

or one year in prison, or both.<sup>48</sup> Parties violating the section prohibiting kickbacks and unwarranted charges may be fined \$10,000 or imprisoned for one year or both, and, in addition, will be jointly and severally liable for three times the amount of the fee, portion, split, or percentage.<sup>49</sup>

An action for damages under the Act must be brought within one year from the date of the violation. Jurisdiction is concurrent in the state and federal courts.<sup>50</sup>

## **XVI. Secured Transactions and Creditors' Rights**

*R. Bruce Townsend\**

### *A. Security Interests in Real Property*

#### *1. Priorities—Bona Fide Purchaser; Possession as Notice*

It is settled that a bona fide purchaser will take priority over prior unperfected interests in land.<sup>1</sup> The recent case of *Huffman v. Foreman*<sup>2</sup> dealt with two issues closely related to this principle: (1) Must a purchaser make further inquiry where he is told by the seller that there was a prior interest in the land but that it has been released or satisfied? (2) Is the purchaser charged with constructive notice when the claimant to an interest in the land is in possession? In *Huffman* an owner sold his land on a conditional sales contract, and the purchaser obtained possession. Although the purchaser remained in possession, he conveyed the land back to the owner for an executory consideration of \$13,500. The court determined that the purchaser retained a vendor's lien for the \$13,500 repurchase price.<sup>3</sup> The owner, thereafter, conveyed

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<sup>48</sup>*Id.* § 2606(c).

<sup>49</sup>*Id.* § 2607(d).

<sup>50</sup>*Id.* § 2614.

\*Professor of Law, Indiana University School of Law—Indianapolis, A.B., Coe College, 1938; J. D., University of Iowa, 1940.

The author wishes to thank Richard Dick for his assistance in the preparation of this article.

<sup>1</sup>*Pugh v. Highley*, 152 Ind. 252, 53 N.E. 171 (1899).

<sup>2</sup>323 N.E.2d 651 (Ind. Ct. App. 1975).

<sup>3</sup>Apparently neither the conditional sales contract nor the reconveyance to the owner were recorded. *Id.* at 653-54. An additional problem occurs when the vendor's lien is not perfected; the unperfected vendor's lien will be defeated by a bona fide purchaser from the vendee. *Hawes v. Chaille*, 129 Ind. 435, 28 N.E. 848 (1891); *Heuring v. Stiefel*, 85 Ind. App. 102, 152 N.E. 861 (1926). A holder of a vendor's lien may protect himself by filing suit for a declaration of his rights and also by filing *lis pendens* notice. *Wilson v. Burgett*, 131

his interest to a second purchaser. The second purchaser withheld only \$10,000 of the purchase money he owed the owner to pay off the first purchaser upon the erroneous information supplied by the owner that this was the amount owing.<sup>4</sup>

The court held that a transferee obtaining knowledge from his seller of an outstanding unrecorded interest in land cannot rely upon the seller's oral representation that the interest has been released. He must make further inquiry. In other words, the second purchaser was not a bona fide purchaser. The court posited the reasonable care standard as the test for determining a purchaser's notice or knowledge. The standard provides that a purchaser with knowledge of facts sufficient to put a reasonable and prudent person on a duty of further inquiry is charged with notice of all matters which could have been discovered if reasonable inquiry had been pursued.<sup>5</sup> *Huffman* teaches that once a purchaser is supplied with information of an outstanding claim to property, reasonable care requires that he seek out hard evidence with respect to the status of the claim before he pays value.

The *Huffman* court did not discuss whether the conditional buyer's possession was sufficient to put the owner's grantee on notice of his claim. The generally accepted rule is that possession serves as constructive notice of the possessor's interest in the land.<sup>6</sup> However, Indiana decisions have held that the grantor's possession under an absolute deed is insufficient to charge purchasers from his grantee with constructive notice of his interest.<sup>7</sup> This exception

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Ind. 245, 27 N.E. 749 (1891). A purchaser under an unperfected land contract will be defeated by a subsequent bona fide purchaser for value from the first purchaser's vendor. *But cf.* *Denham v. Degymas*, 237 Ind. 666, 147 N.E.2d 214 (1958) (purchaser of equitable interest not protected).

<sup>4</sup>The owner was to pay the \$13,500 repurchase price with a \$5,000 down payment and a note for the balance. 323 N.E.2d at 653.

<sup>5</sup>*Accord*, *Mishawaka St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433, 196 N.E. 85 (1936). A presumption of good faith arises when value has been paid. IND. R. TR. P. 9.1(D).

<sup>6</sup>When a grantee, vendee, or transferee holds possession, decisions almost unanimously hold that subsequent purchasers from the transferor must take notice of the transferee's possession and of other matters that reasonable inquiry would disclose. *See, e.g., Raco Corp. v. Acme-Goodrich, Inc.*, 235 Ind. 67, 131 N.E.2d 144 (1956); *McClellan v. Beatty*, 115 Ind. App. 173, 53 N.E.2d 1013 (1944). Indiana, incorrectly it is submitted, recognizes a "lazy banker" rule as an exception. *Mishawaka St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433, 196 N.E. 85 (1936) (vendee's three-day possession was insufficient to impart notice to a banker who took a mortgage without other notice). Possession by a family member is not constructive notice of a transfer from one family member to another family member in possession. *Paulus v. Latta*, 93 Ind. 34 (1883).

<sup>7</sup>*Tuttle v. Churchman*, 74 Ind. 311 (1881); *Bryan v. Reiff*, 84 Ind. App. 516, 150 N.E. 800 (1926).

supposedly resolves the inconsistency caused by the grantor's retention of possession as against his execution of an absolute conveyance. However, as indicated by the problem raised in *Huffman*, the Indiana exception to the general rule does not make much sense. Where the first purchaser is a conditional purchaser in possession, persons dealing with the owner are required to take notice of the first purchaser's interest.<sup>8</sup> On the other hand, if the first purchaser is the holder of a vendor's lien after his reconveyance to the owner, his possession would not, under the Indiana exception, be sufficient to charge those buying from the owner with notice of the first purchaser's lien.<sup>9</sup> In either case, possession should constitute notice and should serve as an effective means of perfection. By making inquiry the prospective purchaser can easily ascertain the interest of claimants in possession, and he ought to do this in all cases.

## 2. Vendor's Lien

A grantor who deeds or conveys an interest in land in exchange for an executory consideration ordinarily cannot rescind or avoid the transaction if the grantee fails to perform his part of the bargain.<sup>10</sup> However, equity protects the grantor in such a case by allowing the seller a vendor's lien upon the interest conveyed as security for the grantee's executory performance.<sup>11</sup> A vendor's lien has been applied in favor of the owner of almost any interest in land, including that of a purchaser under a con-

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<sup>8</sup>*Mowrey v. Davis*, 12 Ind. App. 681, 40 N.E. 1108 (1895). See note 6 *supra*.

<sup>9</sup>*But cf. Melross v. Scott*, 18 Ind. 250 (1862) (deed from vendor in possession recited that purchase money was unpaid).

<sup>10</sup>*McAdams v. Bailey*, 169 Ind. 518, 82 N.E. 1057 (1907). In other words, the law does not imply a parol condition subsequent upon a valid, present transfer of property. If the transferee's promised performance fails, title will not automatically revert to the transferor. However, Indiana and a few states recognize an exception when a deed conveying land is executed in exchange for a promise of support. The courts generally apply an implied condition subsequent upon breach of the duty to support. See, e.g., *Cree v. Sherfy*, 138 Ind. 354, 37 N.E. 787 (1894); *Owens v. Downs*, 121 Ind. App. 294, 98 N.E.2d 914 (1951). Even in this case the grantor may elect to enforce a vendor's lien on the property rather than claim a right of re-entry. *Lowman v. Lowman*, 105 Ind. App. 102, 12 N.E.2d 961 (1938). See also RESTATEMENT OF CONTRACTS § 354 (1932).

<sup>11</sup>*Old First Nat'l Bank v. Scheuman*, 214 Ind. 652, 13 N.E.2d 551 (1938). The vendor's lien does not apply to the sale of personal property. This rule was recognized but not applied in *Scheuman*, where the vendor sold realty and personal property for one gross price.

tract to purchase land who sells his interest to a second vendee<sup>12</sup> and fails to receive his bargained consideration for the transfer.

These principles again were recognized in *Huffman v. Foreman*,<sup>13</sup> which extended the vendor's lien to a purchaser under a conditional sales contract who reconveyed the property to his vendor by an informal instrument of transfer. When the vendor failed to fulfill his agreement to pay for the reconveyance, the court held that although the purchaser could not rescind the reconveyance, he was entitled to a vendor's lien. By treating a reconveying purchaser as a "vendor" entitled to a vendor's lien, the court made use of a novel application of this equitable concept to protect the purchaser when the original vendor did not complete his promised performance following the reconveyance.

Because the reconveyance by the purchaser operated as a satisfaction of his obligation under the original conditional sale, *Huffman* raises the question of whether a vendor's lien may be asserted in all cases where a party to a mortgage, lien, or contract with respect to real estate releases his rights for a consideration which fails. For example, suppose that a mortgagee of land executed a release to his mortgagor for a promised performance which later is breached. Can the mortgagee properly claim a vendor's lien?<sup>14</sup> The answer remains unclear partly because the vendor's lien is inapplicable to cases involving personal property.<sup>15</sup> Since under the lien theory of mortgages, the mortgagee's interest constitutes personal property,<sup>16</sup> a release of that interest arguably

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<sup>12</sup>*Scott v. Edgar*, 159 Ind. 38, 63 N.E. 452 (1902); *Smith v. Mills*, 145 Ind. 334, 43 N.E. 564 (1896); *Johns v. Sewell*, 33 Ind. 1 (1870); *Baldwin v. Siddons*, 46 Ind. App. 313, 90 N.E. 1055 (1910). Based upon the erroneous idea that a vendee holding under an option to purchase land acquires no interest in land, it has been held that the vendee selling his rights under the option has no vendor's lien. Compare *Tyler v. Tyler*, 111 Ind. App. 607, 40 N.E.2d 983 (1942), with *Raco Corp. v. Acme-Goodrich, Inc.*, 235 Ind. 67, 131 N.E.2d 144 (1955).

<sup>13</sup>323 N.E.2d 651 (Ind. Ct. App. 1975).

<sup>14</sup>A mortgagee may avoid a release obtained as a result of fraud, mistake, and the like. *Slushnik v. Walerko*, 105 Ind. App. 211, 13 N.E.2d 335 (1938) (fraud); *Jefferson Park Realty Corp. v. Riggely*, 99 Ind. App. 146, 189 N.E. 381 (1934) (fraud); *Wells v. Huffman*, 69 Ind. App. 379, 121 N.E. 840 (1919) (mistake); *McConnell v. American Nat'l Bank*, 59 Ind. App. 319, 103 N.E. 809 (1915) (right to avoid release obtained by fraud could not be asserted against purchaser from fraudulent mortgagor on the basis of estoppel).

<sup>15</sup>A vendor's lien is not recognized in the sale of personal property. *Johnson v. Jackson*, 284 N.E.2d 530 (Ind. Ct. App. 1972), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1973 Survey of Indiana Law*, 7 IND. L. REV. 226, 228 (1973). See also notes 10 & 11 *supra* & accompanying text.

<sup>16</sup>"In Indiana a mortgage is a lien—a mere security for the debt. The mortgagee has no title to the land mortgaged." Gross Income Tax Div.

cannot be subject to a vendor's lien.<sup>17</sup> However, if a mortgagor conveys his interest to a mortgagee who defaults on the promised return consideration, as in *Huffman*, there is no reason why the mortgagor should not be allowed to claim a vendor's lien.<sup>18</sup>

### 3. *Mortgage Foreclosure and Redemption Period*

Prior to July 1, 1931, real property judicially foreclosed could be redeemed within one year after the sale. The mortgagor was permitted to retain possession during this period.<sup>19</sup> Where the mortgage was executed after July 1, 1931, possession and the right of redemption continued only until the sale, which could not be held for one year after the foreclosure complaint was filed.<sup>20</sup> In 1957 the redemption and possession period was reduced to six months for mortgages executed on or after July 1, 1957.<sup>21</sup> The 1975 General Assembly has once again reduced the redemption and possession period by permitting foreclosure three months after the filing of the complaint. This shortened period applies only to mortgages executed on or after July 1, 1975. An extended possession and redemption period of 12 months was provided for mortgages executed after June 30, 1957, and before January 1, 1958, and also for mortgages executed prior to July 1, 1931,<sup>22</sup> thereby retroactively modifying foreclosure redemption procedures with respect to such mortgages.

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v. Colpaert Realty Corp., 231 Ind. 463, 469, 109 N.E.2d 415, 418 (1952). Under the equitable theory of mortgages, the mortgagee holds only an interest in personal property. *Gabbert v. Schwartz*, 69 Ind. 450 (1880) (security follows the debt).

<sup>17</sup>However, an old decision appears to hold that the release of a mortgage is ineffective upon failure of the bargained for executory consideration given in exchange for the release. *Harris v. Boone*, 69 Ind. 300 (1879) (decided apparently upon the theory that the bargained consideration was a condition precedent to effectiveness of release). Compare *Hanlon v. Doherty*, 109 Ind. 37, 9 N.E. 782 (1886) (release executed on the basis of unilateral mistake is ineffective). Where the mortgagee transfers the debt to the mortgagor, the lien is presumptively discharged by merger. *Belk v. Fossler*, 49 Ind. App. 248, 96 N.E. 15 (1912). However, equity will not permit merger where proof shows that it was not intended or would operate unfairly. Compare *Smith v. Ostermeyer*, 68 Ind. 432 (1879), with *McCrorry v. Little*, 136 Ind. 86, 35 N.E. 836 (1893).

<sup>18</sup>A transfer of the mortgagor's interest to the mortgagee merges title in the mortgagee, presumptively discharging the mortgagor upon his debt. *Cook v. American States Ins. Co.*, 150 Ind. App. 88, 275 N.E.2d 832 (1971).

<sup>19</sup>Ch. 88, § 2, [1881] Ind. Acts 593 (repealed 1931). The purchaser at the sale was given a certificate of purchase until the year expired, at which time he was given a deed if the property was not redeemed. *Id.* § 1.

<sup>20</sup>Ch. 90, § 1, [1931] Ind. Acts 257 (repealed 1957).

<sup>21</sup>Ch. 220, § 1, [1957] Ind. Acts 476 (repealed 1975).

<sup>22</sup>IND. CODE § 32-8-16-1 (Burns Supp. 1975).

The strange provision which retroactively extended the possession and redemption period for the specific dates set out above clearly constitutes special legislation, though not an impairment of contract rights.<sup>23</sup> The Indiana Rules of Trial Procedure passed by the General Assembly and adopted by the Indiana Supreme Court in 1970 made procedures for foreclosure of real estate mortgages, including provisions relating to possession and redemption rights, applicable to all other execution and lien foreclosures.<sup>24</sup> There is no logical reason why five years later mortgages should receive special treatment over execution and other lien foreclosures. Any justification for a 3-month prospective redemption and possession period applies across the board. The Indiana Supreme Court would, therefore, be wise to either throw this new statute out or to construe or amend its rules to provide for a uniform foreclosure period.

Special interest groups "ramrodding" legislation through the rush of an annual session of the legislature should be put on notice that their responsibilities extend to the whole class of persons affected by the change of law they seek. By placing themselves in a special class without good reason, these groups defeat the spirit behind the idea of equal protection. The redemption laws, whether procedural or substantive in character, should apply uniformly and fairly to all classes of liens. If our legislature does not honor the principles of fair play, the judiciary at least must recognize and enforce these basic ideals.

This same amendment to the foreclosure statute also permits the mortgagor to contract away, or "clog," the time limits under which he may exercise his right of redemption. In exchange, the mortgagee must give up his right to a deficiency.<sup>25</sup> This type of agreement probably was barred under the prior law, which held

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<sup>23</sup>Indiana High School Athletic Ass'n v. Raike, 329 N.E.2d 66 (Ind. Ct. App. 1975) (married student denied right to participate in athletics denied equal protection). It has been held that legislative modification of redemption rights upon foreclosure of a mortgage are procedural, and, therefore, they are not protected by constitutional provisions prohibiting impairment of contract. Anderson v. Anderson, 129 Ind. 573, 29 N.E. 35 (1891) (discussing prior conflict of authority); cf. Wright v. Union Cent. Life Ins. Co., 304 U.S. 502 (1938) (upholding congressional extension of redemption period under bankruptcy power).

<sup>24</sup>IND. R. TR. P. 63.1(A) & (C). Since judicial foreclosure is made subject to the same procedures applicable to mortgage foreclosure, it may be reasonable to hold that the redemption period in all cases has been reduced. *Id.* 69(C). However, the 6-month redemption period allowed in the case of execution sales is not worded so that it depends upon the rule in mortgage foreclosure; the debtor is given 6 months to redeem after the judgment creditor's judgment or execution lien attaches. *Id.* 69(A).

<sup>25</sup>IND. CODE § 32-8-16-1.5 (Burns Supp. 1975).

that the mortgagor could not surrender his possession or redemption rights.<sup>26</sup> Clearly, however, the mortgagor could transfer title to the mortgagee for a fair consideration after execution of the mortgage.<sup>27</sup> The new legislation does contain some important restrictions on the mortgagor's transfer of his remaining rights. The waiver of rights must be filed by the owner-mortgagor with the clerk and must include the consent of the mortgagee by endorsement on it. This waiver of redemption rights can be made only after the mortgagee has recovered judgment. This last provision is treacherously deceptive because it will be advantageous to a mortgagee only where the mortgagor is judgment proof or wholly insolvent; on the other hand, it will benefit a mortgagor only where he is able to pay a deficiency. This provision is also subject to the criticism, discussed above, insofar as it does not apply to all executions and liens. Further, it does not deal with the rights of junior lienholders who will be unaffected by a waiver between the mortgagor and a senior mortgagee.

#### 4. *Outright Deed as Equitable Mortgage*

It is a basic tenet of securities law that an outright deed may be proved to be a mortgage and that evidence may be used to establish this fact without violating either the parol evidence rule or the Statute of Frauds.<sup>28</sup> If the grantor can prove that the deed was given as security, he may redeem by paying off the indebtedness and forcing the grantee to foreclose by appropriate foreclosure procedures.<sup>29</sup>

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<sup>26</sup>Federal Land Bank v. Schleeter, 208 Ind. 9, 194 N.E. 628 (1935) (provision in mortgage giving mortgagee right to a receiver during period of redemption held invalid).

<sup>27</sup>Esch v. Leitheiser, 117 Ind. App. 338, 69 N.E.2d 760 (1946) (transfer to mortgagee in full payment of debt upheld); cf. Hackleman v. Goodman, 75 Ind. 202 (1881).

<sup>28</sup>The rule is not based upon proof of fraud or wrongdoing, but rather upon the ancient equitable concept that the debtor is in a vulnerable bargaining position. Cf. Hobbs v. Rowland, 136 Ky. 197, 123 S.W. 1185 (1909). An express agreement that the grantee will reconvey is not required to prove that an absolute deed is a mortgage, but such an agreement is most convincing. Cf. Butcher v. Stultz, 60 Ind. 170 (1877). Several other facts can be considered in determining whether an outright deed is a mortgage. How great was the amount of the consideration received by the grantor relative to the value of the property? White v. Redenbaugh, 41 Ind. App. 580, 82 N.E. 110 (1907). Did the grantor retain possession of the property? Barber v. Barber, 117 Ind. App. 156, 70 N.E.2d 185 (1946). Was there a prior or contemporaneous debt? White v. Redenbaugh, 41 Ind. App. 580, 82 N.E. 110 (1907). However, an indebtedness is not required. Kerfoot v. Kessener, 227 Ind. 58, 84 N.E.2d 190 (1949) (grantor had option to pay off debt).

<sup>29</sup>Davis v. Landis, 114 Ind. App. 665, 53 N.E.2d 544 (1944). However, since the mortgagor's rights under an equitable mortgage must be established

In *Huffman v. Foreman*<sup>30</sup> the court found an outright deed to be a mortgage from the second purchaser's testimony that the property was to be reconveyed when the grantor repaid funds given him in the first exchange.<sup>31</sup> Although the court noted that this finding was not essential to its holding, the decision stands as a helpful reminder that equity will not permit a grantee to hide the real purpose behind an outright deed taken to secure an advance, an indebtedness, or even an option to repurchase.

### 5. Subordination Agreement

An interesting problem arises when a senior lienholder who is under a subordination agreement with a junior lienholder breaches its agreement to give the subordinated junior lienholder notice of the debtor's default and time to cure the default before foreclosure. The senior lienholder in *Calumet Federal Savings & Loan Association v. Lake City Trust Co.*<sup>32</sup> breached the subordination agreement. The court properly held that the junior lien was not elevated to a position of priority because of the breach. The junior lienholder's remedy was confined to a recovery of damages suffered.<sup>33</sup> His damages were computed on the basis of the fair market value of the property on the date of the breach (the date of foreclosure by the senior lienholder) less the amount of the senior lien. However, the junior lienholder could not recover any amount that exceeded the value of the junior lien, and interest accruing after the breach was not includable in determining the value of the junior lien.<sup>34</sup>

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in equity, he may be defeated by estoppel, laches, and other rules of equity. *Ferguson v. Boyd*, 169 Ind. 537, 81 N.E. 71 (1907); *Raub v. Lemon*, 61 Ind. App. 59, 108 N.E. 631 (1915).

<sup>30</sup>323 N.E.2d 651 (Ind. Ct. App. 1975). The grantee in this case claimed priority over a previously retained vendor's lien as a bona fide purchaser.

<sup>31</sup>For a case in accord to the effect that an option to repurchase in favor of the grantor will be construed as a mortgage, see *Kerfoot v. Kessener*, 227 Ind. 58, 84 N.E.2d 190 (1949).

<sup>32</sup>509 F.2d 913 (7th Cir. 1975).

<sup>33</sup>Since the junior lienholder had fully performed by executing the subordination agreement, he was barred from rescinding for breach of a unilateral contract. In *Huffman v. Foreman*, 323 N.E.2d 651 (Ind. Ct. App. 1975), a similar rule was applied in the case of a reconveyance by a conditional purchaser.

<sup>34</sup>The court recognized that upon breach of the subordination agreement, and after default by the debtor, the junior lienholder could have cured or foreclosed his own lien. The computation of his damages would have been less than those permitted under the formula applied by the court. However, in computing the amount of the junior lien, the court disallowed a 24 percent interest penalty which apparently had accrued at the time of breach because of the borrower's prolonged resistance to a foreclosure action.



### 6. Conditional Sales Contracts

Indiana has adopted a fairly clear policy that a conditional seller of real estate may not reclaim his property and declare a forfeiture for nonperformance of conditions in the agreement but must foreclose his lien by judicial proceedings.<sup>35</sup> This rule was recently applied in *Fisel v. Yoder*.<sup>36</sup> The plaintiffs in *Fisel* entered into a conditional sales contract for the purchase of a farm. They had paid \$11,400 on the purchase price of \$42,000 and had made substantial improvements on the property shortly before a barn on the property was destroyed by fire. When the purchasers attempted to apply an insurance check payable to them and the vendor for the loss of the barn toward the balance owing on the contract, the defendant-vendor refused to indorse the check and apply it as requested. Further, the vendor stated that the plaintiffs were in breach of the contract, having failed to carry adequate insurance and having made improvements without consent, and that a forfeiture would be declared if the breaches were not cured. At that point, the purchasers tendered payment in full for the balance of the contract price, but the owner refused the tender. Shortly thereafter the purchasers filed a complaint for specific performance, and the vendor counterclaimed for forfeiture and possession of the property. After reviewing the recent cases considering forfeiture under conditional sales contracts, the court held that the vendor was not entitled to a forfeiture since the purchasers had not breached the contract. The court further held, that upon material breach by the vendor, the purchasers were entitled to seek specific performance even though the contract permitted payment only at a specific, later date.<sup>37</sup>

### 7. Deed in Consideration of Support

Once again the Indiana Court of Appeals dealt with a problem arising from the informal estate plan of a grantor of real

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<sup>35</sup>*Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974).

<sup>36</sup>320 N.E.2d 783 (Ind. Ct. App. 1974). Forfeiture was asserted by the defendant because the plaintiffs had failed to carry insurance equal to the unpaid portion of the contract and also because major improvements had been made without the defendant's written consent, as required by the contract. The court, however, refused to award attorney's fees to the vendor "for forfeiture" as specified by the contract since the vendor was denied a right to declare a forfeiture.

<sup>37</sup>The court found that since the vendor was required to "make his proof of good title available for the inspection of the purchasers prior to the final payment" his refusal to do so, along with his threat of forfeiture, was a material breach which entitled the purchasers to specific performance. *Id.* at 789. However, it appears that the court granted specific performance of the

estate carried out by a deed given in exchange for support.<sup>38</sup> In *Robinson v. Railing*<sup>39</sup> the deed in question recited that it was given in consideration that the "grantees hereby agree to care for the grantor and furnish all food, clothing, lodging, medical and hospital care during his lifetime and furnish suitable burial at his death . . . ." The court construed this language as establishing a covenant, and not a condition precedent or subsequent. Thus, upon breach by the grantees, the grantor could only declare a lien for damages, and could not claim a right to re-enter for condition broken.<sup>40</sup>

## B. Security Interests in Personal Property

### 1. Motor Vehicles

The General Assembly, in an obvious attempt to prevent the illegal transfer of certificates of title and identification numbers from salvaged vehicles to stolen vehicles, has recently enacted a statute requiring the issuance of salvage titles.<sup>41</sup> This statute covers all motor vehicles, semitrailers, or house cars "which, by reason of condition or circumstance, have been declared salvage."<sup>42</sup> The statutory requirements provide for the issuance of a salvage title by the bureau of motor vehicles for vehicles declared a total loss or salvage as a result of damage, theft, or other occurrence. The applicant must pay a fee and surrender a properly notarized certificate of title for the vehicle before the salvage title will issue.<sup>43</sup> The title may be assigned once to another buyer. Registered dealers are permitted an additional assignment.<sup>44</sup> If the vehicle is restored to proper operating condition, a regular certificate of title, based on the salvage title, may once again be issued.<sup>45</sup> It is thus necessary

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contract along with a conditional right to prepay the contract on the dates specified in the contract. *Id.* at 789-90.

<sup>38</sup>A number of cases have considered similar agreements. See *Deckard v. Kleindorfer*, 108 Ind. App. 485, 29 N.E.2d 997 (1940); *Lowman v. Lowman*, 105 Ind. App. 102, 12 N.E.2d 961 (1938); *Huffman v. Rickets*, 60 Ind. App. 526, 111 N.E. 322 (1916).

<sup>39</sup>318 N.E.2d 373 (Ind. Ct. App. 1974). In another recent decision the court construed a similar provision in the deed as a covenant, but failed to accord it proper status as a lien. *Brunner v. Terman*, 150 Ind. App. 139, 275 N.E.2d 553 (1972), discussed in *Townsend*, *supra* note 15, at 229.

<sup>40</sup>The court allowed the grantor to recover damages measured by his loss of bargain. This case is in accord with the general rule stated in earlier cases. See, e.g., *Brunner v. Terman*, 150 Ind. App. 139, 275 N.E.2d 553 (1972); cases cited in note 38 *supra*.

<sup>41</sup>IND. CODE §§ 9-1-3.6-1 to -12 (Burns Supp. 1975).

<sup>42</sup>*Id.* § 9-1-3.6-1(a).

<sup>43</sup>*Id.* § 9-1-3.6-2.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* § 9-1-3.6-9.

for those desiring to take a security interest in a salvaged vehicle undergoing restoration to have the interest noted on the salvage title by the bureau of motor vehicles; otherwise, upon the restoration of the vehicle and the issuance of a new certificate of title, the security interest will be lost. Once noted on the salvage title a security interest will be transferred by the bureau of motor vehicles to any new certificate of title issued on a restored vehicle.<sup>46</sup>

## 2. Assignment of Wages

The Indiana version of the Uniform Consumer Credit Code (UCCC) generally outlaws all assignments of wages, with one exception for revocable deductions permitted by law.<sup>47</sup> The 1975 General Assembly, in a bold anticonsumer measure, indirectly modified this Code provision by authorizing revocable deductions from wages for "deposit" or "credit" to an employee's account in payment to any person or organization "regulated" by the Indiana Uniform Consumer Credit Code.<sup>48</sup> The new statute requires the deduction authorization to be in writing, to indicate on its face that it is revocable at any time upon written notice to the employer, and to evidence agreement by the employer. This provision will seemingly permit zealous lenders to harass unsuspecting debtors with wage "deductions" without limitation on the "deduction" as to purpose or amount.<sup>49</sup> Because the new law permits a "deduction" only in favor of a poorly defined class of persons—those regulated under the UCCC—without regard to the type of transaction, the law runs the serious risk of being construed as special legislation.<sup>50</sup> Adoption of this type of law will certainly catch the eye of

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<sup>46</sup>*Id.*

<sup>47</sup>*Id.* §§ 24-4.5-2-410, -3-403 (Burns 1974). The Indiana version is much broader than the official text of the UCCC which authorizes revocable assignment of wages. UNIFORM CONSUMER CREDIT CODE §§ 2.410, 3.403.

<sup>48</sup>IND. CODE § 22-2-6-2(c) (10) (Burns Supp. 1975), *amending id.* § 22-2-6-2(c) (10) (Burns 1974). The provision replaced allowed a deduction of wages for payment directly to a bank or trust company for "deposit" to the employee's account.

<sup>49</sup>If these deductions are made to secure consumer credit, they must be disclosed in accordance with requirements of the Federal Truth in Lending Act. 15 U.S.C. § 1681f (1970); Regulation Z, 12 C.F.R. § 226.8(a)(5) (1975). The 1975 Indiana amendment does not restrict deductions for deposit or credit to an employee's account for purposes of consumer credit or any particular type of account. IND. CODE § 22-2-6-2(c) (10) (Burns Supp. 1975).

<sup>50</sup>"Regulated lenders" are described as those authorized to make or to take assignments of regulated loans. IND. CODE § 24-4.5-3-501(2) (Burns 1974). "Regulated loans" are consumer loans in excess of the 10 percent annual percentage rate. *Id.* § 24-4.5-3-501(1). A "regulated lender" in most cases is required to be licensed if it engages in the business of making consumer loans in excess of an annual percentage rate of 10 percent. *Id.* § 24-4.5-3-502.

consumer groups and thus furnish ammunition for further emasculation of one of the UCCC's chief purposes—to work out a fair balance between credit grantors and consumers.

### 3. Security Interests in Feedlot Operations

A farmer engaged in feedlot operations requires considerable capital. To obtain funds, he ordinarily must give a security interest in the animals to his supplier or to a lender furnishing funds for inventory and feed. Two recent decisions involve the rights of the supplier or lender who has perfected a security interest in livestock where the farmer-debtor disposed of the collateral.

In *United States v. Topeka Livestock Auction, Inc.*,<sup>51</sup> the secured party recovered in conversion from an auctioneer through whom the debtor-farmer had made an unauthorized sale of cattle. The court applied section 9-307(1) of the Indiana Uniform Commercial Code (UCC), which provides that a buyer of farm products in the ordinary course of business from a farmer takes subject to the rights of a secured party, although a buyer of inventory in the regular course of business in other cases is protected.<sup>52</sup>

In *Yeager & Sullivan, Inc. v. Farmers Bank*,<sup>53</sup> suppliers holding a perfected security interest in feeder pigs authorized the debtor to sell the pigs but attempted to protect themselves by instructing the markets through which the pigs were sold to make

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Further, all persons, including unlicensed persons, making consumer credit sales, consumer leases, and consumer loans including consumer related credit sales and loans are subject to some regulation. *E.g., id.* § 24-4.5-6-201 (dealing with persons required to pay fees for doing business).

The law also poses a serious risk to employers who have no means of knowing what assignees are eligible under the meaningless language of the new law. If deductions are paid to an unauthorized person, the employer may become liable to the employee for the improper deduction plus penalties for failure to pay wages in accordance with law. *Id.* §§ 22-5-5-1 to -3; *id.* §§ 22-2-4-1, -4 (Burns 1974).

<sup>51</sup>392 F. Supp. 944 (N.D. Ind. 1975). The court also held that a security agreement covering after-acquired farm animals was effective.

<sup>52</sup>IND. CODE § 26-1-9-307(1) (Burns 1973); *accord*, *United States v. Pete Brown Enterprises, Inc.*, 328 F. Supp. 600 (N.D. Miss. 1971) (chickens); *Bank of Madison v. Tri-County Livestock Auction Co.*, 123 Ga. App. 768, 182 S.E.2d 687 (1971) (cattle); *Garden City Prod. Credit Ass'n v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971) (cattle). The secured party must file a financing statement, and since an agricultural product is involved, local filing under UCC section 9-401(1)(b) is required. *Swift & Co. v. Jamestown Nat'l Bank*, 426 F.2d 1099 (8th Cir. 1970). Since the secured party in *Topeka* was the Farmers Home Administration, an agency of the Federal Government, the court noted that it was uncertain whether state or federal law applied. The court, however, held that it would follow the UCC rule since the outcome would be the same no matter which law was applied. 392 F. Supp. at 948.

<sup>53</sup>317 N.E.2d 792 (Ind. Ct. App. 1974).

all checks payable both to the secured parties and the debtor. The debtor thwarted the plan by forging the indorsements of the secured party to the checks given in payment for the pigs. In a suit by the secured parties against the collecting bank, which paid over the forged checks, the court denied relief to the extent that proceeds of the checks were used by the debtor to pay subfeeders to whom the pigs were bailed with the secured parties' knowledge.

The court volunteered that since the subfeeders held artisans' liens on the pigs sold,<sup>54</sup> which took priority over the previous security interests under the provisions of section 9-310<sup>55</sup> of the UCC,<sup>56</sup> the secured parties sustained no loss.<sup>57</sup> To this extent the proceeds went for the purpose the forged checks originally were intended. However, the evidence showed that the debtor returned the balance of the proceeds from the forged checks to his feeder business, which the court found was operated as a joint venture with the secured parties. The court determined that although this money went back into the feeder operations—thus apparently benefiting the secured parties both as holders of collateral and as joint venturers—the

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<sup>54</sup>The court pointed to two Code provisions allowing subfeeders an artisan's lien. IND. CODE §§ 32-8-29-1, -30-1 (Burns 1973).

<sup>55</sup>IND. CODE § 26-1-9-310 (Burns 1974) provides:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

<sup>56</sup>Indiana Code section 26-1-9-310 gives an artisan a super-priority over previous security interests only so long as he retains possession of the goods. Although the facts on this point are not clear from *Yeager*, it appears that the lien as well as its super-priority was lost when the subfeeders surrendered possession of the pigs, that is, the pigs were surrendered and sold before the subfeeders were paid. Surrender of possession by an artisan generally constitutes a surrender of his lien. *Vaught v. Knue*, 64 Ind. App. 467, 115 N.E. 108 (1917) (rule applied to statutory lien which was held to be declaratory of common law). An exception to the rule is recognized if possession is surrendered for a temporary purpose without intent to relinquish the lien. *Walls v. Long*, 2 Ind. App. 202, 28 N.E. 101 (1891). There was no discussion in *Yeager* of evidence which tended to show that the subfeeders preserved their liens when the goods were surrendered.

<sup>57</sup>The owner of a negotiable instrument paid or transferred over an unauthorized indorsement cannot recover from the transferee or payor if the funds are applied to the purpose intended by the owner. *Shank v. Peoples State Bank*, 104 Ind. App. 443, 7 N.E.2d 46 (1937). In support of this rule, the *Yeager* court cited *Sharpe v. Graydon*, 99 Ind. 232 (1884), allowing a converter to set off from funds misappropriated the portion applied to the payment of the owner's debt owing to a third person. *Accord*, *Smith v. Downing*, 6 Ind. 374 (1855). The *Smith* court held that the fact that the plaintiff got the converted corn back would not defeat the action; it would be relevant for purposes of mitigation of damages.

collecting bank would have to pay the secured party to the extent that the proceeds were not used to pay debts intended to be satisfied by the improperly transferred checks.<sup>58</sup>

These two cases point up the difficulties of financing feedlot operations. If the secured party allows the debtor to sell the animals, he runs the risk that the debtor will improperly dispose of the proceeds. The *Topeka* decision teaches that if the secured party does not authorize the debtor to dispose of the animals, the secured party need not worry that buyers in the ordinary course of the debtor's business will prevail, since buyers of farm products from farmers are excepted from protection under section 9-307(1) of the UCC. Nonetheless, the *Yeager* court recognized that sub-feeders will obtain a super-priority over previous security interests in feedlot animals to the extent that they acquire artisans' liens for feed and care of livestock—a priority expressly granted by section 9-310 of the UCC.

Expanding litigation in this area further indicates that feedlot operators must be given some authority to sell feeder animals as a means of keeping the business going. Stock buyers may and should become wary of dealing with feedlot operators. Decisions, therefore, often find implied or apparent authority from the secured party to sell the stock, so that buyers from the feedlot

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<sup>58</sup>It seems that the court relied upon the old rule that a converter misapplying funds to an obligation of the owner cannot set off the obligation against the conversion action. This rule was spawned in the era preceding new Indiana Trial Rule 13, at a time when counterclaim and setoff were severely limited. *Cf. Vancleave v. Beach*, 110 Ind. 269, 11 N.E. 228 (1886) (converter of negotiable instrument owned by plaintiff not allowed to set off obligation of plaintiff owing to converter). The *Yeager* court also neglected to analyze UCC section 3-419(3) which was intended to allow a representative of the collecting bank to avoid liability to the owner whose name was forged when collected funds are paid out over an unauthorized signature in good faith and in accordance with reasonable commercial standards. *Berkheimers, Inc. v. Citizens Valley Bank*, 529 P.2d 903 (Ore. 1974) (collecting bank paying over signature of one of conjunctive payees did not pay in good faith). Under UCC section 3-419(3), the collecting bank could not escape ultimate liability to the payor bank on its warranties, if they existed. *See First Nat'l Bank v. Progressive Cas. Ins. Co.*, 517 S.W.2d 226 (Ky. 1974); UNIFORM COMMERCIAL CODE § 4-207. Finally, the *Yeager* decision dealt with checks seemingly payable to the joint venture enterprise, since the payees were not named either conjunctively or disjunctively, so that apparent authority existed in the debtor carrying on the business to indorse the instruments. *See Sondheim v. Gilbert*, 117 Ind. 71, 18 N.E. 687 (1888) (partner authorized to issue paper in firm name); *O'Hara v. Architects Hartung & Ass'n*, 326 N.E.2d 283, 286 (Ind. Ct. App. 1975) ("as to third parties, each joint adventurer is the agent of the others for all acts within the scope of the enterprise.").

operator are protected.<sup>59</sup> *Yeager* demonstrates that the secured party may permit the feeder to dispose of the collateral and at the same time obtain protection by requiring purchasers to make checks payable to both parties. But the case probably goes too far when the secured party wearing two hats, one as the holder of security and the other as joint venturer, was allowed to claim that his indorsement on the checks was unauthorized, thereby throwing the loss on an innocent collecting bank—this is especially true in this case since the funds were returned to the joint venture business.

#### 4. *Special Assessment Liens*

The Indiana statutes contain numerous provisions for liens to secure payment of special assessment taxes. The time at which and the circumstances under which each of these liens attaches can be determined only by consulting separately each statute involved. In an attempt to simplify the search for these special assessment liens, the General Assembly recently amended certain statutory provisions to require the recording of liens for sewer charges and fees before they will attach to property.<sup>60</sup> The lien for such charges or fees attaches only at the time the notice of lien is filed with the county recorder and takes priority over all liens except other tax liens.<sup>61</sup> Thus, this lien is not enforceable against a purchaser unless it is recorded prior to the time the property is conveyed to the purchaser. This amendment also contains provisions for the mandatory release of unrecorded assessment liens existing prior to the conveyance of the property to which they attach but recorded subsequent to such conveyance.<sup>62</sup>

#### 5. *Barrett Bonds*

The so-called Barrett Acts<sup>63</sup> permit special assessments to be financed with bonds secured by liens upon the property benefited by the assessments. Taxpayers owning the assessed land may pay

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<sup>59</sup>See *In re Caldwell Martin Meat Co.*, 10 UCC REP. SERV. 710 (E.D. Cal. 1970) (secured party waived required consent to sale); *Lisbon Bank & Trust Co. v. Murray*, 206 N.W.2d 96 (Iowa 1973) (sale of cattle authorized by course of dealing); *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967) (by consenting, secured party waived prohibition in security agreement); *Central Washington Prod. Credit Ass'n v. Baker*, 11 Wash. App. 17, 521 P.2d 226 (1974) (oral consent to sale of cattle allowed although written consent required of secured party by security agreement). *But cf.* *Baker Prod. Credit Ass'n v. Long Creek Meat Co.*, 226 Ore. 643, 513 P.2d 1129 (1973).

<sup>60</sup>IND. CODE §§ 19-2-5-23, -24 (Burns Supp. 1975).

<sup>61</sup>*Id.* § 19-2-5-23.

<sup>62</sup>*Id.* See also *id.* § 19-2-5-24.

<sup>63</sup>*Id.* §§ 18-6-5-1 to -30 (Burns 1974).

the liens in required installments. These Barrett bonds cause a great deal of confusion not only from the difficulty of ascertaining the existence of the lien but also from the many problems which arise when the assessed property owner fails to pay the required installments.

The recent case of *City of Hammond v. Beiriger*<sup>64</sup> illustrates the problems faced by Barrett bondholders, who must enforce delinquent installment payments against the owners by foreclosure and also pursue other remedies against the municipality when it does not pay collected installments to the holders of the bonds. In *Beiriger*, when the bondholder presented his bonds for payment, the city treasurer dishonored the bonds after asserting that tax funds allocable to the bonds had not been received. The bondholder sued the city when it later failed to redeem the bonds and after it had collected substantial assessments from property owners. Both at trial and upon appeal, the city asserted that the plaintiff's action against the city was barred by a prior foreclosure action against property owners who failed to make required payments on the bonds. The Third District Court of Appeals, in affirming the trial court decision, held that a judgment of foreclosure against the assessed property owners did not bar the right of the bondholder to recover payments collected by the municipality.<sup>65</sup>

As an interesting sidelight of the case, which may be symptomatic of Barrett bond litigation, the court below withheld judgment for twelve years. Because of lack of objection, this flagrant delay was not allowed to affect the decision, but presumably it will attract the attention of disciplinary authorities.<sup>66</sup>

### C. Creditors' Rights and Involuntary Liens

#### 1. Attachment and Garnishment

In Indiana a creditor by statute can procure attachment and garnishment at the threshold of a lawsuit.<sup>67</sup> Along with a bond the creditor must submit to the clerk of the court an affidavit

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<sup>64</sup>328 N.E.2d 466 (Ind. Ct. App. 1975).

<sup>65</sup>The city records indicated that the city collected approximately 80 percent of the installments. *Id.* at 468.

<sup>66</sup>Since neither of the parties objected to the delay, the court appeared to be content to overlook it. Let it be known that this writer objects, and all citizens should become suspicious of justice when entry of a judgment is delayed 12 years.

<sup>67</sup>IND. CODE §§ 34-1-11-1 to -21 (Burns 1973). The attachment statute was broadened in its scope and further regulated by Trial Rule 64(B).



showing the presence of a proper ground for this relief.<sup>68</sup> A proper ground exists only where the defendant is a nonresident, is concealing his person, or is fraudulently concealing or disposing of his property. Upon such a showing, the clerk will issue the attachment writ to the sheriff or the appropriate summons to the garnishee. Thus, neither notice nor hearing is afforded the debtor before either his property is seized in attachment or before assets owned by him or owed to him by a third party are frozen in the hands of a third party through garnishment.<sup>69</sup> Ultimately, the defendant may post a counterbond and obtain a release of his property.<sup>70</sup>

In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,<sup>71</sup> the United States Supreme Court held unconstitutional a similar garnishment statute in Georgia as denying due process. The Georgia statute provided that a plaintiff seeking garnishment need only post a bond and make an affidavit before some officer authorized to issue an attachment.<sup>72</sup> The only substantial difference between the Indiana and Georgia statutes is that Indiana, as discussed above, allows prejudgment garnishment (or attachment) only upon certain grounds.<sup>73</sup> In Georgia, garnishment was permitted in the case of pending actions without such limitations.<sup>74</sup> Therefore, many of the characteristics which the Supreme Court found objectionable in the Georgia statute also appear in the Indiana statute. The clerk in Indiana issues the writ of attachment or garnishment

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<sup>68</sup>IND. CODE §§ 34-1-11-4(a) to -6 (Burns 1973). The affidavit and bond required in garnishment are set forth in section 34-1-11-20. Although attachment and garnishment are separately dealt with by the Indiana law, the plaintiff in garnishment proceedings must file an affidavit in attachment showing grounds for attachment. *Id.* § 34-1-11-4(a). The grounds for attachment or attachment and garnishment must ultimately be proved at trial. *Pomerooy v. Beach*, 149 Ind. 511, 49 N.E. 370 (1898).

<sup>69</sup>IND. CODE §§ 34-1-11-9, -10, -21 (Burns 1973). For the method of attaching an interest in realty see Trial Rule 64(B)(6). The attachment lien on realty is invalid against subsequent bona fide purchasers unless notice is recorded in the *lis pendens* record. IND. CODE § 34-1-4-3 (Burns 1973).

<sup>70</sup>The defendant may obtain the property by either posting a delivery bond (which is conditioned upon a return of the property attached) or a restitution bond (which is conditioned upon payment of the judgment and subsequent dissolution of the lien on the property). IND. CODE §§ 34-1-11-13, -17, -33 (Burns 1973).

<sup>71</sup>419 U.S. 601 (1975).

<sup>72</sup>GA. CODE ANN. § 46-102 (1965).

<sup>73</sup>IND. CODE § 34-1-11-1 (Burns 1973).

<sup>74</sup>GA. CODE ANN. §§ 46-101 to -103 (1965). The defendant could defeat the attachment by posting a counterbond. *Id.* § 46-402.

without the participation of the judge.<sup>75</sup> The writ or process can issue upon an affidavit<sup>76</sup> which may be upon the belief of the affiant.<sup>77</sup> Except for court action upon a counterbond filed by the defendant,<sup>78</sup> no provision exists, either before the writ or process is issued or promptly thereafter, for notice to the defendant and for a hearing upon the merits of the plaintiff's claim or upon his right to attachment.

It is imperative, therefore, that the Indiana legislature by statute or the Indiana Supreme Court by rule correct the defects which make the Indiana attachment and garnishment statute vulnerable to constitutional attack. The following specific changes should be made. The affidavit for attachment and garnishment must be based upon personal knowledge and reliable testimony or documentation. A judge must approve the posting of the bond and the issuance of the writ or process. The defendant must receive prompt notice of the action, and a prompt hearing must be set. Moreover, the court must be convinced at the hearing that the plaintiff has made a showing of probable recovery both upon his claim and upon the grounds for attachment and garnishment.<sup>79</sup> However, existing procedures permit astute litigants a means for making constitutional use of the Indiana statute. A creditor seeking attachment or attachment and garnishment under the present Indiana laws along with his complaint may apply to the court for a special order under Trial Rule 4.14, which allows the court to make an appropriate order for notice of a prompt hearing.<sup>80</sup> After notice to the principal defendant, a hearing should be ordered to determine the plaintiff's probability of success in establishing grounds for attachment and recovery upon his claim. An order of attachment or attachment and garnishment on a finding

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<sup>75</sup>IND. CODE § 34-1-11-6 (Burns 1973). Although the bond is to be approved by the clerk, *id.* §§ 34-1-11-5, -20, the amount of the bond is to be fixed by the court. *Id.* § 34-2-33-1.

<sup>76</sup>*Id.* §§ 34-1-11-4(a), -20.

<sup>77</sup>Champ v. Kendrick, 130 Ind. 549, 30 N.E. 787 (1892). See IND. CODE §§ 34-1-11-9, -10, -21 (Burns 1973).

<sup>78</sup>IND. CODE §§ 34-1-11-13, -17, -33 (Burns 1973).

<sup>79</sup>In other words, the procedure should substantially follow those adopted in compliance with the now famous case of *Fuentes v. Shevin*, 407 U.S. 600 (1974). The *Fuentes* doctrine was held inapplicable to the acquisition of an artisan's lien. *Phillips v. Money*, 503 F.2d 990 (7th Cir. 1974).

<sup>80</sup>The United States Supreme Court made the point in *Di-Chem* that there "is no provision for an *early* hearing." 419 U.S. at 607 (emphasis added). In the case of a temporary restraining order, due process seems to be satisfied by the requirement of a prompt hearing. Thus, Indiana Trial Rule 65(B) dissolves a temporary restraining order after 10 days or as extended for cause as required, and requires prompt hearing on the preliminary injunction. The Indiana provision follows the federal rule on this point. *Carroll v. President & Comm'rs*, 393 U.S. 175 (1968).

of probable cause should satisfy the due process requirements imposed by the *Di-Chem* case.<sup>81</sup>

The Indiana Uniform Consumer Credit Code provides that an employee cannot be discharged because his wages are subject to one or more garnishments.<sup>82</sup> In this respect, the law gives greater protection than the Federal Truth in Lending Act, which prohibits discharge because of garnishment of wages "for any one indebtedness."<sup>83</sup> The Seventh Circuit Court of Appeals in *Brennan v. Kroger Co.*<sup>84</sup> interpreted the federal provision as protecting an employee even though two creditors obtained successive garnishments against his wages. Following an earlier interpretation of "garnishment" by the Department of Labor, the court held that a garnishment of wages occurred only when the employer was required to withhold compensation.<sup>85</sup> Hence, the court determined that a second creditor, who procured a later garnishment and thus enjoyed no right to payments until the first lien was satisfied, had not subjected the employee's wages to garnishment. The employer, therefore, erred in discharging the employee because of more than one garnishment of his wages. Although the court recognized the employer's obligation to honor the second garnishment after the first was satisfied, this inconvenience constituted an improper basis for discharge. Thus, where the employee has suffered two garnishments against his wages, he may now call upon the Secretary of Labor to enforce his rights in the federal courts<sup>86</sup> or, if he wishes, seek relief under Indiana law.<sup>87</sup>

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<sup>81</sup>See *In re Oronoka*, 393 F. Supp. 1311 (N.D. Me. 1975); *McIntyre v. Associates Financial Serv. Co.*, 328 N.E.2d 492 (Mass. 1975) (court refused to apply the *Di-Chem* decision retroactively to pending or prior attachment proceedings).

<sup>82</sup>IND. CODE § 24-4.5-5-106 (Burns 1974).

<sup>83</sup>15 U.S.C. § 1674 (1970). The federal law expressly preserves state laws giving greater protection to an employee. *Id.* § 1677.

<sup>84</sup>513 F.2d 961 (7th Cir. 1975).

<sup>85</sup>Wage-Hour Administrator Opinion Letter No. 1136 (WH-89) (Oct. 26, 1970), [1969-1973 Transfer Binder] CCH LAB. L. REP. ¶ 30,703, at 42,121. The court pointed out, however, that the interpretation made 29 months after the enactment of the statute was not contemporaneous with the passage of the law.

<sup>86</sup>The Federal Truth in Lending Act provides no remedy for an injured employee, but it does provide that a willful violation of the law carries a \$1,000 fine and/or imprisonment of not more than 1 year. 15 U.S.C. § 1674(b) (1970). The Secretary of Labor has power to enforce this Act. *Id.* § 1676. Compare, *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974) (private remedy implied).

<sup>87</sup>Under the Indiana Uniform Consumer Credit Code the employee may seek an order requiring reinstatement and recover wages lost as a result of discharge not to exceed 6 weeks wages. IND. CODE § 24-4.5-5-202(6) (Burns 1974). It should be noted that two garnishments may be permitted where, for example, no exemption is provided against one or both of two garnishees.

## 2. Receiverships

In Indiana a contract creditor may by statute obtain the appointment of a receiver over a corporation upon proof of equitable grounds, usually arising because of corporate insolvency.<sup>88</sup> The statute also allows for the appointment of receiver without notice for "sufficient cause shown by affidavit."<sup>89</sup> In *Environmental Control Systems, Inc. v. Allison*,<sup>90</sup> the Indiana Supreme Court once again made it clear that the affidavit required to justify the appointment of a receiver without notice must contain specific facts, other than those upon information and belief. Lawyers should take time to learn from this case a fundamental lesson in the use of court affidavits. A good affidavit should contain competent testimony based upon either the affiant's personal knowledge of the facts or upon authenticated documentation which would be admissible in court over objection. The testimony or documentation should suffice to make a prima facie case upon the issues to be established.<sup>91</sup>

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This could occur where garnishment of wages subject to exemptions is first allowed in favor of C1. Later a support order is issued and wages are garnished for enforcement of the support order in favor of C2. It appears that no exemption is allowed in the case of support orders. See 15 U.S.C. § 1674 (1970); IND. CODE § 24-4.5-5-105(2) (Burns 1974). However, the Indiana Supreme Court has indicated that debtors are entitled to the best of all exemptions, and since 90 percent of wages are exempt in the case of all orders in proceedings supplemental, it seems that this exemption applies to all claims including claims for support. Compare *Mims v. Commercial Credit Corp.*, 307 N.E.2d 867 (Ind. 1974), with IND. CODE § 34-1-44-7 (Burns 1973) and *Guard v. Guard*, 116 Ind. App. 396, 64 N.E.2d 802 (1946) (holding that only 10 percent of wages are subject to a proceedings supplemental order for support).

<sup>88</sup>IND. CODE § 34-1-12-1 (Burns 1973). See also *South Side Motor Coach Corp. v. McFarland*, 207 Ind. 301, 191 N.E. 147 (1934). A receiver ordinarily will not be appointed on behalf of a tort creditor holding a contingent claim which has not been reduced to judgment. *Royal Academy of Beauty Culture, Inc. v. Wallace*, 226 Ind. 383, 78 N.E.2d 32 (1948). The recent decision of *Puzich v. Pappas*, 314 N.E.2d 795 (Ind. Ct. App. 1974), also recognizes that disputing partners may seek the appointment of a receiver in proceedings for an accounting and dissolution of the partnership.

<sup>89</sup>IND. CODE § 34-1-12-9 (Burns 1973).

<sup>90</sup>314 N.E.2d 820 (Ind. Ct. App. 1974). *Accord*, *Inter-City Contractors Serv., Inc. v. Jolley*, 257 Ind. 593, 277 N.E.2d 158 (1972).

<sup>91</sup>Under Trial Rule 56(E) affidavits used to justify or oppose summary judgment must show the competency of the witness along with facts based upon the affiant's personal knowledge. *Renn v. Davidson's Southport Lumber Co.*, 300 N.E.2d 682 (Ind. Ct. App. 1973). When the issues depend upon proof of a written instrument, it should be presented with authenticating affidavits. *Dallas Co. v. William Tobias Studio, Inc.*, 318 N.E.2d 568 (Ind. Ct. App. 1974).

Although not raised in the *Allison* case, it is now established that notice to the defendant and a hearing on the justification for appointing a receiver must follow promptly the appointment of a receiver without notice. Specific findings by the court upon the issues probably must follow the hearing.<sup>92</sup> Appointment of a receiver, with or without notice, can result in serious damage to the defendant. Action of the court upon the receivership petition should, therefore, follow substantial safeguards of fair play. These safeguards might be construed to require the furnishing of security.<sup>93</sup>

### 3. Bankruptcy

As a general rule the bankruptcy court has no summary jurisdiction over property in the possession of a third party who has a substantial claim to it at the time of the filing of the bankruptcy petition.<sup>94</sup> The United States Supreme Court, in upholding the Seventh Circuit Court of Appeals,<sup>95</sup> applied this general rule in *Phelps v. United States*<sup>96</sup> to the Internal Revenue Service (IRS). The IRS served a levy for the enforcement of a prior lien for taxes upon a common law assignee for the benefit of creditors to whom the bankrupt had made an assignment. The Court held that the assignee, who had received notice of the levy prior to the assignor's bankruptcy, held constructive possession of the debtor's

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<sup>92</sup>*Indianapolis Mach. Co. v. Curd*, 247 Ind. 657, 221 N.E.2d 340 (1966). The court is required to make specific findings where it grants or refuses preliminary injunctions. Since the appointment of a receiver involves injunctive relief, it can be argued that the court should make findings of fact when a receiver is appointed prior to resolution of a creditor's claim which has not been reduced to judgment. IND. R. TR. P. 65(D).

<sup>93</sup>In *Allison* the trial court required a bond, but the record did not disclose whether the bond was posted. Security should be considered as a requirement for the appointment of a receiver without notice. *Indianapolis Mach. Co. v. Curd*, 247 Ind. 657, 221 N.E.2d 340 (1966). Appointment of a receiver without notice and hearing may pose a due process question even if security is furnished. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (garnishment without notice and hearing held in violation of due process). This case is discussed in section *M supra*.

<sup>94</sup>The leading decision on this general problem is *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426 (1924). Summary jurisdiction to settle disputes with respect to property in the possession of third parties with bona fide claims is granted the bankruptcy court in some special situations. Bankruptcy Act § 67a(1), 11 U.S.C. § 107a (1970) (avoidance of liens obtained by judicial proceedings). Summary jurisdiction is granted to the bankruptcy court over assets of the bankrupt which are transferred within four months of the petition and are held by a general receiver or an assignee for the benefit of creditors. *Id.* §§ 2(21), 70a(8), 11 U.S.C. §§ 11(21), 110a(8) (1970).

<sup>95</sup>*United States v. Phelps*, 495 F.2d 1283 (7th Cir. 1974).

<sup>96</sup>421 U.S. 330 (1975).

assets. Thus the bankruptcy court was denied summary power to adjudicate the question of the Government's title. This rule also applies in favor of an assignee of accounts where he has properly notified the account debtor to pay him, but the assignee may lack constructive possession until notification to the account debtor.<sup>97</sup> It should be noted that in *Phelps* the assignee was not a judicial officer.<sup>98</sup> Had the assignment been made under a judicial type of liquidation, as provided in Indiana,<sup>99</sup> it appears that the IRS could not have levied upon the assets after they passed to the liquidator.<sup>100</sup> Hence, where bankruptcy follows a receivership or judicial type of assignment for the benefit of creditors, the bankruptcy court, as successor of the statutory judicial liquidation, should retain summary jurisdiction over claims to the property.

#### 4. Artisans' Liens

The common law recognized the right of a repairman to retain possession of the goods delivered to him for repairs until he was paid for his work and materials. Numerous Indiana statutes extend, but do not necessarily supersede, this common law lien. The statutes apply to various trades. They usually permit the artisan to dispose of the goods, sometimes after public notice and sometimes after notice to the owner, and in some cases they allow foreclosure by court action.<sup>101</sup>

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<sup>97</sup>The United States Supreme Court in *Phelps* disapproved an earlier decision by the Ninth Circuit Court of Appeals, *In re United Gen. Wood Prod. Corp.*, 483 F.2d 997 (9th Cir. 1973), that an assignee of accounts, in this case proceeds of accounts held by a factor, did not have constructive possession of the accounts or the proceeds thereof after the account debtor (the factor) had been notified by the debtor to pay the assignee. 421 U.S. at 333. The *Phelps* Court upheld summary jurisdiction of the bankruptcy court to settle rights of the IRS which had levied upon and served notice of the levy upon the account debtor before bankruptcy. *Id.* at 373. Inasmuch as the account debtor had been notified in that case, the question remains open whether an assignee of accounts has constructive possession unless and until he notifies the account debtor as permitted by UCC sections 9-502(1) and 9-318(3).

<sup>98</sup>An assignee for the benefit of creditors in Illinois is not a judicial officer. *In re Western Marine & Fire Ins. Co.*, 38 Ill. 289 (1865).

<sup>99</sup>IND. CODE §§ 32-12-1-1 to -21 (Burns 1973).

<sup>100</sup>See INT. REV. CODE OF 1954, § 6871; Treas. Reg. § 301.6871(a)-2 (1974) (providing in effect that assets under the control of a court, particularly a receivership, may not be subjected to a levy for taxes).

<sup>101</sup>The statutory liens in favor of particular artisans do not supersede their common law liens. *Grusin v. Stutz Motor Car Co.*, 206 Ind. 296, 187 N.E. 382 (1933). *But cf.* *Nicholas v. Baldwin Piano Co.*, 71 Ind. App. 209, 123 N.E. 226 (1919) (holding that statute authorizing innkeeper's lien superseded common law lien, which took priority over prior interests held by third parties in guest's goods subject to lien).

The 1975 General Assembly reaffirmed the lien in favor of another special interest group, those “engaged in the business of altering or repairing electronic home entertainment equipment.”<sup>102</sup> This new law simply gives this group an artisan’s possessory lien<sup>103</sup> upon the described equipment with a power to sell at auction after receipt of notice by certified mail, return receipt requested, to the owner and any secured party who has perfected by filing.<sup>104</sup> However, it uniquely requires judicial foreclosure if the owner, upon receipt of the notice of sale, informs the lienholder in writing of objections regarding either the quality of the workmanship or an alleged overcharge.<sup>105</sup> Since another existing statute is sufficiently broad to give electronic home entertainment equipment repairmen a possessory lien upon the items repaired,<sup>106</sup> this new statute is of little importance unless it is construed to limit the rights and remedies applicable to this special group of lienholders.

Two cases have recently reviewed Indiana artisans’ lien laws.<sup>107</sup>

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<sup>102</sup>IND. CODE § 32-8-36-1 (Burns Supp. 1975).

<sup>103</sup>*Id.* §§ 32-8-36-1, -2. Although the statute generally gives the repairman of electronic home entertainment equipment a lien, section 32-8-36-2 allows him to sell the equipment if it “is still in his possession,” thus indicating that the lien depends upon the repairman’s possession. It is doubtful that the statute allows the repairman a lien upon such equipment repaired in the home because he does not acquire “possession” of it, but this certainly will pose a serious problem.

<sup>104</sup>*Id.* §§ 32-8-36-2, -3.

<sup>105</sup>*Id.* § 32-8-36-3. Notice of sale is not required to be given to the “owner,” but the owner and any “prior lienholders” are entitled to any amount in excess of the lien.

<sup>106</sup>*Id.* §§ 32-8-30-1 to -3 (Burns 1973). The statutes apply to “any article of value” entrusted to the artisan and provide for sale at public auction.

<sup>107</sup>The Indiana Code gives a lien to a person engaged in repairing, storing, servicing, or furnishing supplies or accessories for motor vehicles, airplanes, construction machinery and equipment, and farm machinery. *Id.* § 32-8-31-1 (Burns 1973). This statute says nothing about “possession” of the repairman as the basis for the lien, but the lien given by this statute expires within 60 days after performance unless notice of intent to hold the lien is recorded with the county recorder as in the case of recording mechanics’ liens. *Charlie Eidson’s Paint & Body Shop v. Commercial Credit Plan, Inc.*, 146 Ind. App. 209, 253 N.E.2d 717 (1969) (lien filed against automobile after a 60-day period as to repairs invalid, but valid as to storage where filed within 60-day period from time of storage).

The Code also authorizes a lien to persons engaged “in the business of storing, furnishing supplies for or repairing motor vehicles, motor bicycles, or motor trucks.” IND. CODE § 9-9-5-6 (Burns 1973). This lien must be entered in a book showing the names and addresses of the owners, the license numbers of the vehicle, and the date of possession. Indiana also recognizes a common law artisan’s lien. *Id.* §§ 32-12-1-1 to -21 (Burns 1973). Another statute is sufficiently broad—in favor of any “mechanic or tradesman”—to

In *Phillips v. Money*<sup>108</sup> the Seventh Circuit concluded that detention pursuant to a common law or statutory mechanic's lien by a private individual in possession of a motor vehicle does not constitute "state action." The owner had claimed that artisans' liens were unconstitutional under the tenuous theory that the states could not permit an artisan's lien without prior notice and judicial hearing in accordance with the doctrine of *Fuentes v. Shevin*.<sup>109</sup> The *Fuentes* case required notice and hearing before a plaintiff in a replevin action could regain possession at the threshold of the lawsuit. Replevin involves affirmative state ministerial action through the officers of a court. It thus differs significantly from the self-help rights granted by state law to an artisan in peaceful possession of goods.

An artisan's lien was also involved in *Yeager & Sullivan, Inc. v. Farmers Bank*,<sup>110</sup> where the court recognized that pig feeders retained a statutory artisan's lien giving them a "super-priority" under section 9-310 of the UCC over previously perfected security interests.<sup>111</sup>

### 5. Mechanics' Liens

Two recent decisions reiterated the rule that a mortgagor, conditional vendee, tenant, or co-owner cannot by contracting for improvements give a mechanic priority over the superior interests of others in the land. Both cases, though, recognized an important exception where the holder of the superior interest actively consents to the improvements. In *Dallas Co. v. William Tobias Studio, Inc.*,<sup>112</sup> the mechanic claimed that the defendants, the lessor, and allow a possessory artisan's lien in favor of a motor vehicle repairman. *Id.* §§ 32-8-30-1, -2. Under this act the lienholder is not required to record his lien or keep an entry book.

<sup>108</sup>503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975).

<sup>109</sup>407 U.S. 67 (1972). This case appears to have been substantially overruled by *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), where the plaintiff was allowed to repossess goods under a replevin suit without notice and hearing since the order was made by a judicial officer. The great weight of the many decisions on this problem hold that *Fuentes* is inapplicable to state laws allowing self-help, possessory liens, and the like, without judicial or other action by state officials. *See, e.g.*, *Parks v. "Mr. Ford,"* 386 F. Supp. 1251 (E.D. Pa. 1975) (artisan's lien); *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973) (statute allowing mechanic's lien upon real property held constitutional although no notice and hearing provided before lien attached). For cases invalidating state artisan lien laws see Annot., 64 A.L.R.3d 814 (1975).

<sup>110</sup>317 N.E.2d 792 (Ind. Ct. App. 1974).

<sup>111</sup>The court cited two artisans' lien statutes as protecting the pig feeders. IND. CODE §§ 32-8-29-1, & 32-8-30-1 to -30-8 (Burns 1973). An extended discussion of the *Yeager* decision may be found in section *B supra*.

<sup>112</sup>318 N.E.2d 568 (Ind. Ct. App. 1974).



those claiming through the lessor, consented to improvements on the land contracted for by the tenant. The defendants answered that the mechanic had contracted with the tenant without their knowledge or consent. The trial court granted the defendants' motion for summary judgment. The appellate court remanded the case upon finding sufficient evidence from testimony and the terms of the lease to show the defendants' active consent in making the improvements. The active consent bound the landlords, their vendees, and a mortgagee of the vendees.<sup>113</sup>

In *O'Hara v. Architects Hartung & Association*,<sup>114</sup> defendant O'Hara authorized an architect to prepare plans for an apartment to be built on land sold to the defendant Wickes. Wickes paid part of the architect's fees. Although the apartment was never built, the court held that the architect could foreclose a lien on defendant Wickes' land for the balance of his fees. The court found evidence which would support the finding of a joint venture between O'Hara and Wickes, but it based its decision upon a determination that Wickes' partial payment constituted sufficient active consent to support a mechanic's lien.

Title lawyers should be alerted to the fact, as illustrated by *O'Hara*, that a mechanic's lien relates "to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery."<sup>115</sup> Hence, an architect's lien may not appear for months or years either in the records or through notice imparted from actual physical construction. *O'Hara*, therefore, is of dubious precedent as against bona fide purchasers of real estate before either construction is commenced or notice of the architect's mechanic's lien is recorded.<sup>116</sup>

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<sup>113</sup>Although the sequence of ownership did not clearly appear from the facts, it seems that if the evidence established that the tenant's improvements were made with the active assent of his landlord, the subsequent vendees of the landlord and their mortgagee would be bound by the lien incurred by the tenant. This result is supported by Indiana Code section 32-8-3-5, which provides that the lien relates back to the time the work of the mechanic commenced. Hence the court of appeals could have granted partial summary judgment against the landlord's vendees and the vendees' mortgagee, conditioned upon proof that the landlord was bound by active assent. *Cf. Mark v. Murphy*, 76 Ind. 534 (1881).

<sup>114</sup>326 N.E.2d 283 (Ind. Ct. App. 1975). Special legislation gives architects, engineers, and surveyors rights to a mechanic's lien. *See, e.g., IND. CODE* § 32-8-25-1 (Burns 1973).

<sup>115</sup>IND. CODE § 32-8-3-5 (Burns 1973).

<sup>116</sup>Thus, if *O* contracts with a mechanic for improvements and work is commenced on June 1, and *O* sells or mortgages the property on June 2, the mechanic will take priority over *O*'s vendee or mortgagee even if his mechanic's lien is recorded after the vendee or mortgagee perfects. *Mark v. Murphy*, 76 Ind. 534 (1881); *Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762 (1896). *O*'s vendee or mortgagee has some kind of notice from the commencement of

Under the Indiana mechanics' lien statutes, notice of a mechanic's lien must be recorded within 60 days. This requirement traditionally has been construed as requiring recordation within 60 days after the mechanic last furnishes work, labor, or machinery for which the lien is claimed to the owner or contractor.<sup>117</sup> When the owner calls back the mechanic to make corrective work, the time period for recordation commences from the point at which the mechanic completes the corrective work.<sup>118</sup> Additional performance added under a new or separate contract does not extend the time period for work done under the old contract.<sup>119</sup>

*Potter v. Cline*<sup>120</sup> reaffirmed these principles. The contractor had completed initial "rough in" work under one of several electrical contracts with the defendant corporation, but he had not finished the job because the corporation had delayed 9 months in having certain necessary devices installed. When the defendant finally called the contractor back to work, his workmen were committed to other projects. The parties agreed, therefore, that the contractor would deliver to the defendant the remainder of the materials in his possession to enable another contractor to finish the job. Following the delivery, the plaintiff-contractor filed notice of a mechanic's lien for all the labor and materials supplied under the various contracts. In a suit to foreclose these liens, the court held that, while the time for filing his liens had expired as to the previous contracts, the filing period for the last contract commenced after the materials ultimately were furnished. This case stands as a warning to mechanics where their work with an owner or prime contractor is spread out over a period of the time under different or separate contracts. The time for recordation relates to the time of completion as to each job. But when completion is delayed on a single contract and continued with

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the construction. But if the mere contracting with an architect is the key point at which the lien attaches, subsequent vendees and purchasers of O have no means of learning of the architect's lien.

<sup>117</sup>IND. CODE § 32-8-3-3 (Burns 1973); *Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973).

<sup>118</sup>Where defective work of the mechanic is corrected at the request of the owner, the time for recordation commences from the time the corrective work is completed. *Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762 (1896). The contractor cannot extend the time of recordation by voluntarily correcting defects. *Ellis v. Auch*, 124 Ind. App. 454, 118 N.E.2d 809 (1954).

<sup>119</sup>*Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973), holds that recordation of a single notice as to two separate contracts, one with the owner and one with the prime contractor, was proper, but the time for recordation was computed separately from the time of completion as to each contract.

<sup>120</sup>316 N.E.2d 422 (Ind. Ct. App. 1974).

the owner's assent or approval, the time for recordation relates to the time when the continued performance is finished.<sup>121</sup>

*Potter* also followed the established rule that the holder of any interest in or claim to land including a mere possessor or a purchaser under a conditional sales contract may bind his interest in land to a mechanic's lien<sup>122</sup> and that his interest in the land may be sold on foreclosure of the lien.<sup>123</sup> Although not raised in *Potter*, an interesting and important issue was raised by the position taken by the conditional purchaser that only a "freehold" interest may be foreclosed and the equally untenable position of the dissent that only a defined "lienable title" may be ordered sold.<sup>124</sup>

Suppose that *D*, a stranger to *O* who is the absolute owner of vacant land, orders work or materials for the property from *M* without informing *M* that *D* owns no title or is unauthorized

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<sup>121</sup>This does not mean that problems have been settled as to when performance upon a particular construction contract is completed. Completion date undoubtedly will remain a matter to be determined by the contract and the facts of each case. An unrevoked termination of the contract by the owner or prime contractor probably would determine the time of completion as to the mechanic. Suppose that after work is completed a subcontractor is directed to correct defective work by the prime contractor without the owner's assent? The time for recording notice of the lien is not extended as to the owner. *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202, 65 N.E. 583 (1903).

<sup>122</sup>Although it is not clear from the *Potter* opinion, it appears that the defendant, against whom a mechanic's lien was asserted, admitted in its pleadings that it was a contract purchaser of a part of the land. There was also evidence that the defendant was in possession of the property. Answers to interrogatories established that the defendant was a contract purchaser, but these were not admitted into evidence. The court properly indicated that disciplinary action may be in order for attorneys representing a defendant who filed pleadings denying title, if in fact they were aware of the defendant's ownership.

<sup>123</sup>A similar result to the effect that any interest in realty is subject to a mechanic's lien was reached in *Dallas Co. v. William Tobias Studio, Inc.*, 318 N.E.2d 568 (Ind. Ct. App. 1974). See also *Koehring v. Bowman*, 194 Ind. 433, 142 N.E. 117 (1924) (reaching a similar result as to the interest of a lessee); *Kendall Lumber & Coal Co. v. Roman*, 120 Ind. App. 368, 91 N.E.2d 187 (1950) (interest of a conditional purchaser subject to a mechanic's lien and foreclosure); *Robertson v. Sertell*, 88 Ind. App. 591, 161 N.E. 669 (1923) (lessee's title prohibiting mechanic's lien not available to the lessee).

<sup>124</sup>The dissent would have required proof of a "lienable title" in the fear that the decree would impair titles of those who were not made parties. This argument was adequately refuted by the majority's discussion of interests subject to a mechanic's lien, and even if not, it is unthinkable that the existence of a stranger's title should be litigated when he is not a party. The defendant worrying about the stranger's title should have vouched him in as a party. Compare IND. CODE § 26-1-3-306(d) (Burns 1974), which allows an obligor to set up claims of nonholders only when they defend the action except in cases of theft or inconsistency with a restrictive indorsement.

by *O* to procure the work. *M* duly records a mechanic's lien on the property. What are *M*'s rights as against *D*, assuming that he has none against *O*? *D*, of course, may be held for the price under his contract with *M*, but since *M* has no lien he cannot recover attorney's fees as allowed by the mechanics' lien statute.<sup>125</sup>

Clearly if *D* is in possession or claims possession, which he certainly does as far as *M* is concerned, *D* has possessory title,<sup>126</sup> which should be sufficient to permit the mechanic's lien to attach and to be foreclosed for whatever that possessory right is worth.<sup>127</sup> But if *D*'s title is worthless, should not *D* be held to an implied warranty, either of title to the land or of authority to bind the owner, *O*? If so, what are *M*'s damages? It seems logical that *M* should be able to claim protection of an implied warranty of title unless he was informed of *O*'s rights; and if *D* purported to contract on behalf of *O* without authority, *M* should be protected by the implied warranty of authority to act as *O*'s agent. A vendor contracting to sell land is bound by an implied warranty of title,<sup>128</sup> and an agent purporting to act as such is bound by an implied warranty that he is authorized by his purported principal in the transaction.<sup>129</sup> Damages for breach of warranty in either case should put *M* in the same position he would have been in had the warranties been fulfilled, and this should include the right to

<sup>125</sup>IND. CODE § 32-8-3-14 (Burns 1973). A mechanic may claim attorney's fees only for enforcement of his valid lien, and he has no right to attorney's fees to the extent of his recovery upon his contract with the owner. *Potter v. Cline*, 316 N.E.2d 422 (Ind. Ct. App. 1974).

<sup>126</sup>It is hornbook law that prior, continued possession is a sufficient title to support the common law remedies such as ejectment and trespass and proof thereof makes a prima facie case as against a wrongdoer. *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236 (1879). Proof of title for almost all conceivable remedies in the great majority of cases is based upon prior possession or constructive possession linked to a prior possession. Constructive possession is established by

- (a) estoppel (as where a tenant is estopped to deny the title of his landlord at the end of the term),
- (b) the common source rule (*i.e.*, parties claiming through a common source are not required or allowed to go beyond the common source in determining superiority of title and possession),
- (c) imputed possession (as where a grantee, devisee, heir, or other transferee or reversioner claiming from one in possession at the time of the transfer or reversion is deemed to continue in possession), or
- (d) color of title (as where a possessor in part of a tract of land under color of title to the whole is deemed to possess the whole).

<sup>127</sup>*Potter v. Cline*, 316 N.E.2d 422 (Ind. Ct. App. 1974) (possession sufficient title upon which a mechanic's lien could be based).

<sup>128</sup>*Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N.E. 808 (1893).

<sup>129</sup>In Indiana an agent acting without authority becomes a principal in the transaction. *Terwilliger v. Murphy*, 104 Ind. 32, 3 N.E. 404 (1885).

attorney's fees which would have been recoverable had the mechanic's lien been allowed to stand against O's good title.<sup>130</sup>

### 6. *Fraudulent Conveyances*

Further development of the law giving rights to creditors against the supplier of a trade name when credit is advanced to the operator of a business carried on under the trade name<sup>131</sup> was enunciated in *Sheraton Corp. of America v. Kingsford Packing Co.*<sup>132</sup> In *Kingsford* the court permitted a meat supplier who advanced credit to a hotel to collect from the franchisor who managed the hotel for another owner but under the trade name of the franchisor. Since recovery was allowed on the basis of estoppel, the creditor could recover from the franchisor only upon proof that the franchisor created an appearance of authority in the franchisee and that the creditor advanced credit upon the representation without knowledge of the true facts. The appearance of authority was inferred from the terms of the franchise agreement requiring the franchisee to carry on its business under the trade name of the franchisor. Reliance was proved from billings submitted by the creditor over a period of time naming the franchisor as debtor.<sup>133</sup>

In *Abrahamson v. Levin*<sup>134</sup> the Indiana Court of Appeals continued to countenance a form of corporate thievery<sup>135</sup> by permitting

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<sup>130</sup>*Compare* *Teague v. Whaley*, 20 Ind. App. 26, 30, 50 N.E. 41 (1898) (convenantee defending title allowed recovery of attorney's fees), *with* *Detroit Fidelity & Sur. Co. v. Frey*, 96 Ind. App. 696, 158 N.E. 910 (1927) (surety on contractor's bond liable for attorney's fees incurred by owner in defending action to foreclose mechanic's lien). Unlike common law restrictions upon express warranties of title recognized in real estate conveyances, the beneficiary of contract warranties is allowed damages measured by the loss of bargain. *Foster v. Klinger*, 92 Ind. App. 700, 175 N.E. 136 (1931); *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N.E. 808 (1893). Damages may be recovered for breach of the agent's implied warranty of authority. W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 124(F), at 216 (1964).

<sup>131</sup>Creditors continuing to supply credit to the purchaser of a business who continued to operate under the seller's trade name were allowed to recover from the seller in *Meggs v. Central Supply Co.*, 307 N.E.2d 288 (Ind. Ct. App. 1974), *discussed in* *Townsend, Secured Transactions and Creditors' Rights, 1974 Survey of Indiana Law*, 8 IND. L. REV. 234, 253 (1974).

<sup>132</sup>319 N.E.2d 852 (Ind. Ct. App. 1974).

<sup>133</sup>Failure of the franchisee to record its assumed name with the secretary of state was considered an important factor in charging the franchisor with fault. *See* IND. CODE §§ 23-15-1-1, -3 (Burns 1973).

<sup>134</sup>319 N.E.2d 351 (Ind. Ct. App. 1975).

<sup>135</sup>In the earlier case of *Rochester Capital Leasing Corp. v. McCracken*, 295 N.E.2d 375 (Ind. Ct. App. 1973), the court adopted a rule to the apparent effect that it is proper for a corporate president to steal small amounts—in this case to use corporate funds to pay his housekeeper.

an insolvent corporation to prefer corporate officers who were also general creditors of the corporation to the exclusion of other general creditors.<sup>136</sup> The holding in *Abrahamson* was based upon a long line of Indiana decisions rejecting the "trust fund"<sup>137</sup> theory of corporate responsibility. The court's position has no appeal to this writer. The legal recognition of the concept of good faith in all types of corporate business dealings is long overdue.<sup>138</sup>

### 7. Miscellaneous

In an important decision, the United States District Court for the Northern District of Indiana in *Allen v. Beneficial Finance Co.*<sup>139</sup> found that the truth in lending disclosure statement used by a large finance company lacked meaningful sequence because information was interposed at random and in three or more columns.<sup>140</sup> The form set forth as an exhibit to the opinion amply supports the court's observation that the helter skelter information therein "effectively masks" information the Truth in Lending Act sought to make more available to the consumer.

Recent amendments to Regulation Z of the Federal Reserve Board exclude from the disclosure requirements of the Federal Truth in Lending Act all consumer credit transactions for agricultural purposes in excess of \$25,000, including transactions secured by interests in land.<sup>141</sup> The 1975 Indiana General Assembly modi-

<sup>136</sup>The creditors seeking to avoid the preference did not seek the appointment of a receiver, a factor which may have influenced the court in denying relief inasmuch as no forum for adjusting equities among all creditors was provided. A statute prohibiting preferences to directors who are sureties on obligations of the corporation was held inapplicable to corporate officers who were not directors and sureties. IND. CODE § 32-12-1-1 (Burns 1973), construed in *Travis v. Porter*, 86 Ind. App. 369, 158 N.E. 234 (1927). This statute has been held constitutional under an attack that since it was included in a statute relating to assignments for the benefit of creditors it violated the single subject requirement for legislation under the Indiana Constitution. *Vale v. Gary Nat'l Bank*, 406 F.2d 39 (7th Cir. 1969).

<sup>137</sup>The "trust fund" theory of corporate preferences provides that the directors of a corporation hold corporate property in trust for the corporate creditors. See *Nappanee Canning Co. v. Reid, Murdoch & Co.*, 159 Ind. 614, 64 N.E. 870 (1902); *Fricke v. Angemeier*, 53 Ind. App. 140, 101 N.E. 329 (1912).

<sup>138</sup>*Tower Recreation, Inc. v. Beard*, 141 Ind. App. 649, 231 N.E.2d 154 (1968) (court repeats several times in opinion that corporate officers are bound to act in "good faith").

<sup>139</sup>393 F. Supp. 1382 (N.D. Ind. 1975).

<sup>140</sup>Accord, *Woods v. Beneficial Fin. Co.*, 395 F. Supp. 9 (D. Ore. 1975). The *Woods* Court reached the same conclusion as to a similar disclosure statement and also allowed recovery of the maximum penalty provided by statute.

<sup>141</sup>40 Fed. Reg. 30,085 (1975). Excluded also are non-real-estate credit transactions over \$25,000.

fied the disclosure provisions of the UCCC to bring it in line with the federal regulations on this point.<sup>142</sup> Companion legislation to the UCCC defines the closing costs allowed as "additional charges" with respect to loans secured by an interest in land.<sup>143</sup> Permitted are fees for title examination, abstracts, title insurance, and surveys; charges for preparation of deeds and settlement statements; escrow deposits for payment of taxes, insurance, and land rents; and notary and appraisal fees subject to specified limitations.<sup>144</sup>

Finally, in *Mishawaka Federal Savings & Loan Association v. Brademas*,<sup>145</sup> the court held that a mortgage created an easement, and when recorded the mortgage was effective to put subsequent purchasers on notice of the easement. The mortgage described the easement as a "right-of-way and easement for ingress and egress across that real estate paved with a blacktop pavement."<sup>146</sup> The easement and the servient estate were described only by identification of a driveway as a monument with reference to the dominant estate.<sup>147</sup> The granting clause of the mortgage creating the easement in favor of the mortgagee purported to bind the owner of the servient estate in its own behalf and as a general partner of the mortgagor-owner of the dominant estate. The court held that the instrument was properly executed and acknowledged, and therefore legally recorded, although it was signed and acknowledged by the servient owner and two of its general partners who signed in that capacity. The case clearly establishes that a conveyance purporting to bind a partnership in the granting clause prima facie is properly executed and acknowledged if it is signed and acknowledged by a general partner so long as the capacity in which the partner signs is indicated.<sup>148</sup>

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<sup>142</sup>IND. CODE § 24-4.5-3-301 (Burns Supp. 1975). Agricultural loans under \$25,000 remain subject to the other provisions of the UCCC except where specifically excluded. *Id.* §§ 24-4.5-2-104(c), -3-104(b) (Burns 1973).

<sup>143</sup>*Id.* § 24-4.5-3-202(d) (Burns Supp. 1975). This provision follows closely the Federal Truth in Lending Act, which also allows such additional charges. 15 U.S.C. § 1605(e) (1970); Regulation Z, 12 C.F.R. § 226.4(2) (1975).

<sup>144</sup>Advance disclosure of settlement costs is required under the Real Estate Settlement Procedures Act of 1974. 12 U.S.C.A. §§ 2601-2616 (Supp. 1, 1975). The accompanying regulations took effect in June 1975. 40 Fed. Reg. 22,449-58 (1975). For a discussion of this Act see Suess, *supra* at pp. 299-305.

<sup>145</sup>319 N.E.2d 674 (Ind. Ct. App. 1974).

<sup>146</sup>*Id.* at 676.

<sup>147</sup>A conveyance creating a right-of-way or easement should describe the easement as well as the dominant estate. *Lennertz v. Yohn*, 118 Ind. App. 443, 79 N.E.2d 414 (1948).

<sup>148</sup>IND. CODE § 23-4-1-9(1) (Burns 1972) (taken from the Uniform Partnership Act), was cited by the court as giving a general partner apparent authority to bind the partnership for "apparently carrying on in the usual way the business of the partnership." 319 N.E.2d at 677.