INDIANA SECURITY LAW, 1940-1945

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This paper purports to present a digest of significant developments in the Indiana Law of Security during the year 1940-1945. It includes legislation and the decisions of the Appellate and Supreme courts, although not all decisions touching the field of Security are included. The basis for selection was the writer's best judgment as to the general significance of the material at hand. It is hoped that the product will be helpful to those who have been out of touch with the field during the period under consideration.

Legislation

Legislation during the period was confined largely to extensions of the Lien laws.

Acts 1943, Ch. 187, p. 559, amended a section of the Mechanics' Lien law, Burns' 1933, Sec. 43-701, so as to require that notice of a no-lien claimants to mechanics' liens. This requirement is in addition to the recording requirement essential to the validity of such provisions in contracts under the prior law.

Acts 1943, Ch. 246, p. 688, provides a laborer's lien for persons employed and working in or about a strip mining operation. Upon proper recording of notice of intention to hold a lien, the lien attaches to the strip mine and all machinery and fixtures connected therewith and to everything used in and about the strip mine.

Acts 1945, Ch. 220, p. 1019, provides cleaners, launderers, etc., with a lien upon the clothing or goods of customers for the reasonable value of the unpaid work, and provides the enforcement thereof through sale upon notice to the owner after ninety days, where the goods are not placed in storage. When placed in storage they may be similarly sold for unpaid charges after twelve months. In order to take advantage of the Act the cleaning establishment must post notice to that effect in its receiving office.

Acts 1945, Ch. 148, p. 344, extends the provisions of the Mechanics' Lien law to registered professional engineers, registered land surveyors and registered architects.

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Acts 1945, Ch. 133, p. 280, amends Acts 1919, Ch. 183, Burns' 1933, Sec. 43-901 et seq., by extending the threshermen's lien there created to operators of farm machinerry generally.

Acts 1945, Ch. 285, p. 1264, is a general curative act legalizing sheriff's sales made pursuant to a judgment of mortgage foreclosure in the event of failure of the judgment defendant to redeem from the sale within one year. The curative effect of the Act is clearly to protect land titles from procedural errors in tthe conduct of foreclosure sales.

Chattel Mortgages

Helms v. American Secuitrity Co., 216 Ind. 1, 22 N.E. (2d) 822 (1939).

Prior to 1935, the Indiana law was settled that chattel mortgages were invalid against innocent purchasers when the mortgagors were permitted thereunder to have possession with the power of sale in the ordinary course of business.

The Chattel Mortgage Act of 1935, inter alia, provided that a chattel mortgage "executed under and pursuant to this act may validly provide that the mortgagor shall, as the agent or trustee for the mortgagee or lender or owner or holder of the secured debt, have the right to sell or exchange any of the mortgaged chattels under the conditions stated in said mortgage, if the proceeds of such sale or exchange are applied upon the mortgage debt or subjected to the lien of said mortgage."

In the Helms case it appeared that a retail dealer in automobiles had mortgaged his cars to a finance company, the mortgage purporting to give the mortgagor power to sell in the regular course of trade, and requiring him to account to the mortgagee for the proceeds, and continuing the lien until actual delivery of such proceeds. The day after this mortgage was recorded one of the cars was sold to a purchaser who did not know of the existence of the mortgage. Upon default in the mortgage the mortagee sued the innocent purchaser in replevin and recovered judgment in the trial court. On appeal, the Supreme Court reversed, holding that the statute would be manifestly oppressive and unjust if construed to have changed the common law, and that the statute is ambiguous and does not clearly show a legis-

lative intent to abrogate the common law rule for the protection of innocent puruchasers of mortgaged goods where the mortgagee suffers them to remain in the possession of the mortgagor and to be offered for sale in the ordinary course of trade.

Thurston v. Buxton, Administratrix, 218 Ind. 585, 34 N.E. (2d) 549 (1941).

This case presents two interesting problems of security law: 1) the legal nature, or classification, of an assignment of the debtor's interest in a decedent's estate as security, 2) whether such an assignment is subject to the provisions of the Mortgage recording act.

T's will left his estate in trust for his widow for life, and thereafter to four legatees, including his son, William A. Buxton. After T's death, and during the lifetime of the widow, William A. Buston borrowed money from Thurston, executing therefor a promissory note and an assignment of his interest in his father's estate. The assignment purported to "sell, assign and set over a sufficient amount of my interest in said estate to pay and fully discharge said loan . . . " and to "authorize, empower and direct the trustee of the funds of the said estate . . . to pay over to said Thurston a sufficient amount of my interest therein to fully pay, cancel and liquidate said note . . ."

This instrument was recorded in Shelby County, but not in Marion County where William A. Buxton resided, and as required by Burns' 1933, Sec. 33-301 in force at the time.

Thereafter William A. Buxton died and his widow was appointed administratrix. The only asset of the estate was money received by the administratrix in payment of the bequest under his father's will. Thurston claimed the entire fund, since his claim on the note exceeded the value of the estate; the administratrix and an undertaker claimed preference for their claims for funeral expenses. The trial court gave preference te the latter claims, but the Supreme Court reversed.

At the outset, the Supreme Court determined the legal effect of the instrument referred to as an assignment. It was said that "An absolute assignment, in that it passes the whole interest in the thing assigned, is distingnished from a mortgage, which creates only a lien; and from a

pledge, which transfers only possession." It was held that the instrument under consideration, since it discloses a loan of money and a promise to repay, was intended merely as a security. It was, therefore, a mortgage, although it may appear on its face to have been an assignment. The interest under T's will was said to be a possibility coupled with an interest which is assignable and the proper subject of a chattel mortgage.

Concerning the failure to record the mortgage in the county of the mortgagor's residence as required by Burns' 1933, Sec. 33-301, in force at the time, the Court followed the prevailing rule that statutes respecting the recording of mortgages of personal property apply only to goods and chattels capable of delivery, and that the mortgage in question was not one required to be recorded.

It may be added that the Recording Act under consideration in this case was repealed by Acts 1935, ch. 147, Sec. 20, and replaced by the Chattel Mortgage Act of 1935, Burns' 1933, Sec. 51-501 et seq. (cum. pocket supp.). Under the new Act the place of recording remains unchanged.

Two cases in the Appellate Court involve a construction of the Chattel Mortgage Act of 1935, Burns' 1933, Sec. 51-501 et seq., and particularly of Section 7 of the Act which requires, inter alia, that chattel mortgages be "duly acknowledged." The cases are: *Universal Discount Corp. v. Brooks*, 58 N.E. (2d) 369 (1944) and *Haverell Distributors v. Haverell Mfg. Corporation*, 58 N.E. (2d) 372 (1944). In the former an unacknowledged chattel mortgage was filed; in the latter a defectively acknowledged chattel mortgage was filed. In each case it was held that the instrument was not entitled to be filed as a chattel mortgage under the Act, and that it was invalid and created no lien as against the mortgagor's other creditors.

Personal Finance Company v. Flecknoe, 216 Ind. 330, 24 N.E. (2d) 694 (1940). Noted, 15 Ind. L.J. 573.

The Chattel Mortgage Act of 1935 provides in general terms that, from the time of recording, a chattel mortgage "shall be a good and valid lien against, and superior to all rights of any and all unsecured creditors of the mortgagor, and any and all subsequent purchasers, mortgagees, lienors and incumbrancers, including judgment creditors, of the mortgagor, . . .".

In reliance upon this statute a mortgagee of an automobile sought to replevy the property from a mechanic who claimed a subsequent common law lien for repairs. Judgment below was for the defendant. On appeal the Supreme Court reversed and ordered a new trial.

To the general rule of priority of mortgage over subsequent mechanic's lien, as stated by the statute in general terms, the Court recognizes an exception, namely, where from the language of the mortgage or from the surrounding circumstances the mortgagee has either expressly or impliedly consented to the making of the repairs in question. In this case there was no express consent, and the Court held that the evidence of the mechanic failed to show a benefit to the mortgagee such as would justify the Court in presuming the mortgagee's consent to making of the repairs. The Court indicated that such implied consent might be found 1) where the repairs would constitute a benefit to the mortgagee by preserving the chattel, 2) where the mortgagee had a beneficial interest in the continued use of the chattel and the repairs were necessary to such continued use, or (3) where the mortgagee had actual knowledge of the repairs being made and made no objection.

Igleheart Bros., Inc. v. John Deere Plow Co., 114 Ind. App. 182, 51 N.E. (2d) 498 (1943).

In this case the Appellate Court hade an interesting application of Indiana security law where the debt was securred by conditional sale contracts and also by chattel mortgage on other property.

The conditional sales contracts apparently were executed in Illinois and were, in form, Illinois contracts. Thereunder the plaintiff sold farm machinery to one Neer in Indiana. The contracts expressly provided that in case of default in payment the seller might repossess and resell in accordance with Illinois law, but they did not contain a "deficiency clause" permitting the seller after repossession to recover from the buyer any deficiency in the price remaining unpaid. As additional security the buyer also executed a chattel mortgage on his growing crop of beans, which mortgage was duly recorded. Defendant, with no actual notice of the mortgage later bought the beans from Neer and paid for them. Plaintiff, seller, thereafter re-

possessed the machinery without litigation and returned it to Illinois. Plaintiff now sues defendant for conversion of the beans, and recovered judgment in the trial court. The Appellate Court reversed under the following analysis of the case:

Although the rights of the parties to the conditional sales contract were governed by the law of Illinois, since that place bore a reasonable relationship to the transaction and the parties intended Illinois law to govern, yet the Illinois law was neither pleaded nor proven, nor were steps taken to have the court take judicial notice of Illinois law in accordance with the Uniform Judicial Notice of Foreign Law Act, Acts 1937, ch. 124; Burns' 1933, Sec. 2-4801, et seq. In that situation, the Court applied the usual conflict of laws presumption that the common law, as interpreted and applied in this state, prevails elsewhere. By that law, a conditional seller, where there is no "deficiency clause" in the contract, may not repossess upon default and then recover the balance under the contract, for his repossession is treated as an election to disaffirm the contract and he may not thereafter treat the sale as complete for the purpose of recovering the price. Thus, the disaffirmance of the contract discharged the debt secured by the mortgage, and the mortgagee, having no further interest in the beans, may not recover for their conversion.

Liens

Watson v. Strohl, 220 Ind. 672, 46 N.E. (2d) 204 (1943).

This case resolves a conflict between the priority provision of the Corporation Employees' Lien Law, Burns' 1940 Replacement, Secs. 43-301 to 43-306, and the priority provisions of the Mechanics' Lien Law, Burns' 1940 Replacement, Secs. 43-701 to 43-713.

Each statute provides for a lien having its inception at the time when the employment or labor is commenced, and each provides for a general priority over all subsequent liens. Under the facts of this case the provisions of the two lien laws were in direct conflict as to the priority of the respective claims of the parties. Plaintiff had foreclosed a mechanics' lien against the owner of the land, and those under whom defendant claimed had similarly foreclosed a corporation employees' lien. Each had foreclosed

within the time limited to him by his statute, but neither had foreclosed against the other lienholder.

The Court gave priority to the mechanics' lien on the ground that the Mechanics' Lien Law was enacted in 1909, many years after the enactment of the Corporation Employees' Lien Law in 1877. The principle applied was stated as follows: "When there is an irreconcilable conflict between two statutes it is the general rule that the statute enacted by a susequent Legislature shall prevail and that the earlier act, or such part of it as is in irreconcilable conflict with the later act, shall be deemed to have been repealed by the subsequent act."

Defendant also relied upon the provision of the Mechanics' Lien Law limiting the time for enforcing the same to one year after recording the notice of lien, and making the lien void if not enforced within such time. Plaintiff had foreclosed within the year against the owner of the land but had not foreclosed against the holder of the corporation employees' lien, and for that reason defendant asserted the plaintiff's lien could not now be enforced against defendant. Had defendant been claiming under a junior mortgage lien this defense would have been good under settled Indiana law, but the Court held that defendant's situation is different from that of mortgagee. Defendant here, like plaintiff, is claiming under a statutory lien which was not enforced against the rival lienor within the time provided by the statute. Defendant, as purchaser at foreclosure sale, simply stepped into the shoes of the original holder of the real estate and took such owner's interest subject to existing liens including the prior lien of plaintiff which had been foreclosed within the time required by the Mechanics' Lien Law.

Beeson v. Overpeck, 112 Ind. App. 195, 44 N.E. (2d) 195 (1942).

This was a case of first impression in Indiana involving a construction of the Mechanics' Lien Law, Burns' 1933, Sec. 43-701. The statute provides a lien for certain named tradesmen and generally for all persons performing labor in the construction or alteration of any building. The architect is not particularly specified in the statute, and the question presented was whether his services in preparing plans and specifications and supervising the remodeling of a building were comprehended under the general term "labor."

The trial court sustained a demurrer to a complaint in which an architect sought to foreclose a mechanic's lien. The Appellate Court reversed, and held that the architect is a laborer within the meaning of the statute. The Court said: "Although there is some conflict of authority, the rule in the majority of states which have adjudicated the question is to the effect that an architect who furnishes the plans and specifications for, and supervises the construction of a building is entitled to a lien thereon, under statutes which merely give a lien in general terms for work and labor furnished in the erection of a building." This broad construction of the statute is said to carry out the purpose of the statute, which is to promote justice and honesty, and to prevent the inequity of an owner enjoying the fruits of the labor and materials furnished by others, without recompense.

As stated above, Acts 1945, Ch. 148, p. 344, gave legislative sanction to the rule of this case.

Mockford v. Iles, 217 Ind. 137, 26 N.E. (2d) 42 (1940).

Under the Lien provisions of the Uniform Warehouse Receipts Act, Burns' 1933, Sec. 67-427, it is held in this case to be clear that the lien upon the goods deposited could not be extended to cover charges in relation to transportation of other goods which were not stored, especially where the services on such other goods were performed under a separate contract or under a separable part of the same contract. Refusal of the warehouseman, therefore, to deliver stored goods upon tender of charges for those goods alone was a termination of his lien, and he was guilty of conversion.

Nash Engineering Co. v. Marcy Realty Corp., 222 Ind. 396, 54 N.E. (2d) 263 (1944).

In the opinion in this case, Judge Richman prepared a careful analysis of the historical development of the wording of the Mechanics' Lien law. Under the construction thus evolved for Burns' 1933, Sec. 43-709, it was held that one who furnishes materials to a sub-contractor but himself performs no labor, is within the provision of the statute entitling him to enforce his claim as a personal liability against the owner of the building.

Mortgages: Real Estate

Fletcher Ave. Saving & Loan Ass. v. Zeller, 217 Ind. 244, 27 N.E. (2d) 351 (1940); also reported in 128 A. L. R. 793 (1940) with annotation.

The decision in this case resolves a conflict between prior decisions of the Supreme Court and the decision of the Appellate Court in *Crampton v. Collyers,* 78 Ind. App. 582 (1922), in which case no petition for transfer to the Supreme Court had been filed.

In the Zeller case a mortgage on real estate was foreclosed, and since the mortgagors were nonresidents of the state, service was had by publication. The judgment fixed the amount of the debt and ordered sale of the property. The mortgagee bought the property for less than the mortgage debt and secured a sheriff's certificate. Within the year of redemption the mortgagors conveyed the property to Zeller who redeemed from the sale. Thereafter the mortgagors procured a reissuance of a certified copy of the order of foreclosure, directed to the sheriff, for the purpose of having the property re-sold to satisfy the balance due and secured by the mortgage as shown by the decree of foreclosure. Zeller brought action to enjoin the sale.

Thus, the question involved was whether a resale of real estate may be had under a decree of foreclosure of mortgage, where the land has been once sold thereunder for less than the mortgage and then redeemed by a grantee of the mortgagor, and where such foreclosure judgment is purely in rem.

The decision of this case settles the rule for Indiana that such resale may be had, and that the contrary decision in the Crampton case is unsound. The decision is placed upon an application of Burns' 1933, Sec. 2-4003, which provides that whenever any real estate sold on foreclosure shall be redeemed by the owner or persons claiming under him, the sale thereof by the sheriff shall be wholly vacated, and the real estate subject to sale on execution, as if such sale had not been made.

In a number of other jurisdictions the contrary view is taken as to the power of resale either because the lien of a mortgage is extinguished by foreclosure sale and redemption does not operate to reinstate it, or because the redemption itself operates to extinguish the lien of the mortgage.

In *Morris v. Buchanan,* 220 Ind. 510, 44 N.E. (2d) 166

(1942), the Supreme Court considered another problem of resale after a redemption made pursuant to the statute which was construed in *Fletcher Ave. Saving & Loan Assn. v. Zeller,* supra. In this case it appeared that a mortgage upon real estate had been foreclosed and the property sold by the sheriff to one of the mortgagees for less than the amount of the debt, leaving personal judgment against the mortgagors partially unsatisfied. Thereafter, during the period of redemption, the mortgagors executed another mortgage to a third person in whose name redemption was made. The original mortgagees then brought action against the redemptioner charging that the redemption was fraudulent in that it was in fact made on behalf of the mortgagors, but in the name of the second mortgagee in order to avoid the resale privilege which would exist under the statute had the mortgagor himself redeemed. The complaint sought a resale of the property to satisfy the obligation of the first mortgage judgment free from the supposed lien of the second mortgage. Plaintiff recovered below, and the Supreme Court affirmed after finding that the evidence warranted the finding that the second mortgage and redemption thereunder were in fact fraudulent.

The case makes it clear that attorneys may not successfully set up a formal dummy transaction to defeat the power of resale which was sanctioned under the statute in *Fletcher Ave. Saving & Loan Assn. v. Zeller,* supra. The scope of the condemnation of such transactions is indicated by the alternate grounds upon which the decision was placed: 1) that the evidence justified the finding that the mortgagors themselves furnished the redemption money, and that they used the second mortgagee's name as a cloak to hide the source of the money, and 2) even though it be assumed that the redemption money came from the second mortgagee and was loaned to the mortgagor in good faith, yet it became the mortgagor's money and when used by the mortgagor for redemption, although in the name of another, it was a mortgagor's redemption within the terms of the statute so that a resale was authorized.

Before leaving the subject of redemption by mortgagors, reference should be made to the decision of the Appellate Court in *Anderson v. Anderson,* 110 Ind. App. 577, 39 N.E. (2d) 806 (1942). In this case a mortgage on real estate was foreclosed against several joint owners who were equally liable

for the payment of the mortgage debt. Thereafter one only of the mortgagors exercised the right to redeem from the foreclosure sale. It was held that after the expiration of the year for redemption the non-redeeming mortgagors were divested of all interest in the property. Redemption by one joint owner does not operate to vacate the sale and restore the interest of the other joint owners. Rather, the redeeming owner was entitled to proportionate reimbursement by the others for the sums laid out in redemption, and was entitled to an equitable assignment of the mortgage lien as security for such payment.

Paulausky v. Polish Roman Catholic Union, 219 Ind. 441, 39 N.E. (2d) 440 (1942).

In this case it appeared that a promissory note was executed and made payable in Illinois and was secured by a mortgage on Indiana real estate. The last paragraph of the note consisted of a cognovit provision authorizing confession of judgment in case of default in payment. Although valid in Illinois, the cognovit provision is void under Indiana law, Acts 1927, ch. 66, p. 174.

After the mortgage debt was in default the mortgagee delivered the note and mortgage to its general counsel in Chicago, Illinois, for collection, and he caused his stenographer to strike out the cognovit paragraph. Thereafter the documents were forwarded by the general counsel to local counsel in Indiana for foreclosure and collection. The trial court found on sufficient evidence that the alteration was not fraudulently made. In the foreclosure action defendant pleaded that the note and mortgage were void for material alteration. The trial court found for the plaintiff and entered judgment foreclosing the mortgage.

The Supreme Court affirmed, placing its decision on several alternate grounds:

1) The cognovit provision is treated as a separate agreement providing an alternate method for attemption to collect the money, and becoming operative only after default in payment, therefore its alteration or obliteration does not change the legal effect of the note and does not invalidate it.

2) Even though not considered an agreement entirely separate from the note, the obliteration of the cognovit provision did not amount to a material alteration of the note. It is said that such a provision is clearly a matter respecting

the remedy and, as such, is governed by the law of the forum, and that under Indiana law the clause is invalid and its presence or absence does not affect the legal rights or relations of the parties in the foreclosure action in any way.

3) The Court further said that even if the alteration of the note had been material, it would not have invalidated the mortgage, since the alteration was not fraudulent and the note and mortgage were separable instruments. The conclusion that the instruments were separable was based on analysis of their terms which indicated that the mortgage was given to secure the payment of the *loan* and that it was not a mere incident of the note.

Home Owners' Loan Corporation v. Braxtan, 220 Ind. 587, 44 N.E. (2d) 989 (1942).

In this case a real estate mortgage was foreclosed, and pursuant to the decree the sheriff gave notice that the property would be sold at public auction at the north door of the courthouse between the hours of 10:00 a.m. and 4:00 p.m. on a designated day. The mortgagor's son-in-law appeared in response to the notice and bought the property at about 10:45 a.m. for $1,025. The mortgagee's attorney had theretofore informed the sheriff that he would bid at the sale. At 1:00 p.m., the mortgagee's attorney sought out the sheriff and offered to bid $6,000, and tendered the sheriff the costs in cash. The sheriff declined the bid. The mortgagee then brought action for an order declaring the mortgage foreclosure sale to be illegal. Judgment below was for defendant. The Supreme Court reversed. It is held that upon a direct attack a sale may be vacated because of inadvertence, mistake, or abuse of discretion by the sheriff, and that where there is such an inadequacy of price as to work an injustice upon either the debtor or creditor, actual fraud is not essential. The sheriff should have withheld closing the sale until after 4:00 o'clock and, since he did not do so, the court below in its discretion should have set aside the sale.

Davis v. Landis, 114 Ind. App. 665, 53 N.E. (2) 544 (1944).

In this case defendants were in possession of land which they were buying under contract. They borrowed money from plaintiff and gave a promissory note in usual form, secured by an assignment of their real estate contract. The assign-

ment contained a provision that if the debt were not paid at maturity the contract should become the absolute property of plaintiff upon service of notice by him upon defendant and delivery of the canceled note. Upon default in payment, plaintiff gave notice, delivered the canceled note, and now sues for possession of the real estate. In the trial court judgment was for plaintiff, but the Appelate Court reversed, after analyzing the nature of the security as follows:

The transaction for security was not a conditional sale, because defendants' note contained an unconditional promise to pay. It was not a pledge, because personal property only, not real property, can be the subject of a pledge. It was a transfer of an equitable interest in real estate as security, and was a mortgage. As such, it was enforceable only through proper foreclosure proceedings, and not through an action for possession.

Pledges

Hammond Pure Ice & Coal Co. v. Heitman, 221 Ind. 352, 47 N.E. (2d) 309 (1943), 145 A. L. R. 997 (1943).

The question presented in this case was whether, when a pledgee becomes insolvent, set-off is available as between the debt represented by securities held by the pledgee as collateral, and a debt owed by the pledgee to the obligor of the securities.

Most of the securities in question were not yet mature at the time of the pledgee's insolvency, and as to the one mortgage note which was mature there had been no foreclosure. The Court remarked that, while it is true that the pledgee of a negotiable instrument may, on default thereon, sue on such pledged instrument in his own name and may also accept payment of such instrument according to its tenor and thereby discharge the instrument, the pledgee is not the full owner of the instrument. He actually has only a lien upon it to secure the payment of the principal debt, and he may not even accept payment before maturity of a note payable on a day certain. In view of the limited nature of a pledgee's interest, the Court held that there was no such mutuality of interest between the two debts as to warrant set-off.

In the A. L. R. annotation to this case, it is observed that the decisions on the question of set-off are about evenly

divided, although they can, for the most part, be reconciled. With reference to the contrary decisions allowing set-off, it is said: "Decisions allowing set-off as between the debt represented by a pledged instrument and a debt owing from the pledgee to the obligor of the instrument are largely supported on the basis of distinctive facts, disclosing that at the time of the pledgee's insolvency the pledgee had in effect become the owner of the pledged instrument and a creditor of the obligor of the instrument, as where the instrument was negotiable and had matured, and the debt which it secured was equal to or greater than it, or there was a peculiar arrangement or course of dealing among the interested persons establishing the pledgee as in effect an owner, or other factors were present leading to the same result."

Suretyship

Employers' Liability Assurance Corp. v. State ex rel., 110 Ind. App. 86, 34 N.E. (2d) 936 (1941).

In this case the Appellate Court considered an interesting problem in the law of Suretyship. Three officers of a bank gave fidelity bond, as required by statute, with personal sureties for a number of years and later replaced by the bond of a corporate surety. During the time, when the bond with personal sureties was in effect, the officers were engaged in a partnership business unconnected with the bank. In order to procure funds for their business they embezzled funds from the bank. This was accomplished by charging the sums taken against the accounts of two estates for which the bank was administrator. This was the situation at the time the corporate surety was substituted for the personal sureties. Thereafter, through bookkeeping entries, sums paid to the bank for the credit of other accounts were posted to the credit of the estates, and the estates were fully reimbursed for the original wrongful entries.

Action was instituted by the bank against the sureties on both the old and the new bonds. The trial court held that the corporate surety was liable and that the personal sureties were not. This was on the ground that the later entries operated to pay the shortages in the estate's accounts and to relieve the personal sureties from liability for the original embezzlement, but that those same entries were new defalcations

which created liability on the corporate bond. The Appellate Court reversed with instructions to the trial court to render judgment against the personal sureties but not against the corporate surety.

The analysis of the Appellate Court goes on the ground that there are two prerequisites for liability on the bonds involved: First, one of the wrongful acts specified in the statute, and second, a pecuniary loss. The bond in force at the time of the wrongful act which resulted in the pecuniary loss is the bond liable, and it is immaterial when the bank actually suffered the pecuniary loss. The Court said: "We think it is obvious that the acts which caused the bank pecuniary loss were the acts of the three officers in taking money from the bank, putting it in their pockets, carrying it out of the bank, and using it in their private business where it was beyond the bank's control." The subsequent bookkeeping transactions, all "within the four walls of the bank," operated only to cover up the original thefts and to change the name of the account in which the bank had to make replacement. The amount for which the bank was liable remained unchanged; the amount of its eventual loss was the same.