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Valparaiso University Law Review

Volume 16
Number 3 Spring 1982

pp.511-535

Spring 1982

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Recommended Citation

Lynn M. Butcher, *Problems with Indiana's Tax Payment Requirements for Adverse Possessors*, 16 Val. U. L. Rev. 511 (1982).

Available at: <https://scholar.valpo.edu/vulr/vol16/iss3/4>

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PROBLEMS WITH INDIANA'S TAX PAYMENT REQUIREMENT FOR ADVERSE POSSESSORS

INTRODUCTION

The process of obtaining title to real property by adverse possession has been recognized for centuries.¹ Adverse possession is generally defined as "[a] method of acquisition of title to real property by possession for a statutory period under certain conditions."² These conditions are the characteristics required of the claimant's possession in order to classify it as sufficiently adverse to the titleholder of the property. At common law, several characteristics were required. The possession was to be actual, visible, notorious, exclusive, under a claim of ownership, hostile, and continuous for at least the statutory period.³ Indiana's common law requirements for adverse possession include all of these elements as prerequisites to the acquisition of title by adverse possession.⁴

In 1927, the Indiana legislature passed a bill⁵ which created an additional requirement to the common law elements required to obtain title by adverse possession. The statute requires that the adverse possessor pay all of the taxes assessed against the property claimed for the statutory period.⁶ This tax payment requirement is not unique

1. For a general look at the historical background of adverse possession, see Note, *Adverse Possession in Indiana*, 16 NOTRE DAME LAWYER 216, 216-18 (1941) [hereinafter cited as *Adverse Possession in Indiana*].

2. BLACK'S LAW DICTIONARY 49 (5th ed. 1979).

3. See Williams, *Title by Adverse Possession in Indiana*, 6 VAL. U.L. REV. 26, 33-44 (1971).

4. *McCarty v. Sheets*, ___ Ind. ___, 423 N.E.2d 297 (1981); *Penn Central Trans. Co. v. Martin*, 170 Ind. App. 519, 353 N.E.2d 474 (1976); *Piel v. DeWitt*, 170 Ind. App. 63, 351 N.E.2d 48 (1976).

5. S. 13, Ind. Gen. Assembly, 75th Sess. (1927).

6. The statute reads:

Hereafter in any suit to establish title to lands or real estate no possession thereof shall be deemed adverse to the owner in such manner as to establish title or rights in and to such land or real estate unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely: Provided, however, That nothing in this act shall relieve any adverse possessor or claimant from providing all of the elements of title by adverse possession now required by law.

IND. CODE § 32-1-20-1 (1976).

to Indiana.⁷ While this type of statute is found in several states, the legislative purposes of the statutes as well as their subsequent applications by state courts have not been uniform.⁸

The focus of this note is on the purpose and application of the Indiana statute as compared to the alternative purposes and applications of similar statutes in other states. Generally, three theories have been used to justify the enactment of tax payment statutes and to guide the statutes' subsequent application: the good faith or evidentiary theory,⁹ the policing theory,¹⁰ and the notice theory.¹¹ An alternative approach to these theories, used by a few state courts, is to apply the statutory requirement without regard for any theory of alleged legislative purpose.¹²

A careful and pragmatic analysis reveals practical difficulties and flaws in each of these approaches. Each of the theories fails to justify the tax payment requirement.¹³ Also, a strict application of the statute, it is argued, creates inequities.¹⁴

7. While numerous states have statutes which require or allow an adverse possessor to pay the taxes on the property he is claiming, each statute varies as to its terms. For example, statutes vary as to the length of time the adverse possessor must pay the taxes on the property (ALA. CODE § 6-5-200 (1975); CAL. CIV. PROC. CODE § 325 (West 1954)). They also vary as to whether color of title to the property is required (ALA. CODE § 6-5-200 (1975)). In addition, they vary as to the other options available to claiming title other than by paying the taxes on the property (TEX. REV. CIV. STAT. ANN. art. 16 §§ 5507-5510 (Vernon 1958)). Some states have statutes which cover all of these variables (COLO. REV. STAT. § 38-41-108 (1973); TEX. REV. CIV. STAT. ANN. art. 16 § 5509 (Vernon 1958)).

Considering the obvious differences in the statutes and the volume of case law interpreting these statutes, it would be virtually impossible for this note to attempt to formulate a comprehensive discussion on how each statute has been applied to date. Therefore, this note focuses on Indiana's statute and its application. However, in order to obtain a clear perspective of the effects of Indiana's stance, a comparison to other states is necessary. Therefore, references will be made to specific state statutes and state case law which illuminate both the Indiana position and the alternatives to that position.

8. See notes 17-55 *infra* and accompanying text.

9. See notes 21-28 *infra* and accompanying text.

10. See notes 29-31 *infra* and accompanying text.

11. See notes 32-55 *infra* and accompanying text.

12. See notes 56-80 *infra* and accompanying text. See also Comment, *The Payment of Taxes Requirement in Adverse Possession Statutes*, 37 CALIF. L. REV. 477, 478-81 (1949) [hereinafter cited as *The Payment of Taxes Requirement*]; Comment, *Payment of Taxes as a Condition of Title by Adverse Possession: a Nineteenth Century Anachronism*, 9 SANTA CLARA LAWYER 244, 249-51 (1969) [hereinafter cited as *A Nineteenth Century Anachronism*]; Annot., 132 A.L.R. 216 (1941). See also *River Farms, Inc. v. Fountain*, 21 Ariz. App. 504, 520 P.2d 1181 (1974).

13. See notes 17-55 *infra* and accompanying text.

14. See notes 56-80 *infra* and accompanying text.

The Indiana courts have held that the purpose of its tax payment statute is to give the titleholder further notice of the presence of an adverse possessor.¹⁵ Relying on the notice theory, the courts have, in most cases, deemed that payment of the taxes by the adverse possessor would not have given notice to the titleholder. Therefore, the taxes need not have been paid by the adverse possessor and the terms of the statute need not be fulfilled.¹⁶ While obviously refusing to strictly apply the statute, the courts have apparently refused to apply the statute in any way which would serve as an additional requirement for obtaining title by adverse possession or which would prevent the passage of title to the adverse possessor. Therefore, this note concludes that the Indiana statute serves no useful purpose and should be repealed.

TAX PAYMENT STATUTES:
THEORIES OF PURPOSE AND APPLICATION

When interpreting and applying any statute, courts generally take one of two basic approaches. First, the judiciary may attempt to determine the intent of the legislature in creating the statute, by use of legislative histories and other extrinsic indicators of that purpose, and apply it to the situation in order to facilitate that purpose. In the alternative, the court may apply the statute according to the clear meaning of the words and phrases in the statute.¹⁷ The former approach has revealed three basic purposes for statutes which require adverse possessors to pay the taxes assessed against the property claimed in order to secure title: the good faith or evidentiary theory,¹⁸ the policing theory,¹⁹ and the notice theory.²⁰ Each of these theories and approaches have been used by various state courts in applying this type of statute.

The Good Faith Theory

The good faith or evidentiary theory states that by paying the taxes assessed against the property being claimed, the adverse posses-

15. In *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979), the Indiana Court of Appeals stated that "[t]he intent of the legislature and the purpose of the statute is to give the recorded titleholder notice that someone is claiming an interest adverse to his." *Id.* at ___, 386 N.E.2d at 989 (footnote omitted).

16. See notes 88-126 *infra* and accompanying text.

17. See notes 56-80 *infra* and accompanying text.

18. See notes 21-28 *infra* and accompanying text.

19. See notes 29-31 *infra* and accompanying text.

20. See notes 32-55 *infra* and accompanying text.

sor shows his good faith in claiming title.²¹ The payment of taxes also provides evidence that the adverse possessor held the property under a claim of right.²² It is generally agreed that, at least in theory, one cannot argue with the notion that the act of paying the taxes does have evidentiary value.²³ However, the question remains as to the sufficiency of that value to support the entire weight of the requirement.

The good faith rationale has been used by only a few state courts when applying a tax payment statute. In Texas, for example, the courts have generally adopted the good faith theory.²⁴ The rationale for this application is that since the payment of taxes is one of the incidents of property ownership, the adverse possessor must be required to pay the taxes as evidence of his good faith in claiming title to the property.²⁵ Largely due to the decisions of the Texas courts, Arizona courts have similarly adopted the good faith theory.²⁶

Despite its adoption by these states, the good faith theory does not give a convincing justification for the passage of a tax payment

21. In *United States v. Schwalby*, 87 Tex. 604, 30 S.W. 435 (1895), *rev'd on other grounds sub nom.* *Stanley v. Schwalby*, 162 U.S. 255 (1896), the Texas Supreme Court held that "[t]he payment of taxes is an incident of ownership, and a circumstance which tends to show an honest belief, on the part of one claiming under a deed, in the justice of his title." *Id.* at ____, 30 S.W. at 437.

22. *Id.*

23. One author has stated:

However, the fallacy of the reasoning in *Schwalby* is that the court equates a circumstance of undoubted evidentiary value with a rigid statutory prerequisite. Even states which do not have a statutory requirement for payment of taxes recognize the fact of payment as strong, though not controlling, evidence of a possessor's intent to claim as his own. The statement of the court in *Schwalby* is therefore an expression of the good faith theory. This theory is difficult to quarrel with in principle.

A *Nineteenth Century Anachronism*, *supra* note 12, at 251.

24. *Mitchell v. Burdett*, 22 Tex. 633 (1858).

25. *Id.*

26. The good faith theory was expressly adopted by the Arizona courts in *River Farms, Inc. v. Fountain*, 21 Ariz. App. 504, 520 P.2d 1181 (1974). In that case the court held:

A reading of the statutes and cases interpreting them discloses three distinguishable rationales supporting them. . . . Another is the "good faith" theory, which views the payment of taxes as a demonstration of honest belief on the part of one claiming under a deed in the strength of his title. Such a position was taken in *United States v. Schwalby*, 87 Tex. 604, 30 S.W. 435 (1895), which held that the title to property on which no tax had been assessed could still be obtained by adverse possession under the Texas statute, since tax payment was merely one of the indicia of ownership and confidence of the validity of the title. *See Wichita Valley Rwy. Co. v. Somerville*, 179 S.W. 671 (Tex. Civ. App. 1915) (*dicta*). Arizona

statute. Given the other common law elements of adverse possession,²⁷ specifically the requirement that the possession itself be under a claim of right, it seems redundant to statutorily require evidence of a good faith claim when that is already necessary at common law. While proof that an adverse possessor had paid the taxes on the property would certainly be well taken as an evidentiary consideration of a claim of right,²⁸ this hardly merits the passage of a statute which mandates payment of property taxes. Thus, this theory alone is unable to justify the necessity of a tax payment requirement.

The Policing Theory

The second theory advanced for the necessity of this type of statute is the policing theory. This theory claims that the purpose of the requirement is to insure that all of the property taxes assessed against the property in the state will be paid.²⁹ By requiring the adverse possessor to pay the taxes on the property he is claiming, this purpose is presumably advanced.

Of the three theories presented, the policing theory is used the least. Few courts give it any credence.³⁰ As pointed out by one author, there are other more specifically designed means available for the

gives great weight to the interpretations of the Texas statute, since it is the source of its own. *Goldman v. Sotelo*, 8 Ariz. 85, 92, 68 P. 558 (1902).

. . . .

We agree with authorities finding the payment of taxes in conjunction with adverse possession to be required primarily as a demonstration of the good faith belief by the adverse possessor in strength of his title rather than notice to the owner of an adverse claim.

Id. at ____, 520 P.2d at 1186-87.

27. See note 4 *supra* and accompanying text.

28. It may be argued that requiring an adverse possessor to pay the property taxes as good faith is analogous to the Statute of Frauds' evidentiary requirement that certain types of transactions, including those particularly relating to land, be made in or evidenced by a writing. However, these statutory requirements are distinguishable. The Statute of Frauds outlines the procedures required of both parties to a transaction in that they must create a writing. The Statute of Frauds does not in any way alter the substantive rights or duties of the relationship between the parties. The tax payment statute, on the other hand, adds another element to those already required of the possession by the adverse possessor. It is not merely procedural but rather it alters the substantive duty of the adverse possessor for a purely evidentiary purpose.

29. See generally *The Payment of Taxes Requirement*, *supra* note 12; *A Nineteenth Century Anachronism*, *supra* note 12; Annot., 132 A.L.R. 216 (1941); 2 C.J.S. *Adverse Possession* §§ 210-25 (1972).

30. An example of a court which does accept this theory is the South Dakota Supreme Court in *Judd v. Meoska*, 76 S.D. 537, 82 N.W.2d 283 (1957). Similarly, in

enforcement and collection of assessed property taxes.³¹ With other more reasonable means available, it is illogical to base the claim of the necessity of a tax payment statute for adverse possession on this basis. Therefore, again, the continued necessity for or rationality of the maintenance of this statute is not shown.

The Notice Theory

The third theory used to justify the statute requiring an adverse possessor to pay the taxes on the property being claimed is the most controversial and most problematic. This theory, known as the notice theory, bases the necessity of the requirement on the notice provided to the titleholder of the presence of an adverse possessor on the property.³² Presumably, the titleholder receives added notice when he attempts to pay the taxes assessed against his property and finds that the taxes have already been paid.

Since the basis for this theory is to give the landowner notice of the presence of an adverse possessor, the question arises as to the necessity of such additional notice.³³ The common law elements of adverse possession require that the claimant's possession must be, among other things, open and notorious.³⁴ These elements are designed to give the landowner notice of the adverse possessor's presence.

It is argued that these elements do not, in fact, provide notice to landowners. Some authors argue the need for additional notice to special interest groups.³⁵ The classic example is a large landowner who loses a portion of his land, usually undeveloped, to an adverse possessor.³⁶ The reason given for the necessity of the extra notice

Murphy v. Nelson, 19 S.D. 197, 102 N.W. 691 (1905), the South Dakota Supreme Court held that "[t]he object of this law evidently was to prevent speculative litigation and to quiet titles, and, in doing this, to encourage and promote the payment of taxes, so indispensable to the support of government." *Id.* at ____, 102 N.W. at 694.

31. For example, tax liens and tax sales. See *A Nineteenth Century Anachronism*, *supra* note 12, at 250.

32. See *A Nineteenth Century Anachronism*, *supra* note 12, at 251; *Kline v. Kramer*, ____, Ind. App. ____, 386 N.E.2d 982 (1979).

33. Admittedly, the legislature has the power to create this type of statute. However, the necessity or rationality of this specific requirement is the issue under analysis in this note.

34. See note 4 *supra* and accompanying text.

35. See Farabaugh & Arnold, *Commentaries on the Public Acts of Indiana, 1927—II. The Adverse Possession Act*, 4 IND. L.J. 112 (1928) [hereinafter cited as *Commentaries on the Indiana Act*]; *Adverse Possession in Indiana*, *supra* note 1; *A Nineteenth Century Anachronism*, *supra* note 12.

36. In Indiana, the special interest group consisted of large landowners in

is that the large landowner did not have actual knowledge of the adverse possessor's presence as the land was undeveloped and the owner did not inspect it and find the claimant.³⁷

The most important question in this area, assuming the landowner does not receive actual notice during the satisfaction of the common law elements of adverse possession,³⁸ is whether the enactment of a tax payment statute will remedy that situation. This question illustrates the theoretical problems with this justification. While owning a large tract of undeveloped land will make actual notice more difficult, the question remains as to who should bear the responsibility of giving or receiving such notice, the adverse possessor or the titleholder. Tax payment statutes apparently attempt to place the burden of giving notice on the adverse possessor. Some may argue that this is only fitting. As all of the other requirements of adverse possession are made the responsibility of the possessor, the need for additional notice should similarly be his burden. As he is the one attempting to obtain the benefit, i.e. possession and title of the land, he should have the responsibility of properly satisfying all of the requirements.

However, it can also be argued that placing this burden on the adverse possessor may relieve the titleholder of any responsibility to inspect his land or in any way attempt to discover the presence of any adverse possessor. While the doctrine of adverse possession may not be intended to punish a titleholder,³⁹ relieving him of responsibility to inspect, would seem to encourage him to "sleep on his rights." This notion is contrary to the policy that adverse possession serves to protect the possessor who has done all he can to give notice

northwestern Indiana that were losing land to adverse possessors. See note 81-87 *infra* and accompanying text.

37. For instance, a mining or timber company, while owning a large tract of land, or several tracts of land, may not use it continuously. They may not even enter the property for years at a time. It may be argued that requiring them to patrol every acre of their land is unreasonable.

38. See note 4 *supra* and accompanying text.

39. In *Craven v. Craven*, 181 Ind. 553, 103 N.E. 333, *rehearing denied*, 181 Ind. 553, 105 N.E. 41 (1914), the Indiana Supreme Court explained the purpose of adverse possession in Indiana. "The intention is not to punish one who neglects to assert his right, but to protect those who maintained the possession of land for the time specified by the statute under claim of right or color of title." *Id.* at 560, 105 N.E. at 41. This purpose was expressly followed by a later Indiana court in *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955). For a further discussion of the *Echterling* case, see notes 88-126 *infra* and accompanying text.

and fulfill the necessary possession characteristics for the statutory period. This is the philosophy adopted by the Indiana courts.⁴⁰

In addition to these theoretical questions, there are practical difficulties in requiring an adverse possessor to pay the taxes on the property possessed. Once again, the given purpose of the tax payment requirement is to provide the titleholder with notice of the adverse possessor's presence. The process of giving notice to the titleholder, under this requirement, can be divided into two steps: (1) the adverse possessor paying the property taxes and (2) the titleholder receiving actual notice that such a payment has been made.⁴¹

In order for an adverse possessor to pay the taxes on the property possessed, he or she⁴² must overcome several problems. When, for example, A, adversely possessing one half of Blackacre, goes to the local treasurer's office and states that he wants to pay the taxes on the property he possesses, a difficulty arises in that the adverse possessor must be able to describe the property he possesses. A legal description would certainly be helpful. However, it seems doubtful that he would have one. This creates a problem in that the treasurer cannot be expected to compute the taxes payable on land described in general or laymen's terms.⁴³ The treasurer needs a definitive description of the land on which the adverse possessor wants to pay the taxes.

Besides the difficulty regarding identity of the land possessed, it is conceivable that the treasurer would not accept payment from a person who wants to pay the taxes on property when he is not the titleholder of record, nor is he purporting to pay the taxes on behalf of the owner of record. The treasurer's hesitancy or suspicion is another practical problem that the adverse possessor must overcome in order to satisfy the statutory requirement. Practically speaking, if the property being claimed cannot be sufficiently identified to the point of determining the amount of tax due on the property, or if the adverse possessor cannot convince the treasurer that he should

40. *Id.*

41. For the sake of clarity, these steps will be discussed separately and with the use of hypotheticals to illustrate typical situations which arise under the implementation of this theory.

42. In order to avoid the confusion that results from constantly stating "he or she," for the remainder of this note, the pronoun "he" will be used to denote generally the person, or type of person, being discussed. Naturally, the sex of the person being discussed has no legal significance in this topic area.

43. For example, it would be virtually impossible for a treasurer to compute the taxes due on the property described as "the area between A's barn and B's house."

be allowed to pay the taxes, the adverse possessor will be prevented from paying the statutorily required taxes. The problems which prevent his compliance are those inherent in the process of complying with the statute. They are not caused by his failure to attempt to abide by the statutory mandate.

In order to complete the process of providing a titleholder with additional⁴⁴ or actual⁴⁵ notice under the notice theory, he must be informed of the fact that the adverse possessor has paid the taxes on all or part of the landowner's property. Assuming the adverse possessor has avoided the problems outlined above and has paid the taxes on the property he possessed, the question remains as to how the titleholder will receive notice of that payment. In a very small community it may be possible that the treasurer, after having to deal with the problems presented by the adverse possessor, would personally inform the titleholder of the adverse possessor's payment. With this method of personal notice, or even if such notice proceeded through the locale's proverbial grapevine, the titleholder receives actual notice. The notice theory's goal is then fulfilled. However, in the vast majority of situations, the treasurer will merely record the fact that the taxes for all or part of that particular piece of property were paid.⁴⁶

Actual notice of the adverse possessor's payment may be prevented for several reasons. If, for example, the adverse possessor in the prior hypothetical, had paid the taxes on only that portion of Blackacre that he possessed, and had made such payment prior to the date when tax bills are mailed to the titleholders of record,⁴⁷ the owner of Blackacre would receive a bill for only that portion of his property on which the taxes were as of yet unpaid. Since the legal descriptions of property included on any given tax bill are frequently incomplete or inaccurate,⁴⁸ it would be virtually impossible for the titleholder to receive actual notice that a portion of his property was

44. The additional notice assumes that the other common law elements already provide the owner with some degree of notice due to the required open, notorious, etc., possession. See note 4 *supra* and accompanying text.

45. By attempting to provide a landowner with notice under this statute, it may, in fact, bring about the only actual notice he receives. See, e.g., note 37 *supra* and accompanying text.

46. The process to be followed in collecting property taxes is outlined in IND. CODE §§ 6-1.1-22-1 to .1-22-22 (1976).

47. *Id.*

48. In *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955), the Indiana Supreme Court stated, "[t]he court takes judicial knowledge of the fact that complete legal descriptions of real estate are not present on the tax duplicates issued by county

not included in the computation of the taxes due. Without realizing that some of his property is not included, the titleholder is not given the opportunity to discover that the adverse possessor is paying the taxes. Therefore, the notice, as intended by this theory's interpretation of the statute, is not given and hence the statutory purpose is not fulfilled.

Even if the complete and accurate description of the remaining property taxes was listed on the tax bill,⁴⁹ it is still questionable whether the property owner would realize that part of his property was not included. Practically speaking, it is unrealistic to expect every property owner to memorize the legal description of his property so that he would notice that a portion was not included on a tax bill. If it is unrealistic or improbable, the property owner once again may not receive actual notice of the adverse possessor's presence.

It can be argued that if the tax bill does give the complete legal description, the titleholder has received technical notice and a greater opportunity for actual notice. However, the purpose of the tax payment requirement according to the notice theory is to give the titleholder notice of the presence of the adverse possessor. Technical notice or a greater opportunity for notice do not satisfy this purpose. Any common law element and especially the requirement that the possession be open and notorious already give the titleholder technical notice or at least a greater opportunity for notice. Perhaps the cumulative effect of these requirements would provide a larger aggregate opportunity for the titleholder to receive actual notice. However, considering the unlikelihood of having a complete legal description on a tax bill and questionable value of a greater opportunity for notice, this argument provides only a very weak basis for the tax payment requirement.

Considering the practical problems in giving the titleholder actual notice, the notice theory falls victim to the pragmatic situations involved in complying with the statutory requirement of paying taxes. The problems discussed above are not the only ones which arise under this theory.⁵⁰ Certainly the volume of cases which have arisen in the

or city treasurers. They are usually sketchy and inaccurate." *Id.* at 146, 126 N.E.2d at 575 (citations omitted).

49. This fact is only assumed for this discussion. A complete description of the property is not required on an Indiana tax bill. See IND. CODE. § 6-1.1-22-2 (1976).

50. For a discussion of other problems arising under the Indiana statute which are not mentioned in this note, see *Adverse Possession in Indiana*, *supra* note 1.

states which have adopted this theory, including Indiana, illustrate the continuing problems faced by all of the parties involved.⁵¹

Given all of the problems encountered when compliance with the statutory mandate is attempted, it is logical to question whether the legislators actually intended that compliance would be so difficult.⁵² Reference must be made to the circumstances which allegedly gave rise to the enactment of the statute.⁵³ In Indiana, the facts indicate that the legislators desired to make the acquisition of title by adverse possession more difficult.⁵⁴ As they wanted to give the landowners greater actual notice of the adverse possessor's presence, the inference is that the ease with which claimants could previously obtain title was unsatisfactory. Therefore, the tax requirement was added to make acquisition by adverse possession more difficult.

However, considering the practical problems discussed above in complying with the statutory requirement, perhaps rather than making the acquisition of title by adverse possession more difficult, the legislators made it practically impossible. Given these problems, the adverse possessor may not be permitted to make payment of the taxes or the titleholder may not be given actual notice of such payment. Either of these roadblocks can prevent compliance with the statute or a failure to give effect to the legislature's intent. In Indiana, however, which has adopted the notice theory, the courts have generally not permitted the practical problems to stand in the way of an adverse possessor obtaining title to the property he has possessed, in compliance with the common law elements of adverse possession, for the statutory period.⁵⁵

An Alternative Approach

In contrast to the method of statutory interpretation and application which delves into the purported purpose of the legislature in enacting the statute, another approach available to the courts is simply

51. For an illustration of the volume of cases presented in Indiana alone in this area, see notes 88-126 *infra* and accompanying text.

52. Again, while it is admitted that the legislature has the power to create this type of statute, the philosophy and purposes are being questioned here. The overall ability to legislate is not under analysis.

53. See notes 81-87 *infra* and accompanying text.

54. *Id.*

55. For a discussion of the Indiana statute's application, see notes 88-126 *infra* and accompanying text. The common law elements of adverse possession are discussed in note 4 *supra* and accompanying text.

to apply the "clear meaning" of the statute.⁵⁶ This approach is most often used when there is no latent ambiguity as to the meaning of the words used in the statute.⁵⁷ The effects of such an approach in applying the tax payment statute are worthy of analysis.

Several authors have compiled textbooks on the topic of statutory construction.⁵⁸ One of the fundamental guidelines set out in these texts is to establish a working method of determining the weight of any particular statute by the degree of absoluteness required in its application by the words and phrases used within the statute. Basically two classifications are used to describe the degrees of application to be used by the courts: directory and mandatory.⁵⁹ In order for a statute to be deemed directory, words such as "may," "can," or "some" are found within the text to illustrate the flexibility or discretion vested in the court to apply or not to apply the statute in a given situation.⁶⁰

The Indiana statute which established the tax payment requirement for adverse possessors contains none of these words.⁶¹ A brief reading of the statute reveals instead words such as "shall," "any," "unless," "no," and "every." Each of these words brings with it connotations of absolute necessity. Such statutes are classified as mandatory.⁶² This type of statute mandates the courts, with little or no flexibility, to apply the statute in the case in which it is raised. The Indiana courts have never applied this statute in a mandatory manner.⁶³ Rather, they have applied the statute with great flexibility and have deemed it to be "supplemental."⁶⁴

56. *Kuhn v. State*, ___ Ind. App. ___, 402 N.E.2d 38 (1980). The distinction between these two approaches is critical. While both methods attempt to apply the statute according to the legislative intent, the materials looked to in order to determine that intent illustrates the distinction. By delving into the alleged purpose of the statute, the court looks to the legislative history, the political climate at the time of the passage of the statute, and any other extrinsic facts which reveal the message that the legislature was intending to send through the statute. SUTHERLAND, STATUTORY CONSTRUCTION § 45.02. (4th ed. 1972) [hereinafter cited as SUTHERLAND]. Alternatively, when applying the "clear meaning" approach, the court looks to the words of the statute to reveal the intent of the legislature. This method is equated with applying the message received as opposed to the message sent by the legislature. *Id.*

57. *Id.*

58. SUTHERLAND, *supra* note 56; E. CRAWFORD, THE CONSTRUCTION OF STATUTES (1940).

59. See SUTHERLAND, *supra* note 56, at § 25.04.

60. *Id.*

61. See note 6 *supra* for the text of the statute.

62. See SUTHERLAND, *supra* note 56, at § 25.04. Indiana defines such statutes as "imperative." See 1953 Op. Att'y Gen. 273.

63. For a general discussion of the application of the Indiana statute, see notes 88-126 *infra* and accompanying text.

64. In *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955), the supreme

It is possible to question what the courts mean by their use of the term "supplementary" as applied to this statute. It would appear that the courts intend for this statute to serve a very limited function. The common law elements appear to be absolute requirements and a court will not deem an adverse possessor to have acquired title without satisfaction of each and every one. However, the courts have held that the statutorily mandated requirement, the payment of taxes, need not be satisfied.⁶⁵

The statute itself explicitly states that it shall not relieve the adverse possessor from complying with all of the other elements required of adverse possession.⁶⁶ A reasonable inference from this statement would be that this statutory requirement was meant to be added to the other elements required of the adverse possessor. It seemingly was not intended that such a requirement would supercede the common law elements. In that sense, the statute "supplements" the requirements already established at common law for a claimant's possession to be deemed adverse. The statute would then operate the same as any of the common law elements.

When considering the absolute language of the statute, one wonders why the Indiana courts did not merely apply the clear meaning rather than delve into the thicket of the notice theory. This is, of course, the ultimate question. Were the Indiana courts to adopt this alternative approach, the application of its tax payment statute would certainly be altered from its present course.⁶⁷

Admittedly, even if the courts enforced the mandate given by the statute, there would still remain a few interpretative problems. First, Indiana's tax requirement is somewhat unique⁶⁸ in that it is not incorporated or included within the statute of limitations which defines the length of time available to the titleholder to maintain an ejectment action before title to the property claimed vests in the adverse possessor.⁶⁹ A problem could arise if an adverse possessor ran the statute of limitations but failed to pay the statutorily required taxes. The statute of limitations would apparently bar the titleholder's eject-

court held that "[t]he act of 1927 must be construed as being supplemental to the statute of limitations, and not as superceding it." *Id.* at 146, 126 N.E.2d at 575.

65. See notes 88-126 *infra* and accompanying text.

66. See note 4 *supra* and accompanying text.

67. See notes 88-126 *infra* and accompanying text.

68. See, e.g., the state statutes in note 7 *supra*.

69. The statute of limitations for this type of action in Indiana is 10 years. IND. CODE § 34-1-2-2 (1976).

ment action and yet the adverse possessor would not be vested with title to the property.⁷⁰

This problem does not appear to be without resolution. It is a well-recognized principle of statutory construction that when two statutes concern a single topic, they are to be read and interpreted as complementary and consistent to the extent possible.⁷¹ This is certainly possible here. The statute of limitations and the common law elements of adverse possession associated with it can be completely consistent with the added statutory requirement that the adverse possessor pay the property taxes. The tax payment statute merely becomes an added requirement which must be fulfilled within the statute of limitations period. Until all elements are in the process of being satisfied, the statute of limitations does not begin to run.

A second problem here is that the states which have adopted a strict or semi-strict approach to the application of their tax payment statutes have been severely criticized⁷² for the alleged inequities which result from such an approach to the statute's application. For example, in boundary line disputes, it is admittedly almost impossible for an adverse possessor to pay the taxes on the strip of land he is possessing. This is the case because most often the claimant does not actually know that he is in possession of another's property. In most states,⁷³ the intent to claim the property is imputed to him in order to satisfy the intent requirement of adverse possession.

However, in order to satisfy the tax requirement obviously the knowledge that the claimant is possessing another's land is of prime importance. Such knowledge is not in fact present in a boundary line dispute. For this reason, some state courts⁷⁴ have created an "equitable exception" to their otherwise strict application of the tax payment

70. *Adverse Possession in Indiana*, *supra* note 1.

71. SUTHERLAND, *supra* note 56 at § 51.02.

72. For example, California has often been criticized as being overly strict in its application of the statute. *The Payment of Taxes Requirement*, *supra* note 12.

73. For example, in *Predham v. Holfester*, 32 N.J. Super. 419, 108 A.2d 458 (1954), which adopted the minority view in the boundary line dispute, stated: In *French v. Pearce*, 8 Conn. 439 (Sup. Ct. Err. 1831), followed by a majority of American courts, it was held that while the possessor must hold the land as his own during the requisite period, his motive or intention in taking and retaining possession is otherwise immaterial with respect to its adverse character.

Id. at 425, 108 A.2d at 461.

74. See general discussion of alternative approaches to this problem in *The Payment of Taxes Requirement*, *supra* note 12.

requirement, and refuse to apply the statute in boundary line cases. The Indiana courts have refused to apply the tax statute to boundary line cases for a similar reason.⁷⁵

Beyond the boundary line cases, few other claimed inequities appear valid. It is argued that vested rights should not be altered due to the application of a new statute.⁷⁶ This, once again, is a well-recognized principle of statutory application and it is not limited to this particular topic.⁷⁷

In the final analysis, while the strict or clear meaning approach has been severely criticized, it appears that the Indiana tax payment statute, given its textual wording, is particularly well suited for such an application. This position has been advocated in some recent Indiana Court of Appeals decisions⁷⁸ by Judge Hoffman. The view presented in his dissents is that the clear meaning of the statute should be enforced, and the previous line of decisions⁷⁹ should be overturned.⁸⁰ While as yet, Judge Hoffman's opinions remain his sole dissenting view, the clear meaning approach to the application of the Indiana statute remains a viable alternative.

THE INDIANA STATUTE

Legislative Intent

In order to construe or interpret⁸¹ a statute, according to its

75. Indiana courts have held that at least in boundary cases, the tax bill does not give adequate notice to the titleholder that an adverse possessor is present. The Indiana courts have refused to apply the statute to defeat the adverse possessor's interest. See *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955); *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979). However, this approach is apparently not limited to boundary line cases. See note 104 *infra* and accompanying text.

76. See *Commentaries on the Indiana Act*, *supra* note 35; Gavit, *In Defense of the Indiana Adverse Possession Act of 1927*, 4 IND. L.J. 321 (1929).

77. Gavit, *In Defense of the Indiana Adverse Possession Act of 1927*, 4 IND. L.J. 321 (1929).

78. *Connors v. Augustine*, ___ Ind. App. ___, 407 N.E.2d 1186 (1980); *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979).

79. For a discussion of the application of the Indiana statute, see notes 88-126 *infra* and accompanying text.

80. In *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979), Judge Hoffman stated, "IC 1971, 32-1-20-1 is clear and unambiguous. . . . *Echterling v. Kalvaitis*, *supra*, should be overruled and the plain meaning of the statute returned to it as was contemplated by the Legislature which adopted it." *Id.* at ___, 386 N.E.2d at 990 (dissenting opinion).

81. The legislative intent and purpose need only be determined when the statute is being construed or interpreted. Some authors, such as SUTHERLAND, *supra*

legislative purpose, the legislative intent of the statute needs to be determined. The Indiana legislative journals provide no assistance in determining the purpose of the legislature in enacting its tax payment statute. Only the procedural steps are outlined regarding the statute's assignment to committees, their reports, and the voting of the legislators.⁸² Therefore, in order to shed light on the actual legislative intent and purpose, outside sources and authors are necessary.

Several authors have discussed the circumstances which gave

note 56, use the terms "construction" and "interpretation" interchangeably. However, the Indiana courts generally use the term "construction" to represent the judicial tool used when a statute is ambiguous on its face. Hence, when the statute is plain and unambiguous, it is not subject to construction. See *Indiana Dep't of State Revenue v. Food Marketing Corp.*, ___ Ind. App. ___, 403 N.E.2d 1093 (1980); 1956 Op. Att'y Gen. 62.

82. In 1927, Indiana State Senator Hodges introduced a bill which required an adverse possessor to pay all of the property taxes assessed against the property being possessed in order for his possession to be deemed adverse. S. 13, Ind. Gen. Assembly, 75th Sess. (1927). See 1927 J. IND. ST. S. 79. The bill was introduced on January 12, 1927, and was referred to the Senate's Committee on Judiciary A. *Id.* On January 21, Senator Harlan, Chairman of the Committee on Judiciary A, reported on Senate Bill No. 13 and recommended that it pass if the following amendments were made:

Strike out the period after the word "adversely" in line 9 and insert in lieu thereof a colon and add the words "Provided, however, That nothing in this act shall relieve any adverse possessor or claimant from providing all the elements of title by adverse possession now required by law.

1927 J. IND. ST. S. 126. After the bill's second, and third readings, it was passed by a vote of 41-7 on January 16. *Id.* at 151, 175-76. The bill was sent to the House for its consideration and was received in the House on January 28. 1927 J.H.R. ST. IND. 177.

The bill was referred to the House's Committee on Judiciary A. *Id.* at 181. On February 7, Representative Harris reported on the bill and recommended its passage provided the following amendments were made:

By striking out of section 1, line 2, the words "of lands or" and by striking out of line 3, the words "real estate thereof."

And by inserting in line 2, after the word "hereafter," the following words: "in any suit to establish title to lands or real estate."

And by adding in line 2, after the word "possession," the word "thereof."

1927 J.H.R. ST. IND. 257. After the bill was read a second, and third time, the House passed the bill by a vote of 82-3 on February 28. *Id.* at 335, 637.

After its passage, the Title of the bill was amended to read "An Act Concerning Adverse Possession of Lands or Real Estate." *Id.* The Senate, on March 3, concurred in the House's amendments. 1927 J. IND. ST. S. 760-61. Governor Ed Jackson signed the bill on March 3, 1927. 1927 J. IND. ST. S. at 821. It became effective May 16, 1927. See IND. CODE § 32-1-20-1 (1976).

rise to the passage of the statute.⁸³ During this time, large landowners, particularly corporations, in northern Indiana were losing large tracts of land to adverse possessors. This occurred in spite of the fact that the corporations had color of title and had been paying the taxes on the property throughout the statutory period.⁸⁴ Since most of the land being lost to adverse possessors was undeveloped,⁸⁵ the corporations claimed to have little or no actual notice of the presence of the adverse possessor on the property.

In response to the problem, the legislators from northern Indiana united forces to stop the loss of this land. They pushed through the legislature a bill⁸⁶ requiring the adverse possessor to pay the taxes assessed against the property. Based on the claimed lack of notice to the titleholders, one author concludes that this statute was designed to give the corporations further notice of the adverse possessor's presence and activities.⁸⁷

Apparently, then, the notice to be given to the landowner by the payment of the taxes under this statute was all important. This was the legislative intent. Therefore, under an application of this

83. *Commentaries on the Indiana Act*, *supra* note 35; *Adverse Possession in Indiana*, *supra* note 1.

84. In their article, *Commentaries on the Public Acts of Indiana, 1927—II. The Adverse Possession Act*, 4 IND. L.J. 112 (1928), G.A. Farabaugh and Walter R. Arnold describe the situation:

Squatter rights and squatter tactics in the northwestern part of Indiana provoked a united endeavour on the part of assemblymen from that region, during the session of the Legislature of 1927, to halt the pernicious effect of one person holding color of title and consistently paying taxes and special assessments on land, while another enjoyed the usufruct and, eventually, became seized with title through adverse possession.

Id. at 112.

85. *A Nineteenth Century Anachronism*, *supra* note 12. In discussing the situation which gave rise to the passage of the Indiana tax requirement statute, this Comment states:

Large corporations owned extensive tracts of unoccupied lands in northern Indiana, but they were losing these to "squatters" who obtained title by adverse possession. Since the corporations were either unable or unwilling to settle the land and obtain notice or foreclose adverse possessors in that manner, they sought and obtained passage of the tax requirement by the Indiana legislature in 1927.

Id. at 253 (footnote omitted).

86. IND. CODE § 32-1-20-1 (1976).

87. While this may have been the desire of the legislature, the question of whether or not titleholders do, in fact, receive notice remains. This is discussed above. See notes 35-55 *supra* and accompanying text.

statute designed to give effect to the legislature's intent, notice to the landowner is a key focal point.

Actual Application in Indiana

The 1927 Indiana statute which requires the payment of taxes by an adverse possessor did not begin to receive substantive judicial interpretation until 1955.⁸⁸ In the landmark decision of *Echterling v. Kalvaitis*,⁸⁹ the Indiana Supreme Court established guidelines for the subsequent application of the statute. These guidelines have been followed in all of the major cases⁹⁰ interpreting this statute to date and are, therefore, relevant to the analysis of Indiana's adoption of the notice theory.

In *Echterling*, the parties were involved in a boundary dispute.⁹¹ Evidence was presented that the adverse possession had begun approximately twenty years prior to the enactment of the statute.⁹² While

88. Prior to 1955, the cases involved other questions. See *Marengo Cave Co. v. Ross*, 212 Ind. 624, 10 N.E.2d 917 (1937) (discussing the necessary requisites for adverse possession of an underground cave); *Sheets v. Stiefel*, 117 Ind. App. 584, 74 N.E.2d 921 (1947) (the allocation of the burden of proof in a case to quiet title against an adverse possessor); *Cooper v. Tarpley*, 112 Ind. App. 1, 41 N.E.2d 640 (1942) (the permissibility of tacking to satisfy the length of time required by the statute of limitations). In 1955, the Indiana Supreme Court decided the case of *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955).

89. *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955).

90. See *Dowell v. Fleetwood*, ___ Ind. App. ___, 420 N.E.2d 1356 (1981); *Connors v. Augustine*, ___ Ind. App. ___, 407 N.E.2d 1186 (1980); *Berrey v. Jean*, ___ Ind. App. ___, 401 N.E.2d 102 (1980); *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979); *Colley v. Carpenter*, 172 Ind. App. 638, 362 N.E.2d 163 (1977); *Penn Central Transp. Co. v. Martin*, 170 Ind. App. 519, 353 N.E.2d 474 (1976); *Piel v. DeWitt*, 170 Ind. App. 63, 351 N.E.2d 48 (1976); *Longabaugh v. Johnson*, 163 Ind. App. 108, 321 N.E.2d 865 (1975); *Smith v. Brown*, 126 Ind. App. 545, 134 N.E.2d 823 (1956); *Nasser v. Stahl*, 126 Ind. App. 709, 134 N.E.2d 567 (1956).

91. Prior to 1889, the titles to both the southeast and southwest quarters of a certain quarter section in Lake County, Indiana, were held by one person. In 1906, the ownership of these two properties was divided. Eventually, they came to be owned by the Kalvaitis' and Echterlings, respectively. Evidence was presented that a fence, located approximately ten feet west of the north-south border between the properties, had been constructed before 1906. A survey of the properties was done by agreement of both of the parties. It revealed that the true border between the properties was ten feet east of the fence. The Echterlings originated a suit in equity to compel the Kalvaitis' to construct on half of a partitional fence along the border created by their record titles. The trial court held that the Kalvaitis' had obtained title to the strip of land, up to the fence, by adverse possession. The Echterlings appealed to the court of appeals. *Id.* at 144, 126 N.E.2d at 573-74.

92. *Id.*

this period would satisfy the statute of limitations,⁹³ the court of appeals questioned the sufficiency of the evidence regarding the common law elements of adverse possession during this time.⁹⁴ It also held that in order for the claimants to have acquired title, they would have had to do so prior to 1927 because after that date, the statute required that an adverse possessor pay the taxes on the property he claimed.⁹⁵ Since the taxes had not been paid by the claimants in this case, the court of appeals refused to allow the claimants to obtain title based on evidence of the common law elements of adverse possession after that date.⁹⁶ The Indiana Supreme Court reversed and held that the failure to pay the assessed property taxes did not prevent the claimants from obtaining title.⁹⁷

In so holding, the Indiana Supreme Court established the framework for this statute's application. First, the court analyzed the

93. Prior to 1951, the statute of limitations in Indiana for actions regarding adverse possession was twenty years. IND. CODE ANN. § 2-602 (Burns 1933). The current statute of limitations is ten years. IND. CODE § 34-1-2-2 (1976).

94. The court of appeals, after recounting the evidence presented at the trial court level regarding the Kalvaitis' use of the land, held that, "[i]n our opinion the proof falls far short of meeting the standards required by law to establish title to another's lands by adverse possession The evidence being insufficient to sustain the court's decision the judgment herein is reversed with instructions to grant appellants' (Echterlings') motion for a new trial." *Echterling v. Kalvaitis*, ___ Ind. App. ___, ___, 123 N.E.2d 465, 467, *rev'd*, 235 Ind. 141, 126 N.E.2d 573 (1955).

95. In reference to the tax payment statute, the court of appeals held: If the court's decision is to be upheld the evidence must show adverse possession of said strip of land by the appellees and their grantors for 20 years prior to 1927 as since then the claimant of a prescriptive title must show that he has paid the taxes and special assessments legally levied against the land during the period he claims to have possessed it adversely. Sec. 3-1314, Burns' 1946 Replacement. This the appellees (Kalvaitis') admit they have not done."

Echterling v. Kalvaitis, ___ Ind. App. ___, ___, 123 N.E.2d 465, 466, *rev'd*, 235 Ind. 141, 126 N.E.2d 573 (1955).

96. *Id.*

97. Specifically, the court held:

It would seem to us that, in view of the foregoing, where continuous, open, and notorious adverse possession of real estate has been established for twenty years to a contiguous and adjoining strip of land such as that here in question, and where taxes have been paid according to the tax duplicate, although said duplicate did not expressly include that strip, adverse possession is established to that strip even though the taxes were not paid by the adverse claimant.

. . . .
The judgment of the trial court is affirmed.

Echterling v. Kalvaitis, 235 Ind. 141, 147-48, 126 N.E.2d 573, 575-76 (1955).

legislative purpose of the statute.⁹⁸ The court adopted the notion that the statute was enacted to "halt the pernicious effect"⁹⁹ of adverse possessors obtaining title to property while the owner of record paid the taxes on the property. The language used by the court is virtually the same as that used by authors writing about the statute at the time it was enacted.¹⁰⁰ The court, in fact, directly refers to a commentary which concludes that the purpose of the statute was to give notice to the titleholder.¹⁰¹ By referring to this article, the inference can be made that the Indiana Supreme Court adopted the notice theory to be used as the guideline for the subsequent application of this statute.

This inference can be based not only on the reference to the law review article, however. It is strengthened by the court's discussion of the property descriptions found on tax bills. The court took judicial notice of the fact that the descriptions are usually incomplete and inaccurate.¹⁰² The only significance of an incomplete or inaccurate property description on a tax bill lies in that such would fail to give notice to the titleholder of the adverse possessor's presence.¹⁰³ If notice is not given to the titleholder, the purpose of the statute fails.¹⁰⁴

98. By delving into the legislative purpose, it can be inferred that the court had determined the statute was ambiguous and needed such interpretation. See notes 56-57 *supra* and accompanying text.

99. Regarding the legislative intent of the statute, the court stated that, "[t]he 1927 act was enacted to halt the pernicious effect of squatters upon lands where title holders had paid taxes on lands owned by them, but where possession of parts of the land was usurped by squatters for long years without claim of title or payment of taxes." *Echterling v. Kalvaitis*, 235 Ind. 141, 145, 126 N.E.2d 573, 575 (1955).

100. See, e.g., *Commentaries on the Indiana Act*, *supra* note 35.

101. The Comment states:

One may conclude that, by the passage of the 1927 Adverse Possession Act, the rights of a person to gain an original title to land or real estate by adverse possession, have added one new requirement to the former pre-requisites, namely, that the adverse claimant must pay taxes on the land for the statutory period.

The reason for this new requirement is also apparent, the further protection of the legal title holder and the greater notice afforded to him.

Adverse Possession in Indiana, *supra* note 1, at 223.

102. See note 48 *supra* and accompanying text.

103. This inference was made by the Indiana Court of Appeals, in *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979), where the court held that, "[i]n *Echterling*, *supra*, our Indiana Supreme Court took judicial notice that the descriptions on tax statements may not be sufficient in all cases to serve as notice to the recorded titleholder that there is an adverse claimant who is claiming an interest adverse to his interest." *Id.* at ___, 386 N.E.2d at 989.

104. The court does not, however, hold the statute to be unconstitutional or invalid. Rather, it seems to hold that since tax bills are inaccurate and incomplete, the payment of taxes according to that tax bill satisfies the statute. While logically

Therefore, the court awarded title to the claimants in spite of the fact that they had not paid the taxes assessed on the strip of land possessed.

While the court did not expressly state that it adopted the notice theory, there is a strong inference that this theory was the basis for its decision. Recently, the Indiana Court of Appeals interpreted the *Echterling* decision as holding that tax bills do not serve as actual notice to the titleholder of the adverse possessor's presence.¹⁰⁵ The court of appeals, also referring to and quoting from the same article cited by the Indiana Supreme Court in *Echterling*,¹⁰⁶ held that the purpose of the 1927 statute was to give the titleholder further notice of the presence of an adverse possessor.¹⁰⁷

This Indiana Court of Appeals case, *Kline v. Kramer*,¹⁰⁸ has served as a modern day counterpart of the *Echterling* decision. The facts were similar as both cases arose out of boundary disputes.¹⁰⁹ Both courts

this seems to imply that the payment of taxes on the property actually claimed need not be made, the court does not explicitly hold that to be its decision.

The inaccuracy and incompleteness of tax bills as a method of justifying not paying the taxes on the property actually possessed appears to be particularly applicable to boundary line disputes. See discussion of *Kline v. Kramer*, at notes 108-26 *infra* and accompanying text. However, the court in *Echterling* does not say that its ruling is limited to this kind of situation. Potentially, then, attorneys could use the argument that no actual notice was given by the tax bill when larger areas of land are in dispute. This argument would be consistent with the general trend of the Indiana courts treatment of the statutory requirement as is illustrated by other cases. See discussion of *Berrey v. Jean*, at notes 122-26 *infra* and accompanying text.

105. *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979). In this case, the court of appeals stated that "[w]here the payment of taxes will not serve as notice to the recorded titleholder that someone is in possession of his land and claiming an interest adverse to his interest in the land, the statute requiring the payment of taxes is not a supplementary element of adverse possession." *Id.* at ___, 386 N.E.2d at 989.

106. *Adverse Possession in Indiana*, *supra* note 1.

107. Specifically, the court held that "[t]he intent of the legislature and the purpose of the statute is to give the recorded titleholder notice that someone is claiming an interest adverse to his." *Kline v. Kramer*, ___ Ind. App. ___, ___, 386 N.E.2d 982, 989 (1979).

108. *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979).

109. In *Kline*, the dispute again arose over a fence which was not, as had been believed, located on the border between the properties owned by the parties. The plaintiffs, the *Kramers*, claimed to have obtained title to the strip of land, approximately one foot wide by 309 feet in length, immediately to the north of their northern border. The strip of land was located along the southern boundary of the *Klines'* property. The fence was located one foot north of their southern border. The plaintiffs brought suit to quiet title. The trial court held that the *Kramers* had acquired title by adverse possession.

held that the adverse possessor had obtained title.¹¹⁰ While reaffirming the rationale and holding of the *Echterling* decision, *Kline* has its own significance because it clearly acknowledged the notice theory as the basis for the Indiana decisions.¹¹¹ Recognizing the adoption of the notice theory in Indiana brings into the analysis all of the practical limitations of the theory discussed above.¹¹²

After considering the practical problems of the notice theory¹¹³ in conjunction with the holdings of the *Echterling*¹¹⁴ and *Kline*¹¹⁵ cases, the question arises as to the effect of Indiana's tax payment statute on adverse possession cases today. Since the supreme court's landmark decision in *Echterling*,¹¹⁶ the Indiana court continues to cite the statute in its decisions.¹¹⁷ For example, in one case,¹¹⁸ the court cites the common law elements of adverse possession and refers the reader to the tax requirement statute, without defining its content or applicability. However, the courts have never held the statute to be a bar against any adverse possessor's acquisition of title.¹¹⁹

In general, the trend established in the *Echterling*¹²⁰ and *Kline*¹²¹ decisions, which is clearly against a strict application of the statute, has been expanded even further. In a recent case,¹²² the court of appeals affirmed the trial court's finding that the title to a large plot of land surrounding a cemetery has passed to the cemetery association by adverse possession prior to the purchase of the record title

110. For the supreme court's decision in *Echterling*, see notes 91-99 *supra* and accompanying text. In *Kline*, the court of appeals affirmed the trial court's decision. The court stated, "[t]he trial court did not err when it did not consider the payment of taxes as a supplementary element of adverse possession." *Kline v. Kramer*, ___ Ind. App. ___, ___, 386 N.E.2d 982, 990 (1979).

111. See notes 101, 103, 105 *supra* and accompanying text.

112. See notes 32-55 *supra* and accompanying text.

113. *Id.*

114. *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955).

115. *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979).

116. *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955).

117. For example, see note 118 *infra* and accompanying text.

118. In *Piel v. DeWitt*, 170 Ind. App. 63, 351 N.E.2d 48 (1976), a complex adverse possession case due to an intervening life estate and the presence of a remainderman, the court held that "[t]o acquire title by adverse possession, the claimant's possession must be: (1) actual, (2) visible, (3) open, (4) notorious, (5) exclusive, (6) under a claim of ownership, (7) hostile, and (8) continuous for at least the statutory period of limitation. See: IC 1971, 32-1-20-1 (Burns Code Ed.); . . ." *Id.* at 69, 351 N.E.2d at 53.

119. See note 90 *supra* and accompanying text.

120. *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (1955).

121. *Kline v. Kramer*, ___ Ind. App. ___, 386 N.E.2d 982 (1979).

122. *Berrey v. Jean*, ___ Ind. App. ___, 401 N.E.2d 102 (1980).

by the defendants.¹²³ The court held that since title had passed prior to the purchase by the defendants, it did not have to consider whether the elements of adverse possession had been fulfilled against these defendants.¹²⁴

This argument is circular, however. In order for the court to determine that title had passed to the cemetery, the tax payment statute is relevant to the possession after 1927. The court states, rather, that the statute need not be considered¹²⁵ as title had passed to the plaintiffs prior to the purchase of the property by the defendants. However, the title did not pass to the plaintiff until long after the statute took effect.

This case is illustrative of the Indiana judicial expansion of the philosophy presented in the *Echterling* and *Kline* cases. The unwillingness of the courts to use the tax payment requirement to prevent

123. The court found that:

The record contains evidence that: the cemetery began operating sometime before 1980; the corner posts had been in place for sixty years or longer; the fencing had at one time enclosed the entire disputed tract, and has existed around three sides thereof for some thirty-three years.

As we interpret the judgment of the trial court, title to the disputed land was found to have passed to the cemetery by adverse possession at some point in time prior to the purchase of the record title thereto by the Berreys in 1975.

... From the foregoing we may infer that title was found to have vested in the cemetery by adverse possession. This occurred well before the Berreys purchased the record title to the property.

Id. at ____, 401 N.E.2d at 104-05.

124. Specifically, the court held:

We do not consider notice to be an issue relevant to this cause. Notice would be a proper issue were it the case that the cemetery possessed the land adversely to the Berreys during the period of the statute of limitations. Inasmuch as we understand the trial court's judgment as having found title passing to the cemetery at a point in time prior to the Berreys' purchase of the record title, the notice argument is unavailing.

Id. at ____, 401 N.E.2d at 105.

125. In its discussion of the tax payment requirement, the court stated: Next, the Berreys contend that title to the disputed land could not have property passed to the cemetery because the latter failed to show any evidence of its having paid taxes thereon.

... Inasmuch as we have determined that notice is not in issue due to the property having passed to the cemetery prior to its acquisition by the Berreys, this contention fails to constitute error.

Id. at ____, 401 N.E.2d at 105.

an adverse possessor from obtaining title is clear. This decision shows that this philosophy will be applied to cases which are not mere boundary line disputes. This expansive view is also seen in cases where the courts have held that when property is not on the tax rolls, and therefore has not been assessed with taxes, the statute does not apply.¹²⁶

In summary, the Indiana courts have made it clear that they will not strictly apply the tax payment statute. Rather, they have held that the purpose of the statute is to provide notice to the titleholder. Further, they have held that tax bills usually do not serve as notice to the titleholder. This is particularly true in, but apparently not limited to, boundary line cases. The general willingness of the courts to avoid the application of this statute seems to be the central theme of the application of Indiana's statute.

CONCLUSION

A guiding purpose of this note has been to give the attorney faced with an Indiana adverse possession case a practical guide to the current status of the law as well as an understanding of the weaknesses in the analysis used by Indiana courts. As this analysis reveals, the theory used by the Indiana courts to explain the purpose of this tax payment requirement has both theoretical and practical flaws. Due to the practical inability of adverse possessors to pay the taxes, and due to the fact that tax bills do not give the titleholder actual notice of the adverse possessor's presence, the statute does not work toward its supposed purpose.

If additional or better notice is not received because of the statute, the notice theory does not serve to justify the statute. The courts have reasoned that since this theory is the purported basis

126. This approach was adopted when the court in *Longabaugh v. Johnson*, 163 Ind. App. 108, 321 N.E.2d 865 (1975) held:

As for the payment of taxes an examination of the exhibits in the record shows that the island area lies within sections of land which are contained in the description in Johnson's abstract of title. Johnson paid taxes in accordance with the tax duplicates which assessed taxes on those sections. This evidence was such that the trial court could have found that Johnson had in fact paid taxes on the property. *Echterling v. Kalvaitis* (1955), 235 Ind. 141, 126 N.E.2d 573.

.....

... If no taxes were assessed, none could be paid. Thus, the statute would not bar Johnson's claim since it requires only that taxes falling due must be paid by one claiming adverse possession.

Id. at 112, 321 N.E.2d at 868.

for the statute, and since notice is not actually given by the adverse possessor's payment of taxes, the court need not apply the statute. The courts, in fact, have avoided application by going to extremes in attempting to find reasons why the statute need not be applied to that particular factual situation. The courts are occupied with finding excuses not to apply the statutes.

In actuality, the statute serves as a hindrance to the courts rather than as an aid to titleholders.¹²⁷ Since the passage of the statute, adverse possessors are still obtaining title to property virtually as easily as they were prior to the enactment of the statute. The repeal of this statute would certainly aid attorneys struggling with the current complexities of the status of this Indiana statute. However, until a repeal is effected, there will be continued litigation as the courts uphold the validity of the statute and yet refuse to enforce its clear meaning.

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127. The Indiana courts are hindered by this statute since they are bound to enforce it, and yet are apparently unwilling to strictly do so. They are therefore set about finding reasons not to apply it to a given factual situation.

