judice by the trial court's decision and do so under the appropriate standard of review in the given case.[148]

V. Constitutional Law

*Jeffrey W. Grove**

A. Indiana Guest Statute Cases

In what one commentator has characterized as the "second wave"[1] of equal protection attacks on automobile guest statutes, which typically provide that an automobile guest cannot recover damages against the host driver for injury caused by the host's ordinary negligence, the statutes of eight states have been declared unconstitutional[2] while those of eleven states have been upheld.[3] Indiana's guest statute is the most recent survivor. It provides:

> The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless

---

[148]*Id.* (citing Wells v. Gibson Coal Co., 352 N.E.2d 838 (Ind. Ct. App. 1976)).

*Associate Professor of Law, Indiana University School of Law—Indianapolis. B.A., Juniata College, 1965; J.D., George Washington University Law School, 1969.

The author wishes to express appreciation to Edwin B. Wainscott and William Dazy, both third-year students at the Indiana University School of Law—Indianapolis, for their assistance.

[1]Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U.CHI.L. REV. 798, 799 (1976). "In the first set of challenges, arising soon after the first statutes were enacted, acts with typical provisions were uniformly upheld. The leading case of the series was *Silver v. Silver* [280 U.S. 117 (1929)] in which the Supreme Court upheld the Connecticut guest statute . . . ." *Id.* at 799 (footnotes omitted).

[2]Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); Laakonen v. Eighth Judicial Dist. Court, 91 Nev. 506, 538 P.2d 574 (1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

[3]Sidle v. Majors, 536 F.2d 1156 (7th Cir. 1976) (upholding Indiana's statute); Beasley v. Bozeman, 294 Ala. 288, 315 So. 2d 570 (1975); White v. Hughes, 257 Ark. 627, 519 S.W.2d 70 (1975); Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975); Duerst v. Limbocker, 269 Ore. 252, 525 P.2d 99 (1974); Cannon v. Oviatt, 520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810 (1974); Tisko v. Harrison, 500 S.W.2d 565 (Tex. Ct. App. 1973).

such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.[4]

In *Sidle v. Majors*,[5] a diversity case brought in the United States District Court for the Southern District of Indiana, plaintiff charged the host driver with ordinary negligence as well as wanton or willful misconduct in causing her injury while she was riding as a guest in the automobile. The district court entered summary judgment for defendant on the ordinary negligence Count, holding that Indiana's guest statute barred recovery. Although Count II, alleging defendant's wanton or willful misconduct, was not tried, plaintiff's appeal from the summary judgment followed upon the district court's entry of judgment on Count I pursuant to Federal Rule of Civil Procedure 54(b).[6] Both at the trial level and on appeal, plaintiff challenged the constitutionality of the guest statute under the Indiana and United States Constitutions. Because the Indiana Supreme Court had not passed on the state constitutional questions, the United States Court of Appeals for the Seventh Circuit certified those questions to that court.[7]

Rejecting the proposition that "the right to bring an action for common law negligence is 'fundamental' and that the burden is therefore upon the proponent of constitutionality to show a compelling state interest justifying the legislative classification,"[8] the Indiana Supreme Court identified the issue as whether the statutory classification of automobile passengers—guests and non-guests—"is reasonable and bears a fair and substantial relation to the legitimate

---

[4]IND. CODE § 9-3-3-1 (1976).

[5]536 F.2d 1156 (7th Cir. 1976).

[6]FED. R. CIV. P. 54(b) provides:

When more than one claim for relief is presented . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[7]*See* IND. R. APP. P. 15(O) (formerly IND. R. APP. P. 15(N)), which provides:

When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer.

[8]Sidle v. Majors, 341 N.E.2d 763, 766 (Ind. 1976).

purpose of the statute."[9] Although the text of Indiana's guest statute contains no expression of the purpose for which it was enacted, and while its enactment was accompanied by no legislative history, the court speculated that the purposes traditionally underlying guests statutes are also attributable to the Indiana statute. Those purposes are "the fostering of hospitality by insulating generous drivers from law suits instituted by ungrateful guests and the elimination of possibility of collusive law suits."[10] Each of these purposes was found to bear a reasonable relationship to the statutory classification.

The court acknowledged that the generosity of a driver toward his guest might well transcend the providing of free transportation; it might even extend to the exercise of "greater care for the safety of his guests than . . . for his own."[11] But this "utopian" inclination to exercise "greater care" is not one "that the guest should have a right to demand"[12] or rely upon. Indeed, the guest should have no right to insist that the host exercise even an ordinary degree of care. In what is obviously a rhetorical question, the court asked: "Is it unreasonable to expect [the guest] either to cast his lot with his host or to decline to accept the hospitality?"[13] In short, the generous instincts of the host should not induce a dilated sense of reliance by the guest and should in no way obscure the fair and substantial relationship between the purpose of discouraging ingratitude and the statute's limitation of liability to conduct that is wanton or willful.

However, if the statutory purpose is described in the affirmative—the "fostering of hospitality"—and if it is true that hospitable hosts may wish, in any case, to exercise a high level of care for the safety of their guests, the purpose hardly seems reasonably related to the operation of the guest statute, which exacts only a minimal standard of care. Therefore, implicit in the court's analysis is the assumption that the hospitable and generous proclivities of hosts would soon be tempered by the greater likelihood of liability that would exist in the absence of statutory insulation.

---

[9] *Id.* at 767.

Indiana's equal protection provision is set forth in IND. CONST. art. 1, § 23: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Within the context of *Sidle* and its companion case, the Indiana Supreme Court detected "no differences in the equal protection provisions of the state and federal constitutions [U.S. CONST. amend. XIV, § 1]." 341 N.E.2d at 767.

[10] 341 N.E.2d at 768.

[11] *Id.* at 769.

[12] *Id.*

[13] *Id.*

In his opinion for the court, Justice Prentice addressed the argument that the availability of liability insurance has largely undercut any notion of "ingratitude." However, that argument was not regarded as persuasive, for in the court's view it fails to take into account several factors: First, such insurance is purchased for the host's protection and not for the benefit of a guest; second, a guest's claim might exceed the liability limits of the host's insurance policy; and finally, even where the claim would not expose the host to liability beyond that provided for in his policy of insurance, "substantial detriments accrue to one who finds himself the defendant in a tort action, not the least of which is the possibility of a cancellation of his insurance or a substantial increase in his premiums."[14]

As to the purpose of eliminating "collusion," the court acknowledged that no statute can offer complete protection against perjury. Thus, while the guest statute's requirement that a guest plead and prove wanton or willful misconduct will deter perjury on the negligence issue, it may not prevent perjury on the question whether the guest was a passenger being transported "without payment." Nonetheless, the court concluded:

> We think it no constitutional infirmity that a statute may not operate to perfection, if it may reasonably be expected to operate effectively. We do not agree with the California Court [in *Brown v. Merlo*[15]] that the classifications are so over-inclusive as to defy notions of fairness or reasonableness.[16]

The Indiana Supreme Court perceived an additional legislative purpose underlying the Indiana guest statute "which, for want of a better designation, could be called protection against the 'benevolent thumb syndrome.'"[17] This was described as a legislative attempt to protect liability insurance companies "from the human propensity of juries to weigh their 'benevolent thumb' along with the evidence of the defendant's negligence,"[18] and concomitantly, to protect the general driving public against the increased insurance premiums presumably occasioned by such "benevolence."

The Seventh Circuit Court of Appeals flatly rejected the conclusions reached by the Indiana Supreme Court in that court's equal protection analysis of the guest statute. Relying heavily upon the

---

[14] *Id.*
[15] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).
[16] 341 N.E.2d at 770.
[17] *Id.* at 771.
[18] *Id.* at 772.

opinion by the California Supreme Court in *Brown v. Merlo*,[19] the Seventh Circuit found that "widespread liability insurance has eliminated any notion of ingratitude,"[20] that the presence or absence of guest statute legislation has no demonstrated bearing on the cost of liability insurance premiums,[21] and that "it is unreasonable to eliminate causes of action of an entire class of persons merely because an indefinite portion of a designated class may file fraudulent lawsuits."[22] Nevertheless, the Indiana guest statute was not invalidated, for the court believed itself precedentially bound by the action of the United States Supreme Court in *Cannon v. Oviatt*.[23] In *Cannon*, the Supreme Court of Utah had upheld the constitutionality of a guest statute virtually identical to the Indiana statute.[24] On appeal, the United States Supreme Court was presented with the question of whether that statute violated the equal protection clause because it barred recovery for ordinary negligence. The Court dismissed the appeal "for want of a substantial federal question."[25] Subsequently, in *Hicks v. Miranda*,[26] the Court ruled that such a disposition operates as an adjudication on the merits.

The Seventh Circuit's reliance upon the Supreme Court's disposition in *Cannon* as the basis for allowing Indiana's guest statute to stand, despite its own inclination to invalidate the statute, was inescapably correct. *Hicks* plainly teaches that the lower courts are bound by summary decisions of the Supreme Court.[27] It seems unwise, however, for the United States Supreme Court to insist that its summary dispositions be accorded the same conclusive precedential effect as its dispositions by opinions, which follow full briefing and oral argument. Indeed, in *Edelman v. Jordan*,[28] decided only one year before *Hicks*, the Supreme Court stated that summary dispositions "are not of the same precedential value as would be an opinion

---

[19] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[20] 536 F.2d at 1157.

[21] Specifically, the court stated:

> [W]hen the Guest Act was enacted in Connecticut in 1927, there was no reduction in automobile premiums, nor was there an increase in the premiums when that statute was repealed ten years later. Note, 42 U. Cinn. L. Rev. 709, 721 (1973). Defendant has not demonstrated that our invalidation of this statute would increase premiums for such insurance.

Id. at 1158 (footnote omitted).

[22] *Id.*

[23] 419 U.S. 810 (1974).

[24] 520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810 (1974).

[25] 419 U.S. at 810.

[26] 422 U.S. 332 (1975).

[27] *Id.* at 344-45.

[28] 415 U.S. 651 (1974).

of this Court treating the question on the merits."[29] This earlier characterization of the relative weight to be accorded summary dispositions seems preferable on several counts. Most importantly, summary dispositions, unlike dispositions following plenary consideration by the Court, are based on limited presentations by the parties, amounting simply to jurisdictional statements and motions to affirm or dismiss that are addressed to those statements. Hence, the Court enjoys relatively less assistance in making an informed and searching examination of the constitutional questions raised in the appeal. In addition, summary dispositions are rarely accompanied by statements of reasons or authority upon which the dispositions rest. Unfortunately, such unexplained dispositions create difficulties for the lower federal courts in knowing just what the Supreme Court intended.[30]

Apart from the Seventh Circuit's necessary reliance on the Supreme Court's summary disposition in *Cannon*, its analysis of the merits of the equal protection issues raised by Indiana's guest statute is less than convincing. The California Supreme Court's opinion in *Brown v. Merlo*, upon which the Seventh Circuit relied so heavily, is a well constructed opinion and, within its framework, makes a strong case for the proposition that guest statute legislation violates the equal protection clause. Unfortunately, that opinion does not deal effectively with what is perhaps the most powerful argument favoring the constitutionality, on equal protection grounds, of guest statutes. Indeed, the Indiana Supreme Court's decision in *Sidle v. Majors* takes little notice of the argument, and only Justice Arterburn, in his concurring opinion, identifies it:

> [T]he common law imposed upon a warehouseman or carrier of freight for pay a higher standard of care than that imposed upon one storing property for no payment for a friend or neighbor. The legislature has the right to enact the same principle with reference to gratuitous operators of automobiles with guests and those who are paid for the transportation of passengers. If at common law the courts saw fit to impose different degrees of negligence and care with reference to gratuitous acts as compared with those for pay, then certainly the legislature constitutionally may do so.[31]

---

[29] *Id.* at 671.

[30] An excellent discussion of these and related concerns is contained in Mr. Justice Brennan's opinion dissenting from the denial of certiorari in Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976).

[31] 341 N.E.2d at 776 (Arterburn, J., concurring).

A more detailed and scholarly treatment of this argument is contained in an unusually perceptive law review commentary in which the author concludes:

> Given its historical background, the doctrine of degrees of care can scarcely be "arbitrary"; it seems unlikely that it could be "essentially unreasonable." Indeed, to some extent at least, the doctrine still reflects what natural justice would seem to require. The guest statutes embody this common law doctrine; and they are no more susceptible than the doctrine itself to a generalized charge of irrationality.[82]

Stated otherwise, guest statutes may be regarded as codifying, in a specific category of cases, the common law doctrine of degrees of care, which was based on the nature of the relationship between the parties. To the extent the purpose of such statutes is to recognize and legislate a minimal standard of care based upon the gratuitous nature of a host-guest relationship, the reasonableness or rationality of the connection between this time-honored policy and the legislative classification seems clear.

In addition to the equal protection challenge to Indiana's guest statute, two other state constitutional provisions were the bases for attacks on the statute. In *Sidle v. Majors*, plaintiff also contended that the legislature's circumscription of the common law action for ordinary negligence constituted a deprivation of due process of law under Indiana's basic charter.[83] This argument is essentially specious, for the concept of due process, however flexible it may be, hardly establishes vested interests in common law standards of conduct or sanctifies those standards as immutable. Rejecting plaintiff's contention, the Indiana Supreme Court observed:

> That our Constitution was not intended to render the common law static is made clear to us by its schedule which expressly provides for changes in the following language: "Laws continued—First. All laws now in force, and not inconsistent with this Constitution, shall remain in force, *until they shall expire or be repealed.*"[84]

---

[82]Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U. CHI. L. REV. 798, 817-18 (1976).

[83]IND. CONST. art. 1, § 12:

> All courts shall be open; and every man, for injury done to him in his person, property or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[84]341 N.E.2d at 774 (emphasis added).

An equally insubstantial constitutional issue was presented to the Indiana Court of Appeals in *Cook v. Mercury Lumber Co.*[35] Plaintiff-administrator alleged that defendant, whose employee was the driver of an automobile in which plaintiff's decedent was a guest passenger, was liable to the estate for the death of decedent caused by the negligent operation of the vehicle. The trial court dismissed this Count as a result of plaintiff's failure to allege that the employee's misconduct was "wanton or willful." Plaintiff asserted that the guest statute violates the right to trial by jury in all civil cases as preserved by Indiana's Constitution.[36] But the guest statute simply does not eliminate the right to a jury trial. Rather, "the legislature changed the standard which the court or jury is to apply in determining liability in guest cases,"[37] a constitutional license that was recognized in *Sidle v. Majors.*[38]

B. Indiana Abortion Law Cases

During the period encompassed by this survey, three separate provisions of Indiana's abortion statute came under constitutional attack. One of these provisions, which was the state's original abortion statute enacted in 1905, imposes criminal liability on "whoever" procures an abortion "unless such miscarriage is necessary to preserve [the pregnant woman's] life."[39] In *Rhim v. State,*[40] defendant, a nonphysician, was convicted as an accessory to this crime. Defendant argued that this provision is unconstitutional in light of the decision by the United States Supreme Court in *Roe v. Wade,*[41] which invalidated a similar provision.

Relying upon its holding in *Cheaney v. State*[42] that a nonphysician convicted of attempting to perform an abortion has standing to raise the constitutionality vel non of the abortion statute, the In-

---

[35]359 N.E.2d 600 (Ind. Ct. App. 1977).

[36]IND. CONST. art. 1, § 20.

[37]359 N.E.2d at 601.

[38]*See* note 34 *supra* and accompanying text.

[39]IND. CODE § 35-1-58-1 (1976). The full text of the provision reads:

> Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman, or with like intent, uses or suggests, directs or advises the use of any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, on conviction, if the woman miscarries, or dies in consequences thereof, be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned in the state prison not less than three years nor more than fourteen years.

[40]348 N.E.2d 620 (Ind. 1976).

[41]410 U.S. 113 (1973).

[42]285 N.E.2d 265 (Ind. 1972), *cert. denied,* 410 U.S. 991 (1973).

diana Supreme Court experienced little difficulty in upholding the challenged provision under the facts of *Rhim*. The court noted that the Connecticut Supreme Court had earlier overturned the conviction of a nonphysician abortionist[43] on the authority of *Roe v. Wade*, but that the United States Supreme Court granted certiorari and vacated that judgment,[44] stating that in *Roe*, the Court "did not hold the Texas statutes unenforceable against a nonphysician abortionist," and that "the rationale of our decision supports continued enforceability of criminal abortion statutes against nonphysicians."[45] The Indiana Supreme Court concluded:

> Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference. And after the first trimester the ever increasing state interest in maternal health provides additional justification for such prosecutions.[46]

While this result is manifestly sound, the court's statement that such prosecutions "infringe upon no realm of personal privacy" seems unnecessarily broad. The teaching of *Roe v. Wade* is "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important State interests in regulation";[47] those interests are "in preserving and protecting the health of the pregnant woman . . . and . . . in protecting the potentiality of human life."[48] What is contemplated by this language, as well as by the result in the case, is a balancing of the state's interests against the right of personal privacy. Therefore, it would have been preferable for the Indiana Supreme Court to say that the mother's right to privacy is *outweighed* by the state's legitimate interest in preserving maternal health by prohibiting abortions performed by nonphysicians.

A more recently enacted provision of Indiana's abortion statute requires that "[d]uring the first trimester of pregnancy" any abortion be performed "in a hospital, or a licensed health facility."[49] In

---

[43]State v. Menillo, 168 Conn. 266, 362 A.2d 962, *vacated*, 423 U.S. 9 (1975).
[44]Connecticut v. Menillo, 423 U.S. 9 (1975).
[45]*Id.* at 10.
[46]348 N.E.2d at 622.
[47]410 U.S. at 154.
[48]*Id.* at 162.
[49]IND. CODE § 35-1-58.5-2 (1976):

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:

Arnold v. Sendak,[50] plaintiff-physicians insisted that this requirement directly conflicts with the United States Supreme Court's decisions in *Roe v. Wade* and *Doe v. Bolton*.[51] The federal district court agreed that the Supreme Court has expressly denied to the states the right to regulate the type of facility in which an abortion is to be performed during the first trimester of pregnancy. In *Roe*, the Court cautioned that state regulation "as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status," is appropriate only after the "compelling" point, which "is at approximately the end of the first trimester."[52] And in *Doe*, the Court specifically invalidated a provision of the Georgia abortion statute on the ground that its "hospital requirement . . . fails to exclude the first trimester of pregnancy."[53]

Finally, a separate but closely related provision of Indiana's abortion statute requires the consent of a parent or person in loco parentis as a condition for aborting an unmarried minor during the first twelve weeks of her pregnancy, unless the abortion is necessary to preserve the mother's life.[54] In *Gary-Northwest Indiana Women's Services, Inc. v. Bowen*,[55] plaintiffs challenged this provision in a federal class action. As the district court found, the issue of parental consent was recently decided by the United States Supreme Court in *Planned Parenthood v. Danforth*.[56] The statute under attack in *Danforth* required the consent of a parent as a condition for abortion of an unmarried minor during the first twelve weeks of pregnancy. The Court there stated:

> [T]he state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

(a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:

(1) It is performed by such physician in a hospital or a licensed health facility as defined in IC 1971, 16-10-2 which offers the basic safeguards as provided by a hospital admission, and has immediate hospital backup . . . .

[50]416 F. Supp. 22 (S.D. Ind. 1976).

[51]410 U.S. 179 (1973).

[52]*Id.* at 163.

[53]*Id.* at 195.

[54]IND. CODE § 35-1-58.5-2(a)(2) (1976).

[55]421 F. Supp. 734 (N.D. Ind. 1976).

[56]428 U.S. 52 (1976).

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.[57]

Hence, the district court invalidated the Indiana provision and permanently enjoined its enforcement.

C. Other Equal Protection/Due Process Cases

1. Indiana Decisions.—Indiana's Tort Claims Act[58] provides that a claim against a political subdivision of the state is barred unless notice of the claim is served on the governing body within 180 days after the loss occurs.[59] The predecessor statute called for such notice within 60 days after the loss.[60] Two years ago in *Batchelder v. Haxby*,[61] the Indiana Court of Appeals, in a 2-1 decision, held that the 60-day notice requirement of the predecessor statute did not deny the victim of a governmental tort equal protection of the laws. The court found that "[g]overnmental units are different from private tortfeasors" and was "unable to say the classification does not rest upon any reasonable basis."[62]

During the current survey period, in *City of Fort Wayne v. Cameron*,[63] the 60-day notice requirement was again the subject of constitutional inquiry, this time on due process grounds. The claim arose when the plaintiff was shot by a city policeman and paralyzed from the neck down. Nine months later he attained the age of majority. Shortly thereafter, and while still hospitalized as a result of the shooting, he served notice of his claim. The defendant-city moved for summary judgment and submitted an affidavit averring that notice of plaintiff's claim had not been received within 60 days of the incident. The trial court denied the motion on the theory that Indiana's separate disability statute,[64] when read with the notice requirement, excused compliance during the period of plaintiff's minority. The appellate court rejected this theory, holding that the disability statute applies only to time limits contained in statutes of limitation and is "inapposite" to the notice requirement, which is

---

[57] *Id.* at 74.

[58] IND. CODE § 34-4-16.5-1 to -18 (1976).

[59] *Id.* § 34-4-16.5-7.

[60] Ch. 16, § 1, 1967 Ind. Acts 21 (repealed 1974).

[61] 337 N.E.2d 887 (Ind. Ct. App. 1975).

[62] *Id.* at 889-90.

[63] 349 N.E.2d 795 (Ind. Ct. App. 1976).

[64] IND. CODE § 34-1-2-5 (1976): "Any person, being under legal disabilities when the cause of action accrues, may bring his action within two [2] years after the disability is removed."

simply "a procedural precedent to the remedy of maintaining a civil action against the city."[65]

The court of appeals then addressed the due process issues. Recognizing that every statute carries with it a presumption of constitutionality and emphasizing the self-restraint which the judiciary should exercise when reviewing the constitutionality of legislation, the majority observed that "[w]here the statute deals merely with a remedy, our courts have been loathe to find an issue in due process unless there exists but a single remedy and the legislature withdraws all legal means of enforcement."[66] Measuring the plaintiff's claim by this standard, the majority found that all legal means of enforcing the remedy were not withdrawn by the notice requirement, which was not "so short and unreasonable as to effectively deprive would-be litigants of any right of action against municipalities."[67] Thus, the requirement, on its face, did not constitute a deprivation of due process. Nor, in the court's view, was the notice provision unconstitutional as applied to plaintiff within the facts of this case. Noting that the statute did not require notice to be given by the plaintiff personally, the court found that plaintiff was not so incapacitated that he was incapable of "indicating his belief that he had a claim"[68] or of directing another to serve notice of his claim on the city within the prescribed time. The matter of plaintiff's minority during the running of the notice period was not dealt with directly. However, the present Tort Claims Act allows notice to be served within 180 days "after the incompetency is removed."[69]

While the constitutional standard invoked in this case seems appropriate, the decision is questionable on its facts. As pointed out by Judge Staton in a vigorous dissent, the appeal arose within the context of a motion for summary judgment in which the city, as the moving party, had the burden of demonstrating the absence of any genuine issue of material fact. Any doubt as to the existence of such an issue must be resolved against the moving party. Because the plaintiff here was paralyzed and hospitalized for more than nine months before he served notice of his claim (indeed, his hospitalization continued even after notice was served, and partial paralysis has persisted), plaintiff's ability—or lack thereof—to cause notice to be served within the statutory period would appear to constitute a

---

[65]349 N.E.2d at 798.

[66]*Id.* at 799.

[67]*Id.*

[68]*Id.*

[69]IND. CODE § 34-4-16.5-8 (1976). It is unclear whether the term "incompetency" would include the kind of physical disability portrayed in *Cameron*.

genuine issue of fact. For this reason, summary disposition was inappropriate. Moreover, if plaintiff's incapacitation rendered him incapable of causing notice to be served, plaintiff's due process rights were impinged under the very standard adopted by the majority: Refusal to excuse compliance under such circumstances would amount to withdrawal of all means of enforcing the remedy as a result of the statute's application. As Judge Staton reasoned, to bar an injured party's claim under such circumstances would be "equivalent to telling the municipalities that, if they are negligent on any occasion, their negligence should be sufficiently gross to insure the complete mental and physical disability of the victim."[70]

The power of a prosecuting attorney to originate and conduct an Alcohol Deferred Prosecution Program was challenged in *Brune v. Marshall*.[71] Under the Program in question, a person arrested for operating a motor vehicle under the influence of alcohol could avoid being charged and prosecuted for the offense by submitting to the rehabilitative measures of the Program and tendering a fifty-dollar fee. The plaintiff here paid a part of the fee and was placed in the Program, only to be removed from it following his violation of certain conditions attendant upon participation. He sued the prosecutor for return of the partial fee paid for admission to the Program. The trial court held the Program to be unconstitutional and rendered a judgment for the plaintiff. The Indiana Court of Appeals agreed that the Program raised due process issues:

> The prosecutor's program may also be constitutionally attacked on a basis of the violation of the arrested individual's Federal due process rights. This may be especially true in light of the possible coercive nature of the choice presented to the subject. The accused faces a choice of "volunteering" for the program and suffering a limited loss of personal freedom; or in the alternative, pleading not guilty and running the risk of a more severe penalty. This possible loss of effective choice, coupled with the program's required waiving of due process rights, presents serious constitutional questions.[72]

However, the court did not decide these questions, preferring instead to hold the Program unlawful because the prosecuting attorney had exceeded his statutory authority in instituting and implementing the Program. A similar program currently in operation

---

[70]349 N.E.2d at 807 (Staton, J., dissenting).
[71]350 N.E.2d 661 (Ind. Ct. App. 1976).
[72]*Id.* at 663.

in Marion County *is* authorized by a statute that appears to avoid the constitutional concerns expressed in *Brune.*[73]

The use of separate actuarial tables for male and female retired teachers in computing benefits to be paid from the State Teachers' Retirement Fund was struck down on equal protection grounds in a 3-2 decision by the Indiana Supreme Court in *Reilly v. Robertson.*[74] The Fund involves a pension portion, contributions to which are made by the state, and an annuity portion, paid for by participating teachers.[75] It is administered by its board of trustees.[76] Prior to 1972, monthly payments from the annuity portion of the fund were calculated on the basis of a mortality table that did not classify the recipient teachers by sex. Beginning in 1972, however, recognizing that the average life expectancy of women as a group had been historically greater than that of men, the board adopted sex-differentiated actuarial tables, which resulted in female retirees receiving less money per month than male retirees.

In applying the equal protection provisions of the Indiana and Federal Constitutions, the court purported to utilize a low-scrutiny review of the classification, requiring only that it bear a fair and substantial relationship to the purpose for which the Fund was created. Although it was recognized that the United States Supreme Court appears to have invoked an intermediate level of scrutiny in equal protection analyses of sex-based classifications,[77] the Indiana Supreme Court found it unnecessary to discuss the application of heightened levels of scrutiny in view of the result reached under the traditional equal protection test. The Fund's board of trustees maintained that the classification resulting from its adoption of separate mortality tables was intended to serve two purposes of the teachers' retirement legislation: to insure the financial integrity of the Fund, and to offer an incentive for teachers to remain in the teaching profession—an incentive that would be diluted for male teachers if they were required, by virtue of their shorter life expectancy, to subsidize female retirees by providing some of the monies used to pay annuity benefits to retired female teachers. The supreme court, however, was not persuaded that the effect of the classification was to promote the security of the Fund, especially since no showing had been made "that the failure of the Board to consider the sex of an-

---

[73]IND. CODE § 16-13-6.1-1 to -34 (1976). The Program is administered by the judges of a court of competent jurisdiction, *id.* § 16-13-6.1-30, and provides a sentencing alternative, *id.* § 16-13-6.1-15, rather than an alternative to prosecution.

[74]360 N.E.2d 171 (Ind. 1977).

[75]IND. CODE § 21-6-1-10 (1976).

[76]*Id.* § 21-6-1-3.

[77]*See* 360 N.E.2d at 175 n.1 (citing Craig v. Boren, 429 U.S. 190 (1976)).

nuitants in computing their annuity portions prior to 1972 placed the solvency of the Fund in jeopardy to any degree."[78] Moreover, although the court acknowledged that "the purpose served by treating men and women differently [here such purpose being the avoidance of this subsidization effect] 'is not without some legitimacy,'"[79] the possibility that "subsidization" by male teachers would dissuade them from remaining in the profession was characterized as "speculative and remote."[80] Finally, the court emphasized that the legislative purpose of encouraging teachers to remain in the profession is accomplished by providing periodic satisfaction of short-term needs arising during retirement, and no difference in those needs as between men and women was found to exist.

Central to any equal protection analysis is judicial discernment of the statutory purpose to which the challenged classification arguably relates. How the purpose is to be divined in the absence, as here, of any real legislative guidance remains a mystery of the judicial process. Still, even accepting the purpose so baldly (though not implausibly) stated by the majority—"to provide an incentive to all teachers to remain in teaching as a lifetime career"[81]—surely the purpose may not be effected at the expense of a defined class of annuitants. Indeed, implicit in the "overall" purpose must be an intent that it operate fairly. If in the absence of sex-differentiated mortality tables male teachers do "subsidize" female retirees, such sex-based inequality should not be sanctioned. Chief Judge Givan's dissenting opinion, though not generally responsive to the majority's analysis, spoke to this inequality:

> There were two avenues to pursue which would have resulted in equal treatment. One was to charge the men a smaller premium during their period of actual service, and upon retirement give equal payment to men and women. The other was to charge an equal premium regardless of sex, but upon retirement to pay a smaller monthly amount to the women retirees. The Board obviously chose the latter.[82]

In addition, the majority acknowledged that the purpose of avoiding "subsidization" (and, presumably, of avoiding any disincentive thus occasioned) had "some legitimacy"; it concluded, however, that the classification was not sufficiently related to this purpose,

---

[78]360 N.E.2d at 176.

[79]*Id.* at 177 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

[80]*Id.*

[81]*Id.* at 176.

[82]*Id.* at 180 (Givan, C.J., dissenting).

since male teachers would discount the subsidization effect in deciding whether or not to remain in the teaching profession. Significantly, however, the majority failed to find that such subsidization does not occur (although it was at pains to minimize the importance and impact of this factor). And surely it is neither arbitrary nor irrational to conclude that a classification that would eliminate this factor would also serve as an inducement for male teachers to remain in the profession, if they were satisfied that the annuity plan did not discriminate against them financially. This is not to say, of course, that the classification would have this effect in the case of all male teachers. Indeed, it is not clear that the annuity plan itself encourages all teachers to decline alternative employment. But the classification resulting from the use of separate mortality tables should withstand a low-scrutiny equal protection analysis, which demands only that the nexus between the classification and the legislative purpose be rational—not that the classification be "necessary" to promote a "compelling" interest. Perhaps the classification could not withstand a heightened level of scrutiny; in fact, perhaps this explains the result in this case. It seems obvious that the majority did indeed apply a higher level of scrutiny than it purported to apply under the traditional equal protection test.

This was, to be sure, a difficult case, and Judge Arterburn's concurring opinion is therefore appealing in its simplicity. He agreed with the result on the ground that "no statistical evidence or mortality table presented . . . shows that in the teaching profession females have a longer life span than males."[83] Thus, the classification based on this fundamental and unsupported assumption was, in his view, invalid.

Issues of procedural due process were presented to the Indiana Court of Appeals in *State v. Elliott*.[84] The defendant in this criminal action posted a $2,000 bond and then failed to appear for a hearing on defense counsel's motion to withdraw his appearance. When the bondsmen did not thereafter produce the defendant at the place and time designated by the court, the bond was declared forfeited. After more than 180 days had elapsed, the state filed a motion for judgment on the bond forfeiture pursuant to the applicable Indiana statute.[85] The state's motion was summarily granted and the money was paid to the state treasurer. Subsequently, the trial court granted the bondsman's Petition to Rescind Judgment and ordered the state treasurer to return the $2,000. The court of appeals reversed. It noted that Indiana's constitution establishes a Common School

---

[83]*Id.* at 181 (Arterburn, J., concurring).

[84]357 N.E.2d 276 (Ind. Ct. App. 1976).

[85]IND. CODE § 34-4-5-12 (1976).

Fund consisting, in part, of "all forfeitures which may accrue."[86] The principal of the Fund "may be increased, but shall never be diminished."[87] Thus, when a forfeiture "accrues" to the Fund, "it becomes part of the principal of such fund and may not thereafter be remitted."[88] The court held that the forfeiture accrued "[w]hen such payment was in [the] possession of the Treasurer of the State."[89] The trial court had therefore erred in ordering the money disgorged.

The bondsman contended, however, that the forfeiture statute is unconstitutionally vague and also denies due process of law by authorizing a judgment of forfeiture to be entered without actual notice to the bondsman, without a hearing, and without pleadings. The statute provides:

> In case the defendant shall not appear as provided in the bond, the court shall thereupon declare the bond forfeited and the clerk shall mail notice of such forfeiture to the addresses indicated in the bonds, and if the bondsmen do not produce the defendant or prove that the appearance of the defendant was prevented by illness, or by the death of a defendant, or the trial defendant was being held in custody of the United States, a state or a political subdivision thereof, or if required notice was not given within one-hundred eighty [180] days after such mailing and pay all costs and satisfy the court that defendant's absence was not with the consent or connivance of the sureties, the court shall at once enter judgment, without pleadings . . . .[90]

In describing certain of the procedures by which a surety may avoid a judgment of forfeiture, this statute is simply incomprehensible.

---

[86]IND. CONST. art. 8, § 2.

[87]*Id.* art. 8, § 3.

[88]357 N.E.2d at 278.

[89]*Id.* at 279. On this score, Judge Staton dissented:

> The prohibition against diminishing the principal goes only to those funds which have properly accrued and constitute the principal. It does not apply to funds which have been mistakenly forfeited and included in the principal. The intent of Article 8, § 3 is not to foreclose a withdrawal of funds from the principal, which never should have been included in the principal. Here, the same judicial determination of forfeiture was rescinded by a second judicial determination. Whether the fund is a part of the principal of the common school fund depends upon the judicial determination of its character as a forfeiture. The judgment which rescinded the previous judgment of forfeiture nullifies the characterization of the fund, and therefore, it is no longer a part of the principal of the common school fund.

Id. at 280 (Staton, J., dissenting).

[90]IND. CODE § 35-4-5-12 (1976).

The appellate court found, however, that the statute, when read with a related provision that prescribes the form for recognizances for appearances of prisoners,[91] does provide fair notice of these procedures. "Such form clearly states that the judgment of forfeiture will be entered if the surety fails to produce the defendant within 180 days after mailing of notice of forfeiture."[92] The surety's vagueness argument was therefore rejected. Moreover, that a judgment of forfeiture shall be entered "without pleadings" was not viewed as repugnant to principles of due process:

> The bondsmen is afforded the opportunity to be heard during the 180-day period. During such period the bondsman may produce the defendant or assert any other available defenses. Due process does not require that the defendant in every instance actually have a hearing on the merits, but only that he be granted an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.[93]

Finally, because the bondsman in this case did not allege that the notice called for in the statute was not actually received, the court did not address the argument that the statutory notice requirement is invalid.

2. Federal Decisions.—The procedural due process guarantees available to prisoners who are transferred from a state reformatory to a state prision for disciplinary confinement or segregation were refined during the survey period in *Aikens v. Lash.*[94] At an earlier stage in this case, the United States Court of Appeals for the Seventh Circuit had held that minimum procedural safeguards must be provided in such situations.[95] Specifically, the court required that the prisoner be given notice of the charges against him; that he be allowed a disciplinary transfer hearing; and that an illiterate inmate, or one faced with issues so complex that he is unable to collect and present evidence, be afforded lay counsel in preparing his case. The court further held that although prison officials have the discretion to deny an inmate the opportunity to cross-examine witnesses against him,[96] that power may not be exercised arbitrarily or capriciously. In the court's view, the exercise of such discretion could not be subjected to informed judicial scrutiny unless a refusal

---

[91] *Id.* § 35-4-5-10.
[92] 357 N.E.2d at 279.
[93] *Id.*
[94] 547 F.2d 372 (7th Cir. 1976).
[95] Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *vacated*, 425 U.S. 947 (1976).
[96] *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

to allow cross-examination, when requested, is accompanied by a written record of the reasons for the refusal.

Following this earlier disposition by the Seventh Circuit, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case[97] for consideration in light of its intervening decision in *Baxter v. Palmigiano.*[98] In *Baxter*, the Court stated that "[m]andating confrontation and cross-examination, except where prison officials can justify their denial . . . , effectively preempts the area . . . left to the sound discretion of prison officials."[99] Hence, on remand the Seventh Circuit concluded, on the authority of *Baxter*, that the prison officials were not required to give written reasons for refusing to allow cross-examination at plaintiff's disciplinary transfer hearing.

Different questions relating to the rights of inmates in state prisons were explored by the Seventh Circuit in *In re Warden of Wisconsin State Prison.*[100] The specific issue presented to the court was whether principles of due process entitle an inmate in a state prison to be present at the trial of a civil action unrelated to the terms of his confinement and brought by the prisoner in federal court. While the court acknowledged the fundamental interest of a prisoner in access to the courts, it declined to accord this interest the status of an automatic right. Instead, a balancing test was deemed appropriate: The prisoner's interest should be weighed against "the interest of the state in maintaining the confinement of persons serving sentences at the place and institution chosen by the state, in avoiding risks of escape, and in economical administration of custody."[101] Some considerations relevant to this balancing were suggested by the court,[102] but how the balance should be struck in the instant case was left undecided as a result of the court's disposition of the appeal on equal protection grounds.

It was disclosed at oral argument that the warden was willing,

---

[97]Lash v. Aikens, 425 U.S. 947 (1976).

[98]425 U.S. 308 (1976).

[99]*Id.* at 322 (footnote omitted).

[100]541 F.2d 177 (7th Cir. 1976).

[101]*Id.* at 180.

[102]Specifically, the court of appeals commented:

> Some of the relevant considerations would seem to be: How substantial is the matter at issue? How important is an early determination of the matter? Can the trial reasonably be delayed until the prisoner is released? Have possible dispositive questions of law been decided? Has the prisoner shown a probability of success? Is the testimony of the prisoner needed? If needed, will a deposition be reasonably adequate? Is the prisoner represented? If not, is his presence reasonably necessary to present his case?

Id. at 181.

under the terms of a Wisconsin state statute,[103] to transport an inmate to a state court if the state judge decided that his presence was necessary. A prisoner who institutes his civil action in a state court is thus afforded better treatment than one who files the action in federal court. This classification was denounced as a denial of equal protection because it is "not rationally related to a legitimate interest of state government."[104] The case was remanded to the district court to determine whether the prisoner's "presence at trial is reasonably necessary."[105] The Seventh Circuit failed to indicate, however, whether the question of reasonable necessity should be answered by application of the balancing test it suggested, or with reference to considerations employed by Wisconsin state judges pursuant to state law. The latter approach would satisfy the court's equal protection objections, but would not preclude the prisoner's federal due process objections if the state law considerations were not sufficiently responsive to the prisoner's interest in access to the courts.

Shifting its attention to the other side of the prison walls, the Seventh Circuit Court of Appeals decided two cases dealing with the constitutional protection extended to policemen in their employment. In *Confederation of Police v. City of Chicago*,[106] plaintiff challenged the failure of the Chicago Police Department to provide patrol officers with a grievance procedure or collective bargaining with respect to adverse action taken against them short of discharge or suspension. Reversing the district court's dismissal of the complaint, the appeals court initially held that due process required utilization of a written grievance procedure.[107] The United States Supreme Court vacated this judgment[108] and remanded for further consideration in light of its decisions in related cases. In *Bishop v. Wood*,[109] the Supreme Court had declared that whether a property interest in public employment cognizable under the due process clause exists "must be decided by reference to state law."[110]

---

[103]WIS. STAT. § 292.45 (1971). This statute seems to permit, but not require, the appearance of a state prisoner as a witness in a civil trial; provision is made for reimbursement of expenses incurred by the institution in transporting the prisoner. The warden construed this statute to permit the appearance of a prisoner as a witness only when the trial is held in a state court.

[104]541 F.2d at 182.

[105]*Id.*

[106]547 F.2d 375 (7th Cir. 1977).

[107]Confederation of Police v. City of Chicago, 529 F.2d 89 (7th Cir.), *vacated*, 427 U.S. 902 (1976).

[108]City of Chicago v. Confederation of Police, 427 U.S. 902 (1976).

[109]426 U.S. 341 (1976).

[110]*Id.* at 344 (footnote omitted).

Taking the hint from this language, on remand the court of appeals re-examined Illinois law and concluded:

> There is no Illinois law, whether from a statutory, regulatory, or judicial source, that protects a Chicago patrol officer from adverse action short of discharge or suspension by the Police Department. . . .
>
> Absent affirmative recognition in Illinois law of an entitlement to particular job conditions, plaintiff's due process claim must fail. Accordingly, the judgment of the district court is affirmed . . . .[111]

The case of *Olshock v. Village of Skokie*[112] also involved the rights of policemen in the face of adverse action taken by their employer. The plaintiff policemen were discharged as a result of administrative hearings that were conducted following a "uniform protest" in which certain policemen reported for work out of uniform. Of the fifty-four policemen who were disciplined, thirty-four were discharged. The only discernible pattern of treatment of the police officers who were disciplined was that the thirty-four who were discharged appeared with an attorney at the hearing, while the twenty who were merely suspended appeared pro se. All had been charged with the same offenses on substantially the same facts. The Seventh Circuit recognized, as it had in *City of Chicago*, that the existence *vel non* of a property interest in public employment cognizable under the Constitution must be decided by reference to state law. Such an interest was found to have been statutorily created in cases of removal or discharge; hence, plaintiffs were entitled to whatever protection the Constitution affords. Even though the court found that the plaintiffs' uniform protest was illegal and would constitute cause for removal or discharge under Illinois law, it held that the arbitrariness of the defendant's response to that protest was contrary to the due process and equal protection clauses of the Federal Constitution. The major significance of *Olshock*, however, lies in the equal protection standard employed, for the Seventh Circuit has added to the list of "suspect classifications." The court stated:

> [T]he defendant board and its individual members acted in a wholly arbitrary manner in purporting to distinguish between suspension and discharge. Actually, they were distinguishing between employing or not employing counsel to represent the protest participants. This was a suspect

---

[111]547 F.2d at 376.

[112]541 F.2d 1254 (7th Cir. 1976).

classification for which they failed to show a compelling need.[113]

Indiana's statutory[114] and constitutional[115] provisions establishing sixty-day residence in a township as a qualification to vote in primary, general, and city elections were invalidated in *Jackson v. Bowen*.[116] Five years ago, in *Dunn v. Blumstein*,[117] the United States Supreme Court struck down a similar residence requirement. It stated that "[d]urational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right"; that such laws "force a person who wishes to travel and change residences to choose between travel and the basic right to vote"; and that "[a]bsent a compelling state interest, a State may not burden the right to travel in this way."[118] Because, pursuant to the state's schema, a voter's qualifications—including residence—were established by oath at the time of registration to vote, and because registration continued until thirty days before the election, the Court found that the state's one-year and three-month residence requirement added nothing to the state's efforts to prevent nonresidents from voting: "The nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident."[119] Thus, the residence requirement in *Dunn* was in no way "necessary" to promote the state's "compelling" interest in preventing voting fraud and was, consequently, invalidated on equal protection grounds.

The same reasoning that underlies *Dunn* was employed by the three-judge federal court in *Jackson*, with the same result. Because Indiana's voter qualifications are established by oath[120] at the time of voter registration, and because registration continues door-to-door until forty-five days before the election and at the principal voter registration office until the twenty-ninth day before the election,[121] the Indiana sixty-day residence requirement was held to suffer

---

[113] *Id.* at 1260.

[114] IND. CODE § 3-1-7-26 (1976).

[115] IND. CONST. art. 2, § 2.

[116] 420 F. Supp. 315 (S.D. Ind. 1976). In Affeldt v. Whitcomb, 319 F. Supp. 69 (N.D. Ind. 1970), *aff'd*, 405 U.S. 1034 (1972), Indiana's former requirement of six months residence in the state was held unconstitutional.

[117] 405 U.S. 330 (1972).

[118] *Id.* at 342 (footnote omitted).

[119] *Id.* at 346.

[120] IND. CODE § 3-1-7-9 (1976).

[121] *Id.* § 3-1-7-7.

"from the same fatal flaw"[122] described in *Dunn*. Indeed, it would appear that no durational residence requirement for voting is permissible unless it is tied to the closing of the voter registration period.[123] Even then, the reasonableness of the cutoff point for registration will be examined, and a registration period that closes fifty days prior to election "approaches the outer constitutional limits in this area."[124]

VI. Contracts, Commercial Law, and Consumer Law

*Gerald L. Bepko**

A. Conditions in Contracts

In *Blakley v. Currence*,[1] the Indiana Court of Appeals confronted a problem concerning loan or mortgage contingency clauses that may be common in real estate purchase transactions. The parties in that case entered into a sales agreement on May 19, 1973, by which they agreed to transfer an unfinished home for $24,750. The agreement provided that the sale was contingent upon the buyer acquiring loan approval for part of the purchase price. Thereafter, in furtherance of the agreement, the buyer contacted five financial institutions in order to obtain financing for the purchase of the unfinished home along with financing for the construction work needed to complete the home.[2] Unfortunately, the buyer's application was rejected by each of these lenders. In one case, the lender preliminarily agreed to make the loan but refused final approval because the buyer could not arrange for a commitment from a reputable building contractor to complete the unfinished home.

In late June, the buyer notified the seller that he could not complete the transaction, and on July 6, the seller brought an action for

---

[122]420 F. Supp. at 317. Like the Supreme Court in *Dunn*, 405 U.S. at 357, the court rejected the residence requirement "as a means of affording some surety that a voter will more likely exercise his right to vote more intelligently." 420 F. Supp. at 317.

[123]*See* Marston v. Lewis, 410 U.S. 679 (1973).

[124]Burns v. Fortson, 410 U.S. 686, 687 (1973).

*Professor of Law, Indiana University School of Law—Indianapolis. B.S., Northern Illinois University, 1962; J.D., IIT/Chicago-Kent College of Law, 1965; LL.M., Yale University, 1972.

[1]361 N.E.2d 921 (Ind. Ct. App. 1977).

[2]The specific language of the agreement was not reprinted in the opinion. It is not clear, therefore, whether the condition involved acquiring a loan simply for the purchase price or for the purchase price plus an amount needed to complete the unfinished home. It is clear that it was the latter which the buyer sought in making a loan application at one of the lenders contacted. *Id.* at 922.