no negligence on the part of the bailee. *Id.*

[9]*Id.* However, the converse—that the bailee may, by contract, narrow the scope of his liability—is not necessarily true. Generally, a court will permit a bailee to escape liability imposed by law if he establishes that the bailor saw and accepted this term in the bailment contract. However, even if this is shown, a court may refuse to enforce the agreement on the ground of public policy. *See* R. BOYER, SURVEY OF THE LAW OF PROPERTY 690 (3rd ed. 1981); *cf.* General Grain, Inc. v. International Harvester Co., 142 Ind. App. 12, 232 N.E.2d 616 (1968) (stating similar rule in connection with professional bailees). *Contra*, RESTATEMENT OF CONTRACTS § 402 (1932).

[10]The relevant portion of the contract read,

> *Vendor* [bailee] *shall be responsible for loss of* or damage to any and all patterns, molds, tools, dies or templates delivered by Purchaser to Vendor and for loss or damage to *any machinery upon which work is to be performed by Vendor while in its possession or control*, however such loss or damage may incur [*sic*].

419 N.E.2d at 781 (emphasis in original). The defendant argued that the pistons did not fall under any of the provisions in the risk of loss provision and therefore were not

In *Spencer v. Glover*,[11] the plaintiff purchased a truck from the defendant, and under the sales agreement the defendant agreed to install a winch on the truck after delivery. The defendant later took possession of the truck and drove it to Flat Rock, Michigan to have the winch installed. During the night the truck was stolen.[12]

Although there was some dispute about the exact language used, it is clear that at the time the defendant took possession of the truck he had made an oral promise to the plaintiff that the truck would be returned in as good a condition as when it was taken. When the truck was not returned, the plaintiff brought an action in two counts: one in negligence against the defendant, as a bailee, and another in absolute liability under the oral contract of bailment.[13] The trial court entered judgment for the plaintiff for the value of the truck without special findings of fact or conclusions of law.[14]

The court of appeals affirmed the trial court's judgment on the merits of the second count—absolute liability—and therefore did not address the negligence issue. The court, as in *Nimet*, held that the general rule of the liability of bailees could be altered by contract.[15] The court rejected the defendant's contention that this case was distinguishable from two previous Indiana cases with similar facts because in *Spencer* there was only an oral bailment contract.[16] The court held that the validity of a bailment contract was governed by the general rules of contract law, under which an agreement such as this was enforceable even though not in writing.[17]

Although neither the *Nimet* or *Spencer* courts dealt specifically with this factor, two other Indiana cases seem to have required that the bailee's assumption of extraordinary liability be clear and unequivocal to be binding.[18] To the extent that *Nimet* and *Spencer* in-

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covered. The court, however, found that the pistons fell under the clear meaning of the term "machinery." This having been established, the risk of loss provision clearly made the bailee liable for any losses which occured.

[11]412 N.E.2d 870 (Ind. Ct. App. 1980).

[12]The defendant parked the truck in front of a respectable motel. He was not sure if he had locked the truck, but he had retained the keys.

[13]*Id.* at 871-72.

[14]*Id.* at 872.

[15]*Id.* at 872-73. The court's statement of the general rule of liability for injury or destruction of goods was somewhat different than that in *Nimet*. The *Spencer* court said that the fact that the goods were received by the bailee in good condition and returned to the bailor in damaged condition gives rise to an inference of fault or neglect on the part of the bailee. *Id.* at 873 (quoting Hainey v. Zink, 394 N.E.2d 238, 241 (Ind. Ct. App. 1979)).

[16]*See* Light v. Lend Lease Transp. Co., 129 Ind. App. 234, 156 N.E.2d 94 (1959); Morrow, Inc. v. Paugh, 120 Ind. App. 458, 91 N.E.2d 858 (1950).

[17]412 N.E.2d at 873-74.

[18]*See* Light v. Lend Lease Transp. Co., 129 Ind. App. 234, 248-51, 156 N.E.2d 94, 102-03 (1959); Morrow, Inc. v. Paugh, 120 Ind. App. 458, 464-65, 91 N.E.2d 858, 860-61 (1950).

volved clear and unequivocal agreements by the bailees to accept liability beyond that imposed by law[19] they are consistent with prior cases. *Spencer* does, however, make an important advance in that it is now clear that an oral agreement by a bailee to assume extraordinary liability may be enforced.

B. Easements and Restrictive Covenants

The most significant case involving the enforceability of restrictions and covenants decided during the current survey period was *Kuchler v. Mark II Homeowners Association Inc.*[20] In *Kuchler*, homeowners residing in the Mark II Subdivision sought declaratory relief against the Mark II Homeowners Association contesting the power of the association as established under a Declaration of Convenants and Restrictions.[21]

The Mark II Subdivision consisted of three separate sections under development by the Fortress Development Co. Although a preliminary plat of the entire tract had been presented to the zoning board for initial approval, Fortress recorded three separate final plats covering each of the three sections under development. Specifically, final plats for each of the three sections of the development were recorded on June 6, 1973, April 26, 1974, and May 2, 1975 respectively. In addition to these filings, Fortress also recorded a document entitled "Declaration of Covenants and Restrictions." This document, recorded on April 25, 1974, established various restrictions on the property owned by the developer and provided for the creation of a mandatory homeowners association for the purpose of maintaining a two-acre plot of common ground located in Section III of the subdivision.[22] The Mark II Homeowners Association was subsequently established on April 19, 1978. Of the three separate final plats recorded on the development, only the plat recorded for Section II specifically incorporated by reference the Declaration of Covenants.

The trial court in *Kuchler* determined on the above facts that Section II was the only section of the three composing the Mark II Subdivision which was burdened by the Declaration of Covenants.[23] Both parties appealed this determination.[24] The homeowners that lived in Section II of the subdivision contested the trial court's determination that their land was burdened and the association contested

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[19]*See* 412 N.E.2d at 873-74; 419 N.E.2d at 781.

[20]412 N.E.2d 298 (Ind. Ct. App. 1980).

[21]*Id.* at 299.

[22]The association, a not-for-profit corporation, was to comprise all lot owners and was to maintain the common ground by levying mandatory assessments upon the lot owners, collectible through liens on the various lots.

[23]412 N.E.2d at 299.

[24]*Id.*

the determination that Section III was not so burdened.[25]

The primary argument advanced by the homeowners on appeal was that the Mark II Subdivision was, in fact, an integrated whole. Therefore, because eleven of the lots contained in Section I of the development had been sold prior to the recording of the Declaration of Convenants, the homeowners contended that the developer could not thereafter place further restrictions on the remainder of the subdivision.[26] The court of appeals, however, rejected this contention stating that although a single plat had been submitted to the zoning board for its approval, it was the final plat which was of controlling importance for purposes of recording and deeding the property.[27] Thus, since three separate plats had been recorded, there were, in effect, three separate subdivisions created. The court of appeals affirmed the trial court's determination that further restrictions could be placed on Sections II and III even though several lots of Section I had been previously sold.[28]

With respect to the association's contention that Section III of the subdivision should likewise be burdened by the Declaration of Covenants, the court of appeals stated that " '[t]here are two methods of creating restrictions upon the use of property. One is by express covenants contained in the deed, and the other is by a recorded plat of the subdivision and a purchaser buys lots in the subdivision with reference to the plat.' "[29] Although none of the deeds involved in *Kuchler* contained the Declaration of Covenants, the court observed that the plat of Section II did incorporate the Declaration by reference.[30] The plat to Section III contained no such reference and the court, on that basis, found no error in the trial court's conclusion that only Section II of the subdivision was burdened by the Declaration of Covenants and Restrictions.[31]

The Indiana Court of Appeals decided two interesting easement cases during this survey period.[32] The first of these cases dealt with

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[25]*Id.*

[26]*Id.*

[27]*Id.* at 300 (citing IND. CODE § 17-3-43-1 (1976)).

[28]412 N.E.2d at 300. Because Section I was not part of the appeal, the court declined to comment on the issue of whether the developer could place further restrictions on that Section following the sale of the eleven lots. *Id.* at n.1.

[29]*Id.* at 300 (quoting Wischmeyer v. French, 231 Ind. 282, 288, 107 N.E.2d 661, 664 (1952)).

[30]412 N.E.2d at 300.

[31]*Id.* The court acknowledged the principle that when a general scheme is evident, the omission of the restrictions from some of the deeds will not inhibit the placing of a burden on the entire tract. *Id.* However, the court stated that because each of the three sections of the subdivision was separate and independent, the recordation of the Declaration of Covenants could not prevail over a complete omission of the restrictions from the deeds of an entire section of the subdivision. *Id.*

[32]Two less significant cases decided during this survey period which involved easements were Brademas v. Carriage House of Mishawaka II, 413 N.E.2d 991 (Ind. Ct.

the quality and nature of the property right which passes upon the grant of an easement. The second case examined the similarity between easements and irrevocable licenses with respect to the rights of purchasers who take the property for value and without notice.

In *Board of Commissioners v. Joeckel*,[33] the defendant, the Board of Commissioners of Vanderburgh County, acquired two separate easements from the plaintiff, Mrs. Joeckel, to accomodate the construction of a bridge project. The easements were granted pursuant to negotiations, and the plaintiff was paid a total of $2,260. No mention was made, either during the negotiations or in the easement itself, concerning the ownership of timber located upon one of the easements. The subcontractor engaged by the defendant to clear the easement had submitted its bid with the qualification that it would receive the timber located on the easements. The subcontractor cut the timber and sold it for a total of $4,252.91. Mrs. Joeckel subsequently brought an inverse condemnation suit for the value of the timber. Although conceding that the defendant could properly clear the timber from the property in furtherance of its use and enjoyment of the easement, the plaintiff contended that the grant of the easement, standing alone, did not give the defendant an ownership interest in the timber. The trial court sustained this contention and the Board of Commissioners appealed.[34]

The court of appeals, following a discussion of the general law of easements, stated that the acquisition of property by eminent domain must be for public use,[35] and that the acquisition of property for use as a roadway gives the public merely a right of passage.[36] Thus, the owner of the property over which a highway is constructed remains the owner in fee of the soil, minerals, and trees located upon the easement so long as that ownership is not inconsistent with the public use.[37] The court observed that the cutting and marketing of the plaintiff's trees "could hardly be classified as a public purpose"[38] and concluded "that the trees may be removed by the holder of the easement if such removal is reasonably necessary to effect the enjoyment of the easement, but the property interest

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App. 1980) (discussing the procedure and statutes applicable to the vacation of streets necessity against a conditional buyer of a portion of the property was barred by Indiana Trial Rule 13(A)) and Citizens of Heron Bay v. Gore, 409 N.E.2d 1228 (Ind. Ct. App. 1980) (discussing the procedure and statutes applicable to the ;vacation of streets or alleys outside corporate limits of cities and towns).

[33]407 N.E.2d 274 (Ind. Ct. App. 1980), *transfer denied*, Nov. 3, 1980.

[34]*Id.* at 277.

[35]*Id.* at 278.

[36]*Id.* at 277-78.

[37]*Id.* at 278.

[38]*Id.*

in the trees does not pass."[39] The court of appeals affirmed the award of damages in favor of Mrs. Joeckel.[40]

In *Industrial Disposal Corp. v. City of East Chicago*,[41] the plaintiff, Industrial, filed an inverse condemnation action against the city when it discovered a water main buried beneath a parcel of property which it had purchased from the New York Central Railroad Company. The evidence indicated that the construction of the water main had been authorized by an instrument executed and delivered to the city by the railroad on the payment of $6,450 consideration.[42] The instrument was never recorded and the plaintiff had no actual notice of the City's use when it purchased the property from the railroad.[43]

The issue in *Industrial Disposal Corp.* became whether the instrument created an easement in favor of the city or a license given for an indefinite period.[44] After much discussion on the differences between licenses and easements,[45] the court held that Industrial may have acquired the realty free of the city's interest in it regardless of whether the instrument was a license or an easement.[46] The real question seems to have been whether or not Industrial took the land with either actual or constructive notice of the city's rights in it.[47] The court of appeals remanded the case for further determination.[48]

C. Joint Ownership

One major case concerning joint ownership was decided during the survey period.[49] *Wienke v. Lynch*[50] involved a conveyance of

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[39]*Id.*

[40]*Id.* at 280.

[41]407 N.E.2d 1203 (Ind. Ct. App. 1980).

[42]*Id.* at 1204.

[43]*Id.*

[44]*Id.* at 1204-05.

[45]*Id.* at 1205.

[46]*Id.* at 1206.

[47]*Id.*

[48]*Id.*

[49]Wienke v. Lynch, 407 N.E.2d 280 (Ind. Ct. App. 1980). Two less significant cases involving joint ownership were also decided during the survey period. In Cooper v. LaPorte Bank & Trust, 415 N.E.2d 778 (Ind. Ct. App. 1981), the court found that an authorization card, along with evidence that the card was intended only to enable the plaintiff to pay bills on behalf of the owner of the account, created a power of attorney in the plaintiff and did not make her a joint owner. Thus, the joint bank account statute was not applicable and the plaintiff was not entitled to any of the funds upon the death of the owner. *Id.* at 779. In Curtis v. Hannah, 414 N.E.2d 962 (Ind. Ct. App. 1981), the court examined the question of whether each of three cotenants were bound by an agreement that not all of them had signed. *Id.* at 964-65. The court reasoned that because it was possible for cotenants to agree to be bound even if all did not sign the agreement, it was a question of the parties' intent. *Id.*

[50]407 N.E.2d 280 (Ind. Ct. App. 1980).

entireties property by one spouse without the other's consent. The court gave effect to the conveyance on the equitable grounds of laches and acquiescence.[51]

In this case, Elsie Wienke conveyed by warranty deed property owned by the entireties with her husband, Walter, to Colonial Discount Corporation. Although the conveyance was made over Walter's objection, he did appear with his wife for the closing. Walter did not sign the deed, however, and remained outside while Elsie signed. Colonial recorded its deed, made improvements on the land with Walter's knowledge, and subsequently conveyed the property by warranty deed to the Lynches who recorded their deed.

About three years after Elsie's conveyance, Walter initiated dissolution proceedings against her. Although Walter was informed by his attorney that he had a legal interest in the property Elsie had conveyed, the property agreement between Elsie and Walter was silent with respect to the entireties property. About two years later Walter brought suit to quiet title to the property. The trial court held for the Lynches, and Walter appealed.[52]

The court of appeals held that "[h]usband and wife have no separable interest in entireties property, therefore, a conveyance by one tenant is ineffective to pass legal title."[53] However,

> [a] finding that the conveyance is ineffective . . . does not lead to the conclusion that the underlying legal interest is immune from equitable defenses of laches and acquiescence. The doctrines of laches and acquiescence are directed at the actions, not the legal interests, of the party against whom they are raised.[54]

The court found that the defenses of laches and acquiescence were applicable and could bar Walter's assertion of legal title. The court found support for this holding in two early Indiana cases.[55]

The court rejected arguments by the defendant that the trial court had erred in computing the period of delay,[56] that the Lynches were not prejudiced by Walter's delay in asserting his title,[57] and

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[51]*Id.* at 283-84.

[52]*Id.* at 282.

[53]*Id.* at 283. The court suggested in a footnote that the unilateral conveyance of entireties property was "inoperable" rather than "void." Thus, a conveyance by one spouse was inoperable and passed no title; however, if the other spouse later joined the conveyance or deeded his or her interest to the other, the deed would become operable as of the date of the unilateral conveyance. *Id.* at n.3.

[54]*Id.* at 283-84.

[55]*Id.* at 284 (discussing Hutter v. Weiss, 132 Ind. App. 244, 177 N.E.2d 339 (1961) and Harwood v. Masquelette, 95 Ind. App. 338, 181 N.E. 380 (1932)).

[56]407 N.E.2d at 284-85.

[57]*Id.* at 285.

that the Lynches' use of the equitable defenses of laches and acquiescence was barred because they had constructive notice of Walter's interest.[58] Walter argued that the period of delay relevant for determining laches was the ten months between the time Colonial bought the property from Elsie and later sold it to the Lynches, because that was the only period in which anyone could have been misled by his inaction. The court rejected this argument on the grounds that laches does not involve reliance. The period of time began when Walter learned of his legal claim—when he arrived for the sale of the entireties property by his wife in 1972—and ended when he asserted his claim in 1977, some five years later.[59]

The court also found that the Lynches had been prejudiced by Walter's delay. Prejudice was established by the payment of taxes and by the bearing of the burdens and risks of property ownership by both Colonial and the Lynches and by the improvements made by Colonial.[60] The court also rejected Walter's claim that the provisions of the Occupying Claimants Act[61] prevented any prejudice, because "the statute is not the exclusive remedy for persons paying taxes and making improvements under color of title."[62] Hence, the Lynches could and did elect to pursue their equitable remedies.

Finally, the court recognized that the absence of Walter's name on the deed which purported to convey ownership of the entireties property constituted constructive notice that there was a defect in the title.[63] The court said, however, that there was no evidence that the Lynches had anything more than mere constructive knowledge and that that alone did not necessarily bar use of the defenses of laches and acquiescence.[64] The court said, "One who fails to search the records acts at his own peril, jeapordizing his interest against prior interest holders of record, but it does not follow that such failure to search the records is tantamount to inequitable conduct."[65]

The court suggested in dicta that even actual knowledge by the Lynches might not have defeated a laches defense.[66] The court also suggested that regardless of whether the divorce proceeding was

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[58]*Id.* at 285-86.

[59]*Id.* at 284.

[60]*Id.* at 285.

[61]IND. CODE §§ 34-1-49-1 to -12 (1976). This statute deals with the rights of both the true owner and the one claiming under color of title to be the owner of a single piece of property.

[62]407 N.E.2d at 285.

[63]*Id.* at 286.

[64]*Id.*

[65]*Id.* Walter had argued that "the Lynches' failure to review the deed records, and act in accordance therewith, [was] such reckless conduct as to render the aid of equity unavailable to them." *Id.* at 285.

[66]*Id.* at 286-87.

res judicata with respect to Walter's interest in the property, laches would still be a bar.[67]

D. Landlord and Tenant Relations

1. The Implied Warranty of Habitability.—Recently, the courts have begun to depart from the doctrine of caveat lessee to imply a warranty of habitability into the lease of residential property.[68] The implied warranty of habitability imposes two distinct obligations upon the landlord.[69] First, in renting an apartment for residential use, the landlord impliedly warrants that the leasehold is free from any latent defects rendering the premises uninhabitable.[70] Second, the landlord impliedly promises that the leasehold will remain in a reasonably habitable state during the entire term of the lease. This

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[67]*Id.* at 287.

[68]Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[69]Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

The courts have employed two distinct rationales as support for the imposition of an implied warranty of habitability in the lease of residential property. *See, e.g.*, Krieger & Shurn, *Landlord—Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 595 (1977). The first of these rationales stems primarily from the realization that the modern tenant, unlike his feudal counterpart, is rarely interested in the land upon which his apartment is situated. Rather, the modern tenant is a purchaser of an entire package of goods and services including heat, light and ventilation. *Id.* at 600. With this realization, the courts gradually turned to the law of contracts in defining the relationship between the modern landlord and tenant. In particular, the courts began looking toward the UCC and applying its various warranty provisions by analogy to the lease of residential property. *Id.*

The second rationale employed as support for the extension of the implied warranty of habitability to residential leases is grounded in essentially the same public policy considerations which prompted the enactment of many of the housing codes in effect throughout the country—that all Americans should have decent living accommodations. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Krieger & Shurn, *supra*, at 601.

Although either the contract rationale or the public policy rationale will logically support the implied warranty of habitability in residential leases, the precise rationale adopted in a given case may become important with respect to such issues as the standard for determining when a landlord has breached the implied warranty and the waivability of the implied warranty by the tenant. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied* 400 U.S. 925 (1970); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Krieger & Shurn, *supra*, at 602-05.

[70]Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

latter obligation necessarily carries with it an implied duty to repair.[71]

In *Breezewood Management Co. v. Maltbie*,[72] Dan Maltbie and John Burke, students at Indiana University, entered into a written lease with the Breezewood Management Company for the rental of an apartment in Bloomington, Indiana. The lease was to run for a term of one year and provided for a total rental of $235 per month.

Upon entering into possession of the premises, Burke and Maltbie immediately discovered several defects including leaks in the plumbing, falling plaster, exposed electrical wiring, absence of heat and hot water, and cockroach infestation.[73] The dwelling had previously been cited for more than fifty violations of the Bloomington minimum housing code which was in effect at the time the lease was signed. Robert Lewis, owner and president of Breezewood, testified that he had accompanied the code enforcement official during the inspection, and that the official notified him of several violations at that time.[74] Nonetheless, many of the violations remained uncorrected at the time of trial.[75]

Following several complaints by Burke and Maltbie as to the condition of the premises, and with approximately three months remaining in the term of the lease, Maltbie notified Breezewood of his intention to vacate the apartment and of his refusal to pay further rent. Breezewood agreed to let Burke remain in possession of the premises for a reduced rental but filed suit against both tenants for the balance due under the lease.[76] Burke and Maltbie each filed counterclaims for damages and abatement of rent contending that there existed an implied warranty of habitability in the lease agree-

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[71]Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

[72]411 N.E.2d 670 (Ind. Ct. App. 1980), *transfer denied*, March 4, 1981.

[73]Since the court's holding was premised upon apparently clear violations of the Bloomington housing code, the court was not called upon to determine which of the specific defects would be considered latent defects nor whether the first breach of the implied warranty of habitability would extend to patent defects existing at the time the lease is executed. However, the *Breezewood* court did seem to indicate in dicta that, at least in the absence of a housing code or ordinance, the implied warranty, if it existed at all, would not extend to patent defects. *Id.* at 674.

[74]Since the landlord clearly had notice of the defects existing at the time the lease was executed, the issue of whether the landlord must possess actual or constructive knowledge of the defective condition and be given a reasonable time to repair before a breach of the warranty will be found was not properly before the *Breezewood* court. For an analysis of this issue *see* Krieger & Shurn, *supra* note 69, at 609.

[75]411 N.E.2d at 671.

[76]*Id.*

ment which Breezewood had breached. The trial court rendered judgment in favor of the tenants, and Breezewood appealed.[77]

In addressing Breezewood's contention that the trial court's judgment was contrary to Indiana law, the court of appeals stated that, in light of several Indiana decisions, it was clear that "the seeds of the modern trend abolishing *caveat lessee* and treating a lease as a contractual relationship have been sown in Indiana."[78] After noting that the Bloomington Housing Code became part of the lease agreement between Breezewood and its tenants,[79] the court concluded that because the premises violated many of the provisions of the Code, Breezewood had breached an implied warranty of habitability.[80]

Concerning the waivability of the implied warranty of habitability in the context of residential leases, the *Breezewood* court distinguished between leases which fall subject to a local housing code and leases which do not. The court quoted several provisions contained in the Breezewood lease which arguably constituted a waiver of the implied warranty on the part of the tenants, Burke and Maltbie.[81] However, the court refused to give effect to these provisions and was, thus, apparently of the opinion that in those cases governed by a local housing code the parties may not, by the terms of the lease agreement alone, waive the implied warranty of habitability.[82] With respect to leases existing outside the scope of a local housing ordinance, however, the court stated that "[a]s long as the premises are not in a substantially different condition than they appear, this court favors upholding the reasonable expectations of the parties."[83]

The final issue addressed on appeal by the *Breezewood* court concerned the amount of damages recoverable by a tenant for the landlord's breach of the implied warranty of habitability.[84] Breezewood argued that, although the tenant's obligation to pay rent was suspended, no damages were recoverable by the tenant upon the

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[77]*Id.* at 672.

[78]*Id.* at 675.

[79]*Id.*

[80]*Id.* at 676.

[81]*Id.* at 671.

[82]This conclusion is buttressed by the *Breezewood* court's reliance upon Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973), in which, according to the *Breezewood* court, the Massachusetts Supreme Judicial Court held "that no provision of a lease agreement could effectively waive the implied warranty of habitability because the warranty doctrine was incorporated into the state sanitary code which governed all residential leases in the Commonwealth." 411 N.E.2d at 674.

[83]411 N.E.2d at 675 n.2.

[84]*Id.* at 675.

landlord's breach of the implied warranty. The court, however, rejected this contention and affirmed the measure of damages adopted by the trial court which represented the difference between the agreed rental and the fair rental value of the premises as they existed in the defective condition.[85] This measure of damages has generally been referred to as the rent abatement measure of damages.[86]

To be contrasted with the measure of damages employed in *Breezewood* is the measure of damages apparently approved by the Indiana Court of Appeals for the Second District in *Welborn v. Society for Propogation of Faith*,[87] also decided during this survey period. In *Welborn* the Indiana Court of Appeals assumed without deciding that Indiana recognized the implied warranty of habitability in the lease of residential property.[88] Although noting the split in authority as to the appropriate measure of damages for the breach of the implied warranty,[89] the *Welborn* court adopted the standard measure of contract damages represented by the difference between the value of the leasehold as warranted and the value of the leasehold as it actually existed.[90] The *Welborn* court, although assuming that the tenants had met their burden of proof on the issue of breach of the implied warranty,[91] denied relief to the tenants on the basis that they had failed to offer any evidence of the fair rental value of the leasehold as impliedly warranted or as promised.[92] Thus, the court concluded that "without evidence of the issue of the value of the injury, any award by the trial court other than nominal damages would be based on speculation, guess, or surmise and therefore erroneous."[93] It remains an open question as to how the apparent conflict over the measure of damages to be used for the breach of the implied warranty of habitability in residential leases between *Welborn* and *Breezewood* will be resolved.

2. Covenant of Quiet Enjoyment.—When a tenant seeks a release from a lease agreement and a suspension of his obligation to pay rent on the basis of the landlord's breach of the covenant of quiet enjoyment, the courts generally require the tenant to show

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[85]*Id.*

[86]*See, e.g.*, Krieger & Shurn, *supra* note 69, at 615. *See also* Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 760 (1976).

[87]411 N.E.2d 1267 (Ind. Ct. App. 1980).

[88]*Id.* at 1270.

[89]*Id.* at 1270 n.5, 1271.

[90]*Id.* at 1271.

[91]*Id.*

[92]*Id.*

[93]*Id.* at 1270.

that he was actually or constructively evicted from the leased premises.[94]

In *Nate v. Galloway*,[95] the Galloways, as tenants, entered into a written lease with the Oxford Development Corporation for the rental of an apartment. Shortly after the Galloways took possession of the apartment, the apartment was purchased by George Nate who immediately informed the Galloways that their lease with the Oxford Corporation was void. In addition, Nate informed the Galloways that a new lease would be required in which the rent would be increased substantially. Upon the tenants' refusal to execute the second lease, Nate informed the Galloways that he would accept no further rental payments and brought an action for the immediate possession of the leased premises.[96] During the pendency of this action, Nate, in an apparent attempt to harass the tenants into vacating the premises, removed several fixtures from the apartment including the stove, the wall tile in the tub area of the bathroom, and the shower attachment.[97] The landlord failed to replace the stove for approximately forty days and failed completely to make the necessary repairs to the bathroom of the apartment. Finally, following a tender and refusal of the monthly rent, the Galloways filed an answer and a counterclaim to the landlord's action for possession of the premises and claimed damages for intentional infliction of mental distress and breach of the lease's covenant of quiet enjoyment.[98] The trial court awarded both compensatory and punitive damages to the tenants on their claim of breach of covenant.

On appeal, Nate challenged the trial court's finding of a breach of the covenant of quiet enjoyment on the basis that no eviction, either actual or constructive, was shown by the tenants. The tenants did not vacate or surrender the premises at any time. In addressing the issue, the court of appeals distinguished those cases[99] in which

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[94]Talbott v. English, 156 Ind. 299, 59 N.E. 857 (1901); Avery v. Dougherty, 102 Ind. 443, 2 N.E. 123 (1885).

[95]408 N.E.2d 1317 (Ind. Ct. App. 1980).

[96]The action brought by Nate was based upon an asserted breach of the lease agreement. Subsequently it was discovered that the asserted breach was nonpayment of rent.

[97]The reason given by the landlord for the removal of these items was so that certain repairs could be performed.

[98]The trial court denied recovery of the Galloways' claim of intentional infliction of mental distress and no appeal was taken on the issue. 408 N.E.2d at 1320 n.1.

[99]Bowers v. Sells, 125 Ind. App. 324, 123 N.E.2d 194 (1954); Avery v. Dougherty, 102 Ind. 443, 2 N.E. 123 (1885). The landlord had offered *Bowers* as supporting the proposition that an eviction must be shown to support a finding of a breach of the covenant of quiet enjoyment. 408 N.E.2d at 1321. In *Bowers*, quite unlike *Galloway*, a tenant had been wrongfully evicted from the premises and was seeking damages for the wrongful termination of the lease agreement.

the courts required an eviction as a prerequisite to the finding of a breach of the covenant of quiet enjoyment by noting that in those cases the tenant was requesting an alteration or termination of the rental payments under the lease agreement.[100] The Galloways, however, were not seeking a termination of the lease agreement, but were merely seeking damages for the landlord's breach of covenant. Thus, states the court, "logic dictates that an eviction is not a prerequisite for a recovery of damages based on the landlord's breach."[101] The court summarized the rule as follows:

> [T]he cases show that when a wrongful eviction has occurred, the tenant may clearly sue for damages based on an improper termination of the lease and his lost interest therein. In situations where no eviction has occurred, it appears that the tenant may still recover damages based on the landlord's interference with the quiet enjoyment of the premises.[102]

The court affirmed the trial court's award of both compensatory and punitive damages in favor of the Galloways by concluding that the tenants' injuries were clearly established by the removal of the stove and the bathroom fixtures, and that the landlord's conduct in removing these items was interlaced with the elements of tort.[103]

Although the trial court in *Galloway* suggested that the landlord's actions might conceivably support the finding of a constructive eviction, the tenants did not pursue the issue on appeal.[104] The issue of constructive eviction was, however, subsequently presented to the same court of appeals in *Sigsbee v. Swathwood.*[105]

In *Sigsbee*, the Swathwoods entered a five year lease of one of two adjacent buildings owned by the Sigsbees. The Swathwoods entered into possession of the premises and began operating a small grocery store on August 1, 1976. Following several disputes with the Sigsbees, the Swathwoods abandoned the leased premises in February of 1979, and brought an action to cancel the lease and to recover damages allegedly resulting from the landlord's wrongful competition and interference with their business. The evidence presented at the trial level revealed three primary points of conflict between the parties during the course of the lease. First, from

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[100]408 N.E.2d at 1321.

[101]*Id.*

[102]*Id.* at 1322. The *Galloway* court offered Kostas v. Kimbrough, 137 Ind. App. 89, 205 N.E.2d 170 (1965), as illustrative of the development of the law in this area. *Id.*

[103]408 N.E.2d at 1323. In upholding the award of punitive damages, the *Galloway* court quoted extensively from Hibschman Pontiac v. Batchelor, 226 Ind. 310, 362 N.E.2d 845 (1977).

[104]408 N.E.2d at 1321 n.2.

[105]419 N.E.2d 789 (Ind. Ct. App. 1981).

the very inception of the lease, the Swathwoods were troubled by periodic leaks in the roof of the leased building. Although the Sigsbees attempted several times to repair the leaks, the roof continued to leak until the Swathwoods abandoned the premises. Second, although under the provisions of the lease the Sigsbees were entitled to inspect the building during the term of the lease, conflict arose between the parties concerning the frequency and methodology of the inspections. The inspection problem, however, was apparently resolved in February of 1978, when Mr. Sigsbee agreed to inspect the building at the same time each week and only when Mr. Swathwood was present. According to Mr. Swathwood, this agreement was satisfactory. Finally, in May of 1978, following an automobile accident in the common parking area, the Sigsbees erected a parking barrier between the two buildings. The barrier concededly did not prevent access to the Swathwoods' store from the adjacent highways. However, at trial the Swathwoods presented evidence that the traffic barrier was responsible for a significant reduction in the Swathwoods' clientele. On the basis of these three disputes concerning the leasehold, the trial court concluded that the Swathwoods were constructively evicted and were therefore entitled to abandon the premises.[106]

On appeal, the Sigsbees argued that there was insufficient evidence to support the trial court's finding of a constructive eviction. In addressing the issue, the court of appeals defined a constructive eviction "as a breach by the lessor 'so direct and positive, and so substantial and permanent in character as to operate as a material and effectual exclusion of the tenant from the beneficial enjoyment of some part of the leased premises.' "[107] The court of appeals further noted that in every case of a constructive eviction the tenant must vacate the premises "within a reasonable time after the lessor has committed the act or omission" considered to be the constructive eviction.[108] Having assumed without deciding that the Sigsbees' failure to successfully repair the leaking roof, the frequency and methodology of inspecting the premises, and the erection of the parking barrier justified the Swathwoods' abandonment,[109] the court of apeals turned to the question of whether the abandonment by the tenants occurred within a reasonable time following each of these acts.[110] Concerning this question, the court stated that generally whether an abandonment occurs within a reasonable time con-

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[106]The trial court also awarded the tenants $4,000 in damages for the landlord's breach of convenants contained in the lease agreement.

[107]*Id.* at 793. (quoting Talbott v. English, 156 Ind. 299, 59 N.E. 857 (1901)).

[108]419 N.E.2d at 794.

[109]*Id.* at 794, 795 n.5.

[110]*Id.* at 794-95.

stitutes a question of fact to be determined in light of the surrounding circumstances.[111] The record indicates that the Swathwoods had abandoned the premises eight months following the erection of the parking barrier, one year following the resolution of the inspection dispute, and two and one-half years following the failure of the Sigsbees to repair the roof. On these facts and the failure of the Swathwoods to present any circumstances tending to explain or justify the delay in their abandonment, the court of appeals concluded as a matter of law that the Swathwoods did not elect to abandon the premises within a reasonable time.[112]

Although the court of appeals determined that the Swathwoods had waived their right to abandon the premises by not abandoning within a reasonable time, the court concluded that the record did support the trial court's finding of the landlord's breach of certain covenants contained the the lease agreement.[113] The court of appeals remanded the case for determination of the damages resulting from these breaches.[114]

3. Termination and Landlord's Duty to Mitigate Damages.—In *Grueninger Travel Service, Inc. v. Lake County Trust Co.*,[115] the landlord, Lake County Trust, brought an action to recover damages for breach of the lease agreement when the tenant, Grueninger Travel, abandoned the leased premises. The trial court entered judgment in favor of the landlord, and the tenants appealed alleging three points of error: (1) that the tenant's liability on the lease ceased when the landlord accepted a surrender of the premises, (2) that the landlord failed to mitigate damages, and (3) that the tenant's liability should have in no event extended beyond the time that a successor tenant assumed possession of the premises.

The facts established at trial of the cause indicated that, despite discontent with the travel agency's location, James Reiffert, owner of the agency, entered into a three year lease with Lake County Trust in December of 1977. Mr. Reiffert, however, continued his search for a more suitable business location, and on September 14,

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[111] *Id.* at 794.

[112] *Id.* at 795. In its opinion, the *Sigsbee* court cited three cases in which the tenant's delay in abandonment was held to be excused. *Id.* at 794 (citing American Nat'l Bank & Trust Co. v. Sound City, U.S.A., Inc., 67 Ill. App.3d 599, 385 N.E.2d 144 (1979) (delay of three months excused for reliance upon lessor's promise to repair); Hatenbauer v. Braumbaugh, 220 Ill. App. 326 (1920) (delay of four months excused for lessee's physical disability); General Indus. & Mfg. Co. v. American Garment Co., 76 Ind. App. 629, 128 N.E. 454 (1920) (delay of four months excused where lessor's breach was of an uncertain and continuing nature)).

[113] 419 N.E.2d at 796.

[114] *Id.*

[115] 413 N.E.2d 1034 (Ind. Ct. App. 1980).

1978, despite admonitions by the landlord, Grueninger Travel Service vacated the leased premises. The keys to the vacated premises were returned to the landlord on September 29, 1978.

On appeal, Grueninger asserted that its delivery and the landlord's acceptance of the keys constituted surrender and acceptance of the leased premises. The court acknowledged that in Indiana, "a surrender may be either express or created by operation of law."[116] However, since Grueninger had offered no evidence of an express surrender,[117] the court was left only to consider whether the trial court's finding that there had been no surrender was contrary to law.[118]

A surrender of a tenancy by operation of law will arise only if the parties engage in conduct so inconsistent with the landlord-tenant relationship as to imply that they both agreed to consider the surrender as effectual.[119] It follows that in order to constitute a surrender by operation of law, there must be more than a mere unilateral act by the tenant. In addition, "there must be some decisive, unequivocal act by the landlord which manifests the lessor's acceptance of the surrender."[120] With that statement of the law, the court of appeals concluded that the mere delivery of the keys by Grueninger, without other evidence tending to establish that Lake County Trust had accepted the keys as a surrender, was insufficient to release Grueninger from further liability under the lease.[121]

The second error alleged by Grueninger on appeal was that the landlord had failed to properly mitigate damages because the premises were not re-leased until January of 1979, although an acceptable tenant was available on October 1, 1978.[122] Thus, according to the tenant, the trial court's award of rent and charges subsequent to October 1, 1978 was erroneous.[123] In addressing this contention,

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[116]*Id.* at 1038 (citing Miller Jewelry Co. v. Dickson, 111 Ind. App. 676, 42 N.E.2d 398 (1942); Donahoe v. Rich, 2 Ind. App. 540, 28 N.E. 1001 (1891)).

[117]413 N.E.2d at 1034. The court noted that "[a]n express surrender is an agreement by the parties . . . which is usually required to be in writing and . . . supported by consideration." *Id.*

[118]Since Grueninger had the burden of proving the surrender, the trial court's judgment in favor of Lake County Trust constituted a negative judgment. As such, the finding could only be attacked on appeal as contrary to law. *See, e.g.*, Brown v. Owen Litho Serv., Inc., 384 N.E.2d 1132 (Ind. Ct. App. 1979); State v. Boyle, 168 Ind. App. 643, 344 N.E.2d 302 (1976).

[119]413 N.E.2d at 1038.

[120]*Id.* at 1039.

[121]*Id.* The court noted that this conclusion was especially compelling given that Lake County Trust had repeatedly admonished Grueninger of its intent to hold Grueninger liable under the terms of the lease. *Id.*

[122]*Id.*

[123]*Id.*

the court of appeals stated that whether a landlord has exercised the requisite diligence in reletting the premises is a question of fact.[124] In affirming the trial court's finding that the landlord had exercised due diligence in reletting the premises, the court of appeals relied heavily on the fact that the tenants failed to give the landlord any notice prior to abandonment. This had effectively frustrated the re-leasing of the premises since it was nearly impossible to lease space without knowing when it would be available.[125] In addition, the court noted that the landlord had engaged in extensive negotiation with several tenants in an effort to lease the space subsequent to Grueninger's abandonment.[126] The evidence indicated that it was advisable to deal with only one prospective tenant at a time and to allow each to reach a decision before commencing discussions with the next.[127] Viewing the entire course of the landlord's conduct, the court was unable to find the trial court's determination in favor of the landlord contrary to law.[128]

The final point raised by Grueninger on appeal was that the trial court erred in holding Grueninger liable under the lease agreement subsequent to January 16, 1979—the date that Lake County Trust executed a new lease of the premises with a successor tenant.[129] The court of appeals disposed of the issue on the language of the lease agreement itself, noting that "[i]t is now clear a lessor and lessee may expressly agree that a re-entry and reletting shall not constitute a surrender."[130] Thus, so long as the landlord does not exceed the rights given him under the lease, no surrender by operation of law will result from the landlords re-entry and reletting of the premises.[131] Under a lengthy provision of the lease agreement,[132] the court held that Grueninger had expressly authorized the

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[124]*Id.* The allocation of the burden of proving due diligence depends on the lease agreement. If the lease includes a mandatory reletting clause, the landlord carries the burden of proof. In the absence of such a clause, the tenant shoulders the burden of showing that the landlord failed to exercise the requisite care. The tenant Grueninger carried the burden of proof in this case. *Id.* at 1039-40.

[125]*Id.* at 1040.

[126]*Id.* The landlord was apparently attempting to retain the same mix of businesses in the mall. This accounted for some of the delay complained of by the tenants. *Id.* at 1041.

[127]*Id.* at 1040-41.

[128]*Id.* at 1041.

[129]*Id.* It was the policy of the landlord to allow a new tenant between 60 and 120 days following the execution of a lease to remodel the premises. During this period, the new tenant was not asked to pay rent. The new tenant only became liable for rent on the date it opened for business.

[130]*Id.* at 1042.

[131]*Id.*

[132]*Id.* at 1042-43.

landlord to relet the premises without terminating Grueninger's liability under the original lease.[133] The court did however indicate in dictum that the presence of such a lease provision would not automatically prevent the finding of a surrender by operation of law.[134] Other circumstances, in connection with the reletting, which conflict with the continuance of the landlord-tenant relationship, may give rise to a surrender by operation of law and consequent termination of the tenant's liability under the lease.[135]

Another factually interesting case dealing indirectly with the termination of the landlord-tenant relationship decided during this survey period was *Speiser v. Addis*.[136] *Speiser* deals with the right of a hold-over tenant to reimbursement for improvements made to the property after the expiration of the original lease. Prior to the expiration of the lease, the landlord proposed a new lease agreement to the tenant, Speiser. Because of Speiser's untimely response to the proposal, the landlord's offer of new lease terms lapsed.[137] Speiser argued that despite the lapse of the offer, he became a hold-over tenant from year to year, as that was the original term of the lease.[138] However, there was clear evidence in the record to indicate that the landlord intended a month to month tenancy in the event that Speiser held over on the original lease without having accepted the landlord's proposal for a new lease agreement.[139] Even after Speiser had been properly notified by the landlord that his month to month tenancy had terminated, Speiser proceeded to make improvements on the property on the theory that his tenancy was actually year to year. The court found sufficient evidence in the record that the landlord had properly proceeded against Speiser and properly notified Speiser of the termination of his tenancy.[140] Therefore, since all improvements were made after notification, the court denied Speiser reimbursement for his expenditures for improvements.[141]

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[133]*Id.* at 1043.

[134]*Id.*

[135]The court offered two examples in which a surrender and acceptance may be found despite the presence of a lease agreement to the contrary. First, the court stated that "if the terms of the original lease do not permit a landlord to relet for a period longer than the unexpired term, and the landlord does so, this action indicated the landlord was acting on its own account, inconsistent with the lease relation and therefore, may work a surrender." *Id.* Secondly, the court noted that "[i]f the landlord materially alters the leased premises without the lessee's consent, the lessor may be deemed to have accepted a surrender." *Id.*

[136]411 N.E.2d 439 (Ind. Ct. App. 1980).

[137]*Id.* at 440.

[138]*Id.* at 441.

[139]*Id.*

[140]*Id.*

[141]*Id.* at 439.

4. Scope of the Duty Owed by Landlord and Tenant to Third Parties.—The nature and scope of the duty existing between landlord, tenant and third persons was addressed during this survey period by the Indiana Court of Appeals in *Great Atlantic & Pacific Tea Co. v. Wilson.*[142] In *Great Atlantic*, a case of first impression, Great Atlantic entered into an agreement with PH & T Realty Corporation under which PH & T agreed to construct a building according to specifications supplied by Great Atlantic. Great Atlantic agreed in turn to lease the building from PH & T upon specified terms for the operation of its business. The agreement continued until the end of 1972 when, upon notice, Great Atlantic removed its fixtures and vacated the leased premises. Shortly thereafter, PH & T assumed control of the premises and commenced efforts to sell or release the building. In February of 1973, a realtor, with the consent of PH & T but unsupervised by any officer or agent of PH & T, undertook to show the building to a group of prospective purchasers including Wilson. Although unable to locate the light switches, the group proceeded through the darkened building. Wilson was injured when he fell into the conveyor opening located in the floor of the building which had been used by Great Atlantic to accomodate a conveyor used for moving stock and merchandise from the basement to the sales floor. The opening had been constructed in the building by PH & T as part of the specifications provided by Great Atlantic. Wilson brought suit against both Great Atlantic and PH & T Realty to recover damages for his personal injuries.[143] The trial court rendered judgment against both defendants and Great Atlantic appealed, asserting that the trial court had erred in finding a duty owing between itself and Wilson following the termination of the lease agreement and its surrender of possession and control of the premises.[144]

In resolving the question of whether any residual liability remains with a lessee after it vacates and surrenders the premises to the lessor, the court of appeals examined extensively the rules

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[142]408 N.E.2d 144 (Ind. Ct. App. 1980). Another case decided during this survey period involving tangentially a landlord-tenant relationship and tort liability was Blake v. Dunn Farms, Inc., 413 N.E.2d 560 (Ind. 1980). *Blake* is discussed in the text accompanying notes 156-71 *infra*.

[143]The plaintiff grounded its suit against Great Atlantic on four separate arguments. First, Wilson asserted that Great Atlantic owed a duty to him on general principles of tort law. Second, Wilson asserted that Great Atlantic was liable for injuries resulting from a defect it created which was eminently dangerous. Third, Wilson argued that there existed an implied warranty of fitness between Great Atlantic and PH&T Realty. Fourth, Wilson asserted that Great Atlantic was liable because the property was used by the public.

[144]PH&T Realty did not appeal the judgment but filed a brief in support of the trial court's judgment.

governing the residual liability of vendors and lessors.[145] On the basis of this examination, the court concluded that "liability for injury ordinarily depends upon the power to prevent injury and, therefore, rests upon the person who has control and possession through ownership, lease, or otherwise."[146] The court noted that Great Atlantic had no affirmative right or duty to alter or improve the leasehold and that Great Atlantic had surrendered the premises in as good a condition as it had received it according to the lease agreement.[147] The court of appeals, therefore, reversed the trial court and ordered judgment in favor of Great Atlantic.[148]

5. The Lease Agreement in General.—A factually interesting landlord-tenant case was presented to the Indiana Court of Appeals during this survey period in *Marcovich Land Corp. v. J.J. Newberry Co.*[149] In *Marcovich*, a commercial lessee, J.J. Newberry Co., sought damages for lost profits arising from the landlord's failure to rebuild the leased building following its complete destruction by fire pursuant to a clause contained in the lease. The trial court determined that the written lease existing between the parties was valid and enforceable and required the landlord to reconstruct the building. The trial court awarded the tenant $117,000 as damages for lost profits resulting from the landlord's refusal to reconstruct the leased property.[150]

The court of appeals rejected both the landlord's defense of unconscionability and the defense of commercial impracticality. The landlord argued that the lease became unconscionable upon the happening of events subsequent to the execution of the lease. The court held, however, that the concept of unconscionability applied only to circumstances which existed at the time the contract was entered into.[151] The evidence was clear that both sides had equal bargaining power and entered into the contract willingly; therefore, the court rejected the unconscionability argument as misplaced.[152]

The landlord also argued that rebuilding the leased building was commercially impractical, as under current economic conditions,

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[145]*Id.* at 147-48. Although noting the appropriateness of the analogy given that the determinative event in either case is the transfer of control and possession of the property, the court assumed without deciding that the residual liability of a lessee would not exceed that of a vendor or lessor and would likely be less, given the limited interest that the lessee has in the property. *Id.* at 150.

[146]*Id.* at 148.

[147]*Id.* at 150.

[148]*Id.*

[149]413 N.E.2d 935 (Ind. Ct. App. 1980).

[150]*Id.* at 937.

[151]*Id.* at 941 (quoting Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co., 412 N.E.2d 129 (Ind. Ct. App. 1980)).

[152]413 N.E.2d at 941-42.

rebuilding would be a bad business risk at great expense. The court held that a bad risk alone was not enough to justify the landlord's failure to rebuild.[153] The *Marcovich* court recognized the general rule that only complete or absolute impossibility is a sufficient basis for an affirmative defense.[154] The court of appeals held further that, even assuming arguendo that an affirmative defense would extend beyond complete or absolute impossibility, the landlord had failed in its burden of proof on the issue.[155]

E. Land Ownership in General

In *Blake v. Dunn Farms, Inc.*,[156] the plaintiff, Blake, was injured when the car in which he was a passenger collided with a horse on a public highway which ran through land owned by the defendant, Dunn Farms. Blake brought an action against both Dunn Farms and Arnold Love, the owner of the animal, alleging that Dunn Farms and Love were negligent in allowing the fences on the property to deteriorate and in permitting a horse to roam freely upon a state highway.

The facts which developed at trial indicated that the property in question, located on both sides of the highway on which the accident occurred, was originally leased by Dunn Farms to Robert McConnell. McConnell, in addition to other farming activities, pastured horses on the east side of the property and sublet the property located on the west side of the highway to Love.[157] Love likewise maintained horses on this portion of the property. Although prior to the accident the McConnells had vacated the leased premises, Love apparently continued to pasture horses on the west side of the highway.

Upon surrender of the property by the McConnells, the stockholders and officers of Dunn Farms made several trips to the farm in order to clean up the buildings and to make arrangments to locate a new tenant. The evidence indicated that the president and the secretary of the corporation had, in fact, visited the property on the date the accident involving the plaintiff occurred. The evidence further revealed that in the various trips to the farm, one or more of the owners had seen horses in the pasture. It was unclear, however, whether the horses observed on those occasions were owned by the McConnells or owned by Love.

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[153] *Id.* at 944 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 281, Comment d at 50 (Tent. Draft No. 9, 1974)).

[154] 413 N.E.2d at 944.

[155] *Id.*

[156] 413 N.E.2d 560 (Ind. 1980).

[157] Love claimed at trial that he paid rent and rendered services in exchange for the right to pasture his horses.

The court of appeals reversed the trial court's entry of summary judgment in favor of Dunn Farms[158] and remanded the case for further determination.[159] The Indiana Supreme Court granted transfer and vacated the opinions issued by the court of appeals.[160]

Although the case may arguably have been decided on the basis of the law of landlord and tenant,[161] the supreme court chose instead to analyze the situation in terms of the responsibility between landowner and owner-keeper of an animal to provide for the confinement and restraint of the animal.[162] Following a review of case authority[163] and the notation of an Indiana statute,[164] the supreme court stated:

> [I]t is the duty of the owner and the keeper of the animal to keep him confined . . . . If the landowner is neither the owner nor keeper, he has no duty to confine or restrain the animal. If an animal is allowed by its keeper to escape from its confinement and harm results, that damage results from the negligent confinement, not from the condition of the land.[165]

The court, in addition, stated that the responsibility for selecting an appropriate method of confinement for the animal resided with the owner-keeper of the animal rather than with the landowner who neither owned nor kept the animal.[166]

The Indiana Supreme Court in reviewing the evidence determined that Dunn Farms was neither the owner nor the keeper of

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[158]The trial court's grant of summary judgment was based upon the contention of Dunn Farms that a landowner is not responsible for injuries caused by an animal roaming at large in which the landowner has neither ownership nor custodial control.

[159]Blake v. Dunn Farms, Inc., 396 N.E.2d 415 (Ind. Ct. App. 1979), *aff'd on rehearing*, 399 N.E.2d 431 (Ind. Ct. App. 1980).

[160]413 N.E.2d at 562.

[161]The court of appeals in reversing the trial court judgment in favor of Dunn Farms relied on Siegel v. 1536-46 St. John's Place Corp., 184 Misc. 1053, 57 N.Y.S.2d 473 (1945) in which liability was based in part upon the landlord-tenant relationship existing between the injured party and the corporate owner of the property. Blake v. Dunn Farms, Inc., 396 N.E.2d 415, 417 (Ind. Ct. App. 1979).

[162]413 N.E.2d at 563. The Indiana Supreme Court stated that the cases in which the issue was broached were in fact based upon such an analysis. *Id.* (citing Thompson v. Lee, 402 N.E.2d 1309 (Ind. Ct. App. 1980)).

[163]413 N.E.2d at 563. The court reviewed extensively the case of Corey v. Smith, 233 Ind. 452, 120 N.E.2d 410 (1954) in which the Indiana Supreme Court concluded that the owner-keeper of an animal was responsible for injuries caused by the animal when it roamed into the path of a vehicle on a public road. 233 Ind. at 456 120 N.E.2d at 412.

[164]413 N.E.2d at 563. The statute quoted by the court states that "[a] person responsible for a domestic animal who recklessly permits the animal to run at large commits a class B misdemeanor." IND. CODE § 15-2.1-21-8 (Supp. 1981).

[165]413 N.E.2d at 563 (citation omitted).

[166]*Id.*

the horse involved in the collision with the plaintiff. In addition, the court was of the opinion that there was no material relationship between Dunn Farms and Love, the owner-keeper of the animal.[167] The fact that the officers of Dunn Farms had on occasion observed horses in the pasture was held to create no duty in the officers to prevent or guard against their escape.[168] On this basis, the supreme court affirmed the trial court's reasoning that Dunn Farms, as merely the owner of the property in question, owed no duty to the plaintiff with respect to the method by which the horses were confined.[169]

Justice DeBruler, in dissent, argued that Dunn Farms should be held to be the keeper of the animal which collided with the automobile in which the plaintiff was a passenger.[170] This conclusion was based primarily upon Dunn Farms' complete control over the premises in question and its exclusive authority to repair the deteriorated fences or to remove the animals from the property.[171]

F. Lateral and Subjacent Support

During this survey period the Indiana courts were given the first opportunity in several years to pass upon a lateral support case. The general common law rule of lateral support is that a landowner has an absolute right to have his land, as it exists in its natural state, supported by the land of his adjoining neighbors.[172] Thus, the rule is clear that should an adjoining landowner excavate on his land and thereby deprive his neighbor of lateral support, he

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[167]*Id.* at 562.

[168]*Id.* at 563.

[169]*Id.* at 564. The Indiana Supreme Court in reaching this conclusion distinguished several lines of authority. The court first distinguished such cases as Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E.2d 943 (1941). In *Pitcairn*, the court held that it was the duty of a landowner to exercise reasonable care to prevent injury from a defective or dangerous condition existing on the land to persons using an adjacent highway. The *Dunn Farms* court emphasized that in *Pitcairn*, it was the property owner himself which had created the dangerous condition. In contrast, Dunn Farms had no connection to the agency which created the dangerous condition. 413 N.E.2d at 564.

Secondly, the Indiana Supreme Court rejected the court of appeals conclusion that persons using a public highway stand in a position with respect to the owners of adjacent land similar to that of a business invitee with respect to a landowner. In this regard, the supreme court stated that "[a] particular landowner does not invite all persons using the highway for their own purposes to make that use or traverse that part of the highway adjacent to his own property." *Id.*

[170]413 N.E.2d at 565 (DeBruler, J., dissenting).

[171]*Id.* For further discussion of the *Dunn Farms* case, see Harrigan, *Torts, 1981 Survey of Recent Development in Indiana Law*, 15 IND. L. REV, 425, 433 (1981).

[172]*See, e.g.*, 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 415 (repl. ed. 1961).

is liable for the resulting damage to his neighbor's land regardless of whether he was negligent.[173] The rule, however, is different when the injury alleged to have resulted from the removal of lateral support is damage to buildings or structures existing upon the land. There is no absolute right to lateral support of buildings or structures.[174] Thus, liability for injury to buildings must be predicated upon the negligence of the adjoining landowner in accomplishing the activity which resulted in the loss of lateral support.[175] In determining whether an excavator has acted negligently, the courts have regularly applied the general negligence standard of ordinary or due care under the circumstances.[176] The Indiana courts have, in addition, stated that in order for the landowner performing the excavation to relieve himself of the necessity of taking extraordinary measures to protect his neighbor's buildings, the improver must give notice of the intended excavation to the adjoining landowner.[177]

In *Spall v. Janota*,[178] the plaintiff landowner, Janota, sought damages for injury to his home which allegedly resulted from excavation performed on the adjoining land of the defendant, Audie Spall.[179] The record of proceedings revealed that Janota's home was located atop an incline which sloped in the direction of the adjacent lot of Audie Spall. The activity complained of consisted of an excavation into the hillside on the Spall property approximately forty feet in width and twelve feet in depth. The excavation was made to accomodate a mobile home placed upon the Spall property by the occupants. The trial court rendered a decision in favor of the plaintiff and the defendant appealed.

Because damages were sought for injury to Janota's home, the court of appeals noted, in accordance with the general rule, that it was necessary for Janota to show that the excavation on the Spall property was negligently performed.[180] The court was, therefore,

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[173]*See, e.g.*, Schmoe v. Cotton, 167 Ind. 364, 79 N.E. 184 (1906); Wolf v. Forcum, 130 Ind. App. 10, 161 N.E.2d 175 (1959).

[174]*See, e.g.*, Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N.E. 296 (1898); Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1892).

[175]*See* Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1892).

[176]*See, e.g.*, Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N.E. 296 (1898); Block v. Haseltine, 3 Ind. App. 491, 29 N.E. 937 (1892).

[177]*See* Bohrer v. Dienhart Harness Co., 19 Ind. App. 489, 49 N.E. 296 (1898).

[178]406 N.E.2d 378 (Ind. Ct. App. 1980).

[179]Although Audie Spall held the record title to the property upon which the excavation was performed, she had purchased the property and given it to her son and daughter-in-law, the Whitsons. The Whitsons occupied the property and authorized the excavation which is the basis of Janota's suit. Janota filed a separate claim against the Whitsons which remained pending at the conclusion of the trial of the claim against Audie Spall.

[180]406 N.E.2d 378, 382.

called upon to determine what type of activity constitutes negligence in lateral support cases. The court began its analysis of the evidence by stating:

> "In determining whether a party has been guilty of carelessness in excavating on his own land, reference may be had to what is usually done by other builders in similar cases." Thus, the standard of care required is that common to all negligence actions, that is, the duty to use reasonable or ordinary care under the circumstances."[181]

Although conceding that it was impossible to formulate a comprehensive definition of "due care" in cases of the *Spall* variety, the court of appeals quoted extensively from the authorities on the issue to establish workable criteria for application to the facts before it.[182] Based upon these criteria the court concluded that, other than the failure to give notice to Janota of the intended excavation, there was no evidence presented in the case which would support a finding that the excavation on the Spall property had been negligently performed.[183]

There are in general two views concerning the requirement that an improver give notice to the adjoining landowners prior to commencing the intended excavation. One line of authority views the failure to give notice as negligence per se.[184] However, the court in *Spall* adopted the alternative and apparently prevailing rule to the effect that the failure to give notice merely constitutes evidence of negligence to be considered by the trier of fact.[185] With respect to the failure of the defendants in *Spall* to give notice prior to commencing the excavation, the court of appeals was of the opinion that the question of foreseeability must necessarily be considered.[186] The trial record disclosed that the excavation upon the Spall property

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[181]*Id.* at 382 (quoting Block v. Haseltine, 3 Ind. App. 491, 497, 29 N.E. 937, 939 (1892)).

[182]The *Spall* court, in particular, adopted the guidelines set out in Powell's treatise on real property. 406 N.E.2d at 382-83 (quoting 5 *R. Powell, The Law of Real Property* ¶ 701, at 299-302 (1980)).

[183]406 N.E.2d at 383.

[184]*Id.* at 381 (citing Note, *The Changing Doctrine of Lateral Support*, 14 TEMP. L.Q. 243, 254-57 (1940)).

[185]406 N.E.2d at 282 (citing 1 AM. JUR. 2d *Adjoining Landowners* § 51 (1962); 2 C.J.S. *Adjoining Landowners* § 20 (1972)).

[186]406 N.E.2d at 381-82. The court of appeals grounded this conclusion in the observation that most of lateral support cases which have dealt with notice as a critical element were cases in which the excavation was performed immediately adjacent to the foundation of the adjoining building. *Id.* at 382. When excavation is so performed, the danger to the adjoining structure is obvious.

was located, at the very least, thirty-seven feet from the plaintiff's adjoining property.[187] The court, therefore, concluded:

> [I]n view of the facts of this case, the distance separating the cut in the hillside from Janota's house, and the lack of foreseeability of such consequences, we do not believe that lack of notice, standing alone, is sufficient to support a finding of negligence which was the proximate cause of the injury, and thus impose liability on the basis of negligence.[188]

The court of appeals was unable to determine the precise basis for the trial court's decision;[189] they nevertheless reversed the decision in favor of the plaintiff as either contrary to law if predicated upon a theory of absolute liability or as unsupported by the evidence if based upon a theory of negligence.[190]

G. Water Law

Several cases involving various issues of water law were decided during the survey period.[191] In *Argyelan v. Haviland*,[192] the plaintiff, Haviland, brought suit against Argyelan alleging that the defendant had accumulated and discharged large quantities of water onto his land. The trial court awarded damages and injunctive relief to the plaintiff, and the defendant appealed, claiming that the trial court's decision was not supported by the Indiana law governing the disposal of surface water.

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[187]*Id.* at 380.

[188]*Id.* at 383.

[189]*Id.*

[190]*Id.* Although unnecessary to its decision, the court of appeals felt it appropriate to comment upon the issue of damages in lateral support cases. *Id.* at 384. The court stated in this regard that the appropriate measure of damages for injury to an adjoining landowner's building resulting from negligent excavation was the lesser of the diminution in value of the damaged structure or the cost of restoring the structure to its original condition. *Id.* (citing 2 C.J.S. *Adjoining Landowners* § 36 (1972); 1 AM. JUR. 2D *Adjoining Landowners* §§ 74-75 (1962)). Because Janota had failed to present any evidence as to the value of his home in its damaged condition or as to the costs of its repair, the court of appeals concluded that there was no evidence in the case upon which the trial court could have based its award of damages. The award was, therefore, held improper. 406 N.E.2d at 384.

[191]Two cases decided during the survey period which had a less direct impact on water law were Grover v. Frantz, 408 N.E.2d 567 (Ind. Ct. App. 1980) (dealing extensively with various substantive interpretations and procedural requirements surrounding the assessment of costs and damages associated with the reconstruction of legal drains pursuant to the Indiana Drainage Code) and State v. Taylor, 419 N.E.2d 819 (Ind. Ct. App. 1981) (dealing with the tort immunity of the Indiana Department of Natural Resources under the Indiana Tort Claims Act and the exclusiveness of remedy feature of the Indiana Administrative Adjudication Act).

[192]418 N.E.2d 569 (Ind. Ct. App. 1981).

The facts developed at trial indicated that the Havilands and the Argyelans were owners of adjoining tracts of land located in the City of Indianapolis. In improving his parcel, the defendant raised the level of the soil by approximately two feet and constructed a retaining wall parallel to the property line separating his property from that of the plaintiff. The retaining wall was constructed such that the top of the wall was approximately four inches higher than the general level of the defendant's property.[193] The defendant subsequently constructed a one-story building on his lot approximately twenty feet from the retaining wall. Two of the three downspouts which provided drainage from the roof of the defendant's building directed water toward the plaintiff's property.[194] The evidence adduced at trial further indicated that, during a moderate to heavy rain, water would fill the four-inch space on the defendant's side of the retaining wall and flow over the wall "like a waterfall"[195] onto the plaintiff's property.

The court of appeals determined that, with respect to surface water,[196] Indiana recognizes what has commonly been referred to as the "common enemy rule."[197] Under this rule, a proprietor of land may take any action necessary to protect himself against the flow of surface water regardless of the effect upon the lands of adjoining property owners.[198] Through the years, however, the courts have recognized that the rule is subject to certain limitations, including the rule that an owner of land may not deliberately collect surface water and discharge it onto his neighbor's property.[199] It was apparently upon this latter rule that the trial court rendered judgment in favor of the plaintiffs.[200]

In addressing the propriety of the trial court's application of the exception to the common enemy rule, the court of appeals noted

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[193]The top of the wall was at some points as much as two and one half feet above the level of the plaintiff's property.

[194]The third downspout was connected to a plastic pipe which directed the water flow to a point eastward of the defendant's building.

[195]418 N.E.2d at 572 (quoting the trial record).

[196]The common enemy rule has application only with respect to "surface water" which the Indiana Court of Appeals in Capes v. Barger, 123 Ind. App. 212, 214-15, 109 N.E.2d 725, 726 (1953) defined as follows: "Water from falling rains or melting snows which is diffused over the surface of the ground or which temporarily flows upon or over the surface as the natural elevations and depressions of the land may guide it but which has no definite banks or channel, is surface water."

[197]418 N.E.2d at 571.

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

[199]418 N.E.2d at 571.

[200]*Id.* at 575.

that the discharge of water onto the land of an adjoining owner was not per se improper.[201] Rather, in order to come within the exception, a defendant must collect surface water and discharge it onto another's property in a *concentrated flow*.[202] In addition, the court interpreted prior cases in which the exception to the common enemy rule was applied as cases in which the defendant engaged in "[a]n affirmative, tortious act at the physical point of discharge"[203] such as the direct channeling of water, by means of ditches or otherwise, onto the land of the plaintiff. The trial record contained no evidence that the defendants had cut slots or channels in the top of the retaining wall and the court of appeals, on that basis, determined that the effect of the retaining wall was, in fact, to protect the property of the plaintiff by dispensing the water evenly across the property line.[204] Thus, the court of appeals concluded its opinion by stating:

> Because there is no evidence in the record that the Argyelans engaged in the positive, tortious wrong of collecting surface water and discharging it in a *concentrated* flow upon the land of their neighbors, the Havilands, the "common enemy rule" prevails and the decision of the trial court must be reversed.[205]

One case decided during the survey period, *State v. Mason*,[206] demonstrates the strictness with which the Indiana Department of Natural Resources will construe permits for construction on the various state lakes and waterways. The case also exemplifies the severity of the consequences which deviation from such a construction permit may yield. In *Mason*, the state department of natural resources sought both a prohibitory injunction to prevent Mason

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[201]*Id.* at 572 (citing Gene B. Glick Co. v. Marion Constr. Corp., 165 Ind. App. 72, 331 N.E.2d 26 (1975)).

[202]418 N.E.2d at 572.

[203]*Id.*

[204]*Id.* The court of appeals distinguished Conner v. Woodfill, 126 Ind. 85, 25 N.E. 876 (1890), a factually similar case, on the basis of the difference in the distance of the building from the property line of the plaintiff's land. In this regard the *Argyelan* court stated: "In *Conner* the downspouts, like small ditches, directed water on plaintiff's land in concentrated streams. In this case, the water run-off is as it would be if no building had been constructed on Argyelan's property: the surface water flows evenly onto the adjacent property." 418 N.E.2d at 573.

[205]*Id.* at 575 (emphasis in original). Judge Sullivan, in dissent, criticized the majority's assumption that the retaining wall "totally negated the collection and discharge of water by the downspouts." *Id.* at 576. (Sullivan, J., dissenting), on the grounds that the testimony clearly indicated that the water came over the wall "like a waterfall." *Id.* Judge Sullivan would, therefore, have affirmed the trial court's decision as amply supported by the evidence. *Id.*

[206]416 N.E.2d 1312 (Ind. Ct. App. 1981).

from further altering the shoreline of Lake Wawasee and a mandatory injunction requiring Mason to restore the shoreline and lakebed to its original condition. The trial court, finding that Mason had not "radically" deviated from the scope of the construction permit issued by the department, denied all injunctive relief and the department appealed.

In January, 1977, Mason was granted a permit to construct a seawall on his property adjacent to the shoreline of Lake Wawasee. The pertinent provisions of the permit authorized Mason to " '[c]onstruct a concrete seawall in conformance with [the] attached sketch' "[207] and limited the permit " 'to the description and specifications set forth [in the permit including the attached sketch].' "[208] By its terms, the permit would become invalid in the event Mason departed from the authorized specifications. Pursuant to the permit, Mason began excavation in the early fall of 1977. The excavation was accomplished through the use of a dragline which enhanced the value of Mason's lake-side property by effectively creating a boat channel providing access to and from Mason's property. Mason admitted the dredging but maintained that such activity was authorized by the permit. As part of its evidence that Mason had exceeded the scope of the construction permit, the department offered expert testimony that the use of a dragline was an improper engineering technique for constructing the foundation for a seawall.[209]

In finding that the trial court had abused its discretion in denying the injunctive relief requested by the department, the court of appeals observed that the permit issued by the department could not reasonably be construed as authorizing the dredging of such a boat channel fifteen to twenty feet away from the shoreline.[210] The court reversed the trial court and remanded the case with direction to grant both the prohibitory injunction and the mandatory injunction requiring Mason to restore the lakebed to its original condition.[211] Given the relative burdens upon the parties and the quality and nature of the injury involved in *Mason*, the result appears somewhat harsh.[212]

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[207]*Id.* at 1313. (quoting the permit issued by the Indiana Department of Natural Resources).

[208]*Id.* (quoting the permit issued by the Indiana Department of Natural Resources).

[209]This testimony indicated that the proper method for constructing the foundation of a seawall was through the use of a backhoe rather than a dragline.

[210]*Id.* at 1315.

[211]*Id.* at 1316.

[212]Although unnecessary to its determination, the trial court as part of the explanatory memorandum filed with its judgment, stated:

> It is also noted that the issuance of injunctions is governed by the kinds of considerations reflected in *Schwartz v. Holycross*; whether the issuance of in-

Mid-America Marketing, Inc. v. Falender Development Corp.[213] was another case involving issues of water law which came to the court of appeals on the refusal of the trial court to grant injunctive relief. In *Mid-America*, the plaintiff Mid-America sought a preliminary injunction to enjoin the defendant from entering upon the plaintiff's property and from performing certain drainage work on the property. The trial court denied the injunction and Mid-America appealed.

The trial record disclosed that Mid-America and Falender owned adjacent tracts of land. The Falender tract was located within the corporate limits of the Town of Zionsville while the Mid-America tract was not within the corporate limits. Although both parties contemplated developing their respective tracts, only Falender Development had commenced improvements. As part of the improvement of its tract, Falender removed the portion of the "Saylor drain" which ran through the property owned by Mid-America.[214] Falender then adopted a drainage plan which would have resulted in water from the Falender tract flowing through a proposed culvert under the county road and onto the property owned by Mid-America. The drainage plan further required Falender to perform certain drainage work on the Mid-America property so that the water passing through the proposed culvert would be properly channeled to meet the existing path of surface water over Mid-America's property. The work proposed on Mid-America's property would have been located within seventy-five feet of the Saylor drain. Because part of the Saylor drain was located within the corporate limits of the Town of Zionsville, the county drainage board transferred jurisdiction of the entire drain to the town. The Town of Zionsville approved the plans of the Falender development and notified Mid-America that Falender would be entering its property to perform the proposed drainage work. Upon the notification from the Town of Zionsville, Mid-America sought the injunction which the trial court denied.

A substantial portion of Mid-America's appeal was grounded in its contention that the Town of Zionsville lacked jurisdiction over

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> junctions is in fact a "matter of grace and not of right," it is apparent on the present record that a refusal to grant injunctive relief will not cause appreciable harm to Plaintiff, while granting such relief would be unnecessarily burdensome and disruptive of defendants' lawful activity, resulting in serious hardship and injustice to them.

Id. at 1315 (quoting trial court's explanatory memorandum). The court of appeals, however, stated that it was unnecessary for the department to show irreparable harm or that the hardships were balanced in its favor since the acts sought to be enjoined were unlawful. *Id.* at 1316 n.3.

[213]406 N.E.2d 372 (Ind. Ct. App. 1980).

[214]The parties agreed that the Saylor drain was a legal drain. *Id.* at 375 n.2.

that portion of the Saylor drain which was located on its property outside the corporate limits of Zionsville. The court of appeals concluded that by the terms of the Indiana Drainage Code, the county drainage board was originally vested with jurisdiction over the Saylor drain.[215] The court construed the drainage jurisdiction transfer provision, section 19-4-1-3.5 of the Indiana Code, as applying only in situations in which a drain is located *within* a given city or town.[216] The court acknowledged the desirability of vesting authority over the entire drain in a single entity but concluded that in *Mid-America* that entity must be the county drainage board rather than the Town of Zionsville.[217] The trial court therefore "erred in concluding that the attempted transfer of jurisdiction was valid as it related to that portion of Saylor drain which is located outside Zionsville."[218]

In approving the proposed drainage work on the Mid-America tract, the Town of Zionsville afforded Mid-America no opportunity to file its objections or to participate in the determination in accordance with the statutory procedures established by the Indiana Drainage Code.[219] The court of appeals concluded that "[t]he fact that the [proposed drainage work] will be accomplished within the area over which the drainage board has a right of entry does not eliminate the need to follow prescribed statutory procedures."[220] The trial court's refusal to enjoin Falender from discharging water on the Mid-America tract was reversed.[221]

H. Real Estate Transactions

1. Warranties.—Two cases decided during the survey period illustrate the limitations which Indiana courts are imposing on the extension of the warranty of habitability. In *Vetor v. Shockey*,[222] the Indiana Court of Appeals refused to extend the warranty of

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[215]406 N.E.2d at 375.

[216]*Id.*

[217]*Id.*

[218]*Id.*

[219]*Id.* at 376. *See* IND. CODE §§ 19-4-3-1 to -7 (1976) (reconstruction of drains); *Id.* §§ 19-4-4-1 to -8 (1976) (periodic maintenance of drains); *Id.* §§ 19-4-2-1 to -15 (1976) (construction of new drains).

[220]406 N.E.2d at 376. *See generally* IND. CODE § 19-4-6-1 (1976). A parallel result was reached in Grover v. Frantz, 408 N.E.2d 567 (Ind. Ct. App. 1980). In *Grover* the court of appeals concluded that the fact that all reconstruction work on a drain was completed within the statutory right-of-way did not preclude liability on the part of persons performing the reconstruction for negligent destruction of structures upon the right-of-way. *Id.* at 570-71.

[221]*Id.* at 378.

[222]414 N.E.2d 575 (Ind. Ct. App. 1980).

habitability to purchasers of used homes from non-builder-vendors, and in *Pennycuff v. Fetter*,[223] the court found that the warranty was totally inapplicable to a sale of commercial property. A third case, *Orto v. Jackson*,[224] created an exception to the general rule that before a home owner can successfully raise a claim for breach of the implied warranty of habitability he must give the builder notice of the defect.

In *Vetor*, the plaintiffs purchased a used home from the defendant, Vetor, who had occupied the dwelling for four years, but was not the builder. Vetor gave the plaintiffs a warranty deed and made specific representations as to the condition of the septic tank. These representations were that the system was in "satisfactory working condition except for certain times of the year when there would be a lot of water on the ground, the septic system might be a little slow."[225] The plaintiffs had trouble with the septic system and brought an action in small claims court for the cost of repair. The trial court found that there was an implied warranty that the septic tank was in working order and held for the plaintiffs. The defendant appealed.

The court of appeals traced the development of the warranty of habitability, beginning with the common law theory of caveat emptor.[226] The court noted, however, that this theory has lost favor in Indiana as well as in other jurisdictions in the context of the purchase of a new home from a builder-vendor, and mentioned that the Indiana Supreme Court had even extended the warranty of habitability to subsequent purchasers. The court, however, could find no Indiana authority for extending this warranty to the purchaser of a used home from a non builder-vendor. The court noted that all jurisdictions which had directly confronted the question had rejected such an expansion, apparently on the grounds that "in the sale of *used* housing, the vendor usually has no greater expertise in determining the quality of a house than the purchaser."[227]

Although the court recognized that there may be certain situations in which it would be necessary to extend the implied warranty of habitability, the court refused to extend the warranty in this case.[228] Thus, while it refused to make an extension in this case the court left the door open for possible further expansion of the warranty of habitability in other areas. In addition, the court suggested that "[a]s for defects *known* to the vendor of an older home at the

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[223]409 N.E.2d 1179 (Ind. Ct. App. 1980).

[224]413 N.E.2d 273 (Ind. Ct. App. 1980).

[225]414 N.E.2d 575, 576.

[226]*Id.*

[227]*Id.* at 577 (emphasis in original).

[228]*Id.*

time of sale, the tort theories of misrepresentation or fraudulent concealment are alternatives open to the unknowing buyer."[229] The court refused to consider these theories in this case, however, because of "the meager record presented for review due to the nature of the [small claims] proceedings below, the limited scope of the trial court's judgment, and the lack of an appellees' brief."[230]

In *Orto v. Jackson*,[231] the Jacksons contracted to have a home built by the plaintiffs' construction company. The agreement provided, among other things, that the plaintiffs would "diligently prosecute construction to a conclusion, unless prevented by acts of the Buyer . . . [or] acts of God,"[232] that they guaranteed all materials and workmanship for one year, and that they agreed to complete work within ninety days after beginning construction.[233] Work was begun in early August 1976, and in November, in reliance upon the terms of the agreement and an oral promise made by one of the partners, the Jacksons sold their home. The construction was not in fact completed until late April of 1977, and the Jacksons were forced to rent a home for six months.[234]

When the Jacksons did finally move in, they experienced a number of difficulties including plumbing leaks, an improperly functioning sewage system, and a buckling basement wall. Subsequent problems arose with faulty trusses used to support the floor and this in turn resulted in some of the walls separating from the ceiling. In addition, there was leakage in the roof and basement, and the gutters fell off the house.[235]

The Jacksons contacted the plaintiffs and attempted to resolve many of these problems. The builders successfully remedied the problem of the buckling wall and repaired some of the plumbing leaks and improperly cut doors. However, other defects, of which the plaintiffs had notice, were never corrected. Finally, the defendants repaired some of the defects without giving the plaintiffs any notice at all.

The defendants refused to pay the agreed contract price, and

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[229]*Id.* The court of appeals in Pennycuff v. Fetter, 409 N.E.2d 1179 (Ind. Ct. App. 1980), refused to find an implied warranty of habitability in the sale of a clubhouse and swimming pool by a non-builder vendor. However, the court did recognize a possible cause of action in fraud or misrepresentation. In this case the buyer was assured by the seller that the swimming pool was in good condition. It was subsequently discovered that several of the pipes had burst.

[230]414 N.E.2d at 578.

[231]413 N.E.2d 273 (Ind. Ct. App. 1980).

[232]*Id.* at 274.

[233]"This provision was handwritten into the contract at the request of Mr. Jackson [the defendant]." *Id.*

[234]*Id.*

[235]*Id.* at 275.

the plaintiffs brought suit to foreclose on their mechanic's lien. The Jacksons counterclaimed for damages. Although the trial court ordered a foreclosure, the court also awarded damages to the defendants. The plaintiffs appealed.

One of the plaintiffs' central arguments was that notice of the alleged defects was a prerequisite for finding them liable for breach of the implied warranty of habitability. The court agreed that this was the general rule in Indiana and noted that under *Wagner Construction Co. v. Noonan*[236] there was an additional general requirement that the homeowner allow the builder "reasonable time to repair."[237] The court suggested that "[u]nder a strict reading of *Wagner*, the Jacksons should not be awarded damages for the [defects for which they failed to give notice prior to repair] since they did not give the builders notice of the defects and reasonable time to repair them."[238] However, the court held that the general rule did not apply in this case. It said that the policy underlying the notice requirement was to allow the builders the opportunity to repair the defects, to reduce the damages, to help them avoid similar defects in the future, and to promote settlement.[239] Yet, the evidence in this case demonstrated that after the builders had filed suit they had no intention of making further repairs. Nor had they attempted to discover why the septic system had not worked, so as to avoid similar problems in the future. Attempts at settlement prior to filing of the action had proven unsuccessful. Thus, the court held that the Jacksons were not required to give notice of these defects because it would have served no purpose.[240]

Several other allegations of error were also addressed by the court, but were of lesser significance to the outcome of this case.[241] Finally, the appellate court upheld the trial court's award of compensatory damages to the defendants.[242] It found that the proper measure of recovery was the "reasonable cost of altering the defective parts of the house so as to make them conform to the plans and specifications" plus injuries for delay, economic loss occassioned by the breach of contract and implied warranty of habitability, loss of the full use and enjoyment of the property, and the probable cost of future repairs.[243] Although it suggested that the trial court might

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[236]403 N.E.2d 1144 (Ind. Ct. App. 1980).

[237]413 N.E.2d at 276.

[238]*Id.*

[239]*Id.*

[240]*Id.*

[241]These allegations included a question of negligence on the part of both parties and a question of accord and satisfaction. *Id.* at 275-77.

[242]*Id.* at 278-79.

[243]*Id.* at 278.

have specified more particularly the allocation of the award, the court found that the evidence established that the Jacksons had expended time, energy, and money in resolving the problems with their home, had lost the use and enjoyment of part of the property, and had suffered aggravation and inconvenience because of the plaintiffs' breach.[244] The court concluded that those damages were foreseeable[245] and that it was within the discretion of the trial court to award them.[246]

2. Mortgages.—In *First Federal Savings and Loan Association v. Arena*,[247] the Indiana Court of Appeals applied a general rule of surety law—that a surety is relieved of secondary liability if the principal debtor and creditor materially alter the original contract—in the context of a transfer of mortgaged property.

In *First Federal*, the defendants, the Arenas, had executed a note, mortgage and supplemental agreement with First Federal for a $32,000 loan. About a year later, the bank advanced the Arenas an additional $5,100 and in consideration the Arenas agreed to an increase in the interest rate payable and executed a separate note, mortgage and agreement supplemental. The Arenas subsequently conveyed the real estate by warranty deed subject to the two First Federal mortgages to a third party, Mr. Richardson. On the same day as the transfer, Mr. Richardson negotiated a modification and extension agreement with First Federal under which he assumed both of the prior mortgages, had the period of repayment increased to twenty years, and agreed to an increase in the interest rate payable.[248] Mr. Richardson later defaulted on the mortgages and notes and First Federal sought to recover against the Arenas under the terms of the modification and extension agreement which First Federal had made with Mr. Richardson.[249] The trial court granted a summary judgment for the Arenas and the plaintiff appealed.[250]

The bank based its case on the terms of the Arenas' supplemental agreement that provided that the Arenas were to remain liable on the mortgage upon the transfer of the property to a successor in interest.[251] Furthermore, First Federal had the right to deal with the successor in interest in the same manner as with the mortgagor.[252] However, the court released the Arenas from liability

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[244]*Id.*
[245]*See id.*
[246]413 N.E.2d at 278.
[247]406 N.E.2d 1279 (Ind. Ct. App. 1980).
[248]*Id.* at 1281-82.
[249]*Id.* at 1282. Richardson and several other lienholders were also made parties. *Id.*
[250]*Id.* at 1281.
[251]*Id.* at 1283.
[252]*Id.*

in this case because Mr. Richardson and First Federal had made material changes in the terms of the mortgage without the Arenas' knowledge or consent.[253]

In reaching this result, the court drew an analogy between the Arenas' relationship to Mr. Richardson and that of a surety and principal debtor. The law of surety will strictly construe any agreement by the surety to future modifications. Therefore, if a material modification is made in a mortgage agreement which exceeds the modifications consented to in the original mortgagor's agreement, the mortgagor is not liable. Based on this reasoning, the court upheld summary judgment for the Arenas.

In *Pearson v. First National Bank*,[254] the Indiana Court of Appeals adopted the majority view with respect to interpreting a loss payable clause of a fire insurance policy in favor of a mortgagee,[255] and in the process the court created a precedent which permits banks to take unfair advantage of mortgagors.

In this case Pearson purchased a restaurant subject to two mortgages in favor of First National and the Small Business Administration. In the purchase agreement Pearson also agreed to insure the premises with a fire, extended coverage, and vandalism policy payable in favor of the bank and the Small Business Administration "as their interests [might] appear."[256] About six months later the restaurant was severely damaged by a fire. An insurance adjuster took bids on the repair work and hired a firm to begin reconstruction. Shortly after beginning work, however, an agent of the construction firm asked Pearson how and when the firm would be paid. Pearson responded by saying he was not sure but assumed that the insurance money would be held in escrow by First National, and he suggested that the agent speak to someone from the bank. When the agent approached the people at First National he was told that no payments would be made until all the reconstruction work was completed. He returned to the bank with Pearson later that afternoon. There they were told that First National had decided to retain the insurance proceeds to pay off the loan rather than rebuild the restaurant. The bank added, however, that it was willing to consider giving Pearson a new loan at a higher interest rate if he desired to rebuild. Pearson had all work stopped and brought suit against First National for breach of contract and tortious miscon-

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[253]*Id.* at 1284. The court initially found that the questions of whether First Federal could increase the interest rate to Mr. Richardson without discharging the Arenas and the interpretation of the terms of First Federal's agreement with the Arenas were ones of law and therefore appropriate for summary judgment. *Id.*

[254]408 N.E.2d 166 (Ind. Ct. App. 1980).

[255]*Id.* at 169-71.

[256]*Id.* at 168.

duct. First National moved for and was granted a judgment on the evidence on the grounds that Pearson failed to prove any breach of contract or tortious damages. Pearson appealed.

The court of appeals began its discussion by asserting that "[g]enerally speaking, a mortgage agreement is a contract, and as such, the mortgagor and mortgagee are free to enter into an agreement concerning the disposition or application of insurance proceeds in the event of a loss."[257] The court also stated that the well-established rule is that when a mortgagor is required to insure mortgaged property

> under a policy containing a clause making any loss payable to the mortgagee . . . "as his interest may appear," the mortgagee is entitled to the proceeds of the policy to the extent of his mortgage debt, holding the surplus, if any, after extinquishment of his debt for the benefit of the mortgagor.[258]

The court noted that "[i]t has been held specifically that a mortgagee named in a loss payable clause will prevail over a mortgagor who desires to use the money to repair."[259]

The court said that it was not clear whether the mortgagee could apply the insurance proceeds to mortgage debts not yet due, but hinted that it accepted the view that the mortgagee had to hold the proceeds until they were due and could not accelerate and recover the whole mortgage debt at once.[260] The court also rejected the sole contrary view that it could find on this issue. In *Schoolcraft v. Ross*,[261] the California Court of Appeals imposed a good faith requirement in exercising an option to apply the proceeds against the debt rather than to rebuild.[262] In *Schoolcraft*, the court found for the mortgagor when it determined that the mortgagee had not acted in good faith when it chose to apply the proceeds against the debt.[263] The Indiana Court of Appeals' only comment about *Schoolcraft* was that it questioned what the California court meant when it said that the collateral was not impaired, when in fact the house was destroyed.[264]

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[257]*Id.* at 169.

[258]*Id.*

[259]*Id.* at 170.

[260]*Id.*

[261]81 Cal. App. 3d 75, 146 Cal. Rptr. 57 (1978).

[262]*Id.* at 80-83, 146 Cal. Rptr. at 60-61.

[263]*Id.* at 80-81, 146 Cal. Rptr. at 60.

[264]408 N.E.2d at 170. The California court probably meant that had this money been used in good faith to repair the fire damaged home, the home would have been worth roughly what it had been before and thus the security would not have been impaired.

The court concluded by asserting that the terms "'payable to the bank and the S.B.A. as their interests may appear'" were words of art with a particular meaning at law and were "entitled to an interpretation consistent with that meaning."[265] It also suggested that the plaintiff's evidence was insufficient even if the court were to adopt an implied element of good faith. It noted that there was no evidence that the plaintiff was current with his mortgage payments at the time of the fire, nor was there evidence that the bank ever gave the plaintiff permission to use the proceeds for reconstruction or that the bank even knew reconstruction had begun.[266] Finally, there was no evidence as to the amount of the mortgage balance at the time of the fire, the amount of proceeds actually paid to the bank and credited to the plaintiff, or how and when the mortgages were retired.[267] The court of appeals affirmed the judgment on the evidence.[268]

While the rule adopted by the court of appeals in this case—essentially caveat emptor—may be in line with the view of a majority of jurisdictions, it is subject to criticism and may result in giving mortgagees a great deal of leverage creating a very real possibility for abuse. An initial problem involves the court's unquestioning reliance upon the principle of caveat emptor. Pearson may in fact have been a sophisticated business person who knowingly bargained for this term and therefore should be bound; however, there are numerous consumer mortgage loan situations involving such clauses where the mortgagor will not know what he is giving up and in fact may have little bargaining power at all. Yet, the court makes no distinction. While it may be fair to hold a sophisticated party to the meaning of a term of art, there is less justification for doing so when the mortgagor does not even know it is a term of art.[269]

The most striking problem with this approach, however, can be exhibited by carrying the scenario of this or other similar cases through. Under the court's analysis the mortgagee bank can set up an escrow account and deposit the insurance proceeds in it. Then as the mortgage payments come due the mortgagee can withdraw funds to cover the payments. In the process, however, the mortgagee has left the mortgagor holding a fire damaged building with no funds with which to repair it. The "opportunity" to refinance at a

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[265] *Id.*

[266] *Id.* at 170-71.

[267] *Id.* at 171.

[268] *Id.*

[269] The Indiana case, Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971), is a leading decision on the issues of the parties' abilities to understand the terms of their contract, equality of bargaining power, and unconscionable contracts. Those factors may be relevant in this case as well.

higher rate of interest undoubtedly provides mortgagees with a means of economic coercion.

The California court's good faith requirement has merit. If, without jeapordizing the mortgagee's interest, the insurance proceeds can be used to fully repair the collateral, the mortgagee receives the protection he sought by requiring insurance and the mortgagor has a building in which to live or do business. This approach seems best suited to reestablish the status quo that existed before the fire and gives neither party an unfair advantage.

3. Land Transfer Agreements.—A number of cases involving issues relating to land transfer agreements arose during the survey period. The areas of law involved included option contracts and pre-emptive right provisions,[270] the statute of frauds and part performance,[271] and the liabilities and rights of parties assisting in land transfer agreements.[272]

a. Option contracts and pre-emptive right provisions.—Two recent cases involved new or interesting questions involving option contracts and pre-emptive rights. In *Theobald v. Chumley*,[273] the plaintiff, Theobald, in November 1972, entered into a real estate contract with the defendant, Mrs. Buskirk,[274] which gave him a ninety-day option to receive six acres of property and cash from Mrs. Buskirk in return for 20.96 acres of his property. Buskirk was to pay $300 per acre for the 14.96 acres in excess of what she conveyed to Theobald, and Theobald was to obtain a proper legal survey description of the land to be conveyed.

In January 1973, Theobald had the survey made and notified Mary Ellen Chumley, who held a power of attorney in behalf of Mrs. Buskirk, that he was exercising the option; he also notified Mrs. Chumley's attorney.[275] It was later discovered that the survey and warranty deed which Theobald had prepared were incorrect and called for two to three more acres than provided for in the option contract. For this reason the deed to Theobald's property was retained by Theobald's attorney and was never delivered. In the meantime, however, Mrs. Buskirk took possession of the 20.96 acres and began to farm it. The problem with the deed was never cor-

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[270] *See* notes 273-302 *infra* and accompanying text.

[271] *See* Summerlot v. Summerlot, 408 N.E.2d 820 (Ind. Ct. App. 1980), *discussed in* Falender, *Decedents' Estates and Trusts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 175, 195 (1981).

[272] *See* notes 303-31 *infra* and accompanying text.

[273] 408 N.E.2d 603 (Ind. Ct. App. 1980).

[274] At the time of the creation of the contract Mrs. Buskirk was one of two co-owners of the property. She subsequently purchased the other interest.

[275] *Id.* at 604. By agreement the option was exercisable either in person or in writing.

rected, and in August of 1974, Theobald brought suit to recover for crops that were harvested by Buskirk during that year. Buskirk in turn cross-claimed for specific performance of the option contract.

The court of appeals said that the sole issue on appeal was whether the option agreement was effectively exercised, and it rejected an argument by Theobald that the option lapsed after ninety days because his exercise did not fully conform to the option agreed upon.[276] The court said that there were essentially two steps necessary to exercise an option to purchase: (1) the optionee (Theobald) had to make a decision to purchase under the option and (2) that decision had to be communicated to the optionor (Buskirk) within the life of the option.[277]

The court noted that in the typical case, where the optionee was the party attempting to enforce the option, the courts had imposed a strict requirement that the optionee exercise the option specifically as to its terms because he was the sole party capable of consummating the option and forming the contract.[278] In this case, however, it was the optionor and the not the optionee who was attempting to enforce the agreement. The court held that when, within the option period, Theobald communicated his decision to exercise the option to Mrs. Chumley and her attorney, the two steps necessary were satisfied and a contract was formed.[279] The court found that the legal survey that Theobald was required to obtain was not a condition to formation of the contract but "necessary merely to properly convey the exchange of lands,"[280] and the court treated the survey and deed including additional acreage as merely an offer which Mrs. Buskirk could accept or reject.[281] The court concluded by admitting that there were no Indiana cases on point but discussed authority from other jurisdictions which supported its decision. The court determined that this was the fairest and most equitable result.[282]

Stoneburner v. Fletcher[283] involved a pre-emptive right created by a conditional sales contract used in connection with a sale of real estate by the defendant, Stoneburner, to the plaintiff, Fletcher. The contract provided, among other things, that the buyer (Fletcher) would have the privilege of accelerating and paying off the contract at any time after four years from the making of the contract. The buyer would also have an opportunity to purchase a lot located adja-

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[276] *Id.* at 604-05.
[277] *Id.* at 605.
[278] *Id.*
[279] *Id.* at 605-06.
[280] *Id.* at 605.
[281] *Id.* at 605-06.
[282] *Id.*
[283] 408 N.E.2d 545 (Ind. Ct. App. 1980).

cent to the property he bought "in event same should be for sale at any time in the future."[284]

Fletcher exercised his option to pay off the full amount in accordance with the contract and received a warranty deed from Stoneburner. A few months later Stoneburner began negotiations with the Kopeckys to sell a strip of the lot which was subject to Fletcher's pre-emptive right. Stoneburner sold the strip to the Kopeckys on July 31, 1975.[285] Fletcher brought an action for equitable relief and damages for breach of the clause creating the pre-emptive right and was awarded a judgment of $4,000. Stoneburner appealed.

One of the primary questions on appeal was whether the pre-emptive right survived the termination of the contract when Fletcher prepaid the purchase price. Stoneburner argued that the clause creating the pre-emptive right was an indivisible and interdependent covenant of the contract. Hence, when Fletcher prepaid the purchase price both the contract and the pre-emptive right terminated.[286] The defendant also argued that the description of the property in question was insufficient and that, along with the lack of a separate recital of consideration and execution established that the pre-emptive clause was interdependent and indivisible.[287] The court rejected both of these arguments.

The court in a footnote mentioned that the defendant was apparently making an argument based on the doctrine of merger by deed.[288] The court suggested that this doctrine generally provides that unless there is fraud or mistake, once the buyer accepts the deed, the contract for sale is "merged" into the deed, and the seller can no longer be held to terms which are in the contract but are not included in the deed.[289] The court noted, however, that collateral or

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[284]*Id.* at 546. The parties labeled this latter provision as either an "option" or an "option of first refusal"; however, the court said this provision was more accurately described as a pre-emptive right. *Id.* at 547 n.4.

[285]*Id.* at 546-47.

[286]*Id.* at 547-48. The defendant argued that the case of Spindler v. Valparaiso Lodge of Benevolent and Protective Order of Elks, No. 500, 223 Ind. 276, 59 N.E.2d 895 (1945), should control the decision here. In *Spindler*, the Indiana Supreme Court held that where a tenant gave up one lease in favor of another lease, he could not enforce a preferential right to purchase the property which was the subject of the first lease. The court of appeals in *Stoneburner*, however, held that *Spindler* was not applicable because the pre-emptive right in *Spindler* pertained to the property that was leased , whereas the pre-emptive right in *Stoneburner* pertained to adjacent property. 408 N.E.2d at 548.

[287]408 N.E.2d at 549.

[288]*Id.* at 548 n.6.

[289]*Id.* at 548-49. Thus, the defendant's argument under the facts of this case would be that when Fletcher received his deed for the tract covered by the first provision of the contract, the terms of the contract were "merged" into the deed. The deed most

independent rights created by the contract of sale are not extinguished if excluded from the deed and constitute an exception to the doctrine.[290] The court maintained that in this case Fletcher's pre-emptive right was not "part of the main purpose of the contract which was the sale and purchase of Parcel C [the parcel dealt with in the first provision of the contract]."[291] In addition the court noted that "the use of the open-ended words 'at any time in the future' could be reasonably interpreted as an expression of the parties' intent, at the time of contracting, that the pre-emptive right would survive the conveyance of the principal property."[292] The court also held that the pre-emptive clause was not interdependent and indivisible from the contract.[293] "A contract is not entire and indivisible simply because it is embraced in one instrument and executed by the same parties."[294] There are two general tests of severability: (1) divisibility of consideration and (2) whether the contract can be completed in part only.[295] The court said, "While the instant contract would not appear to meet the divisibility of consideration test, it could be completed in part only."[296]

The court concluded by saying that the description of the property covered by the pre-emptive rights was "not so insufficient as to render the contract entire and indivisible."[297] It upheld the trial court's ruling that the pre-emptive right survived the tender and delivery of the deed, and it found that the pre-emptive right was still in force.[298]

One question the court never resolved in this case was how long the pre-emptive right would in fact have continued. It clearly rejected the view that the right terminated with the transfer of the deed for the parcel covered by the initial provision of the contract (Parcel C).[299] The trial court found that the pre-emptive right continued for a reasonable time not to expire before the normal pay-out period of the real estate contract.[300] The court of appeals ultimately held that although it felt the probable rule was that the pre-emptive

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probably would not refer to the pre-emptive right in the second tract and hence Stoneburner would argue that the right was extinguished.

[290] *Id.* at 549.

[291] *Id.*

[292] *Id.*

[293] *Id.* at 549-50.

[294] *Id.* at 549.

[295] *Id.*

[296] *Id.* at 550.

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.* at 547.

rights continued for the life of the vendor,[301] and therefore the trial court's determination was erroneous because under either of these tests Stoneburner was liable.[302]

b. Liabilities and rights of parties participating in land transfer agreements.—A number of parties beyond the buyer and seller are often involved in the sale of real estate, and these parties also have rights and liabilities. Two cases decided during this survey period dealt with two of these additional participants: (1) abstract companies[303] and (2) brokers.[304]

i. Abstract companies.—In *Tipton County Abstract Co. v. Heritage Federal Savings and Loan Association*,[305] the court of appeals held that if an abstract company fails to include a prior mortgage against a piece of property in its title opinion, and the party employing the company relies to his detriment on that opinion, the abstracter is liable regardless of whether his employer had constructive or even actual knowledge of the prior mortgage.[306]

In this case the plaintiff, Heritage, took a mortgage loan application which revealed a $25,000 secured loan in favor of another bank from the Bourffs. Heritage sent the abstract of the property to the defendant, Tipton County Abstract Company (TCAC), to be continued from May 1971 to March 1973. TCAC did not find the $25,000 secured loan or any other liens and certified the title. Thereafter, Heritage gave the Bourffs a $70,000 mortgage on the property. In December 1974 the Bourffs declared bankruptcy, and the prior mortgage holder sought to foreclose and joined Heritage as a party defendant. The decree in that case listed the prior mortgage holder as the first mortgagee and Heritage as second. Heritage brought suit against TCAC and recovered $73,999.44 for damages it suffered because of TCAC's failure to include the prior mortgage. TCAC appealed.[307]

The court of appeals based its decision on three fundamental factors—duty, causation, and reliance.[308] It began by saying that TCAC would clearly "be liable for damages caused by their breach of contract by supplying erroneous information in the abstract continuation."[309] The court then quoted an earlier case to show that the reason for this rule was that the abstracter owed his employer a duty

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[301] *Id.* at 548.

[302] *Id.*

[303] *See* notes 305-16 *infra* and accompanying text.

[304] *See* notes 317-31 *infra* and accompanying text.

[305] 416 N.E.2d 850 (Ind. Ct. App. 1981).

[306] *Id.* at 854.

[307] *Id.* at 852.

[308] *See id.* at 852-54.

[309] *Id.* at 852.

of ordinary care and diligence.[310] However, implicit in the court's reasoning is the idea that this duty of care is applicable whether the abstracter's negligence is the erroneous inclusion of improper information or the absence of some relevant facts.[311]

The court went on to discuss the factors of causation and reliance. It said, "The abstracter, however, could not be liable for damages caused by factors other than his breach. . . . Such damages include those caused by the plaintiff's reliance on the abstracter's breach."[312] The court referred to an *American Jurisprudence 2d* annotation for the proposition that a party could rely on the truth and accuracy of an abstracter's report, "unless perhaps the terms of the certificate made it plainly apparent that there was a mistake,"[313] and then the court maintained that under Indiana law it was not clear "that even *actual knowledge* of an abstracter's breach negates recovery if the plaintiff relied on the abstracter's error."[314]

The court ultimately went on to resolve this question and held that

> Heritage's knowledge, actual or constructive, of the prior mortgage is irrelevant if they in fact relied on TCAC's representation that it did not exist. Thus, the gist of TCAC's issue must be whether there is sufficient evidence to support the trial court's finding that Heritage relied on TCAC's error in granting Bourffs the mortgage.[315]

The court reviewed the record and found there was sufficient evidence to support the trial court's finding and affirmed the lower court's decision.[316]

ii. Brokers.—The two common issues that arise with regard to real estate brokers are conformance with the statutory requirements that a broker must plead and prove he is duly licensed[317] and that a broker's contracts must be in writing[318] before he can recover

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[310]*See id.* at 852-53 (quoting Mayhew v. Deister, 144 Ind. App. 111, 118-19, 244 N.E.2d 448, 452 (1969)).

[311]*See* 416 N.E.2d at 853.

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

[313]*Id.* (referring to 1 AM. JUR. 2d *Abstracts of Title* § 19 (1962)).

[314]*Id.*

[315]*Id.* at 854 (footnote omitted).

[316]*Id.* at 854, 855.

[317]IND. CODE § 25-34.1-6-2(b) (Supp. 1981). The survey cases dealing with this requirement arose while a prior version of the statute. IND. CODE § 25-34-1-9 (1976) (repealed 1979), was in effect.

[318]IND. CODE § 32-2-2-1 (1976). This so-called "broker's Statute of Frauds" provides:

> No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one (1) person of a purchaser for the real estate of another, shall be valid unless the same

a commission. Three cases decided during the survey period—one from the first district dealing with the latter issue[319] and two from the third district dealing with the former issue[320]—indicate that there is a difference in the strength or effect of these requirements. The writing requirement is strictly applied while proof of licensing is not.

In *William S. Deckelbaum Co. v. Equitable Life Assurance Society*,[321] the first district dealt with the writing requirement and held that in the absence of a written contract for payment of a commission, a broker could not prevail in an action for tortious interference with a contractual relationship.[322]

In September, 1977, Equitable Life Assurance Society, the owner of the J.C. Penney Building in downtown Indianapolis, indicated to Deckelbaum, an industrial and commercial real estate company, its desire to sell the Penney Building. After Deckelbaum informed Equitable that it had initiated negotiations with Blue Cross, Deckelbaum was given the authority to sell the building for $3,000,000. For its services, Deckelbaum was to receive six percent of the sales price; however, no written contract was ever entered into for payment of the commission.

On April 20, 1978, Blue Cross submitted an offer to purchase through its alleged realtor, F.C. Tucker, and on May 12, 1978, Equitable accepted that offer. Equitable paid Tucker a $150,000 commission. Deckelbaum brought suit against Equitable, Blue Cross, and Tucker for compensatory and punitive damages for conspiring to defraud it. Deckelbaum later dismissed without prejudice its claim against Tucker, and the trial court sustained a Trial Rule 12 motion when Deckelbaum failed to plead over within the time allowed. Deckelbaum appealed. Deckelbaum argued that its claim was for tortious interference with a *pre-contractual* business relationship which did not require the existence of a valid contract and not for the recovery of his commission which would require a written contract.[323] The court never addressed Deckelbaum's allegation of inter-

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shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative: Provided, That any general reference to such real estate sufficient to identify the same shall be deemed to be a sufficient description thereof.

Id.

[319]William S. Deckelbaum Co. v. Equitable Life Assurance Soc'y, 419 N.E.2d 228 (Ind. Ct. App. 1981).

[320]Sutton v. Roth, Wehrly, Heiny, Inc., 418 N.E.2d 229 (Ind. Ct. App. 1981); Marotta v. Iroquois Realty Co., 412 N.E.2d 797 (Ind. Ct. App. 1980).

[321]419 N.E.2d 228 (Ind. Ct. App. 1981).

[322]*Id.* at 232.

[323]*Id.* at 230.

ference with a pre-contractual relationship.[324] Because under Indiana law the tort of interference with a contractual relationship is dependent upon the existence of a valid contract and because no enforceable agreement existed here, the court ultimately held that the trial court's dismissal had to be upheld.[325] In reaching this decision, the court discussed the Indiana law on brokers' commissions.[326] It said that although some jurisdictions allow recovery of brokers' commissions under either oral or written contracts, "Indiana . . . has precluded recovery of [brokers'] commissions when the agreement is not in writing."[327]

Although the first district may not have gone so far as to make a writing a jurisdictional issue without which it had to hold for the parties opposing the broker, it made it quite clear that a broker will have an extremely difficult time recovering a commission without a written agreement.

On the other hand, the third district applied a much more lenient standard in connection with the requirement that a realtor prove he is duly licensed before he can recover a commission. In *Sutton v. Roth, Wehrly, Heiny, Inc.*,[328] the court held that proof of licensing could be inferred from other facts presented into evidence, for example a listing agreement,[329] and in *Marotta v. Iroquois Realty Co.*,[330] the court held that direct proof of due licensing was unnecessary if the parties stipulated to that fact.[331]

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[324]*See id.* at 230-32. The court may have determined that the parties intended to create a contract when they made their oral agreement and that Deckelbaum's formulation of the case as one dealing with a pre-contractual relationship was therefore only a ploy to avoid the rules that related to tortious interference with a contractual relationship; however, it never gave any reason for ignoring Deckelbaum's actual argument.

[325]*Id.* at 232.

[326]*See id.* at 230-32.

[327]*Id.* at 230.

[328]418 N.E.2d 229 (Ind. Ct. App. 1981).

[329]*Id.* at 232.

[330]412 N.E.2d 797 (Ind. Ct. App. 1980).

[331]*Id.* at 799-800.