

still have been invalid since no provision was made for compensation.

Two final cases presented the courts with constitutional issues during the survey period. In *Livingston v. Lukasik*,¹⁴¹ the federal district court found two Indiana statutes¹⁴² concerning the imposition of imprisonment in place of fines to be wanting under the strictures of *Tate v. Short*.¹⁴³ The court granted summary judgment for plaintiff on both issues.¹⁴⁴ In *Poling v. State*,¹⁴⁵ the Indiana Court of Appeals upheld the trial court's refusal to stay suspension of a driver's license while an appeal was pending for conviction for driving under the influence of liquor and for public intoxication.¹⁴⁶

VI. Contracts and Commercial Law

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The following is a cursory review of some of the year's most significant developments in Indiana contracts and commercial law. Because of the nature of the review, there are minimal efforts at

¹⁴¹40 Ind. Dec. 544 (N.D. Ind. 1974).

¹⁴²The statutes involved were ch. 280, §§ 1, 2, [1961] Ind. Acts 654 (repealed 1974); IND. CODE § 35-1-46-1 (IND. ANN. STAT. § 9-2228, Burns Repl. 1956). The former, held to be facially unconstitutional, provided for the imprisonment of a person adjudged guilty and punished by fine until "such fine is paid or replevied." This provision was subsequently repealed by the General Assembly. Ind. Pub. L. No. 147, § 2 (Feb. 19, 1974). The latter provision, held invalid as applied to indigents, provided that persons imprisoned for failure to pay a fine may "serve" their fine at the rate of five dollars for one day. Cf. IND. CODE § 35-4.1-4-16(a) (IND. ANN. STAT. § 9-1828a, Burns Supp. 1974), *as added by* Ind. Pub. L. No. 147, § 2 (Feb. 19, 1974). The new act provides that an indigent cannot be incarcerated for failure to pay a fine, but that one who is not an indigent may be incarcerated if he either refuses or fails to pay. The reason for his failure would seem to be significant.

¹⁴³401 U.S. 395 (1971). This case nullified a Texas system which required the incarceration of persons unable to pay traffic fines. The system, which allowed a credit of five dollars for each day of incarceration, was held to be a denial of equal protection.

¹⁴⁴The court, however, refused further relief requested by plaintiff, which relief would have required defendant to mail copies of the decision to all Indiana Justices of the Peace and would have required the Attorney General to issue an opinion acknowledging the force of the decision, as being an unnecessary and unwarranted violation of principles of federalism.

¹⁴⁵295 N.E.2d 635 (Ind. Ct. App. 1973).

¹⁴⁶License suspension in such circumstances is authorized by IND. CODE § 9-2-1-5 (Burns 1973).

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analysis and some precision may have been sacrificed to the goal of brevity.

A. *Judicial Developments*

1. *Relief for Contract Breach*

The Indiana Supreme Court, in *Skendzel v. Marshall*,¹ rendered a decision that should be a landmark on the subject of relief for contract breach. The case involved the conditional land sale contract, a commonly used device for securing a vendee's obligation in a long term land sale arrangement.² In the event of default by the vendee, the vendor is typically permitted by the terms of the land sale contract to treat the contract as terminated, keep all payments as liquidated damages, and retake possession.³ It was this feature of the land sale contract with which the Indiana Supreme Court dealt.

The hardship imposed on the vendee by enforcement of this vendor's remedial or forfeiture provision is, at least, twofold. First, the amount paid by the vendee prior to default could be disproportionately large when compared to the benefit derived from the temporary use of the property. Secondly, and perhaps more important, the vendee, under this clause, has no right of redemption. If there has been an increase in the value of the property during the contract period, the defaulting vendee will not realize the increment.

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The author wishes to extend his appreciation to Robert L. Bauman for his assistance in the preparation of this discussion.

¹301 N.E.2d 641 (Ind. 1973). The result in this case was anticipated in Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Indiana Law*, 7 IND. L. REV. 226, 231 (1973).

²In a conditional land sale, the vendee takes possession and a conditional right to obtain title after full payment. The vendor retains title during the contract period and has an obligation to convey title after the vendee has fully performed.

³The contract in *Skendzel* provided that:

It is further agreed that if any default shall be made in the payment of said purchase price or any of the covenants and/or conditions herein provided, and if any such default shall continue for 30 days, then, after the lapse of said 30 days' period, *all moneys and payments previously paid shall, at the option of the Vendor, without notice or demand, be and become forfeited and be taken and retained by the Vendor as liquidated damages* and thereupon this contract shall terminate and be of no further force or effect

301 N.E.2d at 643 (emphasis supplied by the court).

These hardships have prompted judicial decisions⁴ and statutes⁵ in other states protecting vendees from the harshness of this forfeiture provision. In Indiana, the courts have developed at least one method of avoiding enforcement of the provision; they have held that by accepting late payments without objection the vendor waives the right to seek forfeiture for subsequent late payments.⁶ However, until the *Skendzel* case, the Indiana courts had continued to accept the premise that the vendor could enforce the forfeiture provision.⁷

The Indiana Supreme Court took the opportunity presented by the *Skendzel* case to deal directly with the provision. After the trial court and court of appeals had disagreed over whether the vendor had waived the right to enforce the forfeiture provision, the supreme court granted transfer. The court took a wholly different tack⁸ and held that the land sale contract was to be treated as a mortgage with all accompanying incidents, such as the vendee's right of redemption. The court said that, in this case, the forfeiture provision was unenforceable because it constituted a penalty and was unconscionable.⁹ The case was remanded to the trial court with instructions to enter judgment of foreclosure on the vendor's lien.

⁴California, Connecticut and Utah apparently have protected the vendee by judicial decision. See G. OSBORNE, HANDBOOK OF THE LAW OF MORTGAGES 30 (1970).

⁵*E.g.*, MD. ANN. CODE art. 21, §§ 110-16 (1957). See G. OSBORNE, *supra* note 4, at 30.

⁶*Carr v. Troutman*, 125 Ind. App. 151, 123 N.E.2d 243 (1954). In the course of the *Skendzel* litigation, this waiver doctrine was mentioned by both the Indiana Court of Appeals, *Skendzel v. Marshall*, 289 N.E.2d 768, 771-72 (Ind. Ct. App. 1972), and the Indiana Supreme Court, *Skendzel v. Marshall*, 301 N.E.2d 641, 644 (Ind. 1973). The court of appeals found that there was no waiver because prepayments had put the vendor in a position in which he did not have to consider the vendee's delinquency a default and because, at the time of the alleged waiver, the vendor's interests were being managed by one of the vendees, as executrix. The supreme court did not resolve the waiver question.

⁷See Townsend, *supra* note 1, at 231.

⁸The vendors filed a petition for certiorari to challenge the constitutionality of the scope of the appellate review by the Indiana Supreme Court. The petition was denied. *Skendzel v. Marshall*, 94 S. Ct. 1421 (1974).

⁹The circumstances were that, in December, 1958, the vendee, Marshall, agreed to purchase the real estate for \$36,000 to be paid in the following manner: \$500 at the time the agreement was consummated, \$500 on or before December 25, 1958, and \$2,500 or more on or before January 15 of each year beginning January 15, 1960. Although the pattern of payments was somewhat irregular, Marshall had paid \$21,000 as of February 25, 1965, when payments were terminated. This included prepayments which, if counted as regular payments, would have caused Marshall to be paid up through January 15, 1968. 301 N.E.2d at 644.

Although the *Skendzel* case will undoubtedly have a significant impact on existing conditional land sale arrangements, the court offered some solace to contract vendors. First, the court stated that there are some cases in which the forfeiture provision should be enforced notwithstanding the ruling in *Skendzel*. The court took special note of those cases in which the vendee has abandoned the property, has absconded, or has made only minimal payments and thus has very little "equity" in the property.¹⁰ In those cases, the need for relief from the forfeiture provision was not considered imperative. Secondly, in a concurring opinion,¹¹ Justice Prentice urged that vendors, such as *Skendzel*, be given the benefit of provisions which would probably have been incorporated in a note and mortgage if the parties had originally dealt on that basis. These benefits would include provisions for increased interest during periods of default, acceleration of the due date upon default, attorneys' fees and expenses of foreclosure, and waiver of relief from valuation and appraisal laws.

Since the decision in the *Skendzel* case, one Indiana court has utilized an exception to the principle set forth in the supreme court's opinion. In *Goff v. Graham*,¹² the vendee in a conditional land sale contract paid a down payment of \$1,950 and one monthly payment of \$562.62 on a contract price of \$61,750 payable over twenty years. Thereafter, the vendee defaulted by failing to make installment payments, failing to pay insurance premiums, and committing some acts of waste. The vendor filed suit and the trial court entered a judgment which apparently had the effect of enforcing the forfeiture provision. The court of appeals affirmed, holding that the small amount paid by the vendee, plus the indications of the vendee's waste and deliberate neglect of the property, justified the trial court's decision.

A feature of the *Goff* case which may be of as much interest as the enforcement of the forfeiture provision is the rationale used by the court of appeals in affirming the trial court's monetary award. The trial court awarded the vendor \$4,186 composed of \$1,686 in unpaid contract payments up to the date on which a receiver was appointed and \$2,500 for waste and neglect. The court of appeals recognized that "the evidence was sufficient to show

¹⁰*Id.* at 650.

¹¹*Id.* at 651.

¹²306 N.E.2d 758 (Ind. Ct. App. 1974). In another case decided since *Skendzel*, *Tidd v. Stauffer*, 308 N.E.2d 415 (Ind. Ct. App. 1974), the court of appeals followed *Skendzel*, reversed a trial court decision enforcing the forfeiture provision, and remanded with instructions to enter a judgment of foreclosure. *Id.* at 420. In the *Tidd* case, the vendee had paid more than \$16,000 of a \$39,000 purchase price.

that these damages for waste and neglect existed," but found that "there was no evidence from which the trial court could fix a compensatory amount attributable to such damages."¹³ Despite this lack of support in the record, the court affirmed the total award on the ground that it could be sustained on another theory—restitution. Although it is not entirely clear in what manner the court was using the restitution theory, it is clear that the court intended to use the principle that the non-breaching party may sue for the value of benefits conferred on the breaching party.¹⁴ There are, however, some limitations on this right. The non-breaching party may not seek this restitution measure of recovery and at the same time seek liquidated damages for the same loss. In addition, the party seeking restitution must return any consideration received in exchange for his own performance.¹⁵ In *Goff*, the court seemed to ignore one of these qualifications. The agreement in the *Goff* case had a standard forfeiture provision which said that in the event of vendee's default the vendor was entitled "to retain all amounts theretofore paid by the Purchaser as agreed payment for the Purchaser's possession of the Real Estate prior to default."¹⁶ If the court were enforcing this provision, it would seem to be improper to also give the vendor a right to recover for benefits conferred under the contract, in this case, the use of the property. The court may, however, have viewed its decision as an application of the restitution principle in gross¹⁷ and not as an enforcement of the liquidated damages clause. However, on this view of the case, the plaintiff would have had to restore any consideration received in exchange for his performance and the court did not appear to make such a deduction.¹⁸ On either view of the case, the court appears to have suggested a new application of restitution theory.

¹³306 N.E.2d at 767.

¹⁴The court cited RESTATEMENT OF CONTRACTS § 347 (1932) which states that for total breach of contract, "the injured party can get judgment for the reasonable value of a performance rendered by him . . . if the performance . . . was (a) a part or all of a performance for which the defendant bargained"

¹⁵*Id.* § 349.

¹⁶306 N.E.2d at 761.

¹⁷This reference is to the principle contained in RESTATEMENT OF CONTRACTS § 347 (1932).

¹⁸The vendee had use of the property for three months during which he collected \$6,350 in rent and the vendee had paid \$2,512.62 on the contract price. The difference would be \$3,837.38, not \$4,186.00. In addition, even if the court used the rent received by the vendee as a measure of benefit conferred, some reduction in that amount would be appropriate to account for the efforts of the vendee in securing the rents. *See* *Grissom v. Moran*, 292 N.E.2d 627, 629 (Ind. Ct. App. 1973), which the court cited with approval at 306 N.E.2d at 767.

There was one other noteworthy case decided during the year on the subject of relief for breach of contract. In *Polish Roman Catholic Union v. Stanish*,¹⁹ the Court of Appeals for the Seventh Circuit had occasion to discuss the measure of recovery for breach of an agreement to loan money. The historic measure of recovery in Indiana for breach of an agreement to loan money was the difference between the interest rate in the breached loan agreement and the market rate of interest, and no recovery was permitted for consequential losses.²⁰ This rule has been applied despite the inability of a borrower to secure the loan elsewhere.²¹ This application proceeds on the assumption that money is always available in the market and, if the borrower is unable to obtain a substitute loan, it is because of his impecunious condition and not because of the lender's breach. Erosion of this rule in Indiana prior to the decision in *Polish Roman Catholic Union* had taken place on two fronts. First, the Indiana courts had apparently developed an exception to this rule in those cases in which notice of the lender's breach did not reach the borrower in time to arrange a substitute loan.²² Secondly, there was dicta in an Indiana Court of Appeals decision which said that the measure of recovery should be the same as it is in all other cases of contract breach.²³ Based on these cases, the Court of Appeals for the Seventh Circuit held that Indiana law permitted the plaintiff to recover for consequential losses when a substitute loan could not be secured.²⁴

¹⁹484 F.2d 713 (7th Cir. 1973).

²⁰*Lowe v. Turpie*, 147 Ind. 652, 49 N.E. 25 (1897).

²¹*Id.*

²²484 F.2d at 724, *citing* *Lowe v. Turpie*, 147 Ind. 652, 49 N.E. 25 (1897).

²³*Doddridge v. American Trust & Savings Bank*, 98 Ind. App. 334, 189 N.E. 165 (1934). It should also be noted that, in *Traylor v. Lafayette Nat'l Bank*, 303 N.E.2d 672 (1973), discussed at notes 25-28 *infra*, the court of appeals assumed without discussion that consequential damages may be recovered in a suit for breach of an agreement to loan money.

²⁴However, the court held that two of the three items of consequential damages awarded by the district court either were not "reasonably foreseeable" or were too speculative. The district court had entered a \$707,000 judgment for the plaintiff which was composed of: (1) \$400,000, the profit which the court found that the plaintiff would have realized on the sale of a completed apartment house complex which he was to build with the loaned money, (2) \$280,000, the profit which the plaintiff would have realized on the sale of four adjoining parcels of land after the complex was completed, and (3) \$27,000, the amount by which the plaintiff's indebtedness to the defendant on other loans exceeded the value of property mortgaged in favor of the defendant. The \$400,000, which represented the estimated profit which Stanish would have realized on the sale of the completed building, was computed on the basis of a projection of rental income. The court said that this projection involved too many uncertainties to be the basis for damages in a contract action. The \$280,000, which represented the profit Stanish would

2. *Parol Evidence Rule*

In *Traylor v. Lafayette National Bank*,²⁵ the court of appeals was presented with a novel question concerning the parol evidence rule. The litigation began with a suit by a lender against a borrower on a note and security agreement. The borrower counterclaimed against the lender alleging breach of an oral agreement to loan further funds. This oral agreement was made while the parties were negotiating the obligation evidenced by the note and security agreement. Some of the proof offered in support of the counterclaim apparently tended to show that the borrower had only a conditional obligation on the note. The trial court excluded this proof on the ground that it contradicted a written integration (the note and security agreement) and was inadmissible according to the parol evidence rule. The court of appeals reversed and remanded for a new trial on the counterclaim. After noting that the borrower admitted being in default on the note, the court held that the agreement to loan additional funds was a separate and distinct oral agreement which would not, if proved, contradict or vary the terms of the note and security agreement.

Some difficulty in applying the parol evidence rule has been caused by the different purposes often served by it²⁶ and the different philosophies undergirding it.²⁷ On any view of the rule, however, the court was correct in its decision in the *Traylor* case. So long as the borrower was only claiming breach of an agreement to make additional loans, the written note should not have prevented him from introducing proof of his claim. This is true even if some of that proof tended to show that the agreement to loan additional funds made the borrower's obligation on the note conditional. Also, if the borrower had been using this proof in his defense in the suit on the note by showing that the oral agreement eliminated, under some circumstances, his obligation on the note, the evidence may still have been admissible. There is authority for permitting a party to prove that a writing is not to have effect until a certain condition comes into existence.²⁸

have made on the sale of the four other parcels, was set aside on similar grounds.

²⁵303 N.E.2d 672 (1973).

²⁶Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1050 (1968).

²⁷Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule*, 42 IND. L.J. 333 (1967).

²⁸*Russell v. Gift*, 90 Ind. App. 106, 167 N.E. 546 (1929); RESTATEMENT (SECOND) OF CONTRACTS § 240(d) (Tent. Drafts Nos. 1-7, 1973).

3. Interpretation of Contracts

In *Fort Wayne Bank Building v. Bank Building & Equipment Corp.*,²⁹ the court of appeals was presented with a problem similar to the problems involved in applying the parol evidence rule. The court employed a somewhat rigid emphasis in affirming the trial court's decision as to the meaning to be given language in a written agreement. The parties had disagreed as to whether language in a written agreement required an owner to indemnify a general contractor for all subcontractor claims or for only those claims which were based on work ordered directly by the owner. The trial court interpreted the contract provision to require the owner to indemnify the contractor for all subcontractor claims and entered a judgment against the owner on a third party complaint. The court of appeals affirmed on the ground that the meaning given the provision by the trial court was supported by the record. In reaching this decision, the court emphasized that a writing which is unambiguous on its face must be interpreted without the aid of evidence of extrinsic circumstances. The court stated that the agreement speaks for itself and is "not glossed by any evidence of the circumstances and motives surrounding the transaction."³⁰ Although the result in this case seems sound, the emphasis may be unduly restrictive. It is often essential in ascertaining the intent of the parties, as expressed in a writing, to know the circumstances surrounding the transaction.³¹

4. Assignment

In an interesting case, *Ertel v. Radio Corp. of America*,³² the Indiana Supreme Court resolved two questions on the subject of assignment. The circumstances which led to the litigation in *Ertel* are somewhat complicated but must be summarized to explain the issues. Radio Corporation of America (RCA) purchased three machines on an open account from Delta Engineering Corporation (Delta). These purchases were made by standard form sales agreements on three separate occasions. At the same time, Delta borrowed funds from Economy Finance Corporation (Economy) and gave a security interest in revolving inventory and accounts receivable as collateral. The security interest in the accounts receivable was created by assignment from Delta to Economy. Economy sent

²⁹309 N.E.2d 464 (Ind. Ct. App. 1974).

³⁰*Id.* at 468.

³¹See RESTATEMENT (SECOND) OF CONTRACTS § 228 (Tent. Drafts Nos. 1-7, 1973).

³²307 N.E.2d 471 (Ind. 1974). The court of appeals decision in this case was reviewed in Townsend, *supra* note 1, at 238.

notice³³ of this assignment to RCA by registered mail before the sale of the third machine and before any payments were made. Although this notice was received by an employee of RCA who was authorized to accept notice, it never reached the accounting department. As a result, RCA made all payments on these accounts to Delta. When Delta became insolvent and defaulted on the loan agreement, Economy sued Delta's surety, Ertel. Ertel claimed that, as surety of Delta, he would be subrogated to any rights Economy had in the collateral, including the accounts receivable from RCA, and Ertel joined RCA by third party complaint.

In its defense, RCA first argued that it had already paid a substantial part of the account debts and that the notice of the assignment was not effective to change its responsibility. RCA apparently urged that it had no "knowledge" of the assignment because the communication from Economy never reached its accounting department. The court held that the "fact that the accounting department never received the notice [was] of no consequence in this case."³⁴ The notice required RCA to make payments to Economy and RCA was responsible for wrongful payment.³⁵ Secondly, RCA argued that it had the right to set off, against the assignee, losses caused by defects in the third machine sold by Delta. Basic contract law permits an obligor to recoup against an assignee any claims which arise out of the same contract as the assigned right or to set off against an assignee any claim against the assignor which arises before notice of the assignment. This principle is carried forth in the Uniform Commercial Code provision governing assignments as collateral.³⁶ The court of appeals viewed the three sales of machinery as separate contracts

³³The notice instructed RCA to make all payments on the accounts to Economy. *Ertel v. Radio Corp. of America*, 297 N.E.2d 446, 448 (Ind. Ct. App. 1973).

³⁴307 N.E.2d at 474. The Indiana Supreme Court cited IND. CODE § 26-1-1-201(26)(b) (IND. ANN. STAT. § 19-1-201(26)(b), Burns 1964) which provides that notice is received when "it is duly delivered at the place of business through which the contract was made or at any other place held out by [the person to be notified] as the place for receipt of such communications."

³⁵See IND. CODE § 26-1-9-318(3) (IND. ANN. STAT. § 19-9-318(3), Burns 1964) which provides that the "account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee."

³⁶*Id.* § 26-1-9-318(1) (IND. ANN. STAT. § 19-9-318(1)) provides that the rights of an assignee are subject to:

- (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and
- (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

and, since RCA's claim against Delta involved a sale which occurred after notice of the assignment, the court stated that the claim could not be recouped against the assignee.³⁷ The supreme court, however, held that RCA could use this claim as a defense. The court pointed out that RCA's claim arose from a contract between RCA and Delta which was automatically assigned to Economy. The claim could thus be asserted against the assignee regardless of when notice was given.³⁸ This is undoubtedly correct so long as the court intended RCA to be able to recoup this claim against the assignee on the third sales contract only. If RCA's claim against Delta, for defects in the third machine, was in an amount larger than the amount due on the third contract, it might have been improper to permit RCA to set off against the assignee the balance on the first two contracts.

5. Suretyship

A unique question of subrogation was presented to the Indiana Supreme Court in the *Ertel* case just discussed. The surety, Ertel, claimed that he should be subrogated to Economy's rights in the collateral and, under general suretyship principles, his argument would be well taken.³⁹ However, RCA argued that the court should not permit subrogation because certain "equities" were present.⁴⁰ This argument was based on the close ties between Ertel and Delta and the fact that Delta had wrongfully received payments on the accounts from RCA.⁴¹ The court acknowledged that subrogation was an equitable right but held that the relationship between Ertel and Delta was not sufficiently close to warrant depriving Ertel of the right. The court noted that, although Ertel was a shareholder and secretary-treasurer of Delta, his role was primarily that of investor. Also, Ertel did not become aware of the fact that RCA had been notified of the assignment and of the obligation to make payments to Economy until after Economy had sought payment from him as surety.⁴²

Two noteworthy cases were decided during the year on the subject of surety discharge. One case involved alteration of the

³⁷297 N.E.2d at 450.

³⁸307 N.E.2d at 476.

³⁹RESTATEMENT OF SECURITY § 141 (1941).

⁴⁰The court quoted from *Vonderahe v. Ortman*, 128 Ind. App. 381, 392, 147 N.E.2d 924, 925-26 (1958), as follows: "[Subrogation] is not an absolute right but one which depends upon the equities and attending facts and circumstances of each case." 307 N.E.2d at 475.

⁴¹Delta could not assert any rights of its own against RCA since RCA had already paid Delta on the accounts.

⁴²307 N.E.2d at 475.

contract between principal and creditor and the other involved impairment of collateral by the surety. In both cases, the surety was a non-corporate accommodation party⁴³ to a promissory note and, in both cases, the Indiana Court of Appeals discharged the surety. In *Indiana Telco Federal Credit Union v. Young*,⁴⁴ the court dealt with discharge by alteration of the contract. The maker of the note defaulted and the payee agreed, without notifying the accommodation party, to accept smaller payments over a longer period than called for in the note. The maker made five payments pursuant to this agreement and then declared bankruptcy. The payee sued the accommodation party, and the court held that the agreement extending the time in which the maker could pay was an alteration of the contract which would discharge the accommodation party.⁴⁵

The reasons for giving sureties this kind of protection are not overwhelming. First, in theory, the surety agrees to assume the risk of non-payment by the principal during a certain period of

⁴³Persons who sign negotiable notes for the purpose of lending their credit capacity to another party are referred to in the Uniform Commercial Code as accommodation parties. See UNIFORM COMMERCIAL CODE § 3-415(1), IND. CODE § 26-1-3-415(1) (IND. ANN. STAT. § 19-3-415(1), Burns 1964). They may sign the instrument in any capacity.

⁴⁴297 N.E.2d 434 (Ind. Ct. App. 1973).

⁴⁵The court based its decision on general suretyship principles. Although the result would not be changed, it is possible that the case should have been resolved by the pertinent provisions of the Uniform Commercial Code as enacted in Indiana. Discharge rights of accommodation parties on negotiable instruments are set forth in IND. CODE § 26-1-3-606 (IND. ANN. STAT. § 19-3-606, Burns 1964), which provides that:

The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has, to the knowledge of the holder, a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges . . . such person

Even if the note in the *Indiana Telco* case was not negotiable because it lacked words of negotiability (e.g., pay to the order of), it would still be governed by this section if it were otherwise in form a negotiable instrument. See *id.* § 26-1-3-805 (IND. ANN. STAT. § 19-3-805). Although not explicitly stated in the quoted section, it is clear that the drafters intended unauthorized extension agreements to discharge sureties. In UNIFORM COMMERCIAL CODE § 3-606, Comment 4, the drafters acknowledge that an extension is an act which discharges and state: "This section retains the right of the holder to release one party, or to postpone his time of payment, while expressly reserving rights against others." If there were no discharge, there would be no need to reserve rights. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 434 (1972) [hereinafter cited as WHITE & SUMMERS].

time; prolonging this period then extends his risk and causes injury to the surety in ways that may be difficult to measure. This rationale, however, is tenuous in such cases as *Indiana Telco*, since the principal was already in default when the extension agreement was made. Secondly, when the payee agreed to accept a smaller payment over an extended period of time, the maker's obligation on the note was suspended or discharged. This might have prevented the surety from being subrogated to any rights of the payee on the instrument, thus diminishing his security. To the extent that there are advantages in suing as payee on an instrument, as opposed to suing under a common law right of subrogation, something is thereby lost by the surety. It should be noted that weaknesses in the justification for this discharge rule may be the reason for permitting the creditor, in the case of a negotiable instrument, to avoid the effect of the rule by merely reserving his rights against other parties as part of the extension agreement with the principal debtor.⁴⁶ It is not even necessary for the creditor to notify the surety of the discharge and reservation of rights.⁴⁷

The case involving impairment of collateral was *White v. Household Finance Corp.*⁴⁸ Household Finance Corp. (HFC) made a loan to Butzin to enable him to purchase an auto. Because Butzin was only twenty years old, his aunt and uncle, Charles and Catherine White, participated in the transaction.⁴⁹ All three of these parties signed the loan agreement, a security agreement with

⁴⁶UNIFORM COMMERCIAL CODE § 3-606(2), IND. CODE § 26-1-3-606(2) (IND. ANN. STAT. § 19-3-606(2), Burns 1964), provides:

By express reservation of rights against a party with a right of recourse the holder preserves (a) all his rights against such party as of the time when the instrument was originally due

⁴⁷At least one court has concluded that notice is not necessary to a reservation of rights. See *Parnes v. Celia's, Inc.*, 99 N.J. Super. 179, 4 UCC REP. SERV. 1159 (1968). In this case, the extension may have been conditioned, however, on the surety's consent. An early draft of UNIFORM COMMERCIAL CODE § 3-606 (1952 version) provided that:

An express reservation of rights is not effective as such as against any party whom the holder does not use due diligence to notify within 10 days after the reservation.

The language was omitted in the 1958 version and has not been restored.

⁴⁸302 N.E.2d 828 (Ind. Ct. App. 1973).

⁴⁹Under current Indiana law, Butzin's age would not have been a disability. IND. CODE § 34-1-2-5.5 (Burns Supp. 1974) states:

No contract, sale, release or conveyance executed by a person after reaching his eighteenth (18th) birthday may be avoided by him on the grounds that, at the time the agreement was executed, he was acting under a legal disability by reason of his age. Nor [may any] legal disability by reason of age be asserted as a defense in an action to enforce a contract against a person who executed the agreement after reaching his eighteenth (18th) birthday.

respect to the auto, and a promissory note. Title to the auto was in the names of Charles White and Butzin, with a lien in favor of HFC. Shortly thereafter, the auto was destroyed in a single car accident. The car was insured and the insurance company sent a check for the proceeds of the policy, \$1,850, payable to Butzin and HFC. They, in turn, indorsed the check to an auto dealer in payment for a second auto. Although title to this second auto was taken in the names of Charles White and Butzin, with HFC listed as lienholder, no new security agreement was executed. Also, the Whites were not notified of this application of the insurance funds. When Butzin defaulted, HFC sued the Whites on the original promissory note. The trial court gave judgment for HFC for the full amount due on the note.⁵⁰

The court of appeals reviewed, for the first time in Indiana, important principles of the law of suretyship under the Uniform Commercial Code. HFC argued that the Whites' failure to designate on the note that they were accommodation parties prevented them from claiming defenses based on accommodation status. On this point, the court noted that their accommodation status was adequately shown by oral proof and that this proof is available to show accommodation status in all cases except when a holder in due course without actual notice of the accommodation is the plaintiff.⁵¹ Once the Whites had established their accommodation status, they were entitled to raise suretyship defenses, such as discharge because of the impairment of collateral.⁵² This defense is based on the right of the surety to rely on the collateral for satisfaction of the principal's obligation and to be subrogated to the creditor's rights in the collateral in the event the surety pays the obligation. HFC urged that the purchase of the second auto with the insurance proceeds was merely a substitution of collateral rather than an impairment. The court held, however, that the failure of HFC to obtain a security agreement was an impairment. In the absence

⁵⁰302 N.E.2d at 830.

⁵¹UNIFORM COMMERCIAL CODE § 3-415(3), IND. CODE § 26-1-3-415(3) (IND. ANN. STAT. § 19-3-415(3), Burns 1964), provides:

As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

⁵²UNIFORM COMMERCIAL CODE § 3-606(1), IND. CODE § 26-1-3-606(1) (IND. ANN. STAT. § 19-3-606(1), Burns 1964), provides:

The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

of a security agreement, HFC's rights in the collateral were diminished and any rights available to the Whites by way of subrogation were also thereby diminished.⁵³

After determining that there was an impairment of collateral, a question remained as to the extent of discharge. The court of appeals did not address itself specifically to this question, but only reversed and ordered the trial court to enter judgment consistent with its opinion. If there were to be a complete discharge, a judgment should have been entered in favor of the accommodation parties. However, the applicable Uniform Commercial Code provision states that accommodation parties are discharged only "to the extent that" the holder unjustifiably impairs the collateral.⁵⁴ This suggests that the discharge should only be commensurate with the impairment.⁵⁵ The actual impairment in this case could be equal to either the value of the second auto at the date when HFC failed to require a security agreement or \$1,850, the insurance proceeds used to purchase it. In entering its final judgment, the trial court should probably deduct one of these amounts from \$2,094.25, the amount awarded to HFC by the trial court, and enter judgment in favor of HFC for the amount remaining.

6. *Private Statute of Frauds—Waiver*

Frequently, written agreements for construction work contain provisions stating that no extra work or change will be paid for unless there is a written work order or other written agreement covering the extra work or change. These provisions are, in effect, private statutes of frauds. Despite the existence of these provisions, it is common for the field superintendent of a general contractor to demand orally that one subcontractor perform extra work or make changes. For reasons of business expedience, subcontractors often comply with these oral requests. In those cases in which the contract includes such a provision, the performing subcontractor could be exposed to some risks. In response to these risks, the Indiana Subcontractors Association has recommended to its membership that an internal field rule be established requiring an

⁵³The court pointed out that, because of the failure to execute a second security agreement, the Whites' interest with respect to the collateral might be defeated by a trustee in bankruptcy for the debtor's estate, by a subsequent lienholder, or by an administrator of the debtor's estate if the debtor had died. 302 N.E.2d at 837.

⁵⁴UNIFORM COMMERCIAL CODE § 3-606(1), IND. CODE § 26-1-3-606(1) (IND. ANN. STAT. § 19-3-606(1), Burns 1964).

⁵⁵There is some authority in support of this interpretation. See WHITE & SUMMERS 435 n.127.

authorized written work order before any extras or changes are performed.⁵⁶

In *Oxford Development Corp. v. Rausauer Builders, Inc.*,⁵⁷ the Indiana Court of Appeals had an opportunity to rule on the efficacy of this private statute of frauds in construction contracts. The job superintendent of the prime contractor orally instructed a subcontractor to install an underlayment which was not included under their existing contract. When the prime contractor thereafter refused to pay for the extra work, the subcontractor stopped his performance and sued. Among other things, the prime contractor urged that the private statute of frauds prevented recovery for the installation of the underlayment since no writing on the subject had ever been executed. In affirming the trial court's decision for the subcontractor, the court disposed summarily of this contention by holding that the trial court could have found that the prime contractor had waived compliance with the provision. The waiver consisted of the oral agreement, an assurance that a written agreement would later be executed, and a pattern of oral work orders followed by written confirmations.⁵⁸

This decision is a sound and logical application of general contract doctrine.⁵⁹ When both parties to an agreement undertake new responsibilities, there is no reason to refuse to enforce a modification of their agreement, including a modification waiving a private statute of frauds. Also, it is well established that a condition which is not material to the exchange or risks in a contract can be waived without the presence of consideration or reliance.⁶⁰ In this case, the contract, at least impliedly, called for the prime contractor to pay the subcontractor for extras or changes in the work. This obligation was, however, conditioned on the prior existence of a

⁵⁶Subcontractor's Handbook H-7 (1974) (published by the Indiana Subcontractors Ass'n, Inc., 4755 Kingsway Drive, Indianapolis, Indiana).

⁵⁷304 N.E.2d 211 (Ind. 1974). The provision was as follows: "No extra work or changes under this contract will be recognized or paid for, unless agreed to in writing before the work is done or the changes made." *Id.* at 215.

⁵⁸A number of other courts have reached the same conclusion. *See, e.g.*, *Rivercliff Co. v. Linebarger*, 223 Ark. 105, 264 S.W.2d 843, *cert. denied*, 348 U.S. 834 (1954); *American Sheet Metal Works v. Haynes*, 67 Wash. 2d 153, 407 P.2d 429 (1965). Both cases were cited by the *Oxford* court.

⁵⁹*But cf.* UNIFORM COMMERCIAL CODE § 2-209(2), IND. CODE § 26-1-2-209(2) (IND. ANN. STAT. § 19-2-209(2), Burns 1964), applicable in sale of goods cases, which provides that a "signed agreement which excludes modification . . . except by signed writing cannot be otherwise modified . . ." It should be noted that this may apply only to modifications without consideration. In any case, an effort to modify which is not successful because of section 2-209(2) may constitute a waiver under section 2-209(4).

⁶⁰RESTATEMENT (SECOND) OF CONTRACTS § 88 (Tent. Drafts Nos. 1-7, 1973).

writing covering the extra work. This is exactly the sort of procedural or technical condition which is often the subject of a waiver.⁶¹

In those cases in which a subcontractor performs extra work pursuant to oral instructions, the portent of *Oxford Development* seems clear; the efficacy of the private statute of frauds provision is in very serious doubt. There is only one question which may remain. The court in *Oxford Development* emphasized that the prime contractor had not only orally requested the extras but had assured the subcontractor that a writing satisfying the private statute of frauds would be subsequently drafted. Further, this assurance was accompanied by a pattern of oral requests followed by written work orders. These assurances and the pattern of conduct could be considered components of the waiver and thus could limit the impact of *Oxford Development*. However, the waiver principle seems broad enough to be activated by an oral request for extra work, standing alone. Indeed, one of the cases upon which the court in *Oxford Development* relied did not involve any such assurances or pattern of conduct.⁶²

B. Legislative Developments

1. Dishonored Checks—Penalty

The risks associated with permitting a check to be dishonored by the drawee bank were recently expanded. To place this expansion in perspective, it is helpful to take note of a law, which has been in effect in Indiana for over forty years, which provided that a person who stopped payment on a check would, if later found to be liable on the check, be responsible for a penalty in the amount of six percent interest on the face amount of the check from the time of execution plus reasonable attorneys' fees.⁶³ The 1973 General Assembly amended this law to expand the application of the penalty provision to include those instances in which a person allows a check or draft to be dishonored by a banking institution because of lack of funds, failure to have an account, or lack of an authorized signature of the drawer or necessary endorser.⁶⁴ The

⁶¹*Id.* Comment *d.*

⁶²*American Sheet Metal Works v. Haynes*, 67 Wash. 2d 153, 407 P.2d 429 (1965).

⁶³IND. CODE § 28-2-8-1 (Burns 1973).

⁶⁴Ind. Pub. L. No. 283 (April 5, 1973), amending IND. CODE § 28-2-8-1 (Burns 1973). The law as amended is as follows:

A. person who, having executed and delivered to another person a check or draft drawn on or payable at a banking institution either (1) stops payment on the check or draft, or (2) allows the check or draft to be dishonored by a banking institution because of lack of

purpose of expanding the application of this penalty provision apparently was to try to give a cost free remedy to persons who rely on checks as the equivalent of cash. For example, a retailer may release goods to a buyer in exchange for a check, treating the check as cash and the sale as a cash sale. Dishonor of the check may present the retailer with unanticipated collection expenses usually associated only with credit sales. Under the new law, the retailer may be able to shift these expenses to the buyer furnishing such a check. It might be unfair, however, to permit the payee of such a dishonored check to impose these costs on the drawer in all cases, even when the dishonor was caused by the drawer's inadvertance. Apparently, in an effort to protect against this possibility, the new law provides that the penalty does not apply to a person who has allowed a check to be dishonored if, within ten days after receiving notice of dishonor, he pays to the holder the full amount of the check.⁶⁵

One matter of interpretation may be raised with respect to the new law, but it should be easily resolved. There may be some question as to whether the ten day payment exception protects only drawers of checks dishonored because of lack of funds, failure to have an account, or lack of an authorized signature of the drawer or necessary endorser, or whether it protects drawers in stop payment cases as well. The wording of the statute seems to make it clear that the exemption applies only to the former.⁶⁶

funds, failure to have an account, or lack of an authorized signature of the drawer, or a necessary indorser, is, if the person who took such action is found liable under applicable law to the payee or bona fide holder on the check or draft in a court action, liable also for (1) interest at the rate of eight percent (8%) per annum on the face amount of the check or draft from the date of its execution, (2) court costs, and (3) reasonable attorney's fees in prosecuting the action. This section does not apply to a person who has so allowed a check or draft to be dishonored if, within ten (10) days after receiving notice of dishonor, he pays to the payee or bona fide holder the full amount of the check or draft. Such a payment is effective for all purposes as of the date it is made.

⁶⁵The law was also amended to increase the penalty to eight percent and to provide for recovery of court costs in addition to attorney's fees. These additional recovery provisions are applicable in cases of both stop payment and dishonor because of lack of funds, etc. See note 64 *supra*.

⁶⁶The statute specifies an exemption for those persons who pay the full amount of the check within ten days *after receiving notice of dishonor*. This language seems to contemplate those cases in which the drawer is notified of the fact that a check has not been paid and seems not to contemplate those cases in which the drawer orders payment stopped. In addition, the exemption provision begins by saying that the penalty does not apply to a person who has so allowed a check or draft to be dishonored. This language, also, does not seem to contemplate a stop payment order. See note 64 *supra*.

2. Warehousemen

a. Agricultural Commodities

There have been some significant recent developments in the law with respect to warehousemen. Beginning January 1, 1975, agricultural commodities⁶⁷ warehousemen in Indiana will be subject to a comprehensive licensing and bonding law enacted by the 1973 General Assembly⁶⁸ and amended by the 1974 General Assembly.⁶⁹ There are several noteworthy features of this new law. It provides a licensing requirement for all agricultural commodity warehouse businesses.⁷⁰ The licensing program is to be administered under the supervision of the Lieutenant Governor, as Director,⁷¹ who is given sweeping powers with respect to licensees and applicants for licenses. He may require reports, prescribe forms for warehouse receipts, promulgate regulations, conduct inspections, and require termination of storage upon his determination that a license should be revoked for failure to comply with the law.⁷² An initial inspection of each applicant for a license must be financed by the applicant.⁷³

In addition to being subject to rule-making and inspection by the Director, license applicants must establish two interrelated kinds of financial capacity. First, the Act provides that every licensed warehouseman shall have and maintain a net worth of at least \$10,000, plus an amount equal to ten cents for each bushel of storage capacity.⁷⁴ Secondly, license applicants must furnish a bond executed by the applicant and a licensed corporate surety. The bond is to be conditioned on the performance by the principal of all the obligations of a licensed warehouseman under the Act.⁷⁵ Although the bond is to run in favor of the Director, the Act also grants the right to sue on the bond to grain depositors who have been injured by failure of the warehouseman to fulfill the Act's conditions.⁷⁶ Bonds furnished under the Act must be in an amount equal to

⁶⁷"Agricultural commodities" is a technical term including "corn, wheat, oats, barley, rye, sorghum and soybeans but not including canning crops for processing." IND. CODE § 26-3-7-2 (IND. ANN. STAT. § 67-702, Burns Supp. 1974).

⁶⁸Ind. Pub. L. No. 268 (April 19, 1973), adding IND. CODE §§ 26-3-7-1 to -36 (IND. ANN. STAT. §§ 67-701 to -736, Burns Supp. 1974).

⁶⁹Ind. Pub. L. No. 120 (Feb. 21, 1974), amending IND. CODE §§ 26-3-7-1 to -36 (IND. ANN. STAT. §§ 67-701 to -736, Burns Supp. 1974).

⁷⁰IND. CODE § 26-3-7-4 (IND. ANN. STAT. § 67-704, Burns Supp. 1974).

⁷¹*Id.* § 26-3-7-1 (IND. ANN. STAT. § 67-701).

⁷²*Id.* § 26-3-7-3 (IND. ANN. STAT. § 67-703).

⁷³*Id.* §§ 26-3-7-6(e), -7-17 (IND. ANN. STAT. §§ 67-706(e), 67-717).

⁷⁴*Id.* § 26-3-7-16 (IND. ANN. STAT. § 67-716).

⁷⁵*Id.* § 26-3-7-9 (IND. ANN. STAT. § 67-709).

⁷⁶*Id.* § 26-3-7-11(a) (IND. ANN. STAT. § 67-711(a)).

twenty-five cents per bushel for the first 100,000 bushels of storage capacity, fifteen cents per bushel for the next 100,000, and ten cents per bushel for each bushel over 200,000.⁷⁷ Although there is a maximum of \$100,000 on this bond requirement, an additional amount may be required on the bond to compensate for any deficiency on the part of the warehouseman with respect to the net worth requirement of ten cents per bushel of capacity.⁷⁸

Another important provision of the Act increases the responsibility of the warehouseman for certain types of damage to grain stored in his warehouse. Generally, a warehouseman is only responsible for damage or destruction of goods caused by his failure to exercise reasonable care.⁷⁹ Licensed agricultural commodity warehousemen will be required to keep a policy of insurance covering, at their market value, all commodities which may be stored in their warehouses against loss by fire, internal explosion, lightning and windstorm.⁸⁰ The warehouseman must settle with depositors, at the market value, for any agricultural commodities damaged or destroyed in this manner without regard to fault. In the event the warehouseman fails to settle, the depositor has a direct action against the insurance carrier underwriting the prescribed insurance.⁸¹

The new Agricultural Commodity Licensing and Bonding Act⁸² replaces a statutory system of local "sealers," appointed by the Commissioner of Weights and Measures, which local "sealers" had authority to seal storage bins and issue certificates showing their contents. This system had apparently fallen into disuse and was specifically repealed by the Act.⁸³ The replacement system created by the Act will serve at least two general purposes. First, it should facilitate borrowing on the security of stored grain. The existence of a warehouse receipt from a state-bonded warehouseman should provide significant assurance to lenders who accept grain as collateral. Furthermore, this kind of storage may serve as a less expensive alternative to field warehousing. Secondly, the Act protects against losses to grain owners that may be caused by speculation and failure on the part of warehousemen. This protection will be afforded not only through the supervision of warehousemen, but also by the bond requirements.⁸⁴ Although there is no reason to

⁷⁷*Id.* § 26-3-7-10 (IND. ANN. STAT. § 67-710).

⁷⁸*Id.* § 26-3-7-10(c) (IND. ANN. STAT. § 67-710(c)).

⁷⁹*Id.* § 26-1-7-204(1) (IND. ANN. STAT. § 19-7-204(1), Burns 1964).

⁸⁰*Id.* § 26-3-7-12(a) (IND. ANN. STAT. § 67-712(a), Burns Supp. 1974).

⁸¹*Id.* § 26-3-7-12(b) (IND. ANN. STAT. § 67-712(b)).

⁸²*Id.* §§ 26-3-6-1 to -27 (IND. ANN. STAT. §§ 67-601 to -627).

⁸³Ind. Pub. L. No. 268, § 3 (April 19, 1973).

⁸⁴There is a companion law which licenses and regulates grain dealers. IND. CODE §§ 25-3.5-1-1 to -22 (Burns Supp. 1974).

believe that this system will not work well, there is one apparent weakness. The bonds which will be required in the amounts set forth above will not protect against all contingencies. At most, bonds are only required in amounts equal to thirty-five cents per bushel of storage capacity.⁶⁵ In many cases, agricultural commodities will have a market price far in excess of this amount⁶⁶ and a depositor or his creditor would not be protected to the full value of the deposit.

b. *Burden of Proof*

A significant development, which concerns all warehousemen,⁶⁷ was brought about by an amendment to a section of the Indiana version of the Uniform Commercial Code. Until this amendment, the Uniform Commercial Code in Indiana provided that a bailee must deliver goods to the person entitled to them under a document of title unless the bailee established "damage to or delay, loss or destruction of goods for which the bailee is not liable."⁶⁸ The National Conference of Commissioners on Uniform State Laws provided optional language in this section which the Indiana legislature did not adopt when it enacted the Code. The optional language provides that "the burden of establishing negligence in such cases is on the person entitled under the document."⁶⁹ The result in

⁶⁵This combines the twenty-five cents per bushel required of all warehousemen who have up to 100,000 bushels capacity with the ten cents per bushel required of all warehousemen in order to compensate for a deficiency in net worth. *See id.* § 26-3-7-10(c) (IND. ANN. STAT. § 67-710(c)).

⁶⁶For example, soybeans often have a market price in excess of \$8.03 per bushel. *See, e.g.,* Wall Street Journal, Sept. 25, 1974, at 22, col. 3.

⁶⁷Although the law under discussion applies to both warehousemen and carriers, it is of very little effect when carriers are concerned. The liability of most carriers for loss or damage is governed by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 20(11) (1970), which imposes nearly absolute liability on carriers, and not just liability for negligence. Those few Indiana carrier contracts not subject to the federal law have the standard of liability established for them by IND. CODE § 26-1-7-309(1) (IND. ANN. STAT. § 19-7-309(1), Burns 1964). This section states that a carrier must exercise that degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. However, it also states that the subsection does not repeal or change any law which imposes liability upon a common carrier for damages not caused by its negligence. Prior Indiana decisions have held that a carrier is a form of insurer of the goods. This insurer status, therefore, is still intact and the burden of proof in a case against a carrier, under either federal or Indiana law, is of little consequence.

⁶⁸IND. CODE § 26-1-7-403(1)(b) (IND. ANN. STAT. § 19-7-403(1)(b), Burns 1964, *as amended, id.* § 26-1-7-403(1)(b) (IND. ANN. STAT. § 19-7-403(1)(b), Burns Supp. 1974).

⁶⁹UNIFORM COMMERCIAL CODE § 7-403(1)(b) (1972 version). Thirteen states have adopted this language; they are Arizona, California, Iowa, Ken-

Indiana was that warehousemen shouldered the burden of establishing freedom from negligence in all cases in which there was damage, delay, or destruction.

The question of who bears this burden in suits against warehousemen for negligent destruction of goods can be of considerable significance. In many cases, the existence of negligence or freedom from negligence cannot be readily proved.⁹⁰ In these cases, the outcome may be determined by the establishment of the burden of going forward with the evidence or the risk of nonpersuasion. Apparently, in an effort to protect Indiana warehousemen, the 1973 General Assembly amended the Uniform Commercial Code to shift these burdens.⁹¹ The legislature did not, however, adopt the optional language provided by the Conference of Commissioners on Uniform State Laws, but instead developed a compromise. In Indiana, this section now provides that the burden is on the persons entitled under the document "whenever the claimed loss or destruction resulted from fire and the amount of claimed loss or destruction . . . exceeds the sum of ten thousand dollars . . ."⁹² This somewhat curious compromise can be explained in the following manner. First, fire could be the most common and the most frequently litigated cause of loss. Damage by wind or water would probably not as often be attributable to the warehouseman's neglect. Thus, the amendment would have the effect of covering most of the significant cases. Secondly, the monetary limit may be based on an assumption about the capacity of various bailors to absorb the costs of investigation of loss and litigation of claims. Bailors with a claim for less than \$10,000 may be persons, such as small businessmen, who store goods on a small scale or who might not have a sufficient financial stake in the goods to warrant paying the costs of investigation and litigation. The opposite assumption could be made about persons who had claims in excess of \$10,000. Although these assumptions are, at best, empirically fragile, they seem to be the only explanation for the compromise.

3. *Chattel Mortgage Payment Receipts*

The 1973 General Assembly made a significant change in a statute which required a mortgagee of household goods to give a

tucky, Maryland, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas and Wyoming.

⁹⁰WHITE & SUMMERS 674.

⁹¹Ind. Pub. L. No. 265 (April 17, 1973), *amending* IND. CODE § 26-1-7-403(1)(b) (IND. ANN. STAT. § 19-7-403(1)(b), Burns Supp. 1974).

⁹²*Id.*

receipt for payments made on the debt.⁹³ The law now requires the mortgagee to give the mortgagor a receipt showing the amount of payment applied to interest, the amount applied to principal, and the amount of the unpaid balance.⁹⁴ However, the requirement of a receipt is obviated whenever the mortgagor makes a payment by check. The penalty for failure to give such a receipt, when required, is drastic. Failure to execute the receipt voids the mortgage, and the mortgagor is then restricted to a remedy based solely on the underlying debt.

VII. Criminal Law and Procedure

*William A. Kerr**

Criminal cases continue to constitute a major portion of the workload confronting the Indiana appellate courts. During the past year, the Indiana Supreme Court filed approximately 100 criminal opinions and the various divisions of the court of appeals filed approximately 190 criminal opinions. In view of the number of opinions filed during the year, this survey must be somewhat selective in nature. The opinions that are included in the survey are reviewed in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and post-trial stages. One opinion of the Indiana Supreme Court is considered first, however, because of its significance for criminal law and procedure in general.

During the 1973 session of the Indiana General Assembly, a portion of the proposed Indiana Code of Criminal Procedure prepared by the Indiana Criminal Law Study Commission was enacted into law.¹ The enacted provisions purportedly became effective on August 1, 1973, following promulgation, but their effectiveness was questionable because of an opinion filed by the Third District Court of Appeals on June 26, 1973, which suggested that

⁹³Ind. Pub. L. No. 267 (April 10, 1973), amending IND. CODE § 26-2-2-3 (IND. ANN. STAT. § 51-203, Burns Supp. 1974).

⁹⁴*Id.*

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¹IND. CODE §§ 35-1.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-100 *et seq.*, Burns Supp. 1974); *id.* §§ 35-2.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-402 *et seq.*); *id.* §§ 35-2.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-903 *et seq.*); *id.* §§ 35-4.1-1-1 *et seq.* (IND. ANN. STAT. §§ 9-1202 *et seq.* All laws, parts of laws, or amendments repealed by these sections are found in Ind. Pub. L. No. 325, § 5 (April 23, 1973).