

Survey of Indiana Property Law

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I. BROKERS

*Craig v. ERA Mark Five Realtors*¹ involves the liability of a real estate broker for listing property as a "multi-family" apartment building when such use was in violation of the applicable zoning ordinance. The seller listed a two-story structure, which had been converted into a multi-family dwelling, with ERA Mark Five Realtors (ERA). ERA showed the property to Hugh Craig, who agreed to purchase the property subject to an existing land contract containing a balloon payment clause.² No one at ERA was aware of the specific zoning of the property at the time of the closing. More than two years after the closing, the City of Indianapolis informed Craig that the use of the property as a multi-family dwelling violated the local zoning ordinance. Craig filed suit against ERA.³

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1. 509 N.E.2d 1144 (Ind. Ct. App. 1987).

2. *Id.* at 1145. The purchaser also alleged that ERA had misrepresented the terms of the installment land contract. The evidence indicated, however, that the seller had failed to mention the balloon payment clause to ERA at the time he listed the property and that when ERA discovered the terms of the contract, shortly before the closing, it immediately informed Craig of the balloon payment clause and offered to rescind the contract. Because Craig was given the opportunity to back out of the deal and chose instead to go ahead with the closing, the court concluded that one of the essential elements of fraud, detrimental reliance, was missing. *Id.* at 1145-47.

3. *Id.* at 1146. Craig did not sue the seller nor did he attempt to rescind the original land contract which contained a representation that there were no existing zoning violations. A zoning ordinance does not affect the marketability of title and buyer takes subject to zoning regulations. However, existing violations of zoning ordinances are often held to make title unmarketable and would allow rescission of the contract for sale. H. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* § 10.12, at 694 (1984) [hereinafter CUNNINGHAM]; Dunham, *Effect on Title of Violations of Building Covenants and Zoning Ordinances*, 27 *ROCKY MTN. L. REV.* 255 (1955); Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 *CORNELL L. REV.* 1 (1985). Where the sale has been completed and the contract has merged into the deed, courts occasionally have found the existing breach of a zoning ordinance to be an encumbrance under the covenants of title. Freyfogle, *supra*, at 4 n.11; Dunham, *supra*, at 258 n.9.

Craig alleged that ERA committed actual fraud by misrepresenting the zoning status of the property. ERA made no representation concerning the specific zoning classification of the property, but the listing agreement and the multiple-listing worksheet described the property as "multi-family."⁴ The court, however, reasoned that: "The mere fact that the defendants represented the property as an apartment building does not rise to the level of an affirmative representation that the use of the property was permissible under the applicable zoning ordinance."⁵

Craig also argued that ERA had agreed to act as his agent in the transaction, and that as such it was under a duty to check the zoning status of the property. The court, however, concluded that assuming *arguendo* a fiduciary relationship existed, ERA had no duty to determine the zoning status of the property. Where information regarding zoning is readily available and easily accessible to all the parties in the public records, the purchaser can not attack the validity of the contract for fraud, misrepresentation or concealment of the problem.⁶ The court noted that Craig and his wife were not inexperienced amateurs in the real estate business. Both Craigs have been licensed to sell real estate in Indiana since the mid-1970's. Prior to this transaction the Craigs owned a duplex and a commercial building which Mr. Craig managed. In addition, Mr. Craig is or was president of Adobe Realty, and at one time owned and operated a real estate school. Thus, the court found that "although the Craigs were not represented by an attorney at the closing, they certainly possessed the skill and knowledge about ascertaining the property's zoning."⁷

II. CONCURRENT OWNERSHIP: TENANCY BY THE ENTIRETY

At common law any conveyance of real property to a husband and wife was deemed to create a tenancy by the entirety because of the unity of marriage.⁸ Marriage was said to create a "oneness" in the husband and wife so that neither had an individual interest in the property apart from the single entity. They held title *per tout et non*

4. *Craig*, 509 N.E.2d at 1147.

5. *Id.*

6. *Id.* at 1148 (citing *Winstead v. First National Bank N.A.*, 709 S.W.2d 627, 631 (Tenn. App. 1986)).

7. *Id.* The court also determined that the two year statute of limitations, Ind. Code § 34-1-2-2(1) (1988), applied to the count alleging negligence on the part of ERA in not discovering the zoning problem, that damages accrued on the date of closing, and that the trial court was not in error in granting a partial summary judgment. *Id.* at 1149-50.

8. *Cunningham*, *supra* note 3, § 5.5, at 210-11.

per my (by the whole but not by the part).⁹ One of the most important attributes of this type of co-ownership was the right of survivorship and, since neither spouse alone had a separate interest which could be conveyed to a third person, this right of survivorship was indestructible without the consent of both spouses.¹⁰ Likewise, since neither spouse had a separate interest apart from the whole, it was held that a creditor of only one spouse could not reach tenancy by the entirety property to satisfy the claim against the debtor-spouse.¹¹ After the enactment of the Married Woman's Property Act,¹² which removed the disabilities of married women, many states abolished tenancy by the entirety.¹³ While this type of co-ownership has been abolished in over half the states, a substantial minority of states, including Indiana, still allow this form of co-tenancy between husband and wife.¹⁴ At common law the personal property of a married woman was owned by the husband¹⁵ and, as a result, tenancy by the entirety was not applied to personalty.¹⁶ However, after enactment of the Married Woman's Property Act, those states which still recognized tenancy by the entirety had to decide whether or not to permit this type of co-ownership in personal property. A number of these states, including Indiana, chose not to apply it in

9. *Id.*; C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 218-19 (2d ed. 1988).

10. C. MOYNIHAN, *supra* note 9, at 219.

11. At common law the husband's creditors appear to have had a right to attach the entirety property for and during the husband's life because of his right to exercise control over the land. However, this position is in conflict with the Married Women's Property Act and the modern view of the husband and wife relationship. *See* Chandler v. Cheney, 37 Ind. 391, 404-14 (1871); Davis v. Clark, 26 Ind. 424, 428-29 (1866). In a substantial majority of the states still recognizing tenancy by the entirety, creditors of only one spouse cannot attach entirety property. Phipps, *Tenancy by Entireties*, 25 Temple L. Q. 24 (1951). Indiana follows the rule that the creditor of only one spouse cannot attach entirety property. *E.g.*, Mercer v. Coomler, 32 Ind. App. 533, 69 N.E. 202 (1903); Patton v. Rankin, 68 Ind. 245 (1879).

12. In the 19th century most states enacted what is commonly known as Married Women's Property Acts, which removed the common law disabilities of married women to own property. *See* Ind. Code § 31-1-9-2 (1988). For a brief history and discussion of the *feme sole* acts in Indiana, see 2A G. HENRY, HENRY'S PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA, Ch. 27, § 2, at 299-319 (J. Grimes 7th ed. 1979) [hereinafter HENRY'S].

13. C. MOYNIHAN, *supra* note 9, at 220.

14. For a list of states still recognizing the tenancy by the entirety see Cunningham, *supra* note 3, § 5.5, at 211 n.3. For a brief history and discussion of the Indiana law of tenancy by the entirety see HENRY'S, *supra* note 12, ch. 34, § 3, at 339-73.

15. HENRY'S, *supra* note 12, ch. 27, § 2, at 299.

16. CUNNINGHAM, *supra* note 3, § 5.5, at 215; HENRY'S, *supra* note 12, ch. 34, § 3, at 351-52.

general to ownership of personal property.¹⁷ The Indiana law governing the tenancy by the entirety is discussed in the three cases under review.

A. *Proceeds from Sale of Crops*

As a general rule, Indiana does not recognize tenancy by the entirety in personal property,¹⁸ but Indiana has made an exception with regard to the proceeds from the sale of land held by the entirety,¹⁹ and with regard to crops grown on tenancy by the entirety property.²⁰ In a case of first impression, *Schoon v. Van Diest Supply Co.*,²¹ the Indiana Court of Appeals held that the proceeds from the sale of crops grown on tenancy by the entirety property can be attached by the creditor of one of the spouses. While the court recognized that personal property "derived *directly* from real estate held by the entirety, such as crops on the land or proceeds arising from the sale of land held by the entirety" can not be attached by such creditors, the court determined that the proceeds from the sale of crops amounted to "proceeds from proceeds" and that the trial court was correct in not enlarging the law authorizing estates by entirety to include such proceeds.²²

B. *Bankruptcy: Release of Interest in Entirety Property by Debtor-Spouse*

In *In re Agnew*,²³ the United States Court of Appeals for the Seventh Circuit concluded that under Indiana law the release of an interest in the proceeds from the sale of tenancy by the entirety property by one spouse to the other was not a transfer of property and that no "division" of proceeds occurred. In *Agnew* the husband filed for

17. C. MOYNIHAN, *supra* note 9, at 220 n.1; HENRY'S, *supra* note 12, ch. 34, § 3, at 351-52.

18. *E.g.*, *Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1924); *Abshire v. State*, 53 Ind. 64 (1876); *Schoon v. Van Diest Supply Co.*, 511 N.E.2d 12 (Ind. Ct. App. 1987).

19. *E.g.*, *Whitlock v. Public Service Co.*, 239 Ind. 680, 159 N.E.2d 280, *reh'g denied*, 239 Ind. 694, 161 N.E.2d 169 (1959); *Abshire v. State, ex rel. Wilson*, 53 Ind. 64 (1876); *Anuszkiewicz v. Anuszkiewicz*, 172 Ind. App. 279, 360 N.E.2d 230, 232 (1977).

20. *E.g.*, *Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1924); *Patton v. Rankin*, 68 Ind. 245 (1879); *Mercer v. Coomler*, 32 Ind. App. 533, 69 N.E. 202 (1903).

21. 511 N.E.2d 12 (Ind. Ct. App. 1987).

22. *Id.* at 13-14 (emphasis in original). The court relied heavily on the language of *Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1923), that tenancies by the entirety "are not in harmony with any other part of the law of Indiana governing the legal rights of husband and wife and the law authorizing their creation *will not be enlarged by construction.*" *Koehring*, 194 Ind. at 437, 142 N.E. at 118 (emphasis added).

23. 818 F.2d 1284 (7th Cir. 1987).

Chapter 7 bankruptcy because of certain business debts incurred as part owner of a plumbing business. Lee Supply Corporation, a creditor, objected to the discharge of the husband's debts because the husband had released to his wife his interest in the proceeds from the sale of property owned by them as tenants by the entirety. The wife subsequently used the funds from the sale to build another house on land which she individually owned. The release of the husband's interest occurred within one year of the date the husband filed his petition in bankruptcy and the creditor's complaint objecting to the discharge alleged "defendant with the intent to hinder, delay or defraud a creditor of the estate transferred property of the debtor to another [in violation of 11 U.S.C. 727(a)(2)]."²⁴ The bankruptcy judge and the district court both found in favor of the debtor and the creditor appealed.

On appeal, the creditor argued that the release of his interest by the husband caused a momentary division of the proceeds which caused the interest to lose its exempt status and made it subject to his individual debts.²⁵ While the court could find no Indiana case directly on point, it noted with interest the language in *Enyeart v. Kepler*²⁶ where the husband, after his wife's death, claimed his earlier deed transferring his interest to his wife was void because entirety property can only be conveyed by both parties. In sustaining a demurrer to the husband's claim by the devisees of the property under the wife's will, the court held that the conveyance by the husband to his wife operated as "a relinquishment of the husband's right as survivor."²⁷ From this language the court concluded that under Indiana law Agnew did nothing more than relinquish his survivorship right to the proceeds from the sale

24. *Id.* at 1286. The bankruptcy judge appears to have based his decision more on the failure to prove fraudulent intent rather than the question of whether the release was a transfer of property. The bankruptcy judge found that there were several valid reasons why the husband released his interest in the proceeds of the sale to his wife. First, a second mortgage on the house had been taken out to finance the start up of the husband's failed business venture, and the repayment of the mortgage out of the proceeds could be viewed as a repayment of a debt of the husband. Second, after the business failed, the wife began making monthly payments to Lee Supply Corporation on the husband's business debts from her own funds. Finally, the facts established that the wife had contributed most of the funds for the purchase of the house. *Id.* at 1285-86. Thus, the husband may have felt morally obligated to release his interest in the proceeds from the sale to his wife. The bankruptcy judge found that the creditor had failed to prove that the husband had made a transfer of assets with the intent to defraud his creditors, that he had concealed information or that he had made a false oath or account. *Id.* at 1286.

25. *Id.* at 1288.

26. 118 Ind. 34, 20 N.E. 539 (1889).

27. *Id.* at 38, 20 N.E. at 541.

and that no separate interest ever vested in the husband which could be reached by his creditor.²⁸

The decision seems to be in accord with the common law concept that neither spouse really has an interest apart from the oneness of husband and wife. Thus, a "release" by one of the parties would simply leave the entire interest in the remaining tenant and nothing would pass from one party to the other.²⁹

C. Contract For Sale by One Spouse: Enforceability

In *Lafray v. Lafray*,³⁰ a son entered into an oral contract with his father agreeing to perform services in exchange for his father's promise to convey the family farm to him at the death of the surviving tenant by the entirety. After the father's death, the mother brought this action to evict the son and his wife. The trial court ordered their eviction and the son appealed.³¹ On appeal, the son argued that the court had improperly excluded evidence of the oral contract. The court, however, concluded that the real issue was not whether the contract with his father existed, but rather whether the mother would be bound by the contract.³² The court found the agreement void because the husband had no separate interest in the farm which he could contract away.³³ There was no evidence that the mother had authorized the contract or that she had ratified the agreement by accepting the services with knowledge of the agreement.³⁴ Alternatively, the son sought to recover in *quantum meruit* for the value of improvements made and services performed, but the court found that the son, who had resided rent and tax free on the land for ten years, had acted on his own rather than his mother's behalf in making the improvements and performing the services.³⁵ The court also concluded that the son was a tenant at

28. *Agnew*, 818 F.2d at 1289.

29. By analogy, Indiana has consistently held that at the death of one of the spouses the interest of the deceased spouse disappears and no interest passes from the deceased spouse to the survivor. *E.g.*, *Anuszkiewicz v. Anuszkiewicz*, 172 Ind. App. 279, 360 N.E.2d 230 (1977); *Department of Revenue v. Weinstein*, 141 Ind. App. 395, 228 N.E.2d 23, *reh'g denied*, 141 Ind. App. 399, 229 N.E.2d 741 (1967); *Vonville v. Dexter*, 118 Ind. App. 187, 76 N.E.2d 856 (1948).

30. 522 N.E.2d 916 (Ind. Ct. App. 1988).

31. *Id.* at 917.

32. *Id.*

33. *Id.* at 918.

34. *Id.* The mother testified that her son had moved onto the farm for personal reasons and that she did not know that he was performing these services as consideration for the alleged contract. *Id.*

35. *Id.* at 919.

sufferance, and that a tenant may not charge his landlord for improvements to the property absent an express contract.³⁶

III. COVENANTS

In *Rasp v. Hidden Valley Lake, Inc.*,³⁷ the developer of Hidden Valley Lake subdivision, Hidden Valley Lake, Inc. (HVL Developer), spread of record and placed in the deeds to the subdivision lots a covenant providing for the payment of a \$5.00 a month water and \$3.00 a month sewer "availability" fee, payable annually and in advance, by lot owners choosing not to connect to the water and sewer lines adjacent to their lots.³⁸ HVL Developer then transferred the sewer and water lines to HVL Services, Inc. and HVL Utilities, Inc., two wholly-owned public utilities subject to regulation by the Public Service Commission of Indiana. Both utilities operated at a loss but HVL Developer paid any deficits out of the "availability" fee fund. Defendants (Rasps) were not hooked up to the utilities and had refused to pay the availability fees. HVL Developer filed suit to recover delinquent availability fees, late charges, interest and attorney fees. The Rasps appealed from a judgment in favor of HVL Developer. Three issues were raised: (1) whether the fees were void as against public policy; (2) whether the covenant ran with the land and bound subsequent purchasers of the lots; and (3) whether the fees should be paid to HVL Developer or to the two public utility corporations as the assignees of the sewer and water lines.³⁹

With regard to the first issue, Rasps claimed that the covenant was unconscionable because it forced them to subsidize public utility companies from whom they received no benefit and was a windfall to HVL Developer who could then expend the funds to promote further sales of its lots. The court disagreed finding that this "mildly coercive incentive" to connect to existing sewer and water is in the public interest as it will promote a more healthful environment in the subdivision and broaden the rate base and reduce the rates charged for the utility services.⁴⁰ The court eliminated the second part of the Rasps first argument by finding that the installation of water and sewer lines by a private developer impresses that portion of the business with a "public interest" which would prevent him from profiting from the providing of such services.⁴¹ Once the developer has recovered the costs

36. *Id.*

37. 519 N.E.2d 153 (Ind. Ct. App. 1988).

38. *Id.* at 155.

39. *Id.* at 154.

40. *Id.* at 156.

41. *Id.* at 156-57.

of installation and a reasonable profit for his efforts, he became a trustee of the funds received from that portion of the business and had to account for their use.⁴²

Rasps next argued that the covenant was a personal covenant between HVL Developer and the original lot owners which did not run with the land and bind subsequent purchasers who were not parties to the agreement. The court disagreed pointing out that "the purpose of the restrictive covenant was to assure that sewer and water services would be available to all the lots in the subdivision."⁴³ A covenant is capable of running with the land: (1) when the grantor intends it to run; (2) when there is "privity of estate between the subsequent grantees of the original covenantor and covenantee[; and (3)] when the covenant touches and concerns the land."⁴⁴ Without further discussion, the court concluded that "[t]he covenant here at issue meets all these requirements."⁴⁵

On the final issue, however, the court did agree with the Rasps that they should not be forced to pay the fee to HVL Developer once the sewer and water lines had been transferred to the utility corporations. In the court's opinion, the wording of the covenant indicates that an assignment was contemplated by the parties from the use of the phrase "grantor, its successors or assigns." An assignment transfers to the assignee all the rights, title, and interest of the assignor in the property assigned. Thus, the judgment was reversed and the case remanded to the trial court for a new trial to ascertain the date and terms of the transfer to the utility corporations in order to determine the real party in interest.⁴⁶

In another case involving restrictive covenants, *Rajski v. Tezich*,⁴⁷ the Rajskis purchased a house in a subdivision, and began construction of a two car unattached garage. They were informed by neighbors of the potential violation of restrictive covenants, and the architectural committee of the Homeowners Association made suggestions to bring the building closer to conformity with the covenants. Despite these warnings and without the approval of the architectural committee, the Rajskis continued construction of the garage. The relevant provision

42. *Id.*

43. *Id.* at 157.

44. *Id.*

45. *Id.* One might question whether the assignment of the water and sewer lines to the utility corporations gave them a property interest and whether the benefit touched and concerned the land. Collection of the availability fees benefits the utility corporations directly and only indirectly benefits lot owners by lowering the sewer and water rates.

46. *Id.* at 157-58.

47. 514 N.E.2d 347 (Ind. Ct. App. 1987).

of the covenant provided that unless a violation was corrected within thirty days after notice to cure or terminate was given by certified mail by any person having a right to enforce the covenants, the violator would be liable for liquidated damages in the amount of \$10 (payable to the Homeowners Association) for each day the violation continued, together with attorney fees and court costs.⁴⁸

George Tezich, a homeowner in the subdivision and president of the Homeowners Association, sent the Rajsakis notice by certified mail demanding the removal of the garage within thirty days and invoking the liquidated damages provision contained in the restrictive covenants. Subsequently Tezich, James Hall (another homeowner), and the Homeowners Association filed suit demanding removal of the structure, liquidated damages, and attorney fees. The trial court ordered that the garage either be attached or removed, awarded liquidated damages in the amount of \$2,930 to the date of judgment, and awarded attorney fees of \$3,750.⁴⁹ On appeal, the court found that the liquidated damages provision was unenforceable as a penalty.⁵⁰ The provision had no relation to actual damages as it provided the same sum for a violation of any of the numerous restrictions, some substantial and some trivial, that ranged from the size, design, and locations of structures down to the type of garbage cans that could be used by lot owners. In addition, the court noted that the damages were payable to the Homeowners Association and not the property owners, "at odds with the notion of providing compensation to interested parties for actual injuries."⁵¹

The Rajsakis also argued that the notice of violations sent by Tezich was defective because it was sent by Tezich in his capacity as president of the Homeowners Association. Prior to trial, the lower court had ruled that the Homeowners Association lacked standing to act as a party because the covenant provided that the restrictions were enforceable only by a "property owner."⁵² Since this ruling was not challenged, the Rajsakis argued they were never notified as required by the language of the covenant. In rejecting this argument, the court noted that Tezich was in fact a lot owner entitled to bring suit and give notice. The words "President, Meadowview Third Addition Homeowners Association" following his signature on the notice were merely *descriptio personae* and did not prevent the inference that he was acting in an

48. *Id.* at 348.

49. *Id.*

50. *Id.* at 349.

51. *Id.*

52. *Id.* at 348 n.1.

individual capacity.⁵³ The court vacated the award denominated as liquidated damages and otherwise affirmed the judgment.⁵⁴

IV. DEEDS

A. *Easement vs. Fee*

In *Brown v. Penn Central Corp.*,⁵⁵ owners of lots contiguous to abandoned railroad right-of-way sought to quiet title to the land in themselves. The trial court found that the portion of an 1871 deed conveying a 100-foot wide right-of-way to the grantee-railroad created nothing more than an easement which was extinguished when the railroad ceased to use the property for railroad purposes and quieted title in the lot owners. However, the trial court found the portion of the deed conveying a strip of land adjacent to the right-of-way 200 feet wide and 1000 feet in length "for Depot and Rail Road purposes" conveyed fee simple title to the strip of land in the railroad company.⁵⁶ The court of appeals affirmed the trial court's determination and the lot owners petitioned for transfer.⁵⁷

On petition to transfer, the Indiana Supreme Court set forth certain rules of construction to be used when construing the meaning of a deed: (1) The object is to determine the intent of the parties; (2) where the deed is unambiguous, the intent must be determined from the language of the deed alone; (3) where the grantee prepares the instrument of conveyance, the grantee will be construed in the light most favorable to the grantor; (4) a deed conveying a "right" usually conveys only an easement; and (5) a conveyance of a strip of land without additional language as to the use or purpose for which the land is to be used is construed as passing an estate in fee.⁵⁸ Examining the deed in question under these rules of construction, the court observed that the language of the deed provided that the strip of land was to be used "for Depot and Rail Road purposes," and the granting clause in the pre-printed portion of the deed expressly stated that the grantors were conveying a right of way.⁵⁹ The court of appeals in affirming

53. *Id.* at 349.

54. An additional issue involving whether an award in the amount of \$3,750 in attorney fees was excessive is not discussed.

55. 510 N.E.2d 641 (Ind. 1987).

56. *Id.* at 642.

57. *Id.*

58. *Id.* at 643-44. These rules of construction are discussed and authority cited in the opinion. *Id.*

59. *Id.* at 644.

the decision of the trial court found the deed ambiguous because the portion of the deed conveying the depot property was hand-written into the pre-printed form. However, the supreme court noted that the hand-written portion was merely a description of the boundaries of the railroad right of way, which included the depot property. Furthermore, since the hand-written portion stated that the conveyance was "for Depot and Rail Road purposes," there was no need to speculate as to the intent of the parties in 1871.⁶⁰ The railroad company chose to use the pre-printed form and the language will be construed against it. Finally, the court noted that "[p]ublic policy does not favor the conveyance of strips of land by [fee] simple titles to railroad companies for right-of-way purposes, either by deed or condemnation."⁶¹ Ownership of the land in fee is not necessary for the purpose for which the land was acquired and the severance of the strips from the parent bodies of land "operates adversely to the normal and best use of the property involved."⁶² The court concluded that the railroad acquired only an easement to the land for depot and railroad purposes which was extinguished upon the abandonment of the right of way.

B. Strip of Land Excluded from Deed

In *Maxwell v. Hahn*,⁶³ the Redmonds created two subdivisions on an 8.5-acre tract of land on Dewert Lake in Kosciusko County. They first platted and recorded "Redmond's Second Addition," consisting of thirteen lots. A strip of land between the thirteen lots and the lake was not included in the deeds to the lots. The recorded subdivision plat provided that "[t]he area between the lake and the lots is common ground for the use of the owners of these lots or future lots that may be laid out west of this addition."⁶⁴ Subsequently, the Redmonds platted and recorded the "Third Addition to Redmond Park," consisting of nineteen lots to the west of the Second Addition. The owners of the "Third Addition" lots claimed the right to use the common ground on the lake shore for purposes of swimming, fishing, and the erection of piers to dock their boats. The trial court recognized an easement on behalf of the owners of lots in the Third Addition to swim and fish in the lake, but held that the developers had vested fee simple title to the common area in the owners of the lots in the Second

60. *Id.*

61. *Id.* (quoting *Ross, Inc. v. Legler*, 245 Ind. 655, 659, 199 N.E.2d 346, 347-48 (1964)).

62. 510 N.E.2d at 644.

63. 508 N.E.2d 555 (Ind. Ct. App. 1987).

64. *Id.* at 556.

Addition.⁶⁵ As owners of the fee, the Second Addition lot owners had exclusive riparian rights to erect piers or docks on the lake shore.⁶⁶

On appeal, the Second Addition landowners cited to the court several Indiana Supreme Court decisions holding that the fee to strips of land abutting against highways and bodies of water should vest in the adjacent landowners.⁶⁷ The court noted, however, that where lands are granted according to a plat, the plat becomes a part of the deed with regard to the limit of the land being conveyed.⁶⁸ Here, the language in the plat of the Second Addition clearly indicated that the strip was common ground for the use of both the Second and Third Addition lot owners. This language rebutted the standard presumption that the fee in the strip of land abutting a body of water should be vested in the adjacent landowners.⁶⁹ As co-owners of an easement, all the lot owners had the right to construct, alter, or improve the easement so long as their actions do not unreasonably interfere with the rights of the other co-owners to enjoy the easement. In dictum, the court noted that the owners of the Second Addition had maintained the common area and paid the taxes on the land. They might have acquired title to the common areas by adverse possession but the point was never argued.⁷⁰

C. Delivery

In *ITT Industrial Credit Co. v. R.T.M. Development Co., Inc.*,⁷¹ R.T.M. Development Co., Inc. (RTM) approached the Zimmers and offered to purchase their property for \$100,000. The Zimmers executed a warranty deed to the property to RTM but, on the advice of their attorney and a banker, they inserted the words "Not valid until receipt of full payment" across the top of the deed.⁷² The Zimmers handed the deed to RTM's agent but advised him that the deed was not to be delivered until the purchase price was paid in full (subsequently, the agent surrendered the deed to RTM even though full payment had not been made). On November 7, 1980, RTM executed a mortgage on

65. *Id.* at 557.

66. *Id.*

67. *Id.* at 558.

68. *Id.* (citing *Gary Land Co. v. Griesel*, 179 Ind. 204, 209, 100 N.E. 673, 675 (1913)).

69. "There was no evidence presented to the trial court to support the finding that the conveyance by the plat owners . . . included the land contiguous to Dewart Lake and the lake approaches." *Maxwell*, 508 N.E.2d at 558.

70. *Id.* at n.1.

71. 512 N.E.2d 201 (Ind. Ct. App. 1987).

72. *Id.* at 202.

the property as security for a loan obtained from ITT Industrial Credit Corp. (ITT). Sometime before the closing between the Zimmers and RTM on November 12, 1980, the words at the top of the deed were crossed out and the Zimmers initials were written nearby (subsequently, the trial court found that the Zimmers had not crossed out the words at the top of the deed or written their initials on it).⁷³ At the closing, the Zimmers received \$30,000 but claimed they were told that it was merely a down payment and that the full price would be forthcoming in three months (this was disputed by RTM who claimed they were told they would receive a promissory note for the additional \$70,000 secured by a second mortgage).⁷⁴

In a subsequent action by ITT to foreclose the mortgage on the property, the trial court found that the Zimmers' deed was never delivered and that no right, title or interest ever passed to RTM or ITT.⁷⁵ On appeal, ITT presented two arguments: (1) that the words at the top of the deed created only an equitable lien on the property for the purchase price; and (2) in any event, the Zimmers were estopped by not returning any of the benefits received in exchange for the property.⁷⁶ With regard to the first argument the court agreed that an express reservation in a conveyed deed only creates an equitable interest, but pointed out that this rule applies only when the deed has been delivered.⁷⁷ Delivery is a question of intent and here the intent of the grantors is clear. The Zimmers did not intend the deed to operate as a conveyance until all the consideration had been paid, and where the intent of the grantor is clear it must be given effect.⁷⁸ With regard to the second argument, the court observed that the Zimmers were not estopped because they were unaware of all the facts when they accepted the down payment.⁷⁹ In dictum, the court noted that RTM might have an action against the Zimmers for the return of the down payment money but that this issue was not before the court.⁸⁰

V. EASEMENTS AND LICENSES

A. *Revocability of Licenses and Damages for Revocation*

Although licenses and easements often involve similar types of land use, they are different in several important respects. An easement,

73. *Id.* at 203.

74. *Id.* at 204.

75. *Id.*

76. *Id.* at 203-04.

77. *Id.* at 204.

78. *Id.*

79. *Id.*

80. *Id.* at 205.

being viewed as a conveyance of an interest in land, comes within the Statute of Frauds; whereas, a license, being viewed as a mere privilege to use the land of another, can be created orally. The easement, being a conveyance of an interest in land, is perpetual unless the terms of the grant expressly or by implication indicate the estate is determinable; whereas, the license, being a mere privilege to use the land, is revocable by the licensor at any time.⁸¹ Although an easement comes within the Statute of Frauds, it can be acquired by prescriptive use just as title to land can be acquired by adverse possession.⁸² Likewise, the courts have generally recognized that an easement, like other interests in land, can be created by estoppel or part performance.⁸³

Where a licensee relies to his detriment on the oral promise of a licensor by expending funds or making improvements to the land, courts often find the license has become "irrevocable" or an "oral easement."⁸⁴ The question of the revocability of a license is raised in *Closson Lumber Co. v. Wiseman*.⁸⁵ In 1948 the Closson Lumber Co. (Closson) orally agreed to allow Wiseman to use its unimproved tract of land for ingress and egress to Wiseman's warehouse. Based upon this gratuitous promise, Wiseman installed an overhead door in the north wall of the warehouse, blacktopped Closson's land, and erected a fence on Closson's north property line. In 1981, Closson notified Wiseman that he could no longer use its land to reach the warehouse. Wiseman filed for a declaratory judgment, and the trial court found that he had nothing more than a revocable license.⁸⁶ On appeal, in a memorandum opinion (*Closson I*), the court of appeals found that the license had ripened into an oral easement, but concluded that the easement could be revoked if Wiseman was compensated.⁸⁷ On remand,

81. CUNNINGHAM, *supra* note 3, § 8.1, at 437; *Richter v. Irwin*, 28 Ind. 26 (1867) (easement is an interest in land).

82. CUNNINGHAM, *supra* note 3, § 8.7, at 450-56. In Indiana an easement by prescription can be acquired by open, continuous, adverse use for twenty years. IND. CODE. § 32-5-1-1 (1988).

83. CUNNINGHAM, *supra* note 3, § 8.8 at 456-58; *Dubois County Machine Co. v. Blessinger*, 149 Ind. App. 594, 274 N.E.2d 279 (1971) (recognizing an oral easement under the doctrine of part performance).

84. *E.g.*, *Stoner v. Zucker*, 148 Cal. 516, 83 P. 808 (1906); *Mueller v. Keller*, 18 Ill. 2d 334, 164 N.E.2d 28 (1960); *Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976); *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453, 2 N.W. 639 (1879); *Ricenbaw v. Kraus*, 157 Neb. 723, 61 N.W.2d 350 (1953); *Shepard v. Purvine*, 196 Or. 348, 248 P.2d 352 (1952); *Rerick v. Kern*, 14 Serg. & Rawle 267 (Pa. 1826).

85. 507 N.E.2d 974 (Ind. 1987).

86. *Id.* at 975.

87. *Id.* It is interesting to speculate why the court did not conclude the license had become an irrevocable easement. See CUNNINGHAM, *supra* note 3, § 8.8, at 456-

the trial court found the proper measure of damages to be the difference between the value of the Wiseman property with the easement and the value of the property without the easement, and that “any lost profits and future earnings, proposed alterations and appraisals might be relevant in arriving at those values.”⁸⁸ The trial court then concluded that the decrease in the market value of Wiseman’s property was \$45,000—the cost of extending the warehouse to the west to provide an alternate means of ingress and egress to the business.⁸⁹ The Court of Appeals in a second memorandum opinion (*Closson II*) affirmed.

On petition for transfer, the Indiana Supreme Court disagreed with the court of appeals’ characterization of the interest as a “revocable easement,” noting that if the interest is revocable it is more properly termed a license.⁹⁰ While the court agreed that compensation could be awarded upon revocation of the license, the court disagreed with the court of appeals on the measure of damages. Noting with approval the dissenting opinion by Judge Sullivan in *Closson II*, the court concluded that the award of damages should be limited to the amounts expended upon the disputed parcel, and that consequential damages such as the prospective expenditures to remodel appellee’s warehouse should not be considered.⁹¹ Thus, the trial court’s award of damages was excessive, the opinion of the court of appeals was vacated, and the case was remanded to the trial court.⁹²

In a dissenting opinion, Justice DeBruler observed that the license was to last so long as Wiseman might need it, and that in reliance

58. Interestingly enough, the position taken by the court is similar to that recommended by the Restatement of Property. RESTATEMENT OF PROPERTY § 519(4) (1944). The Restatement would allow the license to become an easement, but instead of becoming irrevocable, the easement would last only as long as necessary for the grantee to recover any loss resulting from the detrimental reliance. Here, the court is awarding damages directly instead of granting specific performance for a time period sufficient to accomplish the same purpose, a return to the *status quo*.

88. *Closson*, 507 N.E.2d at 975.

89. *Id.* at 976.

90. *Id.* at 977.

91. *Id.* It is not clear why the court believed plaintiff’s recovery was limited to expenditures on the defendant’s land. This might be based upon an assumption that expenditures made upon the plaintiff’s property will be retained by the plaintiff and therefore there is no reason for him to be compensated. In reality, the facts suggest that plaintiff will be left with an overhead door of little or no value without the license or additional expenditures. Clearly the improvements were made for use with the license and without the license the improvements would not have been made.

92. The court observed that the appellee paid no consideration for the oral agreement, never paid the real estate taxes or other assessments on the land, and never compensated appellant for the use of the property. *Id.*

on this promise he expended capital and labor on both the dominant and servient tenements.⁹³ These facts led the court of appeals to conclude in *Closson I* that compensation was due Wiseman for the revocation and this became the law of the case.⁹⁴ Restitution is intended to restore the parties to an equivalent position. In Justice DeBruler's view, the majority opinion does not do this because it fails to take into consideration improvements made on the dominant estate in reliance on the promised license.⁹⁵ Justice DeBruler stresses the point with an example of a farmer who allows his neighbor to cross his land to reach the neighbor's field. The farmer then watches his neighbor plow and plant the field and when the work is done, the farmer revokes the license before his neighbor can harvest his crops. How can the neighbor be restored to the *status quo* without recovery of his investments on his own land?⁹⁶

B. Statute of Frauds: Easement Created by Grantee in Deed Poll

In *Chase v. Nelson*,⁹⁷ a 1921 deed from William and Fannie Ledbetter (the Chases' predecessors in title) to Lenore Alspaugh (the Nelsons' predecessor in title) provided that the grantors and the grantee each agreed to furnish three feet and five inches of land for the use of a common driveway between their lots. The three feet and five inches was to be taken off the east side of the grantors' lot and off the west side of the grantee's lot and was to extend for a distance of seventy-eight feet.⁹⁸ The Chases filed this action alleging the Nelsons had interfered with the use of the common driveway by continuously parking cars on it. The trial court found the Chases had no easement over the Nelsons' property because (1) the 1921 deed failed to identify the dominant and servient tenements and (2) it was not signed by Alspaugh, the Nelsons' predecessor in interest.⁹⁹

On appeal, the court found that the wording in the 1921 deed adequately described the dominant and servient tenements by the reservation of an easement in favor of the grantors on the three-foot five-inch strip on the west side of the property conveyed to Alspaugh and by the grant to Alspaugh of an easement over the three-foot five-

93. *Id.* at 978 (DeBruler, J., dissenting).

94. *Id.* The majority opinion held that the court of appeals reversal in *Closson I* did not decide the scope of damages to be awarded upon revocation of the license. *Id.* at 977.

95. *Id.* at 978 (DeBruler, J., dissenting).

96. *Id.*

97. 507 N.E.2d 640 (Ind. Ct. App. 1987).

98. *Id.* at 641.

99. *Id.* at 641-42.

inch strip of land on the east side of the land retained by the Ledbetters.¹⁰⁰ With regard to the Statute of Frauds requirement that the conveyance of an interest in land must be signed by the party to be charged,¹⁰¹ the court concluded that this requirement does not apply when an interest is conveyed by the grantee in a deed.¹⁰² Acceptance of the deed by the grantee brings the easement into existence without any further act on the part of the grantee. Acceptance of the deed is acceptance of the express easement created in the deed.¹⁰³ Having found the easement valid, the court remanded the case for further findings of fact as to whether the Nelsons' interference, if any, justified the granting of injunctive relief.¹⁰⁴

C. Prescriptive Easement: Quiet Title Action as Res Judicata

In *Popp v. Hardy*,¹⁰⁵ Louis Popp, now deceased, brought an action to enjoin interference with an alleged twenty-foot prescriptive right-of-way across the land of Claude and Rose Hardy (Hardys).¹⁰⁶ The trial court granted the Hardys' motion for a summary judgment.¹⁰⁷ In so doing, the trial court found that (1) a 1966 quiet title decree quieting title to the disputed strip of land in Carl and Myrtle Elrod (the Elrods), the Hardys' predecessors in title, operated to foreclose Popp's claim to a prescriptive easement, and that (2) Popp's use of the right-of-way was permissive and not adverse.¹⁰⁸ Popp appealed.

100. *Id.* at 642-43.

101. IND. CODE § 32-2-1-1 (1988) provides:

No action shall be brought . . . [u]pon any contract for the sale of lands . . . [u]nless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith.

102. *Chase*, 507 N.E.2d at 643.

103. *Id.* While the court could find no Indiana cases directly on point, it did find two cases which could be used by analogy as authority. In *Thiebaud v. Union Furniture Co.*, 143 Ind. 340, 42 N.E. 741 (1895), the court found a contract written in a deed with the knowledge and consent of the grantee was equivalent to a signature on the contract. Similarly, in *Brendonwood Common v. Franklin*, 403 N.E.2d 1136 (Ind. Ct. App. 1980), the court held that a covenant running with the land was binding on the grantee of a deed poll because the acceptance of the deed satisfies the statute of frauds and imposes the undertakings in the deed upon the grantee.

104. *Chase*, 507 N.E.2d at 644.

105. 508 N.E.2d 1282 (Ind. Ct. App. 1987).

106. After Louis' death, his two children, James Popp and Ruth Sipes (James and Ruth), as co-executors of their father's estate, were substituted as party plaintiffs. *Id.* at 1284.

107. *Id.*

108. *Id.* The trial court also found that the alleged easement was not sufficiently described. *Id.* However, on appeal, the court summarily concluded that the easement was sufficiently described for purposes of creating an issue in a summary judgment proceeding. *Id.* at 1287.

The first issue addressed on appeal was the trial court's finding that the quiet title decree of October 18, 1966, was *res judicata* with regard to Popp's claim. If the 1966 decree was *res judicata*, it would foreclose Popp's claim to a prescriptive easement, because acquisition of a prescriptive easement requires actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for twenty years under a claim of right with the knowledge and acquiescence of the owner,¹⁰⁹ and twenty years had not elapsed between the date of the decree and Popp's action. In finding the decree was not *res judicata*, the court noted that while the complaint in the quiet title action filed by Bertha Earl is styled "Complaint To Quiet Title Against The World," it named specific defendants, including the Elrods, and listed specific defects in the title from 1850 to 1954 by book and page number.¹¹⁰ Popp was not named as a party in the action nor was his prescriptive easement listed as a defect in title.¹¹¹ The Hardys argued that Popp was included within the complaint by the words "as well as all persons who might assert any title, claim, or interest in and to the real estate, all of whom are unknown to the plaintiff."¹¹² The court rejected this argument pointing out that it was difficult to see how a person openly using the plaintiff's land could be "unknown."¹¹³ The court observed that

Before *res judicata* operates to bar a subsequent action it must be shown: (1) that the prior court had jurisdiction; (2) the matter now in issue was or might have been determined in the prior suit; (3) that the former controversy was between the same parties or their privies; and (4) that the prior judgment was issued on the merits.¹¹⁴

In this case, Popp was not named as a party nor did the suit by Earl against the Elrods to determine fee simple title to the twenty-foot strip encompass Popp's claim to an easement over the same land. Since Popp's claim was adverse to the Elrods' interest, he was not represented in the suit nor was a judgment entered on the merits.¹¹⁵ Thus, the quiet title action was not *res judicata*.

On the issue of whether Popp's use of the land was permissive and not adverse, the Hardys argued that the admission in the deposition

109. *Id.* at 1288 (citing IND. CODE § 32-5-1-1 (West 1982); *Searcy v. LaGrottee*, 175 Ind. App. 498, 372 N.E.2d 755 (1978)).

110. *Popp*, 508 N.E.2d at 1285.

111. *Id.* at 1285-86.

112. *Id.* at 1285.

113. *Id.* at 1287.

114. *Id.* at 1286 (citing *American National Bank & Trust Co. v. Hines* 143 Ind. App. 217, 239 N.E.2d 589 (1968)).

115. *Popp*, 508 N.E.2d at 1286.

of James Popp, Louis Popp's son, that after 1959 he and his father had asked permission from the Elrods and the Hardys to use the roadway is fatal to the claim of a prescriptive easement.¹¹⁶ The Hardys argued that James should not be able to create an issue of fact with regard to the nature of the use by submitting an affidavit contradicting his own prior testimony. The court agreed with this general principle, but observed that in this case there is evidence corroborating James' affidavit, including the testimony of independent witnesses, some of whom were members of the families of predecessors in the Hardy's title. In addition, there was evidence that the prescriptive easement may have already existed by 1959.¹¹⁷ The court concluded that a material question of fact existed and directed the trial court to overrule both motions for summary judgment and set the cause for trial on the merits.¹¹⁸

VI. LANDLORD AND TENANT

A. *Breach of Lease: Termination*

Under traditional landlord-tenant law, the breach of a lease provision by one of the parties does not permit the other party to terminate the lease absent a statute or an express provision in the lease so providing.¹¹⁹ Leases, however, often contain a "forfeiture" provision giving one party, usually the landlord, the power to elect to treat the breach of a material lease provision by the other as a termination of the lease.¹²⁰ In such a case, the leasehold comes to an end and the

116. *Id.* at 1287. A prescriptive easement is acquired by actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for twenty years under a claim of right. IND. CODE § 32-5-1-1 (1988).

117. *Popp*, 508 N.E.2d at 1288. Since 1928, Louis and his son James had used the roadway across Hardy's property to reach an adjoining fifteen-acre tract of land which Popp owned. Neither the Hardys nor their predecessors in title had ever complained of or objected to Popp's use of the right of way. *Id.* at 1284.

118. *Id.* at 1289.

119. CUNNINGHAM, *supra* note 3, § 6.76, at 393-95. As a general rule, a breach of a covenant in the lease does not work a forfeiture unless the lease so provides. *Churchwell v. Coller & Stoner Bldg. Co.*, 179 Ind. App. 357, 385 N.E.2d 492 (1979) (citing 49 AM. JUR. 2D, *Landlord and Tenant* § 1021 (1970)).

IND. CODE § 32-7-1-5 (1988) provides that the failure of the tenant to pay the rent when due shall terminate the lease upon ten-day notice to quit. Notice to quit is not required where the rent is payable in advance; where the term of the lease has expired; where a tenant at will has committed waste; in the case of a tenant at sufferance; or where the relation of landlord or tenant does not exist. IND. CODE § 32-7-1-7 (1988).

120. CUNNINGHAM, *supra* note 3, § 6.76, at 393-95. A forfeiture term will not be enforced, however, unless the breach goes to the heart of the contract. *Ogle v. Wright*, 172 Ind. App. 309, 360 N.E.2d 240, 244 (1977).

landlord can evict the tenant without any further notice.¹²¹ The right of the landlord to terminate the lease and evict the tenant upon his breach of a lease provision was raised in two cases under review. In *Halliday v. Auburn Mobile Homes*,¹²² tenant violated park rules prohibiting the keeping of dogs. Tenant was given a pamphlet containing the park rules and regulations and the rules and regulations were posted in the park. Landlord, upon discovering that tenant had a dog in his mobile home gave him ten-day notice to quit, and when he failed to do so filed an action for ejectment. The trial court ordered the tenant to vacate.¹²³

On appeal, tenant argued he was entitled to one-month notice.¹²⁴ In rejecting this argument, the court observed that tenant had agreed in the contract that he could be ejected from the park for violation of any rules or regulations of the park which were properly posted.¹²⁵ Thus, the tenancy was terminated upon violation of the posted rules and the tenant was no longer entitled to notice.¹²⁶ The fact that he had found a home for the dog and that it would be expensive to move the double-wide mobile home did not impress the court. He who seeks equity must do so with clean hands.¹²⁷

In *Page Two, Inc. v. P.C. Management, Inc.*,¹²⁸ the court addressed two issues which frequently arise in termination actions for breach of lease: (1) whether the breach is material; and (2) whether the landlord has waived the remedy of termination by his subsequent actions. Through a series of assignments, a group of corporations and individuals, referred to collectively as Page Two, acquired the principle lease on a building in Indianapolis. Prior to the assignment, the second floor of the building

121. Since the termination ends the lease, the tenant becomes a tenant at sufferance and the landlord may proceed to evict the tenant pursuant to IND. CODE § 32-7-3-1 (1988). No notice is required to evict a tenant at sufferance. IND. CODE § 32-7-1-7 (1988).

122. 511 N.E.2d 1086 (Ind. Ct. App. 1987).

123. *Id.* at 1087.

124. Where the tenancy is from month to month, the tenant is entitled to one month's notice. IND. CODE § 32-7-1-3 (1988).

125. *Halliday*, 511 N.E.2d at 1087-88. In a footnote the court cited the statute specifically regulating mobile home parks, IND. CODE § 13-1-7-34 (1988), which provides, "The owner, operator, or caretaker of any mobile home park may eject any person from the premises . . . for the violation of any rule of the park which is publicly posted within the park." *Id.* at 1088 n.2

126. In effect the tenant becomes a tenant at sufferance when he remains in possession after the tenancy has expired. A tenant at sufferance can be evicted by the owner of the premises pursuant to IND. CODE § 32-7-3-1 (1988). No notice is required to evict a tenant at sufferance. IND. CODE § 32-7-1-7 (1988).

127. *Halliday*, 511 N.E.2d at 1089.

128. 517 N.E.2d 103 (Ind. Ct. App. 1987).

had been sublet to P.C. Management, Inc, who operated a comedy club on the sublet premises. Upon the assignment, Page Two became the sublessor. Subsequently, P.C. Management closed its comedy club in May 1986, but continued to use the subleased premises for storage. On September 8, 1986, P.C. Management sent a letter notifying Page Two that it intended to exercise the first two-year renewal option under the sublease for a term commencing on November 15, 1986. By letter dated October 29, 1986, Page Two notified P.C. Management that it was in default under the terms of the sublease, and by letter dated November 13, 1986, Page Two declared the lease terminated and demanded possession. Page Two subsequently refused to accept the monthly rental payment tendered by P. C. Management.¹²⁹

Page Two alleged violations of paragraphs 7 and 8 of the sublease. Paragraph 7 provided that "Sublessee shall pay for utilities used as determined on the basis of the square footage of the sublet premises to the square footage of the premises, wherein such utilities are used."¹³⁰ When Page Two became sublessor, P.C. Management's portion of the utilities, based on the square footage computation, was determined to be 20 percent (20%). A few days after the comedy club moved in May 1986, Page Two had the air conditioning and heating duct work disconnected from the sublet premises. Nevertheless, in July 1986, P.C. Management received a statement for electricity from June 5, to July 7, 1986, computed on the 20% basis even though its actual use for this period was limited to one exit light, an alarm system, and an occasional use of lights. P.C. Management protested the charges as excessive and refused payment. In August and September 1986, Page Two again submitted 20% billings which P.C. Management again protested and refused to pay. Page Two did not respond to these protests or send further statements, but it did continue to accept the monthly rental payments.¹³¹

Paragraph 8 provided that "Sublessee shall maintain fire, casualty and personal injury insurance. . . ."¹³² P.C. Management cancelled its general liability insurance coverage in June 1986, after it had closed the comedy club. The court noted that Page Two had never inquired about or requested proof of insurance coverage until the letter dated October 29, 1986, advising P.C. Management that it was in default of the sublease agreement. On November 18, 1986, P.C. Management made a conditional offer to reinstate the general liability insurance which Page Two refused.¹³³

129. *Id.* at 104-05.

130. *Id.* at 105.

131. *Id.* at 104.

132. *Id.* at 105.

133. *Id.* at 104-05.

In an action by Page Two for a declaratory judgment, the court awarded possession to P.C. Management on the theory that the sublessor had waived the right to terminate the sublease.¹³⁴ With regard to the utility dispute, the trial court found that by accepting the rent after each of the three protests, it had waived the utility dispute as a basis for termination. In addition, Page Two took no steps to resolve the issue and its stonewalling was not a mere delay in the exercise of its right of termination, but was delay coupled with knowledge that payment was not forthcoming.¹³⁵

On appeal, Page Two argued that it could not have waived the right to terminate the lease for the nonpayment of utilities because the right to declare a default had not yet become fixed at the time it accepted the rent, and there can be no waiver based on the acceptance of a rental payment before the time the landlord has the right to forfeit the lease. Page Two appeared to be arguing that it had no right to declare a forfeiture under paragraph 18 of the sublease until it had given ten-day notice of default or unless the utilities had not been paid for thirty days.¹³⁶ The court rejected this argument pointing out that the statement from P.C. Management that the utilities would not be paid was an anticipatory breach of the utility provision which allowed the other party to treat the lease as terminated. Thus, the court found that Page Two's acceptance of the rent after the protest statement, constituted a waiver of the contractual right to terminate the sublease.¹³⁷

With regard to the breach of the covenant to insure, the trial court likewise found that Page Two had waived the insurance default, but in addition concluded that "[t]he matter of insurance was a minor default . . . which does not justify the forfeiture of the Sublease Agreement. . . ."¹³⁸ On appeal, the court affirmed the trial court decision on the alternative ground of lack of material breach.¹³⁹ A provision in a lease allowing the breach of a covenant to work a forfeiture will be enforced only if the breach is material. To determine whether or not the breach is material the court turned to the Restatement of Contracts 275, cited with approval in *Goff v. Graham*.¹⁴⁰ Factors to be considered are:

134. *Id.* at 105-07.

135. *Id.* at 107.

136. *Id.* at 105.

137. *Id.* at 107.

138. *Id.* (quoting Record at 163).

139. *Id.* at 107-08.

140. 159 Ind. App. 324, 306 N.E.2d 758 (1974).

- (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
- (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
- (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
- (d) The greater or lesser hardship on the party failing to perform in terminating the contract;
- (e) The wilful, negligent, or innocent behavior of the party failing to perform;
- (f) The greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract.¹⁴¹

In examining the alleged breach under the Restatement standards, the court concluded that the evidence did not lead to a conclusion contrary to that reached by the trial court. Page Two suffered no loss as a result of the omitted insurance coverage, the use of the premises by the sublessee after termination of the insurance coverage did not present a significant risk of loss to Page Two; Page Two never concerned itself with the question of insurance and P.C. Management offered to reinstate the coverage.¹⁴² The decision of the trial court was affirmed.

B. Crops as Rent

In Indiana, the landlord-tenant relationship itself does not create a lien on the personal property of the tenant for the payment of rent apart from a statute or agreement providing otherwise.¹⁴³ Indiana Code section 32-7-1-18, however, provides that the landlord may acquire a lien on crops grown by the tenant where the tenant has agreed to pay as rent a part of the crops grown.¹⁴⁴ The nature of the lien and the

141. *Page Two*, 517 N.E.2d at 107-08 (quoting RESTATEMENT OF CONTRACTS § 275) (1979)).

142. *Page Two*, 517 N.E.2d at 108.

143. *E.g.*, *Cowles v. Bick*, 191 Ind. 243, 131 N.E. 36 (1921); *Schuler v. Langdon*, 433 N.E.2d 841, 845 n.4 (Ind. Ct. App. 1982); *Cannon v. Northside Transfer Co., Inc.*, 427 N.E.2d 712 (Ind. Ct. App. 1981); *Highland Realty, Inc. v. Indianapolis Morris Plan, Corp.*, 136 Ind. App. 208, 216, 199 N.E.2d 110, 114 (1969).

There are at least two statutory provisions which give a landlord a lien on the tenant's property for the nonpayment of rent. IND. CODE § 32-7-1-18 (1988) provides that the landlord may acquire a lien on crops grown on the leased premises where the tenant has agreed to pay a part of the crop as rent. IND. CODE § 13-1-7-33 (1988) provides that the owner, operator or caretaker of a mobile home park shall have an innkeeper's lien upon the property of the the person renting the lot for the nonpayment of rent. *See Nicholson's Mobile Home Sales, Inc. v. Schramm*, 164 Ind. App. 598, 330 N.E.2d 598 (1975).

144. IND. CODE § 32-7-1-18 (1988).

requirements for its perfection were raised in *Farm Bureau Co-Op v. Deseret Title Holding Corp.*¹⁴⁵ Tenant leased 1030 acres of land from Deseret Title Holding Corporation (Deseret) and agreed to pay as annual rent for 1983 "50 bushels of #2 yellow grade corn per acre."¹⁴⁶ The lease also provided that in the event of a crop disaster from natural causes, defined "as a year in which the county average production as reported by USDA falls 30% below the most recent 5 year (sic) USDA average for the county for the grain being produced," the tenant could deliver 50% of the crop in lieu of the bushel rent stated in the lease.¹⁴⁷ The Montgomery County Farm Bureau Cooperative Association (Co-Op) agreed to supply fertilizers and chemicals to the tenant to put the crops out in exchange for a security interest on the crops to be grown in 1983, which it would hold until tenant paid for the materials. The crop yield was much lower than expected and when payment was not forthcoming, Co-Op filed suit to foreclose its security interest, naming Deseret and others who might have an interest in the crop. Deseret filed an answer claiming a 50% interest in the crop. The trial court agreed and Co-Op appealed.¹⁴⁸

The court began by pointing out that a lease of farmland which provides that the tenant is to pay as rent a certain number of bushels of grain per acre is a "crop paid as rent" agreement which does not vest any title to the crops in the landlord.¹⁴⁹ Whereas an agreement by the tenant to pay the landlord a percentage of the crop to be grown is a "crop share" arrangement which places the landlord and tenant in the position of tenants in common of the grain and gives the landlord a right to his share of the property "as soon as the grain was put into sacks."¹⁵⁰ Reviewing the lease in this case, the court concluded that it was a crop paid as rent agreement and not a crop share agreement.¹⁵¹ In dictum, the court stated that even if Deseret had proven the existence of crop disaster conditions allowing the tenant to pay 50 percent of the crop in lieu of the bushel rent, the bushel provision in the lease would still have prevented it from being construed a crop share agreement.¹⁵² Thus, to acquire a lien on the crop the landlord must comply with the provisions of Indiana Code section 32-7-1-18(b) and file in the recorder's office in the county in which the

145. 513 N.E.2d 193 (Ind. Ct. App. 1987).

146. *Id.* at 194.

147. *Id.* at 195-96 n.1

148. *Id.* at 194-95.

149. *Id.* at 195.

150. *Id.*

151. *Id.* at 195-96.

152. *Id.* at 196.

lease premises is located, at least thirty days prior to the maturity of the crop and during the year in which the crop is grown, notice of his intent to hold a lien upon the crop in the amount of the rent. Since this was not done, the landlord had no lien on the crops and the judgment of the trial court was reversed and remanded.¹⁵³

C. *Holdover Tenants*

When a tenant holds over beyond the term of a lease, the landlord has three options: (1) the landlord can treat the tenant as wrongfully holding over; (2) the landlord can offer the tenant a new lease; or (3) the landlord can treat the lease as continuing, in which case the expired lease continues to operate for a new term equal to the length of the original term, except that where the term of the original lease was for more than a year, the holdover term is from year to year.¹⁵⁴ Where the landlord takes no action to evict the tenant and continues to accept the rent when it is tendered, it is presumed that the landlord has chosen option (3). In such a case, the terms and conditions of the original lease will continue to operate during the hold-over term.¹⁵⁵ This latter point was dramatically illustrated in *Penmanta Corp. v. Hollis*.¹⁵⁶ Edward Hollis and his wife operated a business known as the Toy Chest in Nashville, Indiana. In addition to selling toys, crafts and collectibles, the business included a miniature circus exhibit which Hollis had hand carved in quarter-inch scale portraying the Hagenbeck-Wallace Circus as it appeared in 1934. Hollis charged a small fee to view the exhibit.¹⁵⁷

The business was located in a building owned by the Penmanta Corporation (Penmanta). The three-year written lease between Hollis and Penmanta expired on December 31, 1982, but Hollis remained in possession and continued to operate the business. On August 13, 1983, the hand-carved miniature circus was damaged in a fire caused by the failure of the landlord to maintain the premises. The expired lease contained an exculpatory clause which barred any claim against Penmanta for damage or injury to Hollis or his property resulting from the failure of Penmanta to keep the premises in repair.¹⁵⁸ In reversing a jury verdict and judgment in favor of Hollis, the court concluded

153. *Id.*

154. *City of Bloomington v. Kurzuzovich*, 517 N.E.2d 408, 411 (Ind. Ct. App. 1987).

155. *Id.*

156. 520 N.E.2d 120 (Ind. Ct. App. 1988).

157. *Id.* at 121.

158. *Id.*

that "when a tenant holds over [at the end of the term], and the lessor does not treat the tenant as a trespasser by evicting him," absent an agreement to the contrary, "the parties are deemed to have continued the tenancy under the terms of the expired lease."¹⁵⁹ The court rejected Hollis' argument that because a provision in the lease required the written consent of Penmanta to hold over under the lease and this was not done, this rebutted the legal presumption that the parties intended to continue under the terms of the expired lease. The court found that the waiver of this provision by the landlord did not show a contrary intention.¹⁶⁰ Penmanta unconditionally accepted the rent and allowed Hollis to continue in possession some eight and a half months after the lease had expired before the fire occurred. Thus, the general rule applied that when a tenant holds over beyond the term of the lease, the lease is renewed under the same terms and subject to the same conditions as the original lease, including the exculpatory clause. The only change being that if the original lease is for a term of more than one year, the holdover term is from year to year. The court concluded the trial court was in error in not granting Penmanta's motion for summary judgment and reversed and remanded the case.¹⁶¹ In a concurring opinion, Judge Sullivan noted that perhaps "contractual provisions particularly disfavored in the law, such as an exculpatory provision, might be excluded from the terms and conditions of a holdover tenancy" but that such a determination should come from the General Assembly or the Indiana Supreme Court.¹⁶²

VII. RECORDING: CONSTRUCTIVE NOTICE

Traditionally, the recording of an instrument not entitled to be recorded is not constructive notice of the interest created in the instrument. Thus, a subsequent purchaser for value without actual knowledge of the instrument (b.f.p.) will take the property free of the interest.¹⁶³ This rule has been criticized for protecting those who negligently fail to search the public records while charging those who diligently search the public records with actual notice of anything they discover as a result of the search.¹⁶⁴ The question of whether the

159. *Id.* at 122 (quoting *Mooney-Mueller-Ward, Inc. v. Woods*, 175 Ind. App. 302, 305 n.1., 371 N.E.2d 400, 403 n.1. (1978)).

160. *Penmanta*, 520 N.E.2d at 122.

161. *Id.* at 122-23.

162. *Id.* at 123 (Sullivan, J., concurring).

163. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 219 (1962). In Indiana, to defeat the prior interest, the b.f.p. must also properly record his interest first under Indiana's race-notice recording act. IND. CODE § 32-1-2-16 (1988).

164. J. CRIBBET, *supra* note 163, at 220.

recording of an instrument not entitled to be recorded should operate as constructive notice was raised in *In Re Sandy Ridge Oil Co., Inc.*¹⁶⁵

Sandy Ridge Oil Company (Sandy Ridge) executed mortgages on its oil and gas leases on six oil wells (only one mortgage is in issue) as security for the payment of the note to Halliburton Services. (Halliburton). In a subsequent Chapter 11 bankruptcy proceeding, the debtor in possession sought to avoid the mortgage under 544(a)(3) of the Bankruptcy Code,¹⁶⁶ which permits a trustee to avoid any transfer voidable by a b.f.p. Sandy Ridge argues that the mortgage was voidable because the name of the person who prepared the instrument was not included as required by Indiana Code section 36-2-11-15(b), and thus its recording did not provide constructive notice.¹⁶⁷ The United States Court of Appeals for the Seventh Circuit certified the question of constructive notice to the Indiana Supreme Court under Rule 15(O) of the Indiana Rules of Appellate Procedure:

Does a recorded instrument conveying . . . or otherwise disposing of an interest in or lien on property that does not disclose the name of the preparer as required by Ind. Code 36-2-11-15(b) nevertheless impart constructive notice to a bona fide purchaser?¹⁶⁸

The Indiana Supreme Court began by noting that while there are no Indiana cases specifically addressing the effect of the recording of an instrument without the name of the preparer as required by the statute, the general rule is that the recording of an instrument not entitled to be recorded does not afford constructive notice, citing numerous cases in support of this principle.¹⁶⁹ But the court also noted that the cases offered no supporting rationale for the rule.¹⁷⁰ Halliburton argued that the legislature did not intend a strict interpretation of Indiana Code section 36-2-11-15(b) (Section 15) and offered as support for this position the curative provision of Indiana Code section 36-2-11-16 (Section 16) which provides that the receiving and recording of an instrument by the county recorder is conclusive proof of compliance with Section 16.¹⁷¹ Appellee argued that the existence of the curative provision in Section 16 but not in Section 15 shows an intent to exclude the curative provision from Section 15. The court observed that the

165. 510 N.E.2d 667 (Ind. 1987).

166. 11 U.S.C. § 544(a)(3) (1982).

167. IND. CODE § 36-2-11-15(b) (1988).

168. *Sandy Ridge*, 510 N.E.2d at 669-70.

169. *Id.* at 669.

170. *Id.*

171. IND. CODE. § 36-2-11-15(b) (1988); IND. CODE § 36-2-11-16 (1988).

two sections were enacted separately and that they have not been subsequently considered as companion sections. The curative provision of Section 16 predated the requirement of the preparer's name in Section 15, and thus, it can not be argued that the curative provision was drafted either to exclude or apply to the omission of the preparer's name.¹⁷²

Halliburton also argued that the only reason for the requirement that the preparer's name be noted on the instrument was to guard against the unauthorized practice of law, and thus Section 15 should not be given the strict interpretation urged by the Appellee. The court agreed, observing that the omission of the name of the preparer does not affect the validity of the conveyance or encumbrance.¹⁷³ All the requirements necessary for a valid conveyance or encumbrance appear on the face of the instrument and the noting of the preparer's name "does not enhance the protection of any particular identifiable property interest."¹⁷⁴ Also, the legislature failed to indicate the legal consequences which should flow from a violation of the statute, which in the opinion of the court suggested that "[i]f the General Assembly intended to strip a mortgagee of his rights as against a subsequent purchaser . . . it chose to express that intention in a very guarded way."¹⁷⁵ The court then cited, *Bown & Sons v. Honabarger*,¹⁷⁶ an Ohio Supreme Court decision holding that the purpose of a nearly identical statute was to prevent the unauthorized practice of law.¹⁷⁷ Since enactment of Section 15 "came on the heels of the Ohio statute," the court speculated that Section 15 "may well have been based in substance and purpose on the Ohio statute,"¹⁷⁸ and that the deterrence of the unauthorized practice of law "bears no relation to the legality of the conveyance or encumbrance," and "should not invalidate the clear and undoubted notice which record of the instrument imparts."¹⁷⁹ Having reached this conclusion, the court answered the certified question in the affirmative, that the recordation of an instrument not complying with the requirements of Section 15 imparts constructive notice to a subsequent purchaser.¹⁸⁰

One question left partially unanswered by the court is whether any of the other statutory requirements for recording will be held to be

172. *Sandy Ridge*, 510 N.E.2d at 669-70.

173. *Id.* at 670.

174. *Id.*

175. *Id.* at 671.

176. 171 Ohio St. 247, 168 N.E.2d 880 (1960).

177. *Id.*

178. *Sandy Ridge*, 510 N.E.2d at 671.

179. *Id.*

180. *Id.*

exempt from the general rule. The court did issue a *caveat* suggesting that not all defects would be ignored:

We emphasize that the recording requirements which affect the nature of the interest and the formalities of execution, if absent from a recorded instrument, will not be excused so as to permit the improper document to be afforded constructive notice. By our decision today, we hold only that the omission of the preparer's name, contrary to the requirements of Section 15, does not operate to deprive a recorded document of the constructive notice to which it would otherwise be entitled.¹⁸¹

In a dissenting opinion, in which Justice Givens concurred, Justice Pivarnik observed that the wording of the statute is clear and unambiguous. A mortgage may be received for recordation only if the name of the person who prepared the instrument is indicated at the end of the document. It is presumptuous for the court to attempt to determine the purpose of the legislation absent any ambiguity in the statute.¹⁸²

VIII. RULE AGAINST PERPETUITIES

In *Brown v. American Fletcher National Bank*,¹⁸³ testator's daughter Zilpha, the income beneficiary of a testamentary trust, alleged that the provision dividing the corpus of the trust among the testator's great-grandchildren violated the rule against perpetuities.

The provisions of the trust required the trustee to pay the income from the trust to Zilpha so long as she should live. Upon her death, trustee was to divide the principal of the trust between three named great-grandchildren (Guy Allen Brown, Danny Jay Brown, and Barry Jon Brown) and any afterborn children of the marriage of Norman S. Brown and Nancy Brown. There was also a provision for the issue of any great-grandchildren not surviving. If any of the great-grandchildren were twenty-five years of age at Zilpha's death, the trustee was to distribute to said great-grandchild his respective share. Until each great-grandchild attained the age of twenty-five the trustee was to "pay the net income from the respective funds to said grandchild as the Trustee may deem advisable to provide properly for his welfare."¹⁸⁴

181. *Id.*

182. *Id.* at 671-73 (Pivarnik, J., dissenting).

183. 519 N.E.2d 166 (Ind. Ct. App. 1988).

184. *Id.* at 167.

On appeal from a summary judgment upholding the trust, Zilpha argued that her father's testamentary scheme violated the rule against perpetuities because the interest of a great-grandchild might vest more than twenty-one years after the death of the lives in being at the testator's death.¹⁸⁵ Zilpha relied on *Merrill v. Wimmer*,¹⁸⁶ as authority for her position. In *Merrill*, the provision of a testamentary trust distributing the corpus to the testator's grandchildren when the youngest grandchild reached the age of twenty-five was held to violate the rule and the trust was declared void.¹⁸⁷

The court observed that while the wording of the trust in *Merrill* may at first appear similar, in fact, the two trusts are fundamentally different. In *Merrill* the income from the trust was to be paid to the children and the right to the principal of the trust did not vest in the grandchildren until the youngest grandchild reached the age of twenty-five, a period beyond the rule. In this case, upon the death of the life tenant the trust is to be divided into individual shares and each great-grandchild is to have an immediate right to the income from his respective share and an absolute right to receive his respective share of the corpus upon reaching the age of twenty-five. The immediate right of a beneficiary to all or a part of the income from the corpus of the trust is an indication that his interest in the corpus is vested.¹⁸⁸

Zilpha's final argument dealt with the class gift problem and what is known as the "all or nothing" rule. In order for a class gift to be valid, the interest of each member of the class must vest within the rule. If the interest of even one member of the class can vest beyond the period of the rule, the entire gift fails.¹⁸⁹ Zilpha argued that since great-grandchildren could be born more than twenty-one years after the death of the lives in being at the creation of the interest the entire interest failed. This argument at first appears valid, but, as the court noted, the gift is to named great-grandchildren and the afterborn children of the marriage of Norman and Nancy Brown.¹⁹⁰ Thus the wording of the trust limits the class of beneficiaries to a group of great-grandchildren that are alive (named) or who will be determined within the lifetime of Norman and Nancy Brown (lives in being). In

185. The rule requires that an interest "must vest, if at all, no later than twenty-one (21) years after a life or lives in being at the creation of the interest." IND. CODE § 32-1-4-1 (1988).

186. 481 N.E.2d 1294 (Ind. 1985).

187. *Id.*

188. *Brown*, 519 N.E.2d at 168; see also L. SIMES, THE LAW OF FUTURE INTERESTS § 93, at 192-93 (2d ed. 1966).

189. L. SIMES, *supra* note 188, at § 134, at 289-92.

190. *Brown*, 519 N.E.2d at 169.

addition, as the trustee argued, the trust is to be divided into shares at the death of Zilpha and thus, under the "rule of convenience," the class will close when it becomes reasonably necessary to do so.¹⁹¹ The court observed that in either situation, Zilpha's death, as the trustee argues, or the death of Norman or Nancy Brown after which time no new members can be born, the class will close and the interests will vest within the rule.¹⁹² The judgment of the trial court was affirmed.

IX. VENDOR-PURCHASER

In *Baker v. Townsend*,¹⁹³ a contract for sale with a condition precedent, the Townsends agreed to purchase a lot in Howard County from the Bakers "contingent upon obtaining a permit from the Health Department for the building of a house, well, and septic tank."¹⁹⁴ This provision was inserted into the real estate contract because, without a subsurface tile drain across land owned by others, the real estate could not be approved for a subdivision lot on which either a septic system or a house could be built.¹⁹⁵ While the wording of the contract made it contingent upon obtaining a permit from the County Health Department for the building of a house, well, and septic system, it was later determined that the permit to build a house is issued by the Howard County Plan Commission, although the permit cannot be issued unless the County Health Department first issues a permit for a septic system. Therefore, the court construed the contract as being contingent only upon the obtaining of a well and septic permit from the Howard County Board of Health, which would then make it possible to obtain the building permit.¹⁹⁶ No permit was ever obtained and the Townsends brought this action to rescind the contract based on fraud and failure of a condition precedent. The Bakers counterclaimed for the balance due under the contract. The trial court entered judgment for the Townsends rescinding the contract and returning them to the *status quo*.¹⁹⁷

On appeal, the Bakers argued the contract created an implied duty on the part of the Townsends to make a reasonable and good faith

191. T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 141-42 (2d ed. 1984).

192. *Brown*, 519 N.E.2d at 169. The court concluded that it was unnecessary to decide between the two interpretations as when the class will close but, if at Zilpha's death any of the grandchildren is then twenty-five years of age, the trustee will be forced to close the class in order to determine the amount to distribute. *Id.*

193. 519 N.E.2d 192 (Ind. Ct. App. 1988).

194. *Id.* at 193-94.

195. *Id.* at 193.

196. *Id.* at 194.

197. *Id.*

effort to obtain such permits, citing *Billman v. Hensel*,¹⁹⁸ which found such an implied obligation on the part of the buyer under a clause making the contract conditioned upon the ability of the purchasers to secure a conventional mortgage for not less than \$35,000 within thirty days. The court disagreed, pointing out that in *Billman* the financing clause was based upon the buyer's "ability" to acquire the loan. The condition in *Billman* created a covenant requiring the buyer to act; whereas in *Baker* the condition was silent as to the duty of either party to act.¹⁹⁹ The court also rejected the Bakers' argument that the Townsends should have been required to obtain the permits because of their "unique knowledge" concerning the proposed residence, pointing out that a similar argument could be made with regard to the Bakers because, as prior owners, their familiarity with the neighborhood placed them in a better position to approach the neighboring landowners to obtain the required easements.²⁰⁰ Since the permits were not obtained within a reasonable time, either party had the right to rescind the contract and be returned to the *status quo*.²⁰¹ The judgment of the trial court was affirmed.

198. 181 Ind. App. 272, 391 N.E.2d 671 (1979).

199. *Baker*, 519 N.E.2d at 195.

200. *Id.* at 195 n.1.

201. *Id.* at 195. The contract was executed on March 26, 1983, *id.* at 193, and the trial court found the reasonable time in which to fulfill the condition to have been the period prior to February 24, 1984. *Id.* at 195 n.2.