to grant her petition for fees because it was filed after the appeal was perfected and the trial court was, therefore, without jurisdiction. The general rule is that perfection of an appeal results in removal of jurisdiction to the appellate court and a concomitant loss of jurisdiction of the trial court.[145] However, the rule is inapplicable in divorce proceedings because the trial court is deemed to have continuing jurisdiction of matters before the higher court.[146] The court of appeals therefore affirmed the trial court's decision.

X. Evidence

*William Marple**

A. Impeachment

A defendant's post-arrest silence may not be used even to impeach his trial testimony. The Indiana Court of Appeals in *Lukas v. State*[1] held that a charge or accusation made while the accused is in police custody does not call for a reply and failure to deny or explain the accusation does not constitute an admission. This is an exception to the general rule that when one is accused of or charged with an offense and fails to contradict or explain the charge, both the accusation and failure to respond may be admitted into evidence as a tacit or adoptive admission.[2]

Lukas is incorrect in its reliance on earlier cases of silence while in police custody.[3] In *Lukas,* the charge or accusation was made by the defendant's stepson at a time when he and the

[145]Lake County Dep't of Public Welfare v. Roth, 241 Ind. 603, 174 N.E.2d 335 (1961).

[146]Inkoff v. Inkoff, 306 N.E.2d 132, 135 (Ind. Ct. App. 1974), *relying on* State *ex rel.* Reger v. Superior Court, 242 Ind. 241, 177 N.E.2d 908 (1961).

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[1]330 N.E.2d 767 (Ind. Ct. App. 1975).

[2]Jethroe v. State, 319 N.E.2d 133 (Ind. 1974), *noted in* Marple, *Evidence, 1975 Survey of Recent Developments in Indiana Law,* 9 IND. L. REV. 239, 242 (1975) [hereinafter cited as *1975 Survey of Indiana Law*]; Robinson v. State, 309 N.E.2d 833 (Ind. Ct. App. 1974), *aff'd,* 317 N.E.2d 850 (Ind. 1974), *noted in* Marple, *Evidence—Criminal, 1974 Survey of Recent Developments in Indiana Law,* 8 IND. L. REV. 186, 208 (1974) [hereinafter cited as *1974 Survey of Indiana Law*].

[3]The court cited Garrisson v. State, 249 Ind. 206, 231 N.E.2d 243 (1967), as its most recent application of the rule. The seminal case is Diblee v. State, 202 Ind. 571, 177 N.E. 261 (1931), which relied on Commonwealth v. Kenney, 53 Mass. (12 Met.) 235, 46 Am. Dec. 672 (1847), and other authorities.

defendant were alone in the jail. Therefore, the policy excluding the charge and accompanying silence because the failure to respond is either an assertion of the fifth amendment right to remain silent or a result of the belief that "he had no right to say anything until regularly called upon to answer"[4] could not possibly apply.[5] Since Indiana courts have been blindly following the *Lukas* rule for years, it is unlikely that it will be modified to distinguish police accusations and admit equivocal response or silence when the charge is made by someone other than a police officer.

The Supreme Court of the United States stated a narrower, but constitutionally-grounded, rule in *Doyle v. Ohio*.[6] The Court held that use for impeachment purposes of a defendant's silence in the face of a police accusation at the time of arrest and after receiving the *Miranda* warnings violates the due process clause of the fourteenth amendment. This decision was fully expected in light of the Court's earlier decision in *United States v. Hale*.[7] In *Doyle*, as in *Hale*, the Court found it fundamentally unfair to advise a defendant that he has a right to remain silent and then use his subsequent silence against him. Additionally, both decisions viewed such silence after *Miranda* warnings have been given as insolubly ambiguous, since the arrestee may be relying on his fifth amendment right to remain silent.[8]

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[4]Commonwealth v. Kenney, 53 Mass. (12 Met.) 235, 46 Am. Dec. 672, 674 (1847).

[5]*Compare* Doyle v. Ohio, 96 S. Ct. 2240 (1976), discussed at note 6 *infra*, holding that post-arrest silence of the accused in face of *police accusations* cannot be used against a defendant even for impeachment purposes. McCormick's treatise sets forth, in hypothetical form, facts similar to *Lukas:*

> Suppose X has been taken into custody for the murder of Y. X is sitting in the police station prior to booking, and Y's widow passes by. She sees X, becomes hysterical, and shouts, "Why did you have to kill my husband?" X says nothing and stares at his feet.

McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 161, at 354 (2d ed. 1972) [hereinafter cited as McCORMICK].

The authors point out that "custody clearly exists but (assuming that the police had no part in arranging the confrontation between X and Y's widow) there might well not be 'interrogation.'" *Id. See also* United States v. LoBiando, 135 F.2d 130 (2d Cir. 1943).

[6]96 S. Ct. 2240 (1976).

[7]422 U.S. 171 (1975), *noted in 1975 Survey of Indiana Law, supra* note 2, at 257.

[8]Justice Stevens, dissenting in *Doyle*, cogently exposes the defects of the majority's reasoning. He first notes that Miranda v. Arizona, 384 U.S. 346 (1966), does not require the state to warn the accused that his silence will not be used against him. Therefore there is nothing unfair about using the silence in a case such as *Doyle*, in which the defendant's silence at the time of arrest was inconsistent with his trial testimony that he was the unwitting victim of a frame-up. If the defendant had been

The Court noted, however, that post-arrest silence can be used to contradict a defendant who testifies to an exculpatory version of the facts and claims to have told the police the same version upon arrest.[9] In that situation, the earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.[10]

In *Fletcher v. State*[11] the Indiana Supreme Court granted transfer to review a decision of the court of appeals that impeachment by use of prior crimes is rendered harmless error when the trial is to the court sitting without the intervention of a jury. The court of appeals relied on the presumption that in judge-tried cases the trial judge knows the rules of evidence and will ignore evidence improperly admitted in reaching his judgment.[12] Since the defendant in *Fletcher* specifically advised the trial court that he was relying on a ruling of the Indiana Supreme Court, and the trial court held the questioning permissible, the presumption above is inapplicable. The court decided on the merits that cross-examination of the defendant concerning a conviction of theft was permissible under the landmark case of *Ashton v. Anderson.*[13] Without elaborate reasoning, the court held that a conviction of theft is one involving "dishonesty or false statement," admissible under the *Ashton* rule.

Conduct which would sustain a conviction for theft under the current Offenses Against Property Act[14] would previously have sustained a conviction for any of several crimes, including grand larceny, petit larceny, larceny by trick, obtaining property by false pretenses, blackmail, embezzlement, and receiving stolen property. The court rejected as too cumbersome any procedure which would require the trial court to probe the record of the

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framed, his failure to mention it at the time of arrest is almost inexplicable; therefore under the general rule concerning failure to respond as a tacit admission, the silence is admissible to impeach.

[9]96 S. Ct. at 2245 n.11.

[10]*Citing* United States v. Fairchild, 505 F.2d 1378, 1383 (5th Cir. 1975).

[11]340 N.E.2d 771 (Ind. 1976), *granting transfer from* 323 N.E.2d 261 (Ind. Ct. App. 1975), *noted in 1975 Survey of Indiana Law, supra* note 2, at 259.

[12]King v. State, 292 N.E.2d 843 (Ind. Ct. App. 1973), *noted in Evidence, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 176, 210 (1973) [hereinafter cited as *1973 Survey of Indiana Law*].

[13]258 Ind. 51, 279 N.E.2d 210 (1972), *noted in 1973 Survey of Indiana Law, supra* note 12, at 187-89. *Ashton* was made applicable to criminal cases in Dexter v. State, 260 Ind. 608, 297 N.E.2d 817 (1973), *noted in 1974 Survey of Indiana Law, supra* note 2, at 203.

[14]IND. CODE §§ 35-17-5-1 to -14 (Burns 1975) (repealed effective July 1, 1977).

witness's prior theft conviction to ascertain the common law equivalent. The court did not preclude the possibility that, in a case in which the prior theft conviction arose from facts which did not indicate a lack of veracity on the part of the witness, counsel could make those facts known to the trial court through a pretrial motion in limine, thereby allowing the court an opportunity to exclude, in its discretion, any reference to such conviction.

In *Snelling v. State*,[15] the court of appeals held that cross-examination of the defendant regarding a prior conviction for theft by deception was proper even though the conviction was pending on appeal. The court followed the majority of courts, which hold a conviction extinguishes the presumption of innocence and that the judgment holds fast until it is reversed.

In *Berridge v. State*,[16] the court of appeals held that testimony of a co-conspirator that he had pleaded guilty to the charge of conspiring with the defendant Berridge to defraud the City of Evansville was admissible as impeachment but not as substantive evidence as an admission. The general rule allows into evidence statements of co-conspirators made during the course of the conspiracy as an admission applicable to all fellow conspirators. Once the conspiracy case has ended, as in *Berridge*, the statements are objectionable as hearsay.

In *Patterson v. State*[17] hearsay was defined as testimony of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. The *Patterson* court made it clear that there is no reason to exclude statements made out of court on the basis of a hearsay objection when the declarant is in court and available for cross-examination. The *Berridge* court found, nevertheless, that the co-conspirator's guilty plea was not admissible as direct proof of the conspiracy because it was not material to the issue of defendant's guilt.[18] Of course, the evidence *is* highly material, so much so that it is deemed prejudicial to the defendant on the ground that he will be convicted on the basis of his co-conspirator's guilt. The exclusion as substantive evidence arises as a matter of federal constitutional law, not because the evidence is not material. An anologous situation is that created by *Miranda v. Arizona*.[19] Statements given in absence of the warnings are

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[15]337 N.E.2d 829 (Ind. Ct. App. 1975).

[16]340 N.E.2d 816 (Ind. Ct. App. 1976).

[17]324 N.E.2d 482 (Ind. 1975), *noted in 1975 Survey of Indiana Law, supra* note 2, at 239-42.

[18]*Citing* United States v. Toner, 173 F.2d 140 (3d Cir. 1949).

[19]384 U.S. 436 (1966).

not admissible as admissions as substantive evidence, but such statements may be used to impeach a defendant whose subsequent testimony is inconsistent with the prior statement.[20] The court reached the correct result, but its characterization of the evidence as "not material" does not comport with common understanding.

B. Original Document Rule

The court of appeals in *Wilson v. State*[21] adopted Federal Rule of Evidence 1003,[22] holding that a duplicate of a document is admissible in evidence "to the same extent as an original unless a genuine issue is raised as to the authenticity of the original, or under the circumstances existing it would be unfair to admit the duplicate as an original."[23] In *Wilson* the defendant was accused of stealing a payroll check from a caseworker at her place of employment in the office of the Calumet Township (Lake County) Trustee. On appeal the state attempted to justify introduction of a xerox copy of the payroll check as a public record pursuant to Indiana Code section 34-1-17-7[24] which provides for introduction of public records via attestation by the keeper. In *Wilson* the court questioned whether the check qualified as a public record; in any case, there was no attestation. Neither could the court find the check admissible pursuant to the business

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[20]*See* Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[21]348 N.E.2d 90 (Ind. Ct. App. 1976).

[22]FED. R. EVID. 1003 provides:

> A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

[23]348 N.E.2d at 95.

[24]IND. CODE § 34-1-17-7 (Burns 1973) provides:

> Exemplifications or copies of records, and records of deeds and other instruments, or of office books or parts thereof, and official bonds which are kept in any public office in this state, shall be proved or admitted as legal evidence in any court or office in this state, by the attestation of the keeper of said records, or books, deeds or other instruments, or official bonds, that the same are true and complete copies of the records, bonds, instruments or books, or parts thereof, in his custody, and the seal of the office of said keeper thereto annexed if there be a seal, and if there be no official seal, there shall be attached to such attestation, the certificate of the clerk, and the seal of the circuit or superior court of the proper county where such keeper resides, that such attestation is made by the proper officer.

records exception provided in Indiana Code sections 34-3-15-1 to -3.[25]

The court was then faced with the objection that evidence of a copy of a document or writing is inadmissible until the absence of the original is accounted for by reason other than the serious fault of the proponent.[26] Reviewing Indiana cases which have allowed "duplicate originals" in evidence without accounting for the original,[27] the court noted that those decisions all involved copies produced simultaneously. The importance of that fact is not the time of production, however, but the assurance of trustworthiness. The court therefore held:

> [A] duplicate of a document or other writing is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical, electronic or chemical reproduction or other equivalent technique which accurately reproduces the original.[28]

As noted at the outset, the original need not be accounted for

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[25]IND. CODE §§ 34-3-15-1 to -3 (Burns 1973) provide:

> Any business may cause any or all records kept by such business to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material, and such business may thereafter dispose of the original record.
>
> Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts or administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.
>
> For all purposes of this act [34-3-15-1—34-3-15-3] "business" shall mean and include such business, bank, industry, profession, occupation and calling of every kind.

[26]MCCORMICK, *supra* note 5, § 230, at 560.

[27]Pittsburgh C.C. & St. L. Ry. Co. v. Brown, 178 Ind. 11, 98 N.E. 625 (1912); Federal Union Sur. Co. v. Indiana Mfg. Co., 176 Ind. 328, 95 N.E. 1104 (1911); Town of Frankton v. Closser, 107 Ind. App. 193, 20 N.E.2d 216 (1939); Watts v. Geisel, 100 Ind. App. 92, 194 N.E. 502 (1935).

[28]348 N.E.2d at 95. This language is almost identical to FED. R. EVID. 1001(4), which provides:

> A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

unless a genuine issue of its authenticity is raised or admission of the duplicate would be unfair. The court explained that "unfair" refers to cases in which the duplicate is not fully legible or where only a portion of the total original document is offered and the remainder would be useful for cross-examination or might qualify the portion offered.[29]

The decision is a sound one, given the common understanding and acceptability of xerox and other copies as accurate representations of the original document. The decision also follows the continuing trend by Indiana courts to follow the Federal Rules of Evidence.[30]

C. Judicial Notice

The Supreme Court of Indiana sua sponte rendered an opinion[31] declaring parts of Public Laws 305[32] and 309[33] invalid because they required judges of the newly-created county courts and the small claims division of the Superior Court of Vanderburgh County to take judicial notice of municipal, city, and town ordinances. The court held the provisions invalid because they prescribe procedures contrary to those previously adopted by the supreme court.[34] The law of Indiana is established that "courts do not take judicial notice of ordinances of incorporated towns, and, where suit is predicated on such an ordinance, so much of the

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[29]Similar examples are given in Proposed Fed. R. Evid. 1003 (Advisory Committee's Note), 56 F.R.D. 183, 343 (1972), *citing* United States v. Alexander, 326 F.2d 736 (4th Cir. 1964); Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418 (2d Cir. 1959).

[30]*See* Patterson v. State, 324 N.E.2d 482 (Ind. 1975), *noted in 1975 Survey of Indiana Law, supra* note 2, at 239-42, which adopted the rule that prior inconsistent statements of a witness are admissible as substantive evidence, with reference to FED. R. EVID. 801(d)(1); Rieth-Riley Constr. Co. v. McCarrell, 325 N.E.2d 844 (Ind. Ct. App. 1975), *noted in 1975 Survey of Indiana Law, supra* at 245-47, which held that a witness may give an opinion about an ultimate question to be decided by the trier of fact, with reference to FED. R. EVID. 704. Note also IND. CODE §§ 34-3-15.5-1 to -4 (Burns Supp. 1976), *noted in 1975 Survey of Indiana Law, supra* at 248-49, which provide that computer printouts of hospital records are admissible as original records. FED. R. EVID. 1001(3) provides that all computer printouts are original documents.

[31]*In Re* Public Law No. 305 & Public Law No. 309, 334 N.E.2d 659 (Ind. 1975). For discussions of this case from other viewpoints, see Harvey, *Civil Procedure, supra* at 88, 107 and Marsh, *Constitutional Law, supra* at 129.

[32]IND. CODE § 33-10.5-7-4 (Burns Supp. 1976).

[33]*Id.* § 33-5-43.1-12.

[34]*Id.* § 34-5-2-1 (Burns 1973), providing that procedural rules and cases decided by the courts take precedence over a statute concerning a procedural matter.

same as relates to the action must be made part of the complaint."[35]

Indiana Code section 33-11.6-4-11 provides that the Marion County Superior Court take judicial notice of such ordinances. It was also declared invalid. The court pointed out that courts do not take judicial notice of ordinances because many cities and towns lack an organized codification of municipal ordinances, and it would be virtually impossible for a trial judge to stop his case load to search for obscure ordinances.

The curious procedure for establishing the sex of a defendant formulated in *Sumpter v. State*[36] was clarified in a subsequent appeal of that case to the supreme court after remand.[37] The earlier decision held that when an individual is charged with an offense an element of which is the sex of the accused, the presiding judge may take judicial notice of the defendant's sex. The judge's finding is not necessarily conclusive; once the judge takes judicial notice of the defendant's sex, a rebuttable presumption arises sufficient to constitute a prima facie case in favor of the state.[38]

On remand the trial judge without intervention of a jury held a hearing at which he took judicial notice of the defendant's sex. The defendant rejoined by offering into evidence selected portions of a medical treatise describing various genetic and pathological conditions which make it difficult (if not impossible) to determine an affected individual's sex by external physical observation. Finding this evidence insufficient to rebut the presumption, the trial court entered judgment. The supreme court, indicating that the trial judge and the parties had assumed that the appellant was not entitled to a trial by jury on the issue of her sex, clearly held that the right exists.

The court said that the party against whom the fact is noticed must be permitted an opportunity to demonstrate that the fact is not true or a denial of due process results. Once the defendant challenges the presumption by introducing competent evidence, the presumption passes forever from the case. By affirmative evidence the state must then establish the defendant's sex

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[35]334 N.E.2d at 662, *quoting* Indianapolis Traction & Terminal Co. v. Hensley, 186 Ind. 479, 115 N.E. 934 (1917).

[36]261 Ind. 471, 306 N.E.2d 95 (1974), *modifying on petition to transfer* 296 N.E.2d 131 (Ind. Ct. App. 1973), *noted in 1974 Survey of Indiana Law, supra* note 2, at 216-17.

[37]Sumpter v. State, 340 N.E.2d 764 (Ind. 1976). Since the appeal arose from the supreme court's remand, the court of appeals transferred the case to the supreme court.

[38]306 N.E.2d at 99.

beyond a reasonable doubt to the satisfaction of the jury. While the determination on remand was made by the judge, the court affirmed the decision because it held defendant's evidence insufficient to dispute the presumption.

XI. Insurance

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During the survey period Indiana's appellate courts rendered several decisions of importance to attorneys practicing in the area of insurance law. Of most significant interest is the Indiana Supreme Court's decision affirming an award of punitive damages against an insurer. Decisions from the courts of appeals added a new dimension to the frequently litigated question of when coverage commences under a "conditional binding receipt" contained in an application for life insurance; clarified the scope of coverage of the "omnibus clause" in an automobile liability policy; and rejected the "legal interest" theory of insurable interest.

A. Punitive Damages

Vernon Fire & Casualty Insurance Co. v. Sharp,[1] one of the more provocative cases decided by the Indiana Supreme Court this year, affirmed a First District Court of Appeals decision[2] that punitive damages are recoverable in a breach of contract action when there is a "mingling" of "tortious conduct" with the breach of contract.[3] The obscure and disputed portion of the opinion, at least among the supreme court justices, revolves around the question of whether it is essential to find all of the elements of a

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[1]349 N.E.2d 173 (Ind. 1976), also discussed in Gray, *Consumer Law*, *supra* at 148, Bepko, *Contracts and Commercial Law*, *supra* at 161.

[2]Vernon Fire & Cas. Ins. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974), *discussed in* Frandsen, *Insurance, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 260 (1975) [hereinafter cited as Frandsen, *1975 Survey*]; Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).

[3]349 N.E.2d at 180-81.