

TRAINS, TRAILS, AND PROPERTY LAW: INDIANA LAW AND THE RAILS-TO-TRAILS CONTROVERSY

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INTRODUCTION

The Indiana Supreme Court spent much of its time in 1997 focused on issues other than property disputes. Only a small handful of property cases came out of the high court this past year, and they were principally concerned with arcane rules of deed construction in abandoned railroad corridors. Not surprisingly, however, this is a topic that has generated strong feelings on all sides of the issue, as Indiana is only lately getting on the rails-to-trails bandwagon.¹ The supreme court decided four major cases in this area, two of which had been on petition to transfer for almost two years. Unfortunately, the first three of these cases are subject to some questionable reasoning and consequently provide confusing precedents to lower courts which may result in further litigation before these rails-to-trails cases finally can be put to rest. The fourth, however, is a lengthy analysis of the increasingly important issue of deed interpretation and provides helpful guidance for lower courts.

I. RAILROAD TITLE CASES

A. *Hefty v. All Other Members of the Certified Settlement Class*

The first case to be decided was *Hefty v. All Other Members of the Certified Settlement Class*,² in which a class of adjoining landowners sued Penn Central Corporation and U.S. Railroad Vest Corporation (USRV) to quiet title to an abandoned railroad corridor.³ In July 1992, Warren Buchanan filed a class action suit in Parke County against Penn Central and USRV claiming slander of title of persons owning land adjacent to a line in Parke County. The following month, he moved to expand the class to include everyone owning land adjacent to an abandoned Penn Central corridor anywhere in Indiana. A competing class action was filed in Hamilton in October 1992 by Fern Firestone alleging similar claims

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1. This topic is near and dear to my heart. See Danaya C. Wright, *Private Rights and Public Ways: Property Disputes and Rails-to-Trails in Indiana*, 30 IND. L. REV. 723 (1997). Rails-to-trails is a program that furthers federal railbanking and interim trail use policies by converting abandoned rail corridors to linear parks and pedestrian trails. Railbanking is a federally mandated policy of preserving rail corridors for possible future activation in light of increasing transportation demands. Interim trail use is allowed on railbanked corridors to further the public need for linear parks, greenways, and recreational trails, so long as doing so is not inconsistent with corridor preservation. *Id.* at 723-24.

2. 680 N.E.2d 843 (Ind. 1997).

3. Penn Central had conveyed its interests in most abandoned corridors in Indiana to USRV for the purpose of relinquishing for sale its property rights to corridor land it no longer needed.

against USRV of fraud, slander of title, theft, criminal conversion, criminal mischief and deception, and RICO violations. In December, Buchanan amended his complaint to enlarge the class and add the RICO, conversion, and fraud claims. On the same day, the trial court approved Buchanan's class for settlement purposes and approved James Buchanan, Warren's son, as class counsel.⁴ The parties submitted a proposed settlement agreement and a hearing was set for April 1993, less than four months later. In the meantime, Firestone sought to intervene in the Buchanan action to prevent sending of the settlement notice and to petition for revocation of the Buchanan class certification. When that was denied, Firestone obtained a statewide class certification in the Hamilton County trial court; however, Buchanan succeeded in having the order vacated, and the two actions were consolidated pursuant to Indiana Trial Rule 42(D). After additional motions and objections, the Parke County Circuit Court accepted the Buchanan class settlement agreement in April 1993 without testimony from nonclass members or class members who had opted out. The next year, the court of appeals affirmed the trial court's judgment, noting that those who had opted out had preserved their right to appeal and that the settlement was fair and reasonable.⁵ The saga of the battling class action suits then headed to the supreme court as transfer was granted in July 1995.⁶

On June 2, 1997, the Indiana Supreme Court reversed the trial court's approval of the settlement agreement and remanded the case for further proceedings.⁷ This case is principally about the appropriate standards for approving class settlements, especially when they occur early in the litigation process before adequate time for discovery and negotiations. However, it is not coincidental that a case involving property rights to abandoned railroad corridors would spark such bitter disputes between competing class representatives and class counsel who see the growing rails-to-trails movement as a divisive political issue with the potential for punitive damage and royalty awards. Counsel for the intervening Firestone class, Nels Ackerson of Washington, D.C., has filed class action suits against at least three major railroads in Indiana, and one utility company, in the name of adjoining property owners whose rights, he claims, are being violated by big corporate conglomerates.⁸ On the other hand, counsel for

4. *Hefty*, 680 N.E.2d at 847.

5. *Id.* (citing *Hefty v. All Other Members of the Certified Settlement Class*, 638 N.E.2d 1284, 1288-92 (Ind. Ct. App. 1994)).

6. *Hefty*, 680 N.E.2d at 847.

7. *Id.* at 858.

8. "A huge investment of money has gone into combating the 'level of arrogance that sometimes accompanies companies that have a lot of power . . .'" *Abandoned Rails: What's Right Should Count*, HENDRICKS COUNTY FLYER, Dec. 22-28, 1997, at A6 [hereinafter *Abandoned Rails*] (quoting Nels Ackerson). At the December 1997 Indiana Farm Bureau state convention, Ackerson presented a special interest session: "A Billion Dollar Hoax, the Great Railroad Robbery." *Id.* See also *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties' motions for partial summary judgment); *CSX Transp., Inc. v. Clark*, 646 N.E.2d 1003 (Ind. Ct. App. 1995); *Calumet Nat'l Bank v.*

the Buchanan class, as the son and law partner of the class representative, may not have had the best interests of the entire class in mind when he accepted the settlement agreement.⁹ Neither class, therefore, presents a compelling picture of oppressed victims who must band together to fight corporate America.¹⁰ But with the prospect of punitive damages and royalties from utility companies, the rights to abandoned railroad corridors have taken on greater importance for adjacent landowners, recreational trail developers, railroads, utility companies, city and county service providers, and lawyers. It is not accidental, therefore, that Justice Sullivan cited Judge Posner's warning that "[c]lass actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest. This fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems."¹¹ The saga of the dueling classes, while primarily about the law regarding class action settlements, was made possible in this instance precisely because Indiana law on railroad abandonments was hospitable to a variety of claims about overreaching railroad practices.

The supreme court in *Hefty*, noting that one element of the reasonableness of class settlements is the likelihood of success on the merits, hoped to forestall the flood of rails-to-trails cases that are working their way up through the courts by briefly discussing the general principles of deed interpretation. Unfortunately, Justice Sullivan's brief discussion did not allow for a thorough analysis of the many different issues that complicate any deed interpretation. In the interests of brevity, I will outline what are the principal rules and statutes that should be considered in any railroad deed case and then summarize the contributions of these recent cases to the law.

In 1852, the Indiana General Assembly passed two statutes. The first states that "any conveyance of lands worded in substance as . . . 'A.B. conveys and warrants to C.D.' . . . shall be deemed and held to be a conveyance in fee simple."¹² This statute does not require that the words "fee simple" be present in the conveyance, nor was use of the phrase in form deeds common until well into the twentieth century.¹³ This statute also does not distinguish between

American Tel. & Tel. Co., 682 N.E.2d 785 (Ind. 1997). Ackerson has also been involved in railroad suits in other states. *See, e.g.,* Becker v. Surface Transp. Bd., 132 F.3d 60 (D.C. Cir. 1997) (property owner challenge to conversion of right-of-way to trails in Kansas).

9. *See Hefty*, 680 N.E.2d at 856-57.

10. Penn Central came out of bankruptcy in the late 1970s and transferred all of its railroad assets to Conrail, and USRV, a private entity, was established solely for the purpose of disposing of unwanted property rights in the various states. Jeff Swiatek, *Railbed Ownership Gets Sidetracked*, INDIANAPOLIS STAR, Mar. 28, 1993, at B1.

11. *Hefty*, 680 N.E.2d at 849 (quoting Mars Steel v. Continental Ill. Nat'l Bank & Trust, 834 F.2d 677, 678 (7th Cir. 1987)).

12. 1 REV. STAT., ch. 23, § 12 (1852) (codified at IND. CODE § 32-1-2-12 (1993)).

13. The essential elements of a deed are: "identification of the parties, description of the land, some words indicating present intent to convey, and the grantor's signature." *See* ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 11.1 (2d ed. 1993). Just as deeds using the term

conveyances to railroad companies and conveyances to private individuals. Thus, a conveyance to a railroad company worded in conformity with the statute must be construed to convey a fee simple if we are going to protect the integrity of all deeds. This statute continues unchanged.

The second statute allowed the railroads to acquire through condemnation proceedings whatever "land as is deemed necessary for its railroad, including necessary side-tracks and water stations, materials for constructing, except timber, a right-of-way over adjacent lands sufficient to enable the company to construct and repair its road, and a right to conduct water by aqueducts and the right of making proper drains."¹⁴ Under this condemnation power, a number of railroads acquired land, both by purchase and by condemnation, for their depots, roundhouses, and corridors. In 1905, the general assembly limited the right of railroads to condemn fee simple title to land for their corridors, but left intact their right to condemn fee simple title to land for other railroad purposes.¹⁵ What is crucial to understanding the role of the 1852 and 1905 condemnation statutes is: 1) the railroads could *purchase* any interest they wanted, including fee simple, both before and after the 1905 Act; 2) they could acquire by condemnation fee simple title to any land between 1852 and 1905; 3) they could acquire fee simple title by condemnation to all but their corridor land after 1905; and 4) statutory limitations on their condemnation power do not affect in any way the deed interpretation of railroad conveyances they acquired by purchase. Deeds are deeds, whether they were given to railroads or private individuals, and must be construed according to standard principles of deed construction.¹⁶

As one can imagine, actual railroad practices of land acquisition varied for every parcel: some people granted clear conveyances of fee simple title; others granted easements; some fought the railroads in court and had their land acquired through condemnation proceedings; and some never gave a deed and never challenged the railroad's rights to operate on their land. So long as the railroad was in operation, challenges by original landowners were unlikely to succeed.¹⁷ But problems naturally arose when the railroad discontinued operations along a particular track and the adjacent landowner, who may or may not have been the original grantor, wished to reacquire use of that land.

Indiana cases consistently hold that the general rule is that a "conveyance to

"right of way" are construed as passing easements, deeds that use the terms "convey and warrant the land" are construed to pass fee simple title.

14. 1 REV. STAT., ch. 23, § 15 (1852) (codified at IND. CODE § 8-4-1-16(a) (1993)).

15. Act of Feb. 27, 1905, ch. 48, § 1, 1905 Ind. Acts 59, 59-60 (codified as amended at IND. CODE § 32-11-1-1 (1993)). "Whenever land is taken by condemnation proceedings, the entire fee simple title may be taken and acquired if the land is taken for the site at a station, terminal, powerhouse, substation, roundhouse, yard, car barn, office building, or other purpose, except for a right-of-way." IND. CODE § 32-11-1-1(d).

16. "The deed given, when executed in lieu of condemnation, shall convey only the interest stated in the deed." IND. CODE § 32-11-1-1(d).

17. Adverse possession, prescriptive rights, and the power of condemnation all functioned to stabilize the railroad's property rights to lands they were currently using.

a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put . . . is to be construed as passing an estate in fee, but reference to right of way in such a conveyance generally leads to its construction as conveying only an easement.”¹⁸ This rule comports with traditional property doctrines that construe conveyances of “land” to be fee simples and conveyances of “rights” to be easements. This rule was cited by Justice Sullivan in *Hefty*,¹⁹ and clearly contradicts the arguments of class counsel that the railroads could not acquire fee simple title to property.²⁰

The rules of deed construction are relatively straightforward. Absent ambiguity in a deed, “the intention of the parties must be determined from the language of the deed alone.”²¹ Since railroads were responsible for drafting these conveyances, any ambiguities are to be interpreted strictly against the drafter.²² Ambiguities most often arise in these railroad deeds from the presence of fee simple language (convey and warrant the land) but with additional limitations (for railroad purposes) that would lead to an inference that a defeasible fee was intended, but also containing references to the property as a right-of-way (easement language). The sticking point in these cases is the role of the term “right-of-way,” a term that the U.S. Supreme Court has noted has two distinct meanings: an easement and the corridor land on which a railroad operates its tracks.²³ Thus, if the deed contains all easement language (grants or reserves a right) and subsequently refers to the railroad’s interest as a right-of-way, there is a clear grant of an easement. If the deed contains all fee simple language (conveys and warrants the land) with no reference to the interest as a right-of-way, there is a clear grant of a fee simple. However, if the deed contains a combination of the two, since the 1964 case of *Ross v. Legler*,²⁴ the tradition in Indiana has been to construe such ambiguous conveyance to grant only an easement because public policy

does not favor the conveyance of strips of land by fee simple titles to railroad companies for right-of-way purposes, either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of

18. *L & G Realty & Constr. Co. v. Indianapolis*, 139 N.E.2d 580, 585 (1957) (citation omitted); see also *Hefty*, 680 N.E.2d at 853-55 (citing *Brown v. Penn Cent. Corp.*, 510 N.E.2d 641 (Ind. 1987)).

19. *Hefty*, 680 N.E.2d at 853-54.

20. See *Abandoned Rails*, *supra* note 8; see also *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404, at 13-14 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties’ motions for partial summary judgment); *Tazian v. Cline*, 686 N.E.2d 95 (Ind. 1997).

21. *Hefty*, 680 N.E.2d at 853.

22. *Id.* at 854.

23. *Joy v. City of St. Louis*, 138 U.S. 1, 44 (1890).

24. 199 N.E.2d 346 (Ind. 1964).

the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of the property involved.²⁵

Justice Sullivan in *Hefty* recited these rules and deduced from preceding Indiana cases three general principles of deed construction: 1) conveyance to a railroad of a strip of land without additional limitations is to be construed as passing a fee, but reference to a right-of-way generally leads to its construction as conveying only an easement; 2) deeds prepared by railroads will be construed most favorably to the grantors; and 3) if ambiguity is present, courts will construe the absence of fee simple language as evidence that the parties intended to convey an easement and, in furtherance of public policy, will construe ambiguous instruments in favor of the original grantors, their heirs, or assigns.²⁶ Notably, the opinion did not mention the footnote to the *Ross* public policy rule, which stated that “a possible and reasonable exception within the public policy might exist where such easement and right-of-way is conveyed to and dedicated by a governmental body for a public right-of-way.”²⁷ Furthermore, Justice Sullivan did not address the burden of proof issue that the adjacent landowners in most of these cases may not be the heirs or assigns of the original grantor.²⁸

The burden of proof issue is extremely important in all of the pending class action lawsuits regarding abandoned railroad corridors. The number one cardinal rule of property law is that one cannot convey what one does not own. Lawyers for adjacent landowners are claiming that the railroads, when they attempt to convey their property interests in their corridors to trail groups, are doing exactly that. If they held only easements, and those easements have been abandoned, the railroads have nothing to sell.²⁹ However, the railroads readily admit that their property holdings in most corridors are a complicated mixture of interests, and as a result they will only give a quit-claim deed. The adjacent landowners forget,

25. *Id.* at 347-48.

26. *Hefty*, 680 N.E.2d at 855. This last principle is troubling if courts interpret it to mean that unless the deed uses the term “fee simple” it will be construed to be an easement because such an interpretation violates the 1852 conveyancing statute as well as standard deed practices.

27. *Ross*, 199 N.E.2d at 348 n.2.

28. *See id.* at 347. In many cases, the original grantor, after granting an interest to a railroad, will choose to sell his remaining land. In doing so, he will need to provide the buyer with a warranty deed, something difficult to do without either severing the railroad’s corridor land from the remainder of his land or including a description of the railroad’s interest in the corridor land as an encumbrance. Needless to say, if courts are genuinely interested in determining the original grantor’s intent, they should be looking at subsequent deeds for evidence of what the grantor believed he or she was retaining and could then convey to a subsequent buyer. The burden of proving this should fall on the adjacent landowner who seeks to disprove the railroad’s title.

29. Of course, if the railroad held fee simple, it may sell just as any other landowner might. If it takes a quiet title action and a lengthy court dispute to interpret the railroad’s property interest, then claims that the railroads are maliciously guilty of slander of title or criminal conversion which should be subject to punitive damages would be difficult to support.

however, the number two cardinal rule of property law, which is that one cannot acquire title to land simply by challenging defects in a neighbors' title; one must provide proof of better title. This reflects the weakness in all of these railroad title cases and the impropriety of using class actions to resolve what are basically quiet title disputes. Each deed and condemnation instrument is different and all of these rules require case-by-case deed analysis of the conditions and terms of the instruments. Quiet title cases center on the grantor's intent which is different in every instance. Most of the adjacent landowners whose title claims are questioned by the railroads do not have record title to the underlying land. Thus, even if the railroads only held easements, Justice Sullivan correctly noted that it would be the original grantor's heirs who retained title to the underlying fee, not the adjacent landowners whose land was severed from the railroad corridor nearly 100 years ago.³⁰

Thus, *Hefty* leaves us with three general propositions that are not particularly useful in case-by-case deed analysis except to reiterate the long-standing rule in Indiana that deeds prepared by the railroads should be construed strictly against the drafters. Two weeks after *Hefty*, the supreme court handed down opinions in two other railroad title cases: *Consolidated Rail Corp. v. Lewellen*³¹ and *Calumet National Bank v. American Telephone & Telegraph*.³²

B. Consolidated Rail Corp. v. Lewellen

The first case, *Lewellen*, was a disastrous opinion because the court blindly affirmed the Indiana Court of Appeals' decision with virtually no legal analysis of the deed language and no apparent concern for upsetting long-established property rights and rules. In *Lewellen*, many of the deeds at issue stated: "[Grantor], for consideration, ' . . . hereby Conveys and Warrants to the [Railroad] the Land, Right of way and Right of Drainage for its Railway . . . '"³³ Unlike the court of appeals, the supreme court did not believe that this deed was ambiguous; instead, it held that the deed unambiguously conveyed an easement.³⁴ The court held that this deed did not track the 1852 conveyancing statute³⁵ despite the fact that it included the requisite terms "convey," "warrant," and "the land" because, as Justice Sullivan noted, it had the additional term in the granting clause of "right-of-way."³⁶ It apparently did not occur to the court that this deed might convey three separate interests: the corridor land, a right of way for access to the corridor land across the neighboring fee, and a right to expel surface water onto the neighboring fee from the elevated roadbed. Sadly, the court also failed to note the second 1852 statute that explicitly provided that railroads could

30. *Hefty*, 680 N.E.2d at 855.

31. 682 N.E.2d 779 (1997).

32. 682 N.E.2d 785 (1997).

33. *Lewellen*, 682 N.E.2d at 780 (alteration in original).

34. *Id.* at 782.

35. See IND. CODE § 32-1-2-12 (1993).

36. *Lewellen*, 682 N.E.2d at 781.

acquire these three distinct interests through condemnation.³⁷ The striking similarity between the deed language in the *Lewellen* case and the 1852 railroad condemnation statute, in addition to the use of the statutory terms “convey and warrant the land,” could only lead to the exact opposite conclusion the court reached, which is that these deeds were unambiguous conveyances of a fee simple in the corridor land to the railroad, not an easement. The court’s only reason for its misguided decision was the oft-cited language that “reference to a right-of-way in such conveyance generally leads to its construction as conveying only an easement.”³⁸ This reasoning not only neglected the equally well-established fact that the term right-of-way has two meanings, and that “generally leads to” does not mean “inevitably leads to,” but also neglected the public policy reasons that might justify finding title in the railroad.³⁹ In attempting to reconcile the fee simple language of “convey and warrant the land” with the easement language of “right-of-way,” the court rejected both the argument that there were two different interests being conveyed (the land and a right-of-way to access the land) and the argument that if it was only one interest being conveyed, the greater (the land) should include the lesser (the right-of-way).⁴⁰ Instead, it adopted the court of appeals’ incomprehensibly silly argument that the presence of the greater and the lesser terms meant that the grantor intended only to convey the lesser, because if he had intended to convey the greater he would not have mentioned the lesser.⁴¹

The court in *Lewellen* then held that the particular corridor in dispute, because it was an easement, was subject to extinguishment through willful abandonment.⁴² Abandonment results in the unburdening of the underlying fee, not the “reversion” of a future interest nor the “passing” of the railroad’s rights to the adjoining landowner.⁴³ The encumbrance of the easement is simply removed and the fee holder then possesses unencumbered title. Under Indiana common law, mere nonuser is not enough to extinguish an easement created by express grant, and intent to abandon is a necessary element for finding

37. IND. CODE § 8-4-1-16 (1993) (allowing railroads to acquire whatever land was necessary for their railroads, plus “a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts and the right of making proper drains”).

38. *Lewellen*, 682 N.E.2d at 782 (citations omitted).

39. See *id.* at 782 n.4. At the time suit was brought, West Central Indiana Rails to Trails, Inc., had already purchased Conrail’s interest in the corridor for a public trail. *Id.* at 780.

40. *Id.* at 781-82.

41. See *Conrail v. Lewellen*, 666 N.E.2d 958, 962-63 (Ind. Ct. App. 1996).

42. *Lewellen*, 682 N.E.2d at 782-84.

43. This is despite the incorrect construction of the easement holder’s interest which is often misquoted by Indiana courts: “where easement granted for railroad purposes, upon abandonment the easement automatically *reverts* to the heirs and devisees of the grantors,” *L & G Realty & Constr. Co. v. City of Indianapolis*, 139 N.E.2d 580, 588 (1957), or “upon abandonment of the railroad, the property *passed* to the adjoining landowners,” *Richard S. Brunt Trust v. Plantz*, 458 N.E.2d 251, 255 (Ind. Ct. App. 1983).

abandonment.⁴⁴ In this case, the court declined to apply the common law easement rules because the Indiana General Assembly had enacted a statute in 1987 specifically governing railroad abandonment.⁴⁵ The statute provided that abandonment would occur upon the issuance of an Interstate Commerce Commission (ICC) certificate of abandonment and the removal of “rails, switches, ties, and other facilities.”⁴⁶ In 1992, this statute was declared unconstitutional⁴⁷ and reenacted in 1995.⁴⁸ In a rather questionable move, the court held that if the rails and ties had been removed and an ICC certificate of abandonment had been granted as of the date of the 1987 statute’s enactment, the abandonment was complete, despite the fact that the statute was later held to be unconstitutional and that the railroad’s pre-1987 actions might not have risen to the level of abandonment under the common-law intent standard.⁴⁹ The court did not apply the statute retroactively, but held that it provided a “legal definition of ‘abandonment’ . . . for use on and after July 1, 1987.”⁵⁰ Hence, although the railroad may have maintained its interest under the common-law intent standard, its easement would be terminated on the enactment date of the statute because it then met the abandonment conditions. As a result, the court held that Conrail had abandoned its easement even though it continued to pay property taxes on its corridor, continued to act like an owner over the land, and did not remove trestles, bridges, culverts, drainage tiles and subsurface ballast, i.e., even though it did not manifest the requisite intent to abandon necessary under the common-law rules in effect at the time it removed the tracks.⁵¹

The *Lewellen* decision places county auditors, assessors, and recorders in an untenable position. For instance, the railroads have been operating under the belief that they had fee simple title to this land. They have paid their property taxes and been responsible for maintenance of the land. The court has now determined that they not only did not have fee simple title, but that their

44. *Lewellen*, 682 N.E.2d at 783 (citing *Seymour Water Co. v. Leblin*, 144 N.E. 30, 33 (Ind. 1924); *Brock v. B & M Moster Farms, Inc.*, 481 N.E.2d 1106 (Ind. Ct. App. 1985)). Even a prescriptive easement requires nonuse and intent to abandon. *Id.* (citing *Bauer v. Harris*, 617 N.E.2d 923 (Ind. Ct. App. 1993)).

45. *Lewellen*, 682 N.E.2d at 783 & n.7 (citing former IND. CODE § 8-4-35-4 (1993) (repealed in 1995)). This statute was passed in response to the 1983 National Trails System Act, Pub. L. No. 98-11, §§ 201-207, 97 Stat. 42, 42-50 (codified as amended at 16 U.S.C. §§ 1241-1251 (1994 & Supp. I 1995)), in an attempt to frustrate the federally mandated policies of railbanking and corridor preservation. By loosening the common law abandonment rules, the legislature attempted to extinguish core property rights that had been protected for over a century.

46. *Lewellen*, 682 N.E.2d at 783 & n.7.

47. *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158 (7th Cir. 1992).

48. *See* IND. CODE § 32-5-12-6(a)(2) (Supp. 1997).

49. *Lewellen*, 682 N.E.2d at 783-84.

50. *Id.* at 783.

51. Under the doctrine of *eiusdem generis*, the court held that “rails, switches, ties and other facilities” did not include trestles, bridges, culverts, and the like. *Id.* at 784. *See Wright, supra* note 1, at 751-52 (criticizing the court’s reasoning in *Lewellen*).

easements had been extinguished at least as early as 1987 if not earlier. The adjacent landowner, however, lacks record title to the underlying fee. If the recorder changes Lewellen's deed to include the corridor land, the recorder may be subject to suit from the original grantor's heir who might have the requisite deed. Furthermore, if the corridor land is attached to Lewellen's deed (and thus she profited not from the strength of her own title but solely from the weakness in the railroad's title), the county assessor must reassess her land to recover from her the property taxes that the railroad quite reasonably is going to stop paying. The railroads pay taxes on the value of the intact corridor, though, which is significantly higher than the sum of its parts. The increased value of Lewellen's land is likely to be minuscule, even when added to the increased value of all the other parcels deemed to be adjacent to railroad easements, in comparison to the taxes accruable on the more valuable intact corridor. Hence, the county property tax base will suffer, county recorders and assessors will have hugely disproportionate administrative costs associated with reallocating the property rights involved than they will make up for in increased property tax revenues from adjacent landowners, and the state and federal railbanking policies will be frustrated. Moreover, this result occurs in the name of deed construction that is unsupportable by any reasonable interpretation of Indiana precedents, property law doctrines, or the language of this particular deed.

C. *Calumet National Bank v. American Telephone & Telegraph Co.*

In *Calumet National Bank v. American Telephone & Telegraph Co.*,⁵² the court devised a circular way to have its cake and eat it too. The dispute in *Calumet* involved a utility sub-easement license in an abandoned railroad corridor and the operation of the unconstitutional 1987 Rights-of-Way Act. The following chronology is important to understanding the court's decision in this case. Prior to 1982, Conrail acquired a rail corridor between Winamac and Crown Point, Indiana. In 1982, Conrail acquired an ICC abandonment certificate and by the end of 1985, removed its tracks and ties. In January 1984, however, Conrail entered into a license agreement with AT&T to install and operate fiber optic cables generally "along railroad right-of-way between Harrisburg, PA, and Chicago, IL."⁵³ In 1988, the agreement was amended to include the Winamac to Crown Point corridor. The appellant, Calumet National Bank, as trustee, owns the land adjacent to a six-mile stretch of this corridor. None of the deeds identifying the trust's interests in the adjacent land includes a description of the corridor land, nor any mention that the conveyance includes fee simple title in the corridor subject to Conrail's easement. In a prior quiet title action not at issue in the case, Conrail's interests in the corridor were held to be mere easements.⁵⁴ Hence, the questions addressed on appeal were whether Conrail had abandoned its interests, thus extinguishing the easement, and whether the trust owned the

52. 682 N.E.2d 785 (1997).

53. *Id.* at 787.

54. *Id.*

underlying fee and thus received the railroad's interest upon abandonment.

Remember the cardinal rule that one cannot acquire title to land by challenging defects in a neighbor's title? AT & T quite correctly argued that under the common law, a landowner "whose deed did not contain any description of an adjacent right-of-way acquired no interest in the right-of-way upon abandonment thereof."⁵⁵ If an easement is extinguished and no one can prove ownership of the underlying fee, the land escheats to the state.⁵⁶ But another provision of the 1987 statute provided that adjacent landowners who did not have a deed description of corridor land would be entitled to annex it if no other titleholder appeared and the railroad's easement was abandoned.⁵⁷ Thus, AT & T argued that because the trust did not have record title to the abandoned corridor, its property rights could not be created until 1987 when the statute was passed or the date Conrail abandoned the easements, whichever was later.

Had the court done what it did in *Lewellen* and ruled that Conrail had abandoned as of 1987, the trust's property rights would have been created simultaneously with the destruction of Conrail's rights. But foregoing all attempts at logic and consistency, the court applied the statute retroactively to hold that "Conrail's interest in the right-of-way was extinguished no later than December, 1985."⁵⁸ Applying a statute that was not in effect until two years later to terminate valuable property rights should raise at least one judicial eyebrow. Applying it retroactively to create the corresponding property rights in the trust should raise the other eyebrow, even if doing so would be consistent.

However, the statutorily-created property rights in the adjacent landowners required a recording and hearing process in order to be perfected.⁵⁹ The trust failed to meet the requirements and thus had not perfected their interests under the statute in 1985 when the easement was extinguished, in 1987 when the statute was passed, in 1989 when the trust filed suit, nor in 1992 when that part of the statute was declared unconstitutional. Thus, even if the statute had been applied retroactively to create property rights for the trust in 1985, the trust could not have succeeded in claiming title because it had not met the minimal procedural requirements that were held to be unconstitutional and inadequate for terminating the railroad's property rights.⁶⁰ So, unable to apply the statute to create property rights in the trust, the court relied on the pre-statute common law of other states to rule that the rights of adjacent landowners with no deeds extended to the

55. *Id.* at 789.

56. It is difficult to understand why the state would be willing to surrender its interest in unowned parcels of abandoned railroad corridors, some of which are located in valuable urban centers and are windfalls to land developers, especially in light of the federal and state policies promoting railbanking and interim trail use.

57. IND. CODE § 8-4-35-5 (1987) (repealed 1995) (current version at IND. CODE § 32-5-12-10 (Supp. 1997)).

58. *Calumet*, 682 N.E.2d at 788.

59. IND. CODE §§ 8-4-35-6 to -7 (1987) (repealed 1995).

60. *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158 (7th Cir. 1992).

center of the corridor⁶¹ and that upon abandonment, the trust's title was no longer burdened by the easement nor did it have to record its title or file the requisite affidavits.⁶² In other words, the court would not apply the well-established common-law rules on abandonment which were in effect at the time to determine if Conrail had indeed manifested the requisite intent to abandon. However, the court would apply the common-law rules of other states to the creation of the trust's property rights when there was no Indiana precedent at the time and consistently applying the statute would have dictated a different result. It is difficult to explain how this result is the product of anything other than spurious results-oriented reasoning. By reasoning backward from the statute, the court created property rights in the deedless adjoining landowners that would be considered stronger than the rights of the railroad (who had been using the property, paying taxes on it, maintaining it, and had a deed to it) and the state that had a clear interest in preserving railroad corridors and implementing recreational trails and linear parks.⁶³

D. Tazian v. Cline

If the court really dropped the ball in the *Hefty*, *Lewellen*, and *Calumet* cases, it redeemed itself in part in the fourth railroad title case, *Tazian v. Cline*.⁶⁴ In *Tazian*, an 1873 handwritten deed to the Fort Wayne Railroad was deemed to have conveyed to the railroad fee simple absolute. The deed language in this case was as follows:

said parties of the first part in consideration of five hundred dollars . . .
do grant and convey and warrant to the party of the second part . . . a
strip of land . . . over, across, and through the following described tract
of land . . . said strip of ground to be on and along the central line of said
railroad as the same shall be finally located on such tract of land. . . .
With the right also . . . to cut down standing timber . . . to have and to

61. *Calumet*, 682 N.E.2d at 790. This is patently unreasonable. If the grantor intended to convey land to the middle of the corridor when he subsequently sold his remaining parcel, he would have included a description of the corridor land. His failure to include that land can only be interpreted as his belief that he did not own it to sell. He could not convey the remainder of this parcel, after the railroad corridor was removed, by warranty deed. So his severance of the property is a likely indication that he did not think he owned the corridor.

62. *Id.*

63. One must ask why the court would be willing to look into its crystal ball and modify property rights in 1985 based on the future 1987 statute, but would not look to the 1995 statute announcing a strong public policy in preserving abandoned railroad corridors and building linear trails and parks. And one might imagine that, while the court is willing to accept later-enacted statutes as evidence of prior-existing property rights, it might also take into account that this particular statute was held unconstitutional precisely for depriving the railroads of their property rights without due process of law. See *Penn Cent. Corp. v. U.S. R.R. Vest*, 955 F.2d 1158 (7th Cir. 1992).

64. 686 N.E.2d 95 (Ind. 1997).

hold all and singular the said premises . . . unto the said Fort Wayne . . . Railroad Company and their successors and assigns forever for the uses and purposes therein expressed.⁶⁵

In this case, Alice Cline purchased a 4.24 acre strip of land from Penn Central in 1985 by quitclaim deed. This strip abutted land owned by the Tazians who claimed title to the centerline of the corridor under all the theories advanced in the prior cases. The court here recognized that the original deed language was determinative; if the original grant conveyed fee simple, Cline was the successor in interest to the entire corridor.⁶⁶ If the grant conveyed only an easement to the railroad, Cline would have taken nothing because the easement would have been extinguished upon abandonment by Penn Central.⁶⁷ The court correctly noted that “[i]n a quiet title action, one must recover upon the strength of his or her own title” and not upon the weaknesses of one’s opponent’s title.⁶⁸ The fact that the Tazians had no title, except whatever rights accrued to them by virtue of no one else having better title, finally seemed relevant to the court in this case, though it had no relevance in *Hefty*, *Lewellen*, or *Calumet*.

The court first noted that the deed language was consistent with the “convey and warrant” language of the 1852 conveyancing statute and further noted that while such evidence is not determinative but merely a factor in determining whether the parties intended to convey a fee simple, in this case, the instrument did not refer to the grant of a right nor did the deed appear to limit the conveyance to a right-of-way.⁶⁹ Consequently, the court deemed the granting clause to clearly convey a fee simple absolute.⁷⁰ The court also rejected the arguments of amici (the same counsel that represented the landowners in *Lewellen*, the second class in *Hefty*, and amici adjacent landowners in *Calumet*) that the “across, over and through” language indicated an intent to limit the grant to an easement.⁷¹ The court noted that in all cases in which similar “over and through” language was present and an easement was found, the term right-of-way appeared in the granting clause.⁷² Because this deed did not limit the use or purposes of the land, nor did it contain the term “right-of-way,” the “over and through” language was deemed not controlling.⁷³ The court further rejected arguments that an easement should be deemed the intent of the parties because part of the consideration was the “benefits anticipated from said railroad when constructed,”⁷⁴ because the specific land was not identified by metes and

65. *Id.* at 96.

66. *Id.* at 97.

67. *Id.*

68. *Id.* The court would have done well to remind the Appellees of this rule in *Lewellen*.

69. *Id.* at 98.

70. *Id.*

71. *Id.* at 98-99.

72. *Id.* at 99.

73. *Id.*

74. *Id.* “Benefits” mean the increase in value of remaining land of the grantor. *See*

bounds,⁷⁵ and because the deed included the phrase in the habendum clause “for the use and purposes therein expressed.”⁷⁶ All of these determinations were made with the careful reference to prior case law and a sensitivity to the nuances of deed construction that were noticeably absent in the prior cases. The court offered as final evidence for its construction of a fee simple, the fact that the deed did not describe the interest conveyed as a railroad right-of-way nor limit the conveyance for railroad purposes or uses only.⁷⁷

The *Tazian* case represents a refreshing departure from the previous three supreme court decisions. Justice Sullivan devoted sixteen paragraphs to legal analysis of the different factors that should be weighed in interpreting nineteenth-century deeds. This should be compared to six paragraphs in *Hefty*, four in *Lewellen*, and none in *Calumet*. The *Tazian* case is solely about deed interpretation and Justice Sullivan correctly weighed all the complex and difficult factors that the law uses to evaluate the deed language and the intent of the parties. It is unfortunate that the court did not hear oral arguments or accept briefs in the *Lewellen* case or it might have done a more thorough job of deed interpretation and realized that multiple interests in land can be conveyed in the same instrument. In *Tazian* the deed conveyed the land plus a right to cut timber. In *Lewellen* the deed conveyed the land plus a right of access and a right of drainage. There is no principled distinction between the two except that the deed in *Lewellen* identified all the interests in the granting clause, and the *Tazian* deed buried the right to timber below the land description. But unless the court is willing to reopen the *Lewellen* case, the inconsistency will remain a thorn in the sides of trial court judges. The *Tazian* decision also settles, despite arguments by amici landowners, the issue that the railroads could and did acquire fee simple title to land, just like any other individual or corporation.⁷⁸

But lest I get too enthusiastic about the importance of *Tazian* in heralding a new era of careful judicial analysis, the evils of *Lewellen* continue to spread. In *CSX Transportation, Inc. v. Rabold*,⁷⁹ the court of appeals adopted the misstated rule that “any reference to a right-of-way . . . will cause the deed to be interpreted as conveying only an easement.”⁸⁰ Thus, the court interpreted as an easement a deed clearly meant to widen a pre-existing rail corridor in fee simple that was worded as follows:

[The grantors] do hereby convey and warrant . . . the real estate . . .

AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 134 (Lawrence Friedman & Harry Scheiber eds., 1978).

75. *Id.* at 100.

76. *Id.* at 100-01.

77. *Id.* at 101.

78. See *Abandoned Rails*, *supra* note 8 (quoting Nels Ackerson who stated, “The law has always been that a railroad only takes an easement and not title to the land.”).

79. 691 N.E.2d 1275 (Ind. Ct. App. 1998).

80. *Id.* at 1278 (quoting *Consolidated Rail Corp. v. Lewellen*, 666 N.E.2d 958, 962 (Ind. Ct. App. 1996)).

described as follows . . . Two additional strips of land . . . located one on each side of the present Right of Way . . . Said additional strips is intended to convey enough land to make a Right of Way One Hundred (100) feet in width . . . TO HAVE AND TO HOLD THE SAME . . . forever.⁸¹

Because the term “right of way” appeared in the deed, the court blindly ignored the entire granting clause that clearly conveyed fee simple and the fact that right-of-way was clearly used in this deed in its descriptive meaning of corridor, not its definitional meaning as an easement. And the court overlooked the fact that the grant was “forever,” another indication of fee simple. This court, citing *Ross*,⁸² stated that distinguishing between granting, habendum, and description clauses is an “over-refinement of the rules of construction.”⁸³ This decision, like *Lewellen*, perpetuates the errors of *Ross* by focusing solely on the key phrase “right-of-way” as though its presence magically defeats all other rules and principles of deed interpretation as well as the unmistakable intent of the parties.

Some further comments about these railroad title issues are pertinent here. First, *Tazian* and *Lewellen* illustrate the impropriety of using class action suits to resolve the competing claims between railroads, successors in interest to the railroads, and adjacent landowners. Because most of these deeds are unique and vary significantly from parcel to parcel, the original grantee railroad’s interests must still be determined on a case-by-case basis in quiet title actions. Class action suits, therefore, serve little purpose but to tie all landowners in court and stall any use of these abandoned corridors.⁸⁴ Creating a class of all adjacent landowners in the entire state serves only to frustrate any development of abandoned corridors, even those with landowners who desire conversion to trails. It also hinders railbanking and corridor preservation policies and provides little protection to landowners while creating a monopoly on attorney fees for class counsel.

Second, the exact role played by the term “right-of-way” has not been settled by the Indiana Supreme Court. In all the cases cited by the parties in which an easement was found, either the term “easement” or “right-of-way” was present in the granting clause of the deed, that is, until *Rabold*. Although such evidence is strong in support of a finding that the grantor intended to convey only an easement, it is certainly not determinative. The term “right-of-way” has two widely-accepted legal meanings, only one of which means an easement.⁸⁵ Two trial court decisions have rejected the arguments of adjacent landowners that the presence anywhere in the deed of the term “right-of-way” magically converts it

81. *Id.* at 1277.

82. *Ross v. Legler*, 199 N.E.2d 346 (Ind. 1964).

83. *Rabold*, 691 N.E.2d at 1278.

84. This harkens back to Judge Posner’s warning about the perils of class action suits. *See Mars Steel v. Continental Ill. Nat’l Bank & Trust*, 834 F.2d 677, 678 (7th Cir. 1987).

85. *See Joy v. City of St. Louis*, 138 U.S. 1, 44 (1890); *Consolidated Rail Corp. v. Lewellen*, 666 N.E.2d 958, 962-63 (Ind. Ct. App. 1996).

into an easement.⁸⁶ These decisions correctly note, in following *Brown v. Penn Central*, that “reference to a right-of-way in such a conveyance *generally* leads to its construction as conveying only an easement.”⁸⁷ It does not *always* lead to that conclusion. The importance of the rights at stake should encourage the courts of Indiana to consider all of the relevant factors and rules in deed construction, rather than adopting the 1964 *Ross* court’s opinion that such calculations are “an overrefinement of the rules of construction.”⁸⁸ *Tazian* is an excellent step in moving away from blind results-oriented decision-making and toward thoughtful, legal analysis of the important rights at issue in these cases. Following up on the promise of *Tazian*, however, will require reversing *Rabold*.

Third, the court needs to resolve the interpretive role of the unconstitutional 1987 statute, and its 1995 replacement. It is simply unconscionable to apply the statute when doing so nets the desired result and not when it doesn’t, especially when applied retroactively only for selected issues. Fourth, the court must decide these cases in light of state and federal statutes promoting railbanking and interim trail use.⁸⁹ Although the court in *Lewellen* sidestepped a discussion of the public policies that should be considered when interpreting ambiguous deeds, the importance of corridor preservation has clearly risen to a national priority and should not be frustrated in the name of inconsistent application of outdated anti-railroad precedents.⁹⁰ It is no longer adequate to simply decide all property disputes against the railroads, for doing so raises due process and equal protection concerns. Finally, Judge William Hughes, in the Hamilton Superior Court, set forth an excellent outline of factors that should be weighed in construing nineteenth-century railroad deeds in his order in a Carmel sub-class case.⁹¹ Judge Hughes’ ten principles for evaluating railroad deeds miraculously harmonize all four Indiana Supreme Court decisions discussed herein. Therefore courts faced with a quiet title action regarding railroad deeds should refer to that order. The principles include:

[1] [w]hen interpreting an instrument of conveyance, the Court will look first to the specific wording of the granting clause to determine the object of the conveyance; [2] [t]he interpretation of an instrument of conveyance must consider the instrument in light of the relevant statutes in effect at the time of conveyance; [3] [t]he use of titles such as

86. See Wright, *supra* note 1, at 741 n.91 (citing *Friends of the Pumpkinvine Nature Trail, Inc. v. Eldridge*, No. 20D03-9401-CP-009 (Ind., Elkhart Super. Ct. No. 3) (Sept. 2, 1994) (order granting partial summary judgment)); see also *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties’ motions for partial summary judgment).

87. 510 N.E.2d 641, 644 (Ind. 1987) (emphasis added).

88. *Ross v. Legler*, 199 N.E.2d 346, 351 (Ind. 1964).

89. 16 U.S.C. § 1247(d) (1994); 49 U.S.C. § 10905 (1994).

90. *Consolidated Rail Corp. v. Lewellen*, 682 N.E.2d 779, 784 (1997).

91. *Clark v. CSX Transp., Inc.*, No. 29D03-9308-CP-404 (Ind., Hamilton Super. Ct. No. 3) (Nov. 26, 1997) (revised order on parties’ motions for partial summary judgment).

“Warranty Deed,” “Right of Way Deed,” “Right of Way,” or “Deed of (grantor)” is not dispositive of the parties’ intent, but when read in context may provide additional evidence of the parties’ intent; [4] [c]onditions in an instrument of conveyance that require later performance by a party to the conveyance should be construed as covenants running with the land or as conditions subsequent and will not necessarily defeat what is otherwise a clear conveyance of fee simple title; [5] [d]eeds generally contain three important clauses: the granting clause, the habendum clause, and the clause identifying the subject of the conveyance—the “descriptive clause”; [6] [r]ailroads were empowered to receive fee simple conveyances of land upon which railroad lines were located both prior to and subsequent to 1905; [7] “upon,” “across,” “through,” “over,” “on” or any other preposition does not create an ambiguity, in and of itself, in a statutory fee simple form deed that clearly grants a strip of land or parcel of real estate with no other limiting language; [8] [t]he term “right-of-way” had dual usages in the [past which] can create confusion in a modern day interpretation of these deeds, and where the Court cannot determine the proper usage of the term, in the context of other deed language, the instrument will be adjudged ambiguous; [9] [i]n construing an instrument of conveyance, the Court must read the entire document in context, giving meaning to every part; [and 10] [i]n construing an instrument of conveyance, the Court will look at the consideration paid by the grantee railroad as providing additional evidence of the parties’ intent.⁹²

Reference to that order should obviate the need for trial judges to reinvent the wheel. In conclusion, the *Tazian* decision shows that the court has finally awakened from its long slumber and will begin to treat all deeds, even railroad deeds, with the serious attention that these property interests require. I therefore urge the court to reverse *Rabold* and continue to provide helpful guidance to the lower courts on deed interpretation so these cases may be put to rest once and for all and rights in these rail corridors may be settled so the dangers and nuisances of abandoned rail beds may be abated.

II. FURTHER DEVELOPMENTS

The courts of appeal also decided some important cases this year in the areas of zoning and eminent domain, landlord/tenant, premises liability, and nuisance. For the sake of brevity, I will summarize a few of the more important ones, but will footnote others of which one should be aware.

92. “The significance of the *granting clause* in deed interpretation has been addressed in Rule 1 above. The *habendum clause* may modify, limit and explain the grant, but it cannot defeat a grant that is expressed in clear and unambiguous language. The *descriptive clause* will not defeat an otherwise clear and unambiguous grant, but a vague or indefinite descriptive clause may be considered as evidence of the parties’ intent when the instrument of conveyance contains other limiting language or is otherwise ambiguous.” *Id.* at 6-17.

A. Easements

In *Gunderson v. Rondinelli*,⁹³ an easement owner appealed from a trial court judgment prohibiting him from erecting and maintaining a boathouse, installing underground electrical cables, operating an all-terrain vehicle, and cutting and piling brush on a non-exclusive easement granted for access to Myers Lake in Marshall County, Indiana.⁹⁴ The court of appeals affirmed the trial court's finding that the language of the deed was sufficiently ambiguous to allow for consideration of extrinsic evidence in determining the intent of the parties.⁹⁵ The deed language provided that "Grantor conveys a non-exclusive easement for ingress and egress to Grantees . . . [a]n easement for lake access, 30 feet in width"⁹⁶ The trial court concluded that the intent of the original parties was to provide solely a pedestrian walkway for access to the lake.⁹⁷ Although evidence had been introduced that prior owners had constructed steps in the easement down to the water, constructed a pier, and used the easement for access to a pontoon boat and a raft, the trial court nevertheless held that "[a]lthough certain activities have taken place that exceeded the intended limits of the easement, all of those activities were with permission, consent, approval, and/or participation by the owners of the servient property. Absent such an agreement, the Defendant is limited to the intended use of the easement."⁹⁸

The court of appeals affirmed the trial court's findings that the intent of the parties was to grant an easement "for walking purposes only."⁹⁹ But the court did not address whether waiver or estoppel would limit the ability of the servient estate owner to induce reliance by, for example, allowing ongoing violations of the easement's terms or by standing by while the easement owner invests large sums of money in improvements that could have been prevented. Although the easement owner's ability to meet the requirements of proving waiver or estoppel is not the issue, it might be the case that the "permission, consent, approval, and/or participation by the owners of the servient property"¹⁰⁰ induced investments and reliance that, in equity, should prevent the servient property owner from revoking his or her permission to exceed the limits of the easement.

In *Hensler v. Brooks*,¹⁰¹ the court considered whether a landowner is subject to a declaratory judgment entered against a predecessor in title which was not recorded. The town of Brooksborg claimed that the Henslers were obstructing the extension of Main and Water streets that were platted in 1843 and which ran

93. 677 N.E.2d 601 (Ind. Ct. App. 1997).

94. *Id.* at 602.

95. *Id.* at 604.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.*

101. 684 N.E.2d 1180 (Ind. Ct. App. 1997).

through the Hensler's property. The trial court ruled that the Henslers were bound by a 1935 declaratory judgment that specified the existence and boundaries of Water and Main Streets through their property.¹⁰² The court of appeals reversed, however, holding that because the judgment was not recorded, the Henslers were not on constructive notice of the judgment, and were therefore bona fide purchasers of the land unencumbered by the road easements.¹⁰³ The court did not address whether the Henslers were on inquiry notice, or whether an implied easement by prior use or prescription could have been found.¹⁰⁴ Rather, the court held that the nineteenth-century plat maps sufficiently established the existence of Main Street, and that continued public use of Water Street supported a finding of a public easement.¹⁰⁵ As *Hensler* illustrates, judicial judgments should be recorded so they do not get omitted from the chain of title.

In an important case outlining the duties of easement owners to the general public, the Indiana Court of Appeals held that Indiana Bell Telephone Co. (Indiana Bell) had a duty to inspect work performed on its behalf on an easement. In *Bala v. City of Indianapolis*,¹⁰⁶ a trenching company working for Indiana Bell had allegedly severed a city sewer line during the process of laying telephone cables and conduits which caused a hole to develop. Mr. Bala fell into the hole and was injured while walking his dog one evening and then sued Indiana Bell. The trial court granted summary judgment in favor of Indiana Bell by relying on the 1989 case of *Sowers v. Tri-County Telephone Co.*¹⁰⁷ In *Sowers*, a tree-trimmer hired by the phone company was injured when he fell into an abandoned manhole while working on the company's easement. The Indiana Supreme Court had denied Mr. Sowers relief on the grounds that the utility company was "not responsible for creating the hole and had no reason to know of its existence."¹⁰⁸ The court of appeals in *Bala* rejected *Sowers* and reversed, noting that "it was not consistent with sound legal and social policy to impose a duty upon the telephone company to inspect all property for which it held easement rights."¹⁰⁹ The court distinguished mere ownership of an easement from control over work being done on an easement stating "it is not inconsistent with sound social and legal policy to recognize a duty upon [easement holders] to inspect work performed on [their] behalf."¹¹⁰ Further, the court of appeals, in reversing the trial court, held that the duty analysis is not "merely a function of a utility's status as easement holder .

102. *Id.* at 1182.

103. *Id.* at 1183.

104. See RESTATEMENT (FIRST) OF PROPERTY § 476 (1944); *Shandy v. Bell*, 189 N.E. 627 (Ind. 1934).

105. *Hensler*, 684 N.E.2d at 1184-85; see also *Beaman v. Smith*, 685 N.E.2d 143 (Ind. Ct. App. 1997) (discussing the statutory requirements for dedicating an easement for a public street).

106. 682 N.E.2d 573 (Ind. Ct. App. 1997).

107. 546 N.E.2d 836 (Ind. 1989).

108. *Bala*, 682 N.E.2d at 575 (citations omitted).

109. *Id.*

110. *Id.* at 576.

... [r]ather it focuses upon the utility's use of the land."¹¹¹ Because the trencher's negligent work was performed by and for the utility, the court would impose a duty to inspect that work, not by virtue of the utility's status as easement holder, but by virtue of its control over the work being done.¹¹²

It should be pointed out that the courts do not, and probably should not, take identical approaches in dealing with public and private easements. In *Gunderson*, the court strictly construed the private easement to limit the use to exactly what was intended by the parties, with no expansion in light of changed times and conditions. In contrast, the court in *Hensler* was willing to accept the prescriptive rights of the public to create a dedication and in *Bala* the court held an easement owner to have a duty of care toward the general public.¹¹³ *Hensler* and *Bala* show a greater concern for the rights of the general public than for the private easement holder. Ironically, however, when the courts had the opportunity to consider a quasi-public easement to a railroad for conversion to a public recreational trail in *Lewellen*, the rights of the public were completely disregarded in the analysis. Should the courts make a distinction between the public's prescriptive rights to use Water Street in Brooksborg to reach the Ohio River and the railroad's rights to pull up tracks and ties and convert its easement to a hiking and biking trail? I would suggest not. As mentioned above, treating railroads more stringently than other private easement owners and the general public leads only to inconsistencies that cannot be justified on any sound basis.

111. *Id.* at 575.

112. *Id.* at 575-76. This case is principally about premises liability and the duties landowners owe to invitees, licensees, and trespassers. There were quite a number of other premises liability cases this year. See *Strayer v. Covington Creek Condominium Ass'n*, 678 N.E.2d 1286 (Ind. Ct. App. 1997) (condominium owner's suit against the association in a slip and fall case denied in part because the covenants and restrictions applied only to use of the homes, not the common areas); *L.W. v. Western Golf Ass'n*, 675 N.E.2d 760 (Ind. Ct. App. 1997) (rape victim's suit against foundation that sponsored a scholarship which she received denied in part because the landowner and sponsor could not reasonably foresee the likelihood of a criminal assault); *Sheley v. Cross*, 680 N.E.2d 10 (Ind. Ct. App. 1997) (suit by injured motorist alleging that adjoining landowner's crops impaired motorist's view of oncoming traffic denied because landowner did not owe duty to traveling public when landowner's actions were located entirely upon landowner's property and did not spill out into the street); *Carroll v. Jagoe Homes, Inc.*, 677 N.E.2d 612 (Ind. Ct. App. 1997) (holding that genuine issue of material fact existed as to whether property owner was in control of partially constructed house in which child was injured and whether such house constituted attractive nuisance); *McCormick v. State*, 673 N.E.2d 829 (Ind. Ct. App. 1996) (holding that Indiana recreational use statute barred recovery against the Indianapolis Water Company for death of a boater whose boat went over the spillway of Morse Reservoir).

113. See also *Beaman v. Smith*, 685 N.E.2d 143 (Ind. Ct. App. 1997) (holding that a statutory dedication had been effected and a public easement created simply by marking an "easement for future street" in the plat).

B. Landlord/Tenant

A reminder that Indiana is in an at-will state came in *Stout v. Kokomo Manor Apartments*,¹¹⁴ in which the court of appeals affirmed the eviction of a woman and her thirteen-year-old son from their FmHA subsidized apartment on a series of technicalities, never reaching the merits of her case. Ms. Stout was evicted upon an allegation that her son had caused a breach of the anti-“criminal activity” provision of her lease by allegedly molesting a young child in the complex. Ms. Stout filed a demand for a jury trial and a counter-claim against her landlord. Stout claimed that her son’s actions did not amount to “criminal activity” because at most it was an act of juvenile delinquency and juvenile proceedings are civil, not criminal.¹¹⁵ The court agreed that it was not a criminal activity per se, but that the term “criminal activity” in the lease did not mean that a crime must have been committed.¹¹⁶ The court concluded that “the parties cannot reasonably have entered into the agreement with the intention that ‘criminal activity’ be avoided but any and all forms of delinquent activity be accepted. The evidence therefore is sufficient to support the determination that the act of molestation qualified as ‘criminal activity’ as provided in the lease agreement.”¹¹⁷ The court offered no principled distinction between criminal activity and juvenile delinquency, leaving us to wonder if skipping school, writing on bathroom walls, or spitting on the sidewalk could be grounds for eviction as well.

In support of its ruling, the court relied on arguably hearsay evidence that the son had admitted the act of molestation, and evidence that arguably violated section 31-6-8 of the Indiana Code on confidentiality provisions for juvenile proceedings.¹¹⁸ Ms. Stout was denied a jury trial because she failed to demand one within ten days of the filing of the complaint in the small claims division of the superior court. Nor did she file the required ten dollars to transfer the claim to the plenary docket or ask for leave to proceed without payment of the deposit. After this series of missteps by Ms. Stout and/or her attorney, the court summarized that

[i]nsofar as Stout did not establish her indigency or request leave to proceed without payment of the deposit, she prevented the possibility of a transfer of her case to the plenary docket for a trial by jury. Similarly, by her inactions, Stout permitted the case to proceed on the small claims docket under its informal procedural and evidentiary rules.¹¹⁹

As a result of her delay, the landlord’s claim remained “informal, with the sole objective being to dispense speedy justice.”¹²⁰ In fact, it was so speedy and

114. 677 N.E.2d 1060 (Ind. Ct. App. 1997).

115. *Id.* at 1064.

116. *Id.*

117. *Id.* at 1065.

118. *See id.* at 1063-64.

119. *Id.* at 1067.

120. *Id.* at 1068.

informal, that because the “record does not demonstrate that Stout asked the trial court for any relief from the Landlord’s retention of her pre-paid rent or her security deposit . . . Stout may not proceed against the landlord on this issue for the first time on appeal.”¹²¹ This case is particularly troubling. Although we all recognize the importance of summary eviction proceedings, should Ms. Stout not only lose her apartment, but her housing subsidy as well because she failed to pay the ten dollar fee within ten days that would have moved her case to the plenary docket where standard rules of evidence would have applied?¹²²

C. Life Estates

The Indiana Court of Appeals faced a particularly tricky case after Anna Ellerbusch granted a remainder interest in her house and eighty-eight acres to her sons, reserving a life estate in herself.¹²³ Ms. Ellerbusch had procured an insurance policy on the house which she paid for out of her own personal funds. In 1995, the house was completely destroyed by fire and Ellerbusch was compensated by her insurer for the fair market value of the home. However, she did not use the proceeds to repair or rebuild the house. A year later, one of the remaindermen sued Ellerbusch seeking damages for loss in value to the property and requesting that the court order her to hold the remainderman’s share of the insurance proceeds in a constructive trust. The trial court granted summary judgment for Ellerbusch, and the remainderman appealed.¹²⁴ The court of appeals affirmed, adopting the majority rule that a life tenant, who “insures the property in his own name and for his own benefit and pays the premiums from his own funds, . . . is entitled to the entire proceeds of the insurance upon a loss to the property, even if the insurance covers the full worth of the property.”¹²⁵ The court noted several minority rules which state that if the life tenant “recovers insurance proceeds that exceed the value of the life estate, then the tenant must hold the excess in trust for the benefit of the remaindermen . . .” and that “insurance proceeds collected by the life tenant . . . stand in place of the

121. *Id.*

122. *Id.* at 1065. And even if the trial had been procedurally fair, is eviction the proper response to a 13-year-old child’s “sexual orientation problems” rather than medical treatment? Stout argued her son had “sexual orientation problems,” and that the charge of molestation against him caused an “impairment” which should be a “handicap” meriting protection against housing discrimination under the Fair Housing Act. The court rejected this argument, stating the son’s action “qualifie[d him] as a ‘direct threat to the health or safety of other individuals’ [and thus] the ‘disability’ of Stout’s son [is not protected].” *Id.*

123. *Ellerbusch v. Myers*, 683 N.E.2d 1352 (Ind. Ct. App. 1997).

124. *Id.* at 1353-54.

125. *Id.* at 1354 (citations omitted). This rule is subject to three exceptions: if the instrument creating the estate expressly provides differently, if the life tenant and remaindermen agree, or if a fiduciary relationship exists between the parties. *Id.* None of these exceptions applied in this case. *Id.* at 1355.

destroyed property and must be used to rebuild the property.”¹²⁶ The court, with no discussion, adopted the majority rule explaining that a contract of insurance is a personal contract and “inures to the benefit of the party with whom it is made and by whom the premiums are paid.”¹²⁷ Since Ellerbusch was not required to insure the property for the remainderman’s benefit, she would not be required to hold the insurance proceeds in trust for them either.

Clearly, this is a dangerous rule. If a life tenant can insure her tenancy for full market value, and recover and keep the full market value without rebuilding after a loss, she has converted a part of the remainderman’s interest. Because the remaindermen now receive the fire-scorched land and the remains of a building, their estate has suffered. The life tenant walks away with monetary compensation greater than the value of her life estate. The remaindermen’s property has been damaged and their only recourse is against the life tenant’s estate in an action for waste. But just as we allow the remaindermen to bring an action in waste prior to the determination of the life estate to prevent further destruction of the remaindermen’s interest, so too should the remaindermen be able to attach a portion of the insurance proceeds to insure that the life tenant will have suitable assets to pay a judgment. While Ellerbusch may purchase insurance for the full market value of the estate, her life estate is worth less than the full market value of the property. If she cannot sell unencumbered title to the entire estate without the remaindermen’s participation, she should not be able to destroy the property and keep the full insurance proceeds without being liable to the remaindermen for their damaged estate. Any other rule encourages the life estate holder to get full market value through insurance fraud which he or she could not obtain on the open market.¹²⁸

D. Rule Against Perpetuities

There was a really complicated Rule Against Perpetuities case that came out of the court of appeals this year. *Wedel v. American Electric Power Service Corp.*¹²⁹ involved an agreement for royalties in exchange for coal options (overriding royalty interest in coal),¹³⁰ and whether such an interest was an interest in property that would be subject to the rule against perpetuities. In *Wedel*, the court determined that the 1970 royalty agreement between Mr. Beshear¹³¹ and American Electric Power Services Corporation (AEP) were

126. *Id.*

127. *Id.* (quoting 51 AM. JUR. § 158 (1970)).

128. I am certainly not implying that Mrs. Ellerbusch committed insurance fraud. My only concern is that such a rule, without strict protections for the remaindermen, would encourage insurance fraud.

129. 681 N.E.2d 1122 (Ind. Ct. App. 1997).

130. An overriding royalty interest has been defined as: “a royalty interest in minerals located on property that the royalty holder (i.e., grantee) does not actually own.” *Id.* at 1133 (quoting *Commerce Bank v. Peabody Coal Co.*, 861 S.W.2d 569, 572 n. 4 (Mo. Ct. App. 1993)).

131. Beshear died before completion of this suit and was replaced by the executor of his estate,

interests in property that would be subject to the rule against perpetuities and were not merely contract rights.¹³² Under the agreement, Beshear could elect to receive advance royalty payments for coal covered by various options.¹³³ Beshear had made elections regarding four different types of property interests: 1) acreage Beshear obtained prior to the original agreement; 2) acreage obtained by Beshear on behalf of AEP; 3) acreage acquired independently by AEP; and 4) acreage not acquired by AEP but within the limits of the coal field.¹³⁴ Beshear elected royalties on coal in the first two categories and part of the third under an agreement that required him to either elect advance royalties within five years after AEP exercised its options or wait to receive royalties on coal actually mined.¹³⁵ The court held that Beshear's interests in royalties in the first two categories had vested in interest under the contract which gave him a five-year and an eight-year window within which to elect royalties or the options would be reassigned.¹³⁶ These two interests, therefore, had vested within the necessary period, and were not void.

The court then held that Beshear's interest in the category three options were extinguished by operation of the contract for those options on which he did not previously elect advance royalties.¹³⁷ Additionally, his interest in the category four options were extinguished by the rule against perpetuities because they were nonvested.¹³⁸ The court held, in sum, that "overriding or nonparticipating royalty interests are real property interests which vest immediately in the royalty holder only to the extent that such interests are granted in property owned by the grantor at the time of conveyance, otherwise such royalty interests will not vest until acquisition by the grantor."¹³⁹ This was a case of first impression in Indiana with regard to overriding royalty interests, and the court adopted the rule that property rights that are vested in interest, as well as those that are vested in possession, will not be subject to the rule against perpetuities.¹⁴⁰ Because mineral interests are considered real property, they are vested in interest when the right to future enjoyment is fixed.¹⁴¹ As it turned out, the royalty agreements provided an election period during which the options would become vested in interest; had they not, the options would have been subject to the rule against perpetuities.

Wedel.

132. *Wedel*, 681 N.E.2d at 1132.

133. *Id.* at 1128-29.

134. *Id.* at 1133.

135. *Id.* at 1128-29, 1133-34 & n.10.

136. *Id.* at 1133-34.

137. *Id.* at 1135.

138. *Id.*

139. *Id.* at 1137-38.

140. *Id.* at 1132.

141. *Id.* at 1132-33.

E. Subjacent Support

Unless you live in California where the land is constantly sliding around, burning up, or caving in, I'll bet you never thought you'd actually encounter a subjacent support case once you sold that property casebook to some unsuspecting first-year. But in coal-mining Indiana, one can encounter some really pithy issues. In *Haseman v. Orman*,¹⁴² a group of property owners noticed structural damage to their homes and depressions in their property, the result of subsidence from subterranean coal mining. They filed suit against the owner and lessee of the subsurface mineral rights claiming a breach of their absolute duty to provide the surface owners with subjacent support. The trial court found the owner and lessee strictly liable for the damage. The court based its decision on the 1901 case, *Paull v. Island Coal Co.*,¹⁴³ which restated the well-established rule that "an absolute duty exists on the part of the owners of mineral rights to provide subjacent support for the owners of surface rights."¹⁴⁴ The court of appeals in *Haseman* affirmed the lessee's liability, but reversed the finding of strict liability against the owner of the mineral rights.¹⁴⁵ In qualifying the *Paull* rule, the court of appeals ruled that the "owner or possessor of this land is not liable under the rule . . . unless he was an actor in the withdrawal of support."¹⁴⁶ Strict liability usually imposes liability regardless of fault or participation. However, the court of appeals determined that the underlying reason behind strict liability is to impose liability on the party in the best position to bear the loss, which in this case was the lessee not the absentee owner.¹⁴⁷ Additionally, the court would not find an independent liability under negligence principles because *Haseman* was only a passive lessor of the mineral rights and, "as a result, did not assume a duty to the Ormans"¹⁴⁸ because he was not in control of the mining operations. But if a surface owner has an absolute right to subjacent support, is that right compromised by restricting liability to a cost/benefit analysis of those best able to bear the risk? Under such a rule, what incentive is there on the part of the owner to negotiate a lease that protects the rights of unsuspecting surface owners?

Fortunately, the Indiana Supreme Court vacated the court of appeals' decision.¹⁴⁹ Justice Boehm noted that although Indiana had not ruled on whether a lessor of mineral rights is subject to strict liability (along with the lessee) for subsidence, the lessor was in a better position than surface rights owners to

142. 680 N.E.2d 531 (Ind. 1997).

143. 88 N.E.2d 959 (Ind. App. 1909).

144. *Haseman v. Orman*, 660 N.E.2d 1041, 1044 (Ind. Ct. App. 1996).

145. *Id.* at 1045.

146. *Id.* at 1044-45 (quoting RESTATEMENT (SECOND) OF TORTS § 820 cmt. g (1977)).

147. *Id.* at 1045 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984)).

148. *Id.*

149. *Haseman*, 680 N.E.2d at 532.

“require financial responsibility of his lessee.”¹⁵⁰ Additionally, Justice Boehm stated that “[i]t would be fundamentally unfair to allow Haseman to profit from his lessee’s activities and then wash his hands of any liability by hiding behind the lease.”¹⁵¹ Consistent with rules on duty of care and imposition of liability on the party best able to prevent loss, Justice Boehm declared that “the mineral owner’s duty to provide subjacent support cannot be extinguished by a lease of mineral rights unless a separate contract with the surface estate holder so provides.”¹⁵² In effect, the court correctly imposed the duty on the party who benefitted from the activity rather than on the innocent bystander who was not a party to the lease transaction.

F. Zoning

There were quite a number of zoning cases this year, most having to do with whether zoning variances were justifiably denied.¹⁵³ Other cases concerned alterations to businesses operating under legal non-conforming use status,¹⁵⁴ and petitions for mandamus ordering approval of zoning variances or plats or issuance of permits.¹⁵⁵ But one case stands out as having presented a particularly thorny issue. In *Schlehuser v. City of Seymour*,¹⁵⁶ Donn Schlehuser appealed the City of Seymour BZA’s revocation of two zoning variances that had been granted to him in 1993 to open an automotive repair shop. The City of Seymour petitioned the BZA to revoke Schlehuser’s variances because, it alleged, he was not in compliance with the conditions of the variances. Schlehuser obtained a temporary restraining order to prevent authorities from taking action on the petition, but it was subsequently rescinded and the BZA revoked his variances. In 1995, he petitioned the trial court for a writ of certiorari alleging that the BZA’s actions were ultra vires, violated the BZA’s own rules, and violated his

150. *Id.* at 536.

151. *Id.* at 535.

152. *Id.* at 536.

153. *Crooked Creek Conservation & Gun Club v. Hamilton County North Bd. of Zoning Appeals*, 677 N.E.2d 544 (Ind. Ct. App. 1997) (holding BZA was within the scope of its discretion in denying special exception to zoning ordinance for gun club; *Irving Materials, Inc. v. Board of Comm’rs*, 683 N.E.2d 260 (Ind. Ct. App. 1997) (holding that county had authority to require special exception for mineral extraction in a flood plain).

154. *Deja Vu of Hammond, Inc. v. City of Lake Station*, 681 N.E.2d 1168 (Ind. Ct. App. 1997) (distinguishing between extension and enlargement of non-conforming uses by adult entertainment business that expanded its premises); *Ragucci v. Metropolitan Dev. Comm’n*, 685 N.E.2d 104 (Ind. Ct. App. 1997) (holding in case of first impression, that increase in the number of apartments without altering size of apartment building, was permissible under legal non-conforming use).

155. *Brant v. Custom Design Constructors Corp.*, 677 N.E.2d 92 (Ind. Ct. App. 1997) (reversing trial court for ordering mandamus without sufficiently considering all elements in the ordinance); *Yater v. Hancock County Bd. of Health*, 677 N.E.2d 526 (Ind. Ct. App. 1997) (affirming denial of septic permits to developers when stricter regulations went into effect).

156. 674 N.E.2d 1009 (Ind. Ct. App. 1996).

constitutional rights. After oral argument, the court denied his petition and concluded that the BZA had the power to reconsider and revoke a variance that it had previously issued.¹⁵⁷ The court of appeals agreed with Schleuser that his writ of certiorari should have been granted.¹⁵⁸

Whether a BZA can revoke a variance absent an express grant of that authority is an issue of first impression in Indiana. The court held that if the BZA has an express statutory grant of authority to reconsider and revoke a variance, it certainly may do so.¹⁵⁹ Absent such an ordinance, there must be some safeguards to insure that a zoning board does not act arbitrarily, especially when the recipient has relied on the variance and has invested heavily.¹⁶⁰ Thus, the court held that “the authority to revoke a variance is not inherent in the BZA’s statutory powers to grant and deny a variance.”¹⁶¹ But where a variance is granted subject to certain conditions, if those conditions are adequately spelled out, the variance may be revoked if the conditions are not met.¹⁶² Furthermore, restrictions must “be constitutional and may not themselves exceed the scope of authority delegated to the BZA by the relevant ordinance or statute.”¹⁶³ The court held that any conditions placed on a zoning variance should “1) not offend any provision of the zoning ordinance; 2) require no illegal conduct on the part of the permittee; 3) be in the public interest; 4) be reasonably calculated to achieve a legitimate objective of the zoning ordinance; and 5) impose no unnecessary burdens on the landowner.”¹⁶⁴ Moreover, the landowner must receive notice and have a meaningful opportunity to be heard before the variance can be revoked.¹⁶⁵ This case affirms the well-established rule that zoning variances are not permanently written in stone. However, reasonable conditions and restrictions placed on landowners must be clearly articulated, and landowners must be given notice and an opportunity to be heard, before the variance will be revoked.

CONCLUSION

This survey period was important with regard to property issues. Although many of the cases did not present startlingly new fact situations or technical legal quibbles, the courts continued to make inroads in refining and expanding current principles. There are a few cases that left doubts in the minds of many readers

157. *Id.* at 1012.

158. *Id.*

159. *Id.* at 1013. The court noted the quasi-judicial function of the BZA, in that the BZA “generally has no inherent power to review and vacate, rescind or alter its decision after it has been made.” *Id.* at 1014.

160. *Id.* at 1013.

161. *Id.* at 1014.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

as to their logic, consistency, or fairness, but many reaffirmed traditional property rules in ways that protected settled expectations.

The courts did find themselves on the cusp of an important legal issue, one that requires careful attention to precedents, doctrines, and principles of equity. The railroad title cases will continue to plague the courts until consistent and fair principles of deed construction have been well-established. The courts are well on their way to doing exactly that, and 1998 should be a productive year in that regard. Indiana is out of step with virtually every state court on these issues,¹⁶⁶ not because we are different, but because our judiciary has not given them the attention they deserve. But now is the time to do so, for Indiana cannot afford to lose the valuable and irreplaceable railroad corridors that constitute our national heritage.

166. See Wright, *supra* note 1.