cies, the insurers may not reduce benefits payable under their policies below an amount equal to one hundred percent of total allowable expenses.[60]

F. Conclusion

Certainly the courts' refusals to allow policy restrictions which defeat laymen's expectations of coverage will result in a return to the drawing boards by the policy draftsmen. Further, it is likely that the industry will intensify its lobbying efforts for more favorable legislation. However, it occurs to this writer that until there is a major effort on the part of the insurance industry to strengthen its public image, litigation concerning the business of insurance will increase. A giant step forward would be achieved should the industry devote as much attention to the supervision of policy marketing as it has employed in drafting intricate insurance contracts. In this era of consumer protection, the judiciary should and will respond with equal solicitude for those unjustly denied benefits afforded them under their insurance policies as they do for persons injured through the use of defective products.

XI. Property

*Ronald W. Polston**

This was not an active year for the Indiana courts in the area of real property law.[1] There are a few cases worthy of note, however, not because they represent any significant advances in the law, but because they represent failures to bring the law up to date in areas in which there was a need to do so. This was particularly true of *Booher v. Richmond Square, Inc.*,[2] in the landlord-tenant area, and to a lesser extent of *Pulos v. James*,[3] which dealt with land use controls. Two other cases, *Continental Enterprises, Inc. v.*

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[60]During the transition period, litigation is almost certain to arise to determine which insurer is primarily liable when one policy is subject to the amending provision and another is exempt because its renewal date has not yet been reached.

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[1]Many cases which, in the broadest sense, relate to real property are treated in other parts of this survey; for example, Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973), is treated in the section on Secured Transactions.

[2]310 N.E.2d 89 (Ind. 1974).

[3]302 N.E.2d 768 (Ind. 1973).

Cain[4] and *Selvia v. Reitmeyer*,[5] although correctly decided, demonstrate a need for specific legislation in the easement area.

In *Booher v. Richmond Square, Inc.*,[6] the court held, in overruling a defense of res judicata, that a landlord, after abandonment of the premises by the tenant, is entitled to bring successive suits for rent installments as they come due. The landlord sought to recover rental installments for the period from October 30, 1969, to September 30, 1971. The landlord previously had recovered a judgment for rent up to October 29, 1969. The previous judgment was asserted, unsuccessfully, as a bar to the instant suit. In overruling the defense of res judicata the court was, of course, being consistent with previous Indiana cases, and cases in most other jurisdictions, which regard a lease as a conveyance rather than a contract. Under the conveyance view, upon abandonment by the lessee, the landlord has no obligation to mitigate damages[7] and, in fact, may not be able to do so without terminating the lessee's obligations under the lease.[8] He may allow the property to lie idle and sue for rental installments as they come due.[9] In fact, he may not be able to utilize the doctrine of anticipatory repudiation to bring his suit at once upon abandonment.[10] When he sues, the measure of damages is the rent reserved.[11] All of this is consistent with the idea that the landlord has conveyed a property interest to the lessee and the lessee has an obligation to pay for that interest. Since the property belongs to the lessee during the term of the lease, the landlord has no obligation upon abandonment by the lessee to attempt to lease it to another. In fact, if the landlord exercises any dominion over the property, the effect may be to terminate the lessee's interest. Since the rent obligation "grows out of the land," the lessee would have no further duties under the lease, not even the obligation to respond in damages for his breach.

The application of contract law would lead to an entirely different result in this situation. Under contract law, if the lessee abandoned the premises and repudiated the lease, the lessor would immediately have a single cause of action for damages.[12] He could recover the difference between the contract price (rent reserved)

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[4]296 N.E.2d 170 (Ind. 1973).

[5]295 N.E.2d 869 (Ind. 1973).

[6]310 N.E.2d 89 (Ind. 1974).

[7]Patterson v. Emerick, 21 Ind. App. 614, 52 N.E. 1012 (1899); Aberdeen Coal & Mining Co. v. City of Evansville, 14 Ind. App. 621, 43 N.E. 316 (1896).

[8]Paxton Realty Corp. v. Peaker, 212 Ind. 480, 9 N.E.2d 96 (1937).

[9]Booher v. Richmond Square, Inc., 310 N.E.2d 89 (Ind. 1974).

[10]*Id.* at 92.

[11]*Id.*

[12]RESTATEMENT OF CONTRACTS §§ 318 & 349, comment *e* at 597 (1932); 4 A. CORBIN, CONTRACTS § 954, at 832 (1951).

and the fair market value of the services not yet furnished (the reasonable rental value of the premises).[13] The rights of the parties would thus be settled immediately and the landlord would be free to rent the property to others. Indeed, if he failed to do so, the loss would be his. The modern tendency is to regard the lease as a contract to provide real property to a lessee.[14] Under this theory, the landlord has a continuing obligation under an installment contract. The fact that the lessee has an interest in real property is only incidental to the contract and, if the lessee breaches and repudiates, the fact that his property interest terminates is not allowed to obscure the fact that he is liable for breach of contract. In determining the lessee's liability, contract principles of anticipatory repudiation, mitigation of damages and measure of damages are utilized. The result is fairer to both landlord and tenant. The dispute is quickly resolved. The landlord must see that the property is utilized and yet he is entitled to those damages he actually has suffered.

These contract principles should, however, be adopted as a package by any court considering their application to the landlord-tenant situation. To permit the landlord to utilize anticipatory repudiation unless he is also limited to a contract measure of damages would be worse than the present system, for to do so would be to permit him to recover in advance all future rentals. To adopt a rule requiring the landlord to mitigate his damages, without at the same time applying principles of repudiation, would not produce any fairer results than present law provides. In fact, it might make matters worse because it might require that the landlord wait until the end of the term to sue in order to determine the difference between rent reserved and the rent received in the effort to mitigate.[15] The *Booher* case provided the Indiana courts with an excellent opportunity to adopt the contract package. By upholding the plea of res judicata the court could have made it clear that contract principles control in the landlord-tenant situation.[16]

In the area of land use controls the Indiana Supreme Court, in *Pulos v. James*,[17] held unconstitutional a statute which gave an

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[13]Hawkinson v. Johnston, 122 F.2d 724 (8th Cir. 1941).

[14]*See* Harvey, *A Study to Determine Whether the Rights and Duties Attendant Upon the Termination of a Lease Should Be Revised*, 54 CALIF. L. REV. 1141, 1183 (1966).

[15]*See* Hermitage Co. v. Levine, 248 N.Y. 333, 162 N.E. 97 (1928), in which it was held that a clause in a lease providing for mitigation of damages required the landlord to wait twenty years to bring his action in order to insure that proper credit was given the lessee for rentals received in the attempt to mitigate.

[16]*See* RESTATEMENT OF CONTRACTS § 449 (1932).

[17]302 N.E.2d 768 (Ind. 1973).

administrative body the power to vacate a plat and to make any "change or amendment [of] any recorded covenant or restriction."[18] In two cases consolidated for appeal, the Planning Committee of the Metropolitan Plan Commission of Marion County vacated plat restrictions which limited the use of the property to single family residences. Persons whose property was benefited by such restrictions questioned the constitutionality of the Planning Committee's action. The question presented was whether the benefit of a restrictive covenant is property within the meaning of constitutional provisions which prohibit the taking of property without compensation.[19] The court followed a respectable, but not unanimous, line of authority and held that the benefit side of a restrictive covenant is an interest in real property.

There can be no doubt that restrictive covenants create interests which are appurtenant to and pass with conveyances of both the burdened and benefited land. Such interests are sometimes referred to as negative easements because, just as in the easement situation, they create non-possessory rights in the land of others. In the easement situation, the benefited party has an affirmative right to make some use of the burdened land. In the restrictive covenant situation, however, the benefited party has a right to demand that the burdened party not make a particular use of his land. Thus, restrictive covenants create property rights in much the same sense as easements. This does not necessarily mean, however, that any governmental interference with such rights amounts to a taking of property in the constitutional sense.

It is true that some courts have held that when a governmental body condemns a tract of land subject to restrictive covenants and seeks to use the property in a manner inconsistent with the restrictions, it must pay compensation to those who own the benefit side of the covenants.[20] A number of courts, however, have held otherwise in such situations,[21] indicating that even if there is a direct taking and the governmental body has no interest other than acquisition of the burdened property for a use inconsistent with the covenants, these negative rights are not entitled to constitutional protection. Furthermore, the courts themselves have recognized that limits must be placed on the freedom of individuals to create such rights. The courts will, for example, act to relieve property of the

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[18]*Id.* at 770.

[19]U.S. CONST. amend. XIV; IND. CONST. art. 1, §§ 21, 23.

[20]*See* United States v. Certain Lands in the City of Augusta, 220 F. Supp. 696 (S.D. Me. 1963), and cases cited therein.

[21]*See* Arkansas State Highway Comm'n v. McNeill, 381 S.W.2d 425 (Ark. 1964), and cases cited therein.

burden of restrictive covenants when an area is so changed that it would be unjust to continue to enforce them.[22]

Since courts can terminate the obligation of these covenants and, since there is disagreement as to whether the executive and legislative branches of government need pay compensation even if the governmental purpose is simply to confiscate such rights, there seems to be little reason why the executive and legislative branches cannot validly terminate such rights upon the basis of a judgment that the public interest demands it. The policy purpose of Indiana Code section 18-5-10-41, the statute under attack in *Pulos,* was obvious. The power to vacate restrictions was given to an administrative body charged with land use planning. The power of such bodies to interfere with private rights for purposes of controlling land use is well established, the justification being the police power of the state.[23] Nevertheless, while there is agreement concerning the validity of zoning ordinances generally, there is disagreement as to whether such ordinances invalidate restrictive covenants when the two are inconsistent.[24] The more modern view is that the zoning ordinance will prevail in the case of an inconsistency,[25] at least if the zoning ordinance forbids the use specified in the restrictive covenant.[26] If, of course, a zoning ordinance can constitutionally invalidate a restrictive covenant, there is absolutely no reason why a statute cannot empower an administrative body to proceed directly against restrictive covenants as did the statute in the instant case. It is apparent therefore that, while the court in *Pulos* had ample authority for its position, it again took a property-oriented approach in the face of developing authority in the opposite direction.

In *Continental Enterprises, Inc. v. Cain*[27] and *Selvia v. Reitmeyer,*[28] plaintiffs unsuccessfully sought to establish easements by

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[22]Downs v. Kroeger, 200 Cal. 743, 254 P. 1101 (1927). *See also* Bachman v. Colpaert Realty Corp., 101 Ind. App. 306, 194 N.E. 783 (1935).

[23]*See, e.g.,* Lutz v. New Albany City Plan Comm'n, 230 Ind. 74, 101 N.E.2d 187 (1951).

[24]Most cases have held that the covenant prevails. *See, e.g.,* Murphey v. Gray, 84 Ariz. 299, 327 P.2d 751 (1958); Capp v. Lindenberg, 242 Ind. 423, 178 N.E.2d 736 (1962); Whiting v. Seavey, 159 Me. 61, 188 A.2d 276 (1963). *Contra,* City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950).

[25]8 McQuillan, Municipal Corporations § 25.09 (1965); Comment, *The Effect of Private Restrictive Covenants on Exercise of the Public Powers of Zoning and Eminent Domain,* 1963 Wis. L. Rev. 321.

[26]Grubel v. MacLaughlin, 286 F. Supp. 24 (D.V.I. 1968); City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950). This is the position of the Restatement of Property § 568 (1944).

[27]296 N.E.2d 170 (Ind. 1973).

[28]295 N.E.2d 869 (Ind. 1973).

way of necessity across the lands of others. In both cases the absence of any previous unity of ownership was quite correctly held to bar the implication of an easement by way of necessity. In neither case does the opinion reveal how the tracts became landlocked. However, a common cause of inaccessible land in recent years has been the construction of interstate highways and lakes and the reopening of rural lands which have been unused for many years with the result that access roads have been abandoned. The two cases emphasize that, in many situations, Indiana law affords no remedy to landlocked property owners.[29] In situations in which the lack of access resulted from a conveyance subdividing a larger accessible tract in such a way that the part conveyed or retained was cut off from an access road, an easement can be implied in the conveyance which created the problem.[30] Easements by way of necessity are implied easements. There must be a conveyance into which such an easement can be inserted by way of implication. Easements do not arise simply as a result of a public policy requiring that all land be accessible, although that may be one of the reasons for the doctrine of implied easements by way of necessity.[31] Such easements are created by a grant in which it is assumed that the parties intended to create an easement giving access to land which would otherwise be inaccessible. The statements by the courts in both *Cain* and *Selvia* that there must have been a previous common ownership become relevant in this context. When, however, the inaccessibility is created by the construction of a limited access highway, or by the closing and abandonment of a road, no remedy is available to owners of landlocked property, even though there may have been a previous common ownership.

Our legal system should not tolerate a situation in which land may be rendered useless due to lack of access. Society as a whole suffers from such economic waste, and this is true even though the owner of such property may have been fully compensated by a condemnation award at the time his land was rendered inaccessible. It may be true that courts can offer no relief in this situation, but legislatures can. Many states have enacted statutes giving the landlocked property owner the right of eminent domain in this situa-

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[29]Indiana has had a statute for many years providing a right of eminent domain to a landowner whose property has become landlocked because of the "straightening of any stream or the construction of any ditch." IND. CODE § 32-5-3-1 (Burns Supp. 1974). In 1973, this was amended to add "or the erection of any dam constructed by the State of Indiana or the United States."

[30]Conover v. Cade, 184 Ind. 604, 112 N.E. 7 (1916).

[31]*See* Moore v. Indiana & Michigan Elec. Co., 229 Ind. 309, 95 N.E.2d 210 (1950).

tion.[32] A similar statute is needed in Indiana. The right should be available to the landlocked property owner without regard for the conditions under which his land was rendered inaccessible.

XII. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

The last year has seen some sensational developments in the law of secured transactions and creditors' rights. The vendor under a conditional sales contract is now recognized as holding a security interest in land like that of a mortgagee. The exemptions of a wage earner have been expanded by the Indiana Supreme Court but narrowed by the highest Court of the land. The Indiana courts have also dealt with many technical and policy questions which should be of interest to the legal profession.

A. Real Estate Recording Statutes and Priorities

The Indiana recording statutes are incomplete, inconsistent, and leave much to be desired, especially with respect to reserved interests and transfers not literally or fully covered by recording laws.[1] An example of one problem will illustrate this observation. Suppose that *V* contracts to sell land to *P* on a conditional sales contract. Later, a third party, *P2*, acquires an interest from *V*.

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[32]An example of such legislation is 10 TENN. CODE ANNO. § 54-1902 (1956) which provides:

> Any person owning any lands, ingress or egress to and from which is cut off or obstructed entirely from a public road or highway by the intervening lands of another, or who has no adequate and convenient outlet from said lands to a public road in the state, by reason of the intervening lands of another, is given the right to have an easement or right-of-way condemned and set aside for the benefit of such lands over and across such intervening lands or property.

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[1]Indiana has two general statutes governing priorities. One relates to reserved interests. IND. CODE § 32-1-2-17 (Burns 1973). The other applies to conveyances, mortgages and leases. *Id.* § 32-1-2-16. Other statutes provide for recordation of certain types of instruments without including rules of priorities. *E.g., id.* § 32-1-2-32. *Cf. id.* §§ 30-4-4-1, -2 (Burns 1972). None of the statutes states a clear or satisfactory rule for determining priorities, but IND. R. TR. P. 63.1(A), providing for the effect of lis pendens notice filing or lack of it, is satisfactory in that area.