Recent Developments in Property Law

Walter W. Krieger*

I. Adverse Possession

In order to acquire title to land by adverse possession, the possession must be actual, visible, notorious, exclusive, under claim of ownership, hostile to the true owner, and continuous for the ten year statutory period.[1] In addition, in Indiana, the claimant must have paid all taxes and special assessments falling due during the period the land was possessed adversely.[2] Several decisions decided during this survey period discuss in detail the "elements" of adverse possession.[3]

In *Davis v. Sponhauer*,[4] the Sponhauers owned a lot with a cottage and boat house on Lake Wawasee. The land was bordered on the south and east by lake channels and on the west by Davis's land. A large portion of the disputed area was originally a roadway, thought to be the boundary between the Sponhauer and Davis properties. The parties' predecessors-in-interest vacated the roadway in 1957. From 1973 to 1977, a gravel lot in the disputed area was used by the Sponhauers and the Vances (Davis's predecessor-in-interest) for parking their vehicles. In 1977, the Sponhauers and the Vances blacktopped the gravel area, each paying half the cost. The Sponhauers maintained the blacktopped area after that time. In addition to parking their vehicles on the blacktopped lot, the Sponhauers and the Vances used the area for basketball and other activities.

When Davis acquired title in 1986, a survey required by Davis's lender revealed that the platted boundary ran along the eastern edge of the vacated road. Until this time everyone believed the boundary line ran through the middle of the blacktopped parking area. In 1989, relations between the Sponhauers and Davis began to deteriorate, and when Davis

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* Associate Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1959, Bellarmine College; J.D., 1962, University of Louisville; LL.M., 1969, George Washington University.

1. Estate of Mark v. H.H. Smith Co., 547 N.E.2d 796, 799 (Ind. 1989). Indiana Code § 34-1-2-2(6) (1988), establishes a 10 year statute of limitation for the recovery of real estate.

2. Ind. Code § 32-1-20-1 (1988).

3. In addition to the two decisions discussed under this topic, the reader may wish to examine the discussion of the acquisition of a prescriptive easement by adverse use discussed *infra* notes 26-31 and accompanying text.

4. 574 N.E.2d 292 (Ind. Ct. App. 1991)

erected a fence six inches west of the platted boundary, the Sponhauers brought an action to quiet title.[5] The trial court found that the Sponhauers had acquired title by adverse possession and by a property line agreement.[6]

On appeal, Davis argued that the Sponhauers failed to prove the common-law and statutory elements of adverse possession. First, Davis argued that the Sponhauers' possession was not open and notorious. The court observed that "notorious possession" is possession so conspicuous that it is known or talked about by people in the vicinity of the premises. It must be such "that the owner ought to have known that a stranger was asserting dominion over his land."[7]

In reviewing the record, the court noted that the Sponhauers had parked their vehicles in the disputed area since 1957 and that they and the Vances had agreed to blacktop the area, splitting the cost. In addition, the Sponhauers had placed a pier, constructed a birdhouse, and done landscaping in the disputed area. Neighbors testified to their understanding of the location of the property line based upon the Sponhauers' use of the property. The court found that the Sponhauers' use was more than "casual maintenance" which the Indiana courts have found to be insufficient to support a claim of adverse possession.[8]

Davis also argued that the Sponhauers' possession was not exclusive.[9] The court responded by pointing out that from 1973 until 1986 the Sponhauers and the Vances recognized the property line as running approximately through the middle of the blacktopped area and that those renting the cottage from the Sponhauers parked their vehicles on the east part of the lot.[10]

Next, Davis claimed that the Sponhauers' possession was not hostile or adverse to the Vances. The court acknowledged that "the claim of

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5. The Sponhauers also sued for slander of title, injunctive relief, damages, and attorney's fees; however, these issues are beyond the scope of this survey.

6. *Davis*, 574 N.E.2d at 299. Both the Vances and the Sponhauers were shown the boundary line between the two properties by the Claytons (Sponhauers's predecessor-in-title) in 1973. Vance testified that he had an understanding with the Sponhauers as to the location of the property line and the court found that the sharing of the costs of improving the blacktopped area was further evidence of the agreement. The trial court placed the property line where the Sponhauers and the Vances agreed that it was located.

7. *Id.* at 297 (quoting McCarty v. Sheets, 423 N.E.2d 297, 301 (Ind. 1981)).

8. *Id.* at 297-98. Periodic or sporadic acts of ownership in a disputed area are not sufficient to establish adverse possession. *See, e.g.*, Beaver v. Vandall, 547 N.E.2d 802, 803 (Ind. 1989); McCarty v. Sheets, 423 N.E.2d 297, 300 (Ind. 1981); Green v. Jones, 490 N.E.2d 776, 779 (Ind. Ct. App. 1986).

9. Exclusive possession is possession of such a character that it operates as an ouster of the owner of legal title. *Beaver*, 547 N.E.2d at 804 (quoting Philbin v. Carr, 129 N.E. 19, 28 (Ind. Ct. App. 1920)).

10. Davis v. Sponhauer, 574 N.E.2d 292, 298 (Ind. Ct. App. 1991).

ownership must be based on some ground justifying the adverse claimant's belief that he is the owner, and that claim must be communicated to the true owner."[11] Here, however, the court observed that the Sponhauers and the Vances were both shown what was believed to be the boundary line between the two properties by the Claytons, the Sponhauers' predecessors-in-interest, and Mr. Vance and his son testified that the Sponhauers' use of the property was consistent with the boundary line as they believed it to exist. It was under a claim of right which was clearly communicated to the true owner. The court further remarked that even if it believed Davis's claim that on a few occasions after 1989 the Sponhauers requested his permission to use the disputed area, it would be irrelevant because title had already vested in the adverse claimant.[12]

Davis also contended that the Sponhauers failed to pay the taxes on the disputed area during the statutory period as required by Indiana Code section 32-1-20-1. In response, the court observed that the Indiana courts have not applied this statute in cases involving boundary line disputes. The purpose of the statute was to provide the owner with notice that someone had paid the taxes on the land and was claiming an interest in the property. In the case of a boundary line dispute, however, both parties pay the taxes on their part of the property and the improvements thereon. Thus the statute would not give notice to the record owner of the claim.[13]

Finally, Davis maintained that assuming arguendo that the Sponhauers had proven the elements of adverse possession, their claim to the disputed area must fail because they could not establish the quantity of the land involved.[14] In rejecting this contention, the court observed that the Claytons, the Sponhauers' predecessor-in-interest, pointed out the boundary line to both the Sponhauers and the Vances, and it was not error for the trial court to use this evidence to determine the quantity of the land.[15]

In *Snowball Corp. v. Pope*,[16] the court once again addressed the elements of adverse possession. The Snowball Corporation owned ap-

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11. *Id.* (citing Estate of Mark v. H.H. Smith Co., 547 N.E.2d 796 (Ind. 1989)).

12. *Id.* (citing Kline v. Kramer, 386 N.E.2d 982, 987 (Ind. Ct. App. 1979)).

13. *Id.* at 298-99 (quoting Kline v. Kramer, 386 N.E.2d 982, 989 (Ind. Ct. App. 1979)).

14. A number of Indiana decisions have held that the claim must be limited to that portion over which the claimant exercises continuous acts of ownership and that "where the quantity is small the rule as to the location of the line is exacting." McCarty v. Sheets, 423 N.E.2d 297, 300 (Ind. 1981). *See also* Carter v. Malone, 545 N.E.2d 5, 7 (Ind. Ct. App. 1989).

15. Davis v. Sponhauer, 574 N.E.2d 292, 299 (Ind. Ct. App. 1991).

16. 580 N.E.2d 733 (Ind. Ct. App. 1991).

proximately 8,000 square feet of land in Brownsburg, Indiana, which at one time was a swamp. The swamp was filled in by the Popes in 1957 and became an extension of the lawn at their residence. Snowball brought an action to quiet title to the unimproved tract of land, and the Popes counterclaimed under the theory of adverse possession.

On appeal from a judgment in favor of the Popes, Snowball argued that because it was unaware of its ownership of the disputed tract, its lack of knowledge should prevent the ten year statute of limitations from running. Snowball cited two cases in support of this argument, both of which the court found inapposite. The cases involved situations in which the true owners were unaware of the adverse activities on the land, not situations in which the owners were unaware of their interests in the land itself.[17] The court concluded that if it tolled the ten year statute of limitations simply because the true owner was unaware of its interest in the land "the entire doctrine of adverse possession would be abrogated."[18]

Snowball next contended that the Popes failed to establish that their possession was sufficiently notorious, exclusive, and open and visible to satisfy the elements of adverse possession. With regard to Snowball's contention that the Popes' possession was not "notorious," the court observed that the reason for requiring that the possession be "notorious" is that the true owner will be alerted that a stranger is asserting a claim to his land. The court then defined the term as possession "so conspicuous that it is generally known and talked of by the public—at least by people in the vicinity of the premises."[19] Here, several residents of Brownsburg testified that they believed the tract belonged to the Popes. In fact, the Brownsburg Town Board required the Popes to fill in the swamp located on the land. Thus, the trial court was not in error in finding the possession to be notorious.[20]

With regard to the argument that the possession was not exclusive, the court observed that exclusive means claiming the title to the exclusion of others: "The possession must be exclusive also as against persons other than the owner of legal title; and where the claimant occupies the land in common with third persons, or with the public generally, the

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17. In *Marengo Cave Co. v. Ross*, 10 N.E.2d 917 (Ind. 1937), the possessor's activities in an underground cave were not observable by the surface owner, and in *Able v. Love*, 143 N.E. 515 (Ind. Ct. App. 1924), the issue was whether the possession met the elements requisite for adverse possession.

18. *Pope*, 580 N.E.2d at 735 (citing Craven v. Craven, 103 N.E. 333, 335 (Ind. 1913) (holding that the mere fact the true owner is unaware of his rights to the land will not prevent the statute of limitations from running)).

19. *Id.* (quoting McCarty v. Sheets, 423 N.E.2d 297, 301 (Ind. 1981)).

20. *Id.*

possession is not such exclusive possession as will constitute the basis of title."[21] Snowball argued that the Popes had failed to prove exclusive possession because children ice skated on the swamp in the winter, pedestrians were allowed to walk across the property on their way to a nearby restaurant, and there were no fences or "no trespassing" signs. The court found these facts "irrelevant" because these activities did not suggest that the Popes intended to share the ownership to the land, but rather, if anything, it suggested a license had been granted.[22]

Next, the court addressed the element of "open and visible" possession, which requires that the possession be of such a nature and character as to apprise the world that the land is being occupied and by whom. The purpose of this element is to provide the true owner with notice that someone has taken possession and is claiming ownership of the land.[23] Snowball claimed that the Popes did nothing to the land other than cut the grass. The court observed that the nature and character of the land must be considered when determining the sufficiency of the acts of ownership. Here, the swamp was not completely filled and the area was not spacious enough for much development. In short the court found the land was not suited for most purposes and that the use was consistent with the nature of the land.[24] The court concluded that the use by the Popes met the requirements for adverse possession and affirmed the judgment of the trial court.[25]

II. Easements

A. By Prescription

A prescriptive easement can be established by showing actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for a period of twenty years under a claim of right or such continuous, adverse use with the knowledge and acquiescence of the owner.[26]

In *Larch v. Larch*,[27] William Larch and DMB Agricorp, Inc. (DMB) brought suit to quiet title to a drainage tile connection on adjoining

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21. *Id.* at 736 (quoting Philbin v. Carr, 129 N.E. 19, 28 (Ind. Ct. App. 1920)).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Ind. Code § 32-5-1-1 (1988); Greenco, Inc. v. May, 506 N.E.2d 42, 45 (Ind. Ct. App. 1987); Searcy v. LaGrotte, 372 N.E.2d 755, 757 (Ind. Ct. App. 1978).
27. 564 N.E.2d 313 (Ind. Ct. App. 1990).

land owned by Ruth Larch, Edward Larch, and Velma Barrett. The trial court granted partial summary judgment in favor of DMB, finding that DMB had acquired a prescriptive easement.[28]

On appeal, the defendants argued that the use of the tile by DMB was "permissive." While recognizing that the use of land with the permission of the owner is insufficient to establish an easement by adverse use, the court observed that "[o]nce open and continuous use of another's land commences with knowledge on the part of the owner, such use is presumed to be adverse to the owner."[29] Deposition testimony indicated that DMB had connected the tiles in 1947 and that the defendants' predecessor-in-title was present, saw DMB make the connection, and did not object. No evidence was introduced to rebut the presumption that the use was adverse.

The defendants further argued that DMB did not acquire a prescriptive easement because DMB failed to pay taxes on the easement, citing Indiana Code section 32-1-20-1, which provides the following:

> [I]n any suit to establish title to lands or real estate no possession thereof shall be deemed adverse to the owner . . . unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling due on such lands or real estate during the period he claims to have possessed the same adversely.[30]

In rejecting the defendants' argument, the court noted that the explicit language of the statute limits its application to suits to acquire "title to lands" by adverse possession. The court could find no case applying the statute to a suit to establish an easement and affirmed the trial court's granting of partial summary judgment.[31]

B. By Implication

Implied easements can arise in different situations. First, an implied easement can arise from a prior use of the property:

> Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership . . . there arises by impli-

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28. *Id.* at 315.
29. *Id.* at 317.
30. IND. CODE § 32-1-20-1 (1988).
31. *Larch*, 564 N.E.2d at 317.

cation of law a grant or reservation of the right to continue such use.[32]

If the benefited portion of the land is conveyed to the grantee, the right to continue the use of the part of the land retained by the grantor is called an implied grant. If the grantor retains the benefited portion of the land, the right of the grantor to continue to use the part of the land conveyed to the grantee is called an implied reservation.[33] Implied grants are favored by the law because they benefit the land being conveyed, and most courts require that the continued use be only a reasonable necessity to the enjoyment of the dominant estate. Implied reservations, on the other hand, are not favored by the law because they burden the land being conveyed.[34]

A second situation in which an easement by implication may arise, regardless of any prior use of the land, is by way of necessity to prevent a tract of land from becoming landlocked. When the conveyance of a portion of the land would result in either the part being conveyed or the portion retained by the grantor becoming landlocked, the court will imply a way of necessity across the other portion of the land to reach a public highway.[35] Most cases require strict necessity to impose an implied way of necessity across the land of another.[36] Scholars have warned that a failure to distinguish between the implied easement by necessity and the implied easement based on prior use when discussing the requirement of necessity "can lead to a confusion of tongues."[37] Despite this warning, the Indiana courts have consistently used the phrase "way of necessity" to describe both types of implied easements.[38] The Indiana courts continue to state that when there is an obvious and permanent servitude on one part of the land at the time ownership is severed, an easement will be implied if the use is reasonably necessary

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32. John Hancock Mut. Life Ins. Co. v. Patterson, 2 N.E. 188, 191 (Ind. 1885). *See also* Shandy v. Bell, 189 N.E. 627 (Ind. 1934); Searcy v. LaGrotte, 372 N.E.2d 755 (Ind. Ct. App. 1978); Krueger v. Beecham, 61 N.E.2d 65 (Ind. Ct. App. 1945). For a discussion of the implied easement based on prior use, see ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 8.4, at 444-46 (1984).

33. JOHN E. CRIBBET & CROWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 371-72 (3rd ed. 1989).

34. *Id.* at 372. *See also* CUNNINGHAM, *supra* note 32, § 8.4, at 446.

35. *See, e.g.*, Shandy v. Bell, 189 N.E. 627 (Ind. 1934); Dudgeon v. Bronson, 64 N.E. 910 (Ind. 1902). For a discussion of the implied way of necessity, see CUNNINGHAM, *supra* note 32, § 8.5, at 447-49.

36. CRIBBET & JOHNSON, *supra* note 33, at 371-72.

37. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 848 (2d ed. 1988).

38. *See, e.g.*, McConnell v. Satterfield, 576 N.E.2d 1300 (Ind. Ct. App. 1991); Hunt v. Zimmerman, 216 N.E.2d 854 (Ind. Ct. App. 1966); Krueger v. Beecham, 61 N.E.2d 65 (Ind. Ct. App. 1945).

for the fair enjoyment of the part benefited.[39] However, the meaning of "reasonably necessary" appears to be restricted by the use of the phrase "way of necessity" to describe the easement. This confusion of tongues is dramatically illustrated in *McConnell v. Satterfield*.[40]

In 1972, the Satterfields, who owned lots A and B, built a garage on the northern portion of lot B and constructed a driveway across lot A leading to the side of the garage. In 1986, the Satterfields divorced and Margaret became the owner of the two lots. The McConnells bought lot B at a sheriff's sale in 1989. At the time, they were aware that the driveway was on lot A, but they continued to use it to reach the garage, despite Satterfield's objection. Satterfield constructed a fence to prevent the McConnells from using the driveway, and when the McConnells tore down the fence, Satterfield brought an action for damages, ejectment, and to quiet title. The McConnells counterclaimed, alleging an implied easement by necessity. The trial court found for Satterfield and against the McConnells on their counterclaim.[41]

On appeal the court made the following observation:

> Generally, an easement will be implied where during the unity of title, an owner imposes an apparently permanent and obvious servitude on one part of the land in favor of another part, and the servitude was in use when the parts were severed, if the servitude is reasonably necessary for the fair enjoyment of the part benefited.[42]

Here, the driveway was the only way to reach the garage. The McConnells would be required to tear out part of the pool deck and retaining wall or construct the driveway over a septic system. Nevertheless, the court found that the easement was not necessary:

> The requirement of reasonable necessity does not do away with the requirement that some necessity be shown. The McConnells admit that they are not landlocked and that they have means of access to their lot from the southern side which fronts on a public highway. The McConnells acknowledge that Indiana

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39. *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Patterson, 2 N.E. 188 (Ind. 1885); Shandy v. Bell, 189 N.E. 627 (Ind. 1934); Searcy v. LaGrotte, 372 N.E.2d 755 (Ind. Ct. App. 1978); Hunt v. Zimmerman, 216 N.E.2d 854 (Ind. Ct. App. 1966); Krueger v. Beecham, 61 N.E.2d 65 (Ind. Ct. App. 1945).

40. 576 N.E.2d 1300 (Ind. Ct. App. 1991).

41. *Id.* at 1301.

42. *Id.* at 1302.

> has not granted a way of necessity when only a portion of the land is inaccessible.[43]

The court then cited *Hunt v. Zimmerman*[44] for the rule that a right of way by necessity cannot apply to property which is already accessible to the landowner.[45] In *Hunt*, the court refused to find an implied easement across the back yard of the land retained by the grantor even though the garage on the grantee's lot opened onto the land retained by the grantor and, because of the shape of the grantee's lot, the garage could not be reached by car except across the land retained by the grantor. In refusing to find an implied easement the court remarked that the lot itself was accessible from the street:

> A right of way by necessity cannot apply to property which is already accessible to the landowner. . . . It may be true that he had no ingress or egress for the use of his garage in the manner for which it had been designed, but this is not our concern. We are concerned only with the land as a whole, and not as to the use of a particular building located on the land.[46]

In light of the language in *Hunt*, it is not surprising that the court in *McConnell* came to the conclusion that there was no implied easement to use the driveway. What is not clear, in light of these Indiana decisions, is the meaning of the phrase "reasonable necessity." The decisions suggest that there is little if any distinction between the necessity required for a way of necessity and that required for an implied easement based on prior use.

C. Riparian Rights

There were three reported cases during this survey period dealing with the riparian rights of access easement holders. In *Klotz v. Horn*,[47] the Horns, who owned a single tract of land abutting Eagle Lake, conveyed the rear portion of the lot, which did not abut the lake, to Nedra Sainer in 1975. The deed granted Sainer a six foot wide easement appurtenant "for the purpose of access to Eagle Lake." Ten years later Sainer conveyed her tract to the Klotzes, who subsequently erected a pier at the lake end of their easement (the easement being appurtenant passed with the conveyance of the dominant estate from Sainer to the Klotzes). The Horns sought a permanent injunction to prevent the Klotzes

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43. *Id.*
44. 216 N.E.2d 854 (Ind. Ct. App. 1966).
45. McConnell v. Satterfield, 576 N.E.2d 1300, 1302 (Ind. Ct. App. 1991).
46. *Hunt*, 216 N.E.2d at 856-57.
47. 558 N.E.2d 1096 (Ind. 1990).

from placing a pier or other structure on the easement. The trial court granted the Horns' motion for summary judgment finding that, as a matter of law, the Klotzes had no right to place a pier at the end of the easement. The court of appeals affirmed, holding that no riparian rights were expressly granted to Sainer under the warranty deed. The Indiana Supreme Court granted transfer and reversed.[48]

The supreme court began with the observation that the issue is not whether the Klotzes themselves have riparian rights, but whether they are entitled to use the riparian rights of the Horns, i.e., whether the language "access to the lake" gave them the right to place a pier on the Horns' servient estate. Although the right to maintain a pier was not expressly granted in the deed, if the language of the grant is ambiguous, then parol or extrinsic evidence is admissible to determine the intent of the parties who created the easement "taking into consideration all of the surrounding circumstances."[49] Here, the evidence revealed that the bottom of the lake was "very murky and weedy" at the end of the easement, making swimming, wading, fishing, and boating extremely limited without a pier to reach deeper water.[50]

The court distinguished *Brown v. Heidersbach*,[51] upon which both the trial court and court of appeals relied, in finding that there was no right to maintain a pier on the easement. The supreme court noted that in *Brown*, the easement was granted for the benefit of a number of lot owners to be used in common. Additionally, unlike the present case, there was a beach available to the lot owners in *Brown* which made it possible for them to enjoy their easement without a dock or pier. More importantly, in *Brown*, the court considered the surrounding circumstances in reaching its conclusion that no riparian rights were intended to be granted: "An instrument creating an easement must be construed according to the intention of the parties, as ascertained from all facts and circumstances, and from examination of all its material parts."[52] The court admonished the trial court that on remand it "should likewise hear evidence to determine the intent of the parties who created the easement and then balance the interests of the present titleholders of the dominant and servient estates."[53]

In a dissenting opinion, Justice DeBruler concluded that the granting of a six foot wide path for access to the lake did not indicate that the

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48. *Id.* at 1100.
49. *Id.* at 1098.
50. *Id.* at 1099.
51. 360 N.E.2d 614 (1972).
52. *Id.* at 620.
53. Klotz v. Horn, 558 N.E.2d 1096, 1100 (Ind. 1990).

parties intended its use for cars or the transportation of large watercraft.[54] Furthermore, the attachment of a pier at the end of the easement would require a construction on and alteration of the bank which would severely restrict the right of the landowners to enter and leave the lake or to tie up boats of their own. Justice DeBruler would affirm the summary judgment based on the physical evidence surrounding the granting of the easement.[55]

Hunter v. Kellogg[56] presented a somewhat similar factual situation. The Scheeles conveyed property abutting Lake Wawasee, but reserved a five foot strip "for ingress and egress to and from the roadway to the water's edge of the Lake."[57] Nothing was said about the right to construct a pier at the end of the easement, but the grantors constructed a pier immediately following the conveyance, and it remained in seasonal use for approximately fifty years until this suit was brought. The trial court found that although the deed did not expressly reserve riparian rights, the dominant tenants (the Scheeles) intended to reserve the right to place a pier in the lake.

Hunter, the current owner of the servient estate, argued that the language in the deed was unambiguous and that it was error for the trial court to have considered surrounding facts and circumstances to determine the grantors' intent. The court of appeals, citing *Klotz*, agreed with the trial court that the language in the instrument was ambiguous.[58] Furthermore, the court found that because the easement was created by reservation, rather than by grant, there was even more of an ambiguity.[59] The trial court judgment was affirmed.[60]

In *Bromelmeier v. Brookhart*,[61] the question of riparian rights was raised in the context of an easement acquired by prescription. Since about 1962, the Bromelmeiers and their predecessors in title had used a ten foot wide strip located between the lots of Brookhart and Stellhorn for access to Crooked Lake. In 1987, Brookhart and Stellhorn purchased the ten foot strip and commenced this action. The trial court found that the Bromelmeiers had acquired a prescriptive easement, but that it did not include the right to maintain a pier. The court reached this conclusion based on two factors: (1) the easement did not give the dominant tenant riparian rights and (2) during two summers the Bro-

54. *Id.* (DeBruler, J., dissenting).
55. *Id.*
56. 563 N.E.2d 1338 (Ind. Ct. App. 1990).
57. *Id.* at 1339.
58. *Id.* at 1340.
59. *Id.*
60. *Id.* at 1340-41.
61. 570 N.E.2d 90 (Ind. Ct. App. 1991).

melmeiers had elected not to place a pier in the lake, thus interrupting the prescriptive period.[62]

As to the first point, the court of appeals noted that in *Klotz*, the Indiana Supreme Court had determined that an access easement may include the right to maintain a pier.[63] Although *Klotz* involved an express easement, the court determined that the purpose and intent of the parties has no less of a bearing on the scope of an easement by prescription. Here the facts indicated that Robert Seely, a predecessor in the Bromelmeiers' title, had used the strip in 1962 for swimming, walking, and boating and had placed a pier in the lake at the end of the easement. In addition, he stored the pier sections on the strip of land during the winter. The pier was used continuously except for a two year period in 1971 and 1972.

The trial court found that the Bromelmeiers had failed to establish a continuous twenty year use of the easement for storing and attaching a pier. However, the court of appeals did not agree. In 1971, the pier was in disrepair and the then owners of the Brookhart property (the Conrads) testified that they allowed the Bromelmeiers to use their pier until they could get a new one. The Bromelmeiers purchased a new pier in 1973 and the use resumed uninterrupted until 1988. The court concluded that "mere intermissions in use of reasonable durations" will not prevent the establishment of a prescriptive easement.[64] To stop the adverse period from running, there must be an interruption of the use by the owner of the servient estate or a voluntary abandonment of the easement by the adverse user. Here, there was no evidence of an intent to abandon the easement.

In light of these facts, the court of appeals held it was "clearly erroneous" for the trial court to fragment the use and purpose of the easement by recognizing a right of access to the lake but denying a right to maintain the pier.[65] The part of the judgment denying the Bromelmeiers the right to maintain the pier was reversed.[66]

III. Landlord and Tenant

A. Clauses Limiting Right of Tenant to Assign or Sublet

The tenant's interest in a lease is freely alienable unless the lease contains a covenant against the transfer of the tenant's interests.[67] Rather

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62. *Id.* at 91.
63. *Id.*
64. *Id.* at 92 (relying on Griffith v. Neff, 196 N.E.2d 757 (Ind. Ct. App. 1964)).
65. *Id.*
66. *Id.* at 92-93.
67. Because such clauses restrict the free alienation of property, they are not

than prohibiting such transfers, clauses more commonly require the tenant to obtain the landlord's consent to an assignment or sublease.[68] Under the traditional common-law rule, the landlord can arbitrarily and capriciously refuse to consent to an assignment or subletting for any reason unless the language of the covenant provides that such consent shall not be unreasonably withheld.[69] Recently, however, a number of jurisdictions have abandoned the common-law rule and have adopted a commercially reasonable standard requiring the landlord to show reasonable grounds for the refusal to consent to the transfer unless the language of the covenant provides that such consent may be arbitrarily withheld.[70]

During the last survey period, the Indiana Court of Appeals, in *First Federal Savings Bank v. Key Markets, Inc.*,[71] rejected the traditional common-law rule and adopted a construction of the covenant based upon the contractual duties of the parties to act reasonably and in good faith. In so doing the court used the rationale set forth in *Fernandez v. Vasquez*:[72]

> [A] lease is a contract and, as such, should be governed by the general contract principles of good faith and commercial reasonableness. One established contract principle is that a party's good faith cooperation is an implied condition precedent to performance of a contract. Where that cooperation is unreasonably withheld, the recalcitrant party is estopped from availing herself of her own wrongdoing. A withholding of consent to assign a lease which fails the tests for good faith and commercial reasonableness, constitutes a breach of the lease agreement.[73]

The Indiana Supreme Court granted transfer and reversed.[74]

In reversing the court of appeals decision, the supreme court refused to accept the contractual construction of the covenant adopted by the court of appeals:

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favored by the law and are narrowly construed. *See* CUNNINGHAM, *supra* note 32, § 6.69, at 386. Thus, a clause prohibiting the "assignment" of the lease without the consent of the landlord would not prohibit the tenant from subletting the premises, nor would a provision prohibiting "subletting" without the landlord's consent prohibit an assignment. *See* F.W. Woolworth Co. v. Plaza North, Inc., 493 N.E.2d 1304 (Ind. Ct. App. 1986).

68. CUNNINGHAM, *supra* note 32, § 6.69, at 386.
69. *Id.* at 387-88.
70. CRIBBET & JOHNSON, *supra* note 33, at 275.
71. 532 N.E.2d 18 (Ind. Ct. App. 1988).
72. 397 So. 2d 1171 (Fla. Dist. Ct. App. 1981).
73. *Id.* at 1173-74.
74. First Fed. Sav. Bank v. Key Markets, Inc., 559 N.E.2d 600 (Ind. 1990).

> These broad general statements of contract construction do not accurately describe the duties and responsibilities of courts in interpreting contracts, or they should at least be applied in very limited and specific instances where such a question of construction is apparent, particularly when one uses such expressions as "good faith cooperation," "recalcitrant party" and "wrongdoing."[75]

Instead, the court held that when the wording of the consent to assign provision does not specifically provide that the landlord's consent "shall not be unreasonably withheld," such language should not be implied, and the contract shall be enforced as written. The parties to a contract are free to agree to limit the assignability of a lease, and when they so choose, the court should look to the language used by the parties to express their intent. If the parties desired to limit the landlord's right to withhold consent they could have done so by including the phrase "which consent shall not be unreasonably withheld." When the language used by the parties is clear and unambiguous, the court will require the parties to perform consistently with the bargain they made.[76] The court concluded with the following observation:

> It is not the province of the courts to require a party acting pursuant to such a contract to be "reasonable," "fair," or show "good faith" cooperation. The proper posture for the court is to find and enforce the contract as it is written and leave the parties where it finds them. It is only where the intentions of the parties cannot be readily ascertained because of ambiguities or inconsistency in the terms of the contract or in relation to extrinsic evidence that a court may have to presume the parties were acting reasonably and in good faith in entering into the contract.[77]

Neither of the parties required "paternalistic protection" because they were experienced in business enterprises and "entered into a lease clear in its terms and well understood in the business community."[78]

B. Rent Acceleration Clause

A rent acceleration clause allows the landlord to advance the due date on future rent installments in the event of the tenant's breach of

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75. *Id.* at 603.
76. *Id.* at 603-04.
77. *Id.* at 604.
78. *Id.* at 606.

any of the covenants in the lease.[79] Many courts see no problem with such a provision because the landlord could have made the entire rent payable in advance in the lease. The landlord is simply making the rent payable in advance upon the happening of a condition, the tenant's default.[80] A problem arises, however, when the landlord chooses to evict the tenant because of the default and also attempts to recover the entire rent for the remainder of the term under the acceleration clause. When the lease is terminated, the court may view the tenant's duty to pay rent as ending and the provision for acceleration of the rent as a liquidated damages provision or an unenforceable penalty.[81]

In Indiana the problem is further confused by a recent decision, *Nylen v. Park Doral Apartments*,[82] which holds that rent may be recovered for the remainder of the term, even after an eviction of the tenant, when a "saving clause" so provides.[83] Finally, under traditional landlord-tenant law, when the tenant voluntarily vacates the premises before the end of the term, the tenant's duty to pay rent continues, and a rent acceleration clause, if enforceable, would simply make future rent payable immediately. Today, however, in a growing number of states, including Indiana,[84] when the tenant abandons the premises before the end of the term, the landlord is under a duty to mitigate his damages by making reasonable efforts to relet the premises.[85] Thus, the landlord will not be entitled to the full rent for the remainder of the term under an acceleration clause.

The validity of an acceleration clause was raised in *Parrish v. Toth*.[86] Less than one year after leasing commercial property for a term of three years, the tenant (Parrish) vacated the premises and ceased paying rent. The landlord (Toth) filed suit seeking the rent for the remainder of the term, clean-up costs, and attorney's fees. The court found that the lease had been breached and issued a partial summary judgment in favor of Toth. A hearing was held on the issue of damages, and Parrish raised Toth's failure to mitigate damages. The court found that Toth had made

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79. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 5.40, at 351 (1980).

80. *Id. See also* CUNNINGHAM, *supra* note 32, § 6.52, at 365.

81. CUNNINGHAM, *supra* note 32, § 6.52, at 366. *See also* SCHOSHINSKI, *supra* note 79, § 5.40, at 351-53.

82. 535 N.E.2d 178 (Ind. Ct. App. 1989).

83. *Id.* at 182-83. The saving clause in *Nylen* provided the following: "Eviction of tenant for a breach of lease agreement shall not release tenant from liability for rent payment for the balance of the term of the lease." *Id.* at 181.

84. *See, e.g.*, State v. Boyle, 344 N.E.2d 302 (Ind. Ct. App. 1976); Hirsch v. Merchants Nat'l Bank & Trust Co., 366 N.E.2d 833 (Ind. Ct. App. 1975).

85. SCHOSHINSKI, *supra* note 79, § 10.12, at 675-81.

86. 559 N.E.2d 369 (Ind. Ct. App. 1990).

reasonable efforts to relet the premises, and a judgment was entered awarding Toth twenty-nine months rent, clean-up costs, and attorney's fees, less set-off for common area maintenance charges.[87]

The court distinguished *Roberts v. Watson*,[88] which held that rent installments not yet due and owing cannot be recovered by the landlord upon the tenant's default. Here, the court reasoned, the rent for the entire balance of the term had become due upon the tenant's default under the acceleration clause.[89]

It should be noted that the court awarded the landlord the full amount of the future rent installments, even though there were more than twenty months of the lease term remaining. What would happen if the landlord leased the premises at the same or a higher rent the next month? Could the landlord receive double rent for the remaining nineteen months? It has been suggested that the defaulting tenant, if he has been found liable for the rent for the remainder of the term under an acceleration clause, should be able to recover any additional rent received by the landlord, less expenses and damages.[90]

C. Self-help Eviction

At early common law the landlord could use as much force as necessary to evict a holdover tenant, but today it is generally held that the landlord may only regain possession without judicial process by peaceable means.[91] The key issue becomes what is a "peaceable means." One effective method used by some landlords to force the holdover tenant to vacate the premises is to cut off the utilities. Unfortunately, disconnecting utilities, particularly in the winter months, can lead to serious health problems.[92] Because of the danger to the health and general welfare of the tenant, a number of modern landlord-tenant statutes now prohibit the landlord from disconnecting utilities in occupied dwellings.[93] The constitutionality of two City of Evansville ordinances prohibiting landlords from disconnecting utilities in rental units was raised in *Chandley Enterprises v. Evansville*.[94] When the tenant failed to pay the rent,

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87. *Id.* at 370.

88. 359 N.E.2d 615 (Ind. Ct. App. 1977).

89. *Parrish*, 559 N.E.2d at 372.

90. SCHOSHINSKI, *supra* note 79, § 5.40, at 352.

91. *Id.* § 6.5, at 399-403. *See also* Calef v. Jesswein, 176 N.E. 632 (Ind. Ct. App. 1931).

92. *See, e.g.*, Welborn v. Society for Propagation of Faith, 411 N.E.2d 1267 (Ind. Ct. App. 1980).

93. *See, e.g.*, UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.207, 7B U.L.A. 427 (1985).

94. 563 N.E.2d 672 (Ind. Ct. App. 1990).

the landlord (Chandley) disconnected the utilities. The tenant complained to the Evansville Department of Code Enforcement, which ordered the landlord to reconnect the utilities. Chandley complied with the order, but subsequently brought an action for a declaratory judgment to have the two ordinances declared illegal.

Chandley first argued that the ordinances violated the constitutional prohibition against impairment of contractual obligations. The lease contained the following provision:

> B. Lessor further reserves the right to use whatever self-help it deems appropriate and necessary to effectuate re-entry and taking of possession of premises including, but not limited to, disconnection of all gas, electric, water and other utility services as well as changing of locks and removal of personal property located upon said premises.[95]

In rejecting this argument, the court observed that the city ordinance was adopted in 1962, that the lease was entered into in 1988, and that the constitutional prohibition against impairment of contracts does not apply to contracts entered into after a statute is already in force.[96]

Chandley also argued that the ordinances interfered with his right to contract now and in the future. Chandley argued that to justify the impairment of contracts, an ordinance must be necessary and reasonable under the circumstances.[97] The court agreed, but concluded that the ordinances in question were a reasonable exercise of the city's police power: "These ordinances may be intended to preserve the health and safety of dwellers, to prevent landlords from constructively evicting tenants, and to preserve the status quo pending a judicial determination of the parties' rights."[98] The court also rejected Chandley's argument that the ordinances force landlords to pay a trespasser's utilities, finding that "a landlord has other options for removal of a trespasser including the pursuit of court action."[99]

Chandley also claimed that, as a penalty statute, the ordinances "must be sufficiently explicit so as to inform individuals of the consequences of the contemplated conduct."[100] The court, however, did not find the language vague because it simply prohibited the landlord from

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95. *Id.* at 674.
96. *Id.*
97. *Id.* at 674-75 (relying on Wencke v. City of Indpls., 429 N.E.2d 295 (Ind. Ct. App. 1981)).
98. *Id.* at 675.
99. *Id.*
100. *Id.*

disconnecting utilities in an occupied dwelling.[101] Likewise, the court rejected Chandley's argument that the statute was overbroad and interfered with the legitimate rights of lessors to remove trespassers from their property. The court held that landlords do not have an absolute right to use self-help.[102]

Finally, Chandley argued that a municipality may not alter the law governing civil actions between private individuals. The court agreed that the police powers of a municipality are restricted to the protection or promotion of a public interest or welfare, but that when the ordinances, as here, are found to be for the health and safety of tenants, they will not be declared invalid merely because they affect private relationships.[103]

The right of the landlord to resort to self-help was also discussed in *Adami-Saenger Partnership I v. Wood*.[104] Wood, a tenant in a shopping center mall, leased space from Adami-Saenger Partnership I. Lee, the mall manager, "took exception to Wood's behavior while a tenant of the Mall"[105] and refused to renew Wood's lease when it terminated on July 31, 1988. However, the landlord's attorney, Bieberstein, verbally offered Wood a three year lease of a vacant space in the mall on July 18, 1988. Wood accepted the offer and waited for a copy of the lease. Subsequently, Bieberstein notified Wood that he had withdrawn his offer and reminded her that the lease was to end on July 31. Wood refused to vacate. Lee, after consulting with the mall's attorney, decided she did not want to wait another sixty to ninety days to remove the tenant by judicial process and resorted to self-help on August 1, 1988. After the mall closed, the tenant's property was removed from a kiosk space and placed in another space (Marsh space) in the mall also being used by the tenant. The lock on the Marsh space was changed, thus preventing the tenant access to her property for one day. In addition, during removal of the property from the kiosk space, some merchandise was damaged. The court permitted the tenant to recover compensatory damages, including lost profits,[106] but denied punitive damages:

> To recover punitive damages for breach of contract, a plaintiff is required to prove by clear and convincing evidence, that the

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101. *Id.*

102. *Id.*

103. *Id.* at 675-76.

104. 568 N.E.2d 1112 (Ind. Ct. App. 1991).

105. *Id.* at 1113.

106. *Id.* at 1113-15. Judge Conover, in a dissenting opinion, argued against awarding lost profits, pointing out that Wood was no longer a mall tenant since her lease had expired. It would appear, however, that the majority viewed the verbal offer of a three year lease by Adami's attorney and Wood's acceptance as a new lease justifying the awarding of future profits.

> defendant's actions in breaching the contract were accompanied by malice, fraud, gross negligence or oppressive conduct. . . . Moreover, the plaintiff must produce some evidence "that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other such noniniquitous human failing."[107]

Here, the court found that while Lee's decision to use self-help was "improvident," "the evidence was not inconsistent with the hypothesis that Adami's conduct was the result of mere overzealousness." [108]

D. Landlord's Liability for Criminal Acts of Third Parties

Traditionally, the landlord has not been held liable for injury to the tenant caused by the criminal acts of a third party. However, in the past few years there has been some chipping away at the landlord's immunity.[109]

In *Nalls v. Blank*,[110] the tenant was assaulted when she entered her third floor apartment by an individual who had gained access to the apartment building and the third floor by vandalizing a key retaining box affixed to the outside of the building. In the tenant's suit against the landlord for negligence, the trial court entered summary judgment in favor of the landlord and the tenant appealed.

The landlord made an interesting argument by claiming that the utilization of a key retaining box could not be considered negligence because it is one of three alternative methods of access to apartment house mail boxes required by U.S. postal regulations to be provided by owners of apartment houses with self-closing, automatic locking street doors.[111] The court responded by noting that compliance with an administrative regulation does not establish as a matter of law that due care was exercised.[112] The regulation was adopted to provide the mail carrier with access to the mail boxes and had nothing to do with the safety of the tenant. Furthermore, the regulation did not require that the receptacle provide access to any part of the building other than where the mail boxes were located. It may not have been reasonable

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107. *Id.* at 1115.

108. *Id.*

109. *See* SCHOSHINSKI, *supra* note 79, § 4.15, at 217-23. *See also* Center Management Corp. v. Bowman, 526 N.E.2d 228 (Ind. Ct. App. 1988).

110. 571 N.E.2d 1321 (Ind. Ct. App. 1991).

111. *Id.*

112. *Id.* at 1323.

for the landlord to leave a key in the receptacle which provided access to other parts of the building.

Although it is the traditional common-law rule that the landlord is under no duty to protect the tenant from criminal acts, the court noted the following exception:

> [A] duty may be imposed upon one who, by affirmative conduct or agreement, assumes to act, even gratuitously, for another. . . .
>
> In this case, defendant provided self-closing, self-locking steel doors both at the street level entrance to the apartment building and at the entrance to the third floor where plaintiff's apartment was located. The trier of fact could reasonably infer that defendant had undertaken to provide security to plaintiff against criminal attack by a third party.[113]

Since the jury could reasonably find that it was not necessary to provide the mail carrier with access to the upper floors of the apartment building or to leave a key in the receptacle which would allow access to all floors, the granting of summary judgment was deemed inappropriate, and the case was reversed and remanded.[114]

IV. Mineral Estates — Strip Mining[115]

With technological advances in the methods of extracting minerals, one of the more controversial issues has become the degree to which the owner of the mineral estate may damage or destroy the surface estate in removing the underlying minerals.[116] Often, the deed severing the mineral estate from the surface estate is written in broad language conveying "all minerals" or "all coal" to the grantee and waiving liability for damage to the surface.[117] Although such deeds are generally silent regarding the specific right to strip mine, some courts have interpreted the broad language in the grant of the mineral estate as a waiver of

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113. *Id.*

114. *Id.* at 1324.

115. The term "strip mining" is used to describe any type of mining in which the surface of the earth is removed to enable extraction of the underlying minerals.

116. *See generally* Donald N. Zillman & J. Russell Tyler, Jr., *The Common Law of Access and Surface Use in Mining*, 1 J. Min. L. & Pol'y 267 (1985); Michael V. Withrow, Comment, *Broad-form Deed—Obstacle to Peaceful Co-existence Between Mineral and Surface Owners*, 60 Ky. L.J. 742 (1972).

117. The term "broad form deed" is often used to describe such an instrument. Normally such a deed contains a long and detailed description of the rights granted to the owner of the mineral estate and reserves to the grantor only such surface rights as are consistent with the mineral rights conveyed. *See* Akers v. Baldwin, 736 S.W.2d 294, 298 (Ky. 1987).

the common-law right to support of the surface[118] and have suggested that the conveyance of "all minerals" (or "all coal") carries with it the right to remove all the minerals (or coal) even if the only economically feasible way to do so results in the destruction of the surface estate.[119] Other courts, however, look at the circumstances existing at the time of the conveyance to determine whether the parties intended to permit surface mining. An important factor in determining the intent of the parties is whether, at the time of the conveyance, shaft mining was the only method used for extracting minerals in the area.[120] Finally, some courts hold that the right to strip mine minerals should be permitted only when the right to do so is clearly expressed in the deed.[121]

The nature and extent of the right of the owner of the mineral estate to use the surface estate in extracting the underlying coal was raised in *Consolidation Coal Co. v. Mutchman*.[122] The action was brought by a lessee to determine the nature and extent of the title and interests of the owners of a number of coal estates purchased in fee simple from Gibson County in 1943. The trial court found that except in instances where the deeds limited the grant to specific seams or veins of coal or where the grant conveyed all but a certain vein or seam, the deeds "were unambiguous and were intended to convey 'all coal' regardless of the methodology which might be employed to remove it or the depth where the coal could be found."[123] The court also found that ownership of "all coal" carried with it the right to remove the coal by reasonable and necessary methods, but a factual question existed concerning the extent of the use of the surface reasonably necessary for the removal

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118. Zillman & Taylor, *supra* note 116, at 280-82.

119. *See, e.g.*, Buchanan v. Watson, 290 S.W.2d 40 (Ky. Ct. App. 1956); Department of Forest & Parks v. George's Creek Coal & Land Co., 242 A.2d 165 (Md.), *cert. denied*, 393 U.S. 935 (1968); Western Energy Co. v. Genie Land Co., 635 P.2d 1297 (Mont. 1981).

120. These courts interpret the deed in light of existing circumstances and conclude that the parties only intended to allow extraction of the minerals under then accepted mining methods. *See, e.g.*, Smith v. Moore, 474 P.2d 794 (Colo. 1970); Christensen v. Chromalloy Am. Corp., 656 P.2d 844 (Nev. 1983); Franklin v. Callicoat, 119 N.E.2d 688 (Ohio Com. Pl. 1954); Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970); Doochin v. Rackley, 610 S.W.2d 715 (Tenn. 1981); DuBois v. Jacobs, 551 S.W.2d 147 (Tex. 1977); Phipps v. Leftwich, 222 S.E.2d 536 (Va. 1976); West Virginia-Pittsburgh Coal Co. v. Strong, 42 S.E.2d 46 (W. Va. 1947). Kentucky attempted to adopt this construction by statute, KY. REV. STAT. § 381.930-.947 (Baldwin 1984), but the statute was struck down by the Supreme Court of Kentucky as unconstitutional. Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).

121. *See, e.g.*, Franklin v. Callicoat, 119 N.E.2d 688 (Ohio Com. P. 1954); West Va.-Pittsburgh Coal Co. v. Strong, 42 S.E.2d 46 (W. Va. 1947); Stewart v. Chernicky, 266 A.2d 259 (Pa. 1970).

122. 565 N.E.2d 1074 (Ind. Ct. App. 1990).

123. *Id.* at 1081.

of the coal which precluded the granting of partial summary judgment on this issue. The lessee appealed the denial of the partial summary judgment.

On appeal, the surface owners contended that the coal deeds were intended only to convey so much of the coal as was minable at the time of the conveyance, i.e., by shaft mining and not by strip mining.[124] The court of appeals examined three Indiana decisions dealing with the right of the owners of the mineral estate to use the surface[125] and reached the following conclusion: "From this trilogy of cases, we deduce that in Indiana the question is not so much whether the deed is ambiguous but whether strip mining, even though not contemplated by the parties, is reasonably necessary to effectuate the grant."[126] Although the court found that this rationale applied to the majority of deeds involved, it did not apply in those situations "where the grantor expressly set out to preclude use of the surface or required immediate payment of damages for injury to crops."[127] In such cases, "'all coal' may not have been

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124. The surface owners cited decisions from Pennsylvania, West Virginia, and Ohio for the position that strip mining is not an incident to ownership of the mineral estate.

125. *Consolidation Coal*, 565 N.E.2d at 1082-83. In *Ingle v. Bottoms*, 66 N.E. 160, 163 (Ind. 1902), the Indiana Supreme Court held that the surface owner had no right to interfere with the construction of a railroad switch on the surface by the owner of the mineral estate. Ownership of the coal carried with it as a necessary incident, not only the right to penetrate the surface, but also the means and processes for mining and removing the coal as may be reasonably necessary including the construction of roads and railroad tracks.

In *Drake v. Durreger*, 11 N.E.2d 88 (Ind. Ct. App. 1937), the surface owners brought suit to prevent the coal owners from stripping the dirt above the coal, claiming that the coal could be removed by shaft mines and that the surface was best suited for agriculture. The *Drake* court, citing *Ingle*, held that the existence of a right to surface mine was a question of fact, i.e., whether the method used was unreasonable and unnecessary.

In *Creasey v. Pyramid Coal Corp.*, 61 N.E.2d 477 (Ind. Ct. App. 1945), the coal owners constructed an electric transmission line on the surface even though the grant did not expressly include the right to erect a transmission line and even though the use of electricity to operate mining equipment was unknown at the time of the grant. The court found that the grant was so broad that it was clear the grantors intended to give the grantees the right to make whatever use of the surface as was reasonably necessary in removing the coal from beneath the land. It should be noted that both *Ingle* and *Creasey* involve the right to use the surface incident to shaft mining of coal and do not involve the right to strip mine coal. Although *Drake* does involve the removal of a portion of the surface to reach the coal, the court refers to the dig as "a 'drift' shaft into the hillside to reach a rider vein." *Drake*, 11 N.E.2d at 90. Furthermore, in the reservation of the mineral estate in *Drake* the grantor expressly reserved "the right to dig, mine, and remove said coal and minerals . . . without liability for caving in or subsidence of the surface incident to mining and removing the coal." *Id.*

126. *Consolidation Coal*, 565 N.E.2d at 1083.

127. *Id.* There were 116 deeds involved which the court grouped into five sets

intended to include the coal removable only by destroying the surface," and extrinsic evidence may be introduced to aid in construction.[128] However, with regard to the unambiguous deeds, the trial court should have entered partial summary judgment in favor of the lessee.[129]

This decision appears to recognize that when "all coal" is conveyed by a mineral deed which does not contain language limiting the use of the surface, strip mining is permitted if this method of mining is reasonably necessary to remove the minerals.

V. Vendor and Purchaser

A. Inquiry Notice

If an interest in land is not properly recorded, a subsequent purchaser will take the property free and clear of the unrecorded interest provided he is a bona fide purchaser "in good faith and for a valuable consideration, having his deed, mortgage or lease first recorded."[130] In order to qualify as a bona fide purchaser, the subsequent grantee must be without actual or constructive notice of the unrecorded interest at the time of the purchase. In Indiana, inquiry notice is a type of actual notice which occurs when the purchaser has information which would lead a reasonable person to make an inquiry. The purchaser will be charged with actual knowledge of all interests or claims which the inquiry would have disclosed.[131] Inquiry notice issues were raised in two cases decided during this survey period.

In *Guthrie v. National Advertising Co.*,[132] Guthrie purchased land subject to an unrecorded ground lease. At the time of the sale, Guthrie was informed by the auctioneer and the seller that there was an advertising

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according to the language of the grant. The court indicated that the deeds varied greatly:

> Some simply granted "all coal" underlying the estate, with and without the provision "grantee not liable for damages to the surface," while others contain rights to use the surface within limits, as may be necessary for shafts, "granting all such rights as may be necessary for the best operation of the coal mines," without liability for subsistence of the surface. Some contain options to purchase surface; others require payment for the use of the surface taken. Two sets appear to severely limit surface use [by denying any surface rights or requiring the accommodation of farming or payment of damages for destruction of crops].

Id. at 1082.

128. *Id.* at 1083.

129. *Id.* at 1086.

130. Ind. Code § 32-1-2-16 (1988).

131. White v. Foster, 77 Ind. 65 (1881); Willard v. Bringolf, 5 N.E.2d 315 (Ind. Ct. App. 1936) (holding that actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstances from which a court or jury would be justified in inferring notice).

132. 556 N.E.2d 337 (Ind. Ct. App. 1990).

sign on the land, although he may not have been aware of the name of the lessee. Later, at the closing, Guthrie was informed by the seller and his attorney that National Advertising owned and maintained the advertising sign on the property. Furthermore, Guthrie had the opportunity to inspect the sign, and if he had done so, he would have seen the National 3M logo displayed on both sides. The trial court found that Guthrie had knowledge of facts which should have led a reasonable person to inquire about the lease. Guthrie appealed the finding that he had actual notice of the lease.

In Indiana, an unrecorded lease for more than three years is not valid against a subsequent purchaser of the land "other than the grantor, his heirs and devisees, *and persons having notice thereof.*"[133] The court observed that had the lease been recorded, the recording would have been constructive notice of its existence, but when the lease is not recorded, subsequent purchasers will be bound only if it is proven that they had actual notice of its existence.[134] Thus the court turned to the doctrine of inquiry notice: "A purchaser who has notice of facts making it incumbent upon him to make inquiry is bound by all the knowledge that a reasonable inquiry would have imparted and *actual notice may be implied therefrom.*"[135] The court of appeals concluded that the trial court's determination that Guthrie had actual notice of facts sufficient to put a reasonable person on inquiry was supported by the facts and affirmed the judgment.[136]

In *Lamb v. Lamb*,[137] Vera Lamb conveyed a one-ninth undivided interest in a twenty acre tract of land to her eight children and a daughter-in-law, retaining a life interest in the property. Subsequently, eight of the grantees conveyed their interests to Johnny Lamb as trustee. Johnny was to either reconvey or sell the property and distribute the proceeds to the grantees upon Vera's death. At Vera's death, her son, Francis Lamb, and the Lovealls both expressed an interest in purchasing the entire twenty acre tract. Johnny entered into a contract to sell Francis an undivided eight-ninths interest. Soon thereafter, with Francis's consent, Johnny conveyed two and one-half acres to the Lovealls. The Lovealls were not told of the contract for sale between Johnny and Francis.

When Francis approached Johnny about completing the contract, Johnny, who was ill and operating under the belief that he needed the consent of the other grantees to convey the land, advised Francis to

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133. IND. CODE § 32-1-2-11 (1988) (emphasis added).
134. *Guthrie*, 565 N.E.2d at 338.
135. *Id.* (emphasis added).
136. *Id.* at 339.
137. 569 N.E.2d 992 (Ind. Ct. App. 1991).

meet with the other family members and pay each their share. Francis contacted the other family members and all but two accepted payment. Johnny then gave Francis a warranty deed for the eleven and one-half acres he had purchased. In the meantime, the Lovealls obtained the consent of the other two grantees to purchase their interests, and Johnny gave the Lovealls a warranty deed to six acres. Francis, having learned of the sale to the Lovealls, brought this action for specific performance of the contract. The case turned on whether the Lovealls had notice of the contract of sale with Francis at the time they purchased the additional six acres. Francis argued that even though the Lovealls did not have express notice of the contract between Francis and Johnny, the Lovealls had implied notice:

> [A]ctual notice has been divided into two classes, (1) express and (2) implied, which is inferred from the fact that the person charged had means of knowledge which he did not use. Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination, which, if made, would disclose the existence of other facts is sufficient notice of such other facts.[138]

Francis claimed that the Lovealls were put on notice when they saw him cutting brush on the six acres which they subsequently purchased and when they subsequently discovered that Francis had purchased the remaining eleven and one-half acres. The court disagreed. At the time the Lovealls observed Francis cutting the brush, he owned an undivided interest in the property. This action was not so unusual as to require the Lovealls to inquire further. Likewise, the court held that the Lovealls did not have implied notice when they became aware that Francis had approached other family members and that he had acquired eleven and one-half acres from them.[139] Instead, in the court's view, such actions were an indication that no contract existed between Francis and Johnny. Thus, the Lovealls were bona fide purchasers with no notice of Francis's interest.[140]

B. Equitable Conversion

Once the parties have entered into a valid contract for the sale of real property, equity treats the purchaser as the owner of the real estate.

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138. *Id.* at 994 (citing Mishawaka St. Joseph Loan & Trust Co. v. Neu, 196 N.E. 85, 89-90 (Ind. 1935)).

139. *Id.*

140. *Id.* at 994-95.

The seller is viewed as holding "bare" legal title as security for the payment of the purchase price. In many states, including Indiana, a judgment creditor can obtain a lien on the judgment debtor's real property by entering and indexing the judgment in the judgment docket in the county where the land is located.[141] If the judgment debtor has already sold the real property under a land contract, a question arises as to whether under the doctrine of equitable conversion there is any interest in the real estate for the lien to attach. Clearly the judgment creditor can obtain a garnishment order requiring the purchaser to pay the unpaid purchase price to the judgment creditor, but once the purchaser has paid the full purchase price to the seller without the judgment creditor asserting his rights, does the purchaser take the land free and clear of the judgment lien?

The right of the judgment creditor of a contract vendor to a lien on the real property after the full purchase price has been paid by the purchaser was raised in *Cook v. City of Indianapolis.*[142] Clyde Realty sold real estate to Cosby under a land contract. On June 9, 1977, Blakley obtained a judgment in the amount of $4,063.75 against Clyde Realty which was recorded in the judgment docket. At the time the judgment was recorded and indexed, Cosby still owed $5,190.53. Cosby made his final payment to Clyde in July 1977. By a series of conveyances, Cook became the owner of the real estate. In a condemnation action by the City of Indianapolis to acquire title to Cook's property, Blakley intervened and was awarded $10,783.68 of the condemnation proceeds to satisfy his judgment. Blakley had renewed the judgment against Clyde in 1987, naming Cook as garnishee-defendant. One of the issues raised on appeal was whether the trial court erred in awarding part of the proceeds to Blakley.

In reversing the trial court on this issue, the court of appeals held that under a land contract, title vests in the purchaser at the time the contract is consummated.[143] The majority cited *Rural Acceptance Corp. v. Pierce*[144] for the position that the vendee's equitable interest is superior to the judgment lien, and the judgment creditor could not reach the property "other than by asserting the vendor's remaining rights." In *Rural*, the court ordered the vendee to pay the balance of the contract to the judgment creditor, but in this case the creditor never asserted its rights to the balance due under the contract; therefore, Cosby took the property free of the lien upon payment of the balance of the contract

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141. *See, e.g.*, IND. CODE § 34-1-45-2 (1988).
142. 559 N.E.2d 1201 (Ind. Ct. App. 1990).
143. *Id.* at 1203.
144. 298 N.E.2d 499 (Ind. Ct. App. 1973).

to Clyde.[145] Blakley argued that he was not aware of the land contract and thus had no opportunity to assert his rights, but the court held that the purchaser's possession under the contract was notice to the world of his claim of ownership.[146]

In a dissenting opinion, Judge Sullivan interpreted *Rural* differently: "I read [*Rural*] to hold that liens against real estate are valid against a contract purchaser to the extent of the unpaid contract balance at the time the lien attaches."[147] Thus, Judge Sullivan would have awarded Blakley the amount of the unpaid purchase price at the time of the recording of the judgment lien. It should be noted that in *Rural*, the judgment creditor brought a garnishment proceeding to obtain the unpaid purchase price. The case does not indicate that a lien attached to the unpaid proceeds. If the court were to attach a lien on the property in the amount of the unpaid proceeds, the purchaser would be required to search the public records each time he made a payment on the contract to the seller or else run the risk of being forced to pay twice. Since the purchaser acquired his interest before the judgment lien, it can be argued that the subsequent recording of the judgment lien is not notice to the prior purchaser.[148] Furthermore, it can be argued that under the doctrine of equitable conversion there is no longer a real property interest in the debtor/vendor for the judgment lien to attach.[149]

C. Boundary Overlap in Deeds: Liability of Title Insurer

In *Downing v. Eubanks*,[150] Mary Spickler conveyed a five acre tract of land (Tract I) to Lentz who reconveyed it back to Mary the same day. Mary then conveyed Tract I in July 1984 to Jerry and Anna Spickler who reconveyed the land to Mary in October 1984. In September 1985, the guardian of Mary's estate conveyed Tract I to the Downings who recorded the deed. The Downings purchased title insurance from the Ticor Title Insurance Company of California.

In August 1977, Mary conveyed a fifteen acre tract (Tract II) abutting Tract I. Subsequently, a 7.02 acre portion of Tract II was purchased by the Russells from the Eubanks under a land contract. A survey by the Russells revealed that their property overlapped Tract I in a strip 100 feet wide and 617.5 feet long. The Russells and the Eubanks then

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145. *Id.* at 502.

146. *Id.* at 503.

147. Cook v. City of Indpls., 559 N.E.2d 1201, 1205 (Ind. Ct. App. 1990) (Sullivan, J., dissenting).

148. *See* CUNNINGHAM, *supra* note 32, § 11.10, at 795.

149. *See* R. Bruce Townsend, *Secured Transactions and Creditors' Rights*, 8 IND. L. REV. 234, 260-61 (1974).

150. 557 N.E.2d 1027 (Ind. Ct. App. 1990).

brought this action to quiet title to the disputed strip, and the Downings filed a third party complaint against their title insurer. The trial court granted summary judgment to Ticor and following a trial, entered judgment in favor of the Eubanks and the Russells.

On appeal, the Downings argued that they were bona fide purchasers of Tract I because the conveyance of Tract II was outside their chain of title, citing *Szakaly v. Smith*.[151] The court found the Downings' reliance on *Szakaly* to be misplaced. *Szakaly* does hold that a grantee cannot be charged with constructive notice of conveyances outside the chain of title;[152] however, because of the reconveyance of Tract I to Mary in 1971, Mary was the owner of both Tract I and Tract II at the time she conveyed Tract II in 1977. Because Mary owned the entire undivided 53.33 acre parcel "when Downing purchased Tract I, the history of Tract I's reincorporation into the parent tract was a matter of record. While remote grantees are not required to search all conveyances from a common grantor, they are required to search those which fall within their chain of title."[153]

With regard to the action against the title insurer, the court noted that the standard preprinted industry-wide form of the American Land Title Association contains a specific exclusion for overlapping boundaries: "(2) Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises."[154] Because no survey was conducted the overlap was not covered.[155]

VI. Water Law

A. Surface Water: The Common Enemy Rule

At common law surface water was viewed as a common enemy and each landowner was free to "deal with it in such manner as best suits his own convenience."[156] The landowner's right to occupy and improve his property was not restricted by the fact that the changes might cause surface water to accumulate or stand on a neighbor's land or pass onto

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151. 544 N.E.2d 490 (Ind. 1989)

152. *Id.* at 492.

153. *Downing*, 557 N.E.2d at 1029.

154. *Id.* at 1030.

155. *Id.* In dicta the court stated that had a survey been conducted which failed to discover the overlap, then it would have been covered by the policy: "An accurate survey of Tract I would have resulted in the overlap being covered by the policy." *Id.*

156. Argyelan v. Haviland, 435 N.E.2d 973, 975 (Ind. 1982).

or over it, and he was not liable for any injury caused by his actions.[157] In 1981, the Third District Court of Appeals in *Rounds v. Hoelscher*[158] rejected the common enemy rule in favor of a "reasonable use" test. Earlier the same year, the Second District Court of Appeals in *Argyelan v. Haviland,*[159] applied the common enemy rule in a surface water case. The Indiana Supreme Court granted transfer to settle the conflict between the two districts and reaffirmed Indiana's adherence to the common enemy rule.[160]

During this survey period, the court of appeals was once again invited to reject the common enemy rule, but declined. In *Pickett v. Brown,*[161] the Picketts sued the adjoining landowners (the Browns) for damages caused by water and mud flowing from the Browns' property after the Browns constructed a new home on their lot. The trial court granted a judgment at the end of the Picketts' evidence based on the common enemy rule. The Picketts argued that they came within the exception recognized by the supreme court in *Argyelan* that "Indiana doubtlessly would not permit a malicious or wanton employment of one's drainage rights."[162] The court, however, found no evidence to support the Picketts' claim that the Browns maliciously channeled or accumulated the water and then cast it upon the Picketts' land. Finally, the Picketts asked the court to abandon the common enemy rule and adopt the reasonable use rule, but the court declined to advocate again the adoption of the reasonable use rule as it had done previously in *Rounds*: "[O]ur supreme court promptly pinned our ears back and reasserted the common-enemy doctrine as the law in Indiana in *Argyelan*. . . . Therefore, as we have experience in this area, we respectfully decline the Picketts' invitation to reverse supreme court precedent."[163]

B. Riparian Rights

In *Watson v. Thibodeau,*[164] the question was raised as to whether riparian rights can be withheld by the grantor of land which abuts the shore of a lake. When the Indianapolis Water Company, who owned the water and land beneath Morse Reservoir, sold abutting land to Shorewood Corporation, covenants and deed restrictions provided that

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157. *Id.* at 977. *Argyelan* did recognize one exception: "[O]ne may not collect or concentrate surface water and cast it, in a body upon his neighbor." *Id.* at 976.

158. 428 N.E.2d 1308 (Ind. Ct. App. 1981).

159. 418 N.E.2d 569 (Ind. Ct. App. 1981), *vacated*, 435 N.E.2d 973 (Ind. 1982).

160. Argyelan v. Haviland, 435 N.E.2d 973 (Ind. 1982).

161. 569 N.E.2d 706 (Ind. Ct. App. 1991).

162. *Argyelan*, 435 N.E.2d at 976.

163. *Pickett*, 569 N.E.2d at 709.

164. 559 N.E.2d 1205 (Ind. Ct. App. 1990).

the owners of subdivision lots abutting the reservoir would have no riparian rights.

In a dispute between two neighboring property owners, the Watsons and the Thibodeaus, the court found that the Watsons' sailboat lift cradle, placed within the boundaries of their extended property line, created a nuisance.[165] The Watsons argued that the Indiana Constitution and statutes granted them riparian rights as abutting landowners despite the terms of the purchase. In rejecting this claim, the court concluded that nothing in the Indiana Constitution or statutes prevents a grantor from withholding riparian rights. Title in Shorewood extended only to the shoreline of Morse Reservoir and Watson could acquire no riparian or littoral rights from Shorewood. In concluding that riparian rights could be withheld, the court also indicated that they could not only be retained by the grantor but that they could be transferred to a third party:

> [W]hile riparian rights may be transferred by grant and are generally transferred without special mention in the conveyance, they may be specially *reserved to the grantor*. Riparian rights *may be separated from the ownership of the land to which they are appurtenant, either by grant of such rights to another, or by a reservation thereof in the conveyance of the land*, as did Indianapolis Water Company here.[166]

This language appears inconsistent with the views expressed by the Indiana Supreme Court in *Klotz v. Horn*.[167] In *Klotz*, the court held that if the parties intended, the dominant tenant of an access easement to a lake could use the riparian rights of the abutting landowner.[168] The issue was not whether riparian rights attached to the dominant estate which did not abut the lake, but whether the dominant tenant could use the riparian rights of the servient estate. In framing the issue in this manner, the court noted that at least one court has held that riparian rights cannot be conveyed to owners of land not abutting the lake or stream "since riparian rights accrue only to land immediately upon a lake and not to any other land."[169] The language in *Watson* suggests that riparian rights may be reserved by the grantor or conveyed to a third person separate from the abutting property, thus potentially creating riparian rights in non-abutting property or even in gross.

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165. *Id.* at 1209.
166. *Id.* at 1208 (emphasis added).
167. 558 N.E.2d 1096 (Ind. 1990).
168. *Id.* at 1097-98
169. *Id.* at 1098 (citing Schofield v. Dingman, 247 N.W. 67 (Mich. 1933)).