

above,⁷⁶ the new law also provides a presumption that all joint accounts are intended to have the survivorship characteristics set forth in the statute.⁷⁷ In keeping with the apparent intent of the courts in *Fanning* and *Robison*, the Act specifically allows such accounts as exceptions to the wills statutes;⁷⁸ however, donee-beneficiaries are not allowed to retain the funds as against the "claims, taxes, and expenses of administration, including the statutory allowance to the surviving spouse or dependent children," to the extent of the donee-beneficiary's gain and the insufficiency of estate assets.⁷⁹

XVI. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

A. Recording Statutes: Recording Contracts Affecting Persons Tapping into Municipal Sewers

Legislation permits owners and developers of land outside a municipality to connect to municipal sewers by contract binding the owners and their successors to pay a fair pro rata share of the cost of the sewer when they tap into the line.¹ This statute requires that the contract include a provision binding owners and their successors to an agreement not to remonstrate against annexation. However, an owner will not be bound unless the contract is recorded in the real estate records before he taps into the line.²

A recent Indiana Court of Appeals decision³ holds that recording of a contract between the municipality and the developer's contractor (who was not a record owner of the land) is ineffective

⁷⁶*Id.* §§ 32-4-1.5-3(a) and -4(a).

⁷⁷*Id.* § 32-4-1.5-1(4) provides that "joint account" means an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.

⁷⁸*Id.* §§ 32-4-1.5-6 and -14.

⁷⁹*Id.* § 32-4-1.5-7.

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¹IND. CODE § 19-2-7-16 (Burns 1974).

²*Id.* Such recorded contracts will bind owners and their successors. *Doan v. City of Fort Wayne*, 253 Ind. 131, 252 N.E.2d 415 (1969).

³*Residents of Green Springs Valley Subdivision v. Town of Newburgh*, 344 N.E.2d 312 (Ind. Ct. App. 1976).

as constructive notice to bind purchasers from the original developer who had tapped into the sewer unless the contract was recorded within the purchaser's chain of title. The original owner of the land was a developer who contracted with his contractor for construction in his development of a sewer which was to be attached to the municipal sewer system. The contract waived the right to remonstrate by the developer, his successors, and all owners who tapped into the sewer. The contractor then contracted with the municipality to hook on to the latter's sewer and this second contract also required all owners who tapped into the sewer to waive the right to remonstrate. The second contract, which identified and described the developer and the property to be serviced by the sewer, was recorded. Based upon the conflicting testimony of title lawyers⁴ as to whether or not the recorded contract was linked to the record owners of the land (in this case the developer), summary judgment in the court below was reversed. The First District Court of Appeals held that a material issue of fact existed as to whether purchasers from the developer who had tapped into the sewer after the contract was recorded were charged with constructive notice of, and bound by, the waiver found in the contract. The case was sent back for trial to determine whether the recorded contract was within the record chain of title through which the remonstrators claimed.

The opinion follows established law to the effect that transfers by persons outside the record chain of title (before they acquire record title, or after they have disposed of title on record) are not constructive notice to subsequent purchasers of the real estate.⁵ However, the court rejected application in this situation of equally clear law that purchasers claiming the right to use an unrecorded easement or other interest in land (in this case the interest would have been a sewer easement) are charged with all limitations upon that interest which inquiry to the servient owner (in this case the municipality) would have disclosed.⁶ Like

⁴On the admission of expert testimony about the effect of recordation, the case was clearly in error. When an instrument in unrecordable form is spread of record, it is not constructive notice to purchasers. *See, e.g., Bledsoe v. Ross*, 59 Ind. App. 609, 109 N.E. 53 (1915).

⁵*Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N.E. 37 (1912); *Corbin v. Sullivan*, 47 Ind. 356 (1874).

⁶A grantee claiming under a recorded or unrecorded instrument of transfer is charged with notice of all reserved or excepted interests. *Wiseman v. Hutchinson*, 20 Ind. 40 (1863); *Larrance v. Lewis*, 51 Ind. App. 1, 98 N.E. 892 (1912) (purchaser under improperly recorded deed required to take notice of recital reserving timber in grantor). This rule applies to transferees of the dominant owner of an easement. *Spencer Stone Co. v. Sedwick*, 58 Ind.

most recording statutes, the recording provision involved in this case was silent as to the circumstances under which owners would be protected by the failure to record.⁷ The effect of actual knowledge or notice from other sources is not considered in the statute, nor is there a provision requiring a description of the land or the names under which the contract should be indexed. The decision of the court of appeals makes it clear that the public is not charged with constructive notice of restrictions and burdens attached to the use of public sewers emanating from contracts with developers, unless the contract describing or identifying the property is recorded under the name of the record owner as of the time of recordation. It seems that a contract between a municipality and a non-record owner will not suffice unless the contract describes the property, clearly identifies the record owner as such by name, and refers to the fact that it is made pursuant to an authorizing contract with the record owner. These elements must be sufficiently stated to put a purchaser on notice that he is linked by privity through binding contracts with a record owner. The contract should be indexed under the name of the record owner or grantor. In no event should the question depend upon the varying opinions of title lawyers as to the circumstances under which the link to the record owner is sufficient.⁸ The case indicates, however, that purchasers with actual knowledge of the contracts purporting to bind them would be bound by the waiver.

B. Mortgages—Effect of Security Furnished by Third Party

A mortgagee or secured party may obtain as original or additional security a security interest in the property of a third party who, in effect, becomes a surety to the extent of the collateral furnished to secure the debtor's obligation.⁹ A novel illustration of this rule was presented by *American Savings & Loan Association v. Hoosier State Bank*.¹⁰ There, because the mortgagors had an insufficient down payment, the mortgagee took an assignment of a savings account owned by a third party as additional security

App. 64, 105 N.E. 525 (1914). Cf. *Selvia v. Reitmeyer*, 295 N.E.2d 869 (Ind. Ct. App. 1973).

⁷IND. CODE § 19-2-7-16 (Burns 1974).

⁸See note 4 *supra*.

⁹See, e.g., *Owen County State Bank v. Guard*, 217 Ind. 75, 26 N.E.2d 395 (1940) (wife furnished a certificate of deposit as security for a loan to the husband's corporation; as surety, she was released by failure of bank to exercise setoff); *Damler v. Baine*, 114 Ind. App. 534, 51 N.E.2d 885 (1943) (stock of a third party was pledged as security for principal; when it was sold, the third party as surety recovered reimbursement from the principal).

¹⁰337 N.E.2d 486 (Ind. Ct. App. 1975).

for a loan. In a foreclosure action upon the mortgage, the third party sought recovery of the savings account based upon the condition that it should not be subject to withdrawal until the mortgage was reduced below a certain amount. Because conflicting evidence was produced as to whether payments had reduced the loan below the specified amount, a finding in favor of the third party was upheld.

C. Foreclosure Procedures—Real Estate

1. Mortgage Foreclosure

On judicial foreclosure a debtor who has given a lien or mortgage upon real estate is allowed a statutory period of redemption. He is permitted to continue in possession and foreclosure sale is forbidden until a period of time after the filing of the complaint for foreclosure.¹¹ For mortgages executed after July 1, 1975, the period is three months; for non-mortgage liens and for mortgages executed after January 1, 1958, the period is six months; other periods are fixed by statute for mortgages executed on prior dates.¹² Suppose that the court with jurisdiction in a foreclosure action orders a sale and it is held before the period of redemption has expired. After the time for appeal has passed, may the order or the sale be challenged? *Indiana Suburban Sewers, Inc. v. Hanson*¹³ properly held that this is a collateral attack on the judgment. The order or a sale under it may be challenged only on grounds enumerated in Trial Rule 60(B).¹⁴

An interesting problem sometimes arises as to what interest of a debtor and other owners is acquired by the purchaser upon a foreclosure or at a tax or judicial sale. Although the doctrine of

¹¹IND. CODE § 32-8-16-1 (Burns Supp. 1976); IND. R. TR. P. 69(A), (C). Trial Rule 69(A) is applicable only to enforcement of judgments which were not secured by lien prior to judgment. The rule allows a six-month redemption period from the time a judgment or decree becomes a lien upon real estate. Trial Rule 69(C) makes procedures for foreclosure of all liens on real estate subject to the rules governing foreclosure of mortgages. The intent was to make redemption periods allowed in the case of mortgage foreclosures applicable to other lien foreclosures and to adopt a similar rule for executions on real estate.

¹²Mortgages executed prior to January 1, 1958, are subject to a one-year redemption period. IND. CODE § 32-8-16-1 (Burns Supp. 1976). For a discussion of the unsatisfactory amendment to this law enacted in 1975, see Townsend, *Secured Transactions and Creditors' Rights, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305, 309-11 (1975).

¹³334 N.E.2d 720 (Ind. Ct. App. 1975).

¹⁴IND. R. TR. P. 60(B) provides special circumstances for relief from a final judgment or order.

caveat emptor applies in the case of most forced sales,¹⁵ several Indiana decisions hold that the burdens and rights under restrictive covenants pass to the purchaser at the sale.¹⁶ In *Indiana Suburban Sewers, Inc. v. Hanson*,¹⁷ the court held that the purchaser at a foreclosure sale became the owner of the public utility's certificate of authority as well as its physical property, notwithstanding the fact that the buyer was not qualified to exercise the certificate. In *Budnick v. Indiana National Bank*,¹⁸ a tax sale of land upon which a pipeline easement was located did not pass the title free of the encumbrance, even though the pipeline was taxed separately. However, it was held that the buyer at the tax sale acquired rights to a payment due under the recorded easement for a second pipeline which had been laid over the easement after the tax lien attached, even though the taxpayers had previously been paid. Public utilities acquiring easement rights thus must make certain that the acquisition price is applied first to tax liens before the funds are paid over to the servient owner.¹⁹

2. Conditional Sales Contracts

In light of *Skendzel v. Marshall*,²⁰ it is now clearly established that when a vendee in possession of the property has obligated himself under a conditional land sales contract to pay the purchase price in installments, the vendor cannot declare a forfeiture upon

¹⁵*Parker v. Rodman*, 84 Ind. 256 (1882) (mortgagor's warranty of title did not extend to stranger who purchased). If there is a total failure of title, the purchaser is subrogated to the rights of the lienholder or creditor who is paid from the proceeds of the sale. *Weaver v. Guyer*, 59 Ind. 195 (1877). See IND. CODE § 34-1-67-4 (Burns 1973).

¹⁶*Lake Erie & W.R.R. v. Priest*, 131 Ind. 413, 31 N.E. 77 (1891) (purchaser bound by covenant to maintain fence); *Midland Ry. v. Fisher*, 125 Ind. 19, 24 N.E. 756 (1890) (purchaser bound to build fence); *Hickam v. Golladay*, 83 Ind. App. 569, 149 N.E. 375 (1925) (reservation of right of way on foreclosed property is preserved to mortgagor).

¹⁷334 N.E.2d 720 (Ind. Ct. App. 1975).

¹⁸333 N.E.2d 131 (Ind. Ct. App. 1975).

¹⁹It seems, therefore, that from the time of payment the easement becomes taxable to the utility, and the taxable value to the servient owner is reduced. In this connection, see *Board of Comm'rs v. Midwest Associates, Inc.*, 253 Ind. 551, 255 N.E.2d 807 (1970), holding that the interest of a vendee under a contract to purchase land from an owner not subject to taxation (the United States) is taxable.

²⁰261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974). See also *Townsend, Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 236-39 (1974). On writ of mandate, the Indiana Supreme Court in this case upheld the final decree of the lower court which on remand allowed the vendors their claim for payment of delinquent taxes and a \$1,000 attorney fee. 330 N.E.2d 747 (Ind. 1975).

default, notwithstanding a provision in the contract giving him that right. Ordinarily, the vendor must proceed by judicial foreclosure. This principle was acknowledged if not applied in *Pierce v. Yochum*,²¹ in which a contract buyer's default upon annual payments for a farm led the vendor to seek ejectment and damages. The court upheld a "negative judgment" and refused to permit foreclosure for the vendors because delinquent payment of installments and taxes (grounds under the contract for default at the option of the vendor) previously had been accepted. Vendor's conduct constituted a waiver of the option until such time as the vendee was given notice of vendor's intent to declare a default unless delinquencies were made up within a reasonable time. In *Pierce* such notice had not been given.²² Interestingly, the vendor claimed that under the following contract provision the parties' past conduct could not amount to such a waiver: "The failure of the Sellers to exercise any option herein granted them upon any given default of the Buyers shall not constitute a waiver of their rights to exercise said option or options . . ."²³ The appeals court applied a literal construction to this anti-waiver provision, and held that while the vendor's acceptance of delinquent payments would not constitute a waiver of later options, it did constitute a waiver of the option to declare earlier defaults. Probably a better basis for throwing such provisions out is that, as in the case of all waivable provisions in a contract, an anti-waiver provision also may be waived.²⁴ On the other hand, in *Donaldson v. Sellmer*,²⁵ the First District Court of Appeals upheld a decree cancelling a conditional sales contract without judicial foreclosure sale in a case in which the vendee had paid approximately \$7,000 on a \$16,500 contract. The court found the vendee in default under his contract because of delinquent installments, waste totaling \$11,000, failure to acquire adequate insurance, contracting to sell the property without the written consent of the vendor, and abandonment of the property. The court also awarded the vendor an affirmative judgment based upon the difference between the \$11,000 waste and the amount paid by the vendee on the contract. If any facts would

²¹330 N.E.2d 102 (Ind. Ct. App. 1975).

²²See also *Universal C.I.T. Credit Corp. v. Shepler*, 329 N.E.2d 620 (Ind. Ct. App. 1975), in which acceptance of late payments as constituting waiver of the right to accelerate or declare default is considered. This case is discussed in text accompanying note 51 *infra*.

²³330 N.E.2d at 110.

²⁴Compare *Foltz v. Evans*, 113 Ind. App. 596, 613, 49 N.E.2d 358, 365 (1943) ("It is well settled that a contract stipulating that any modification must be in writing may nevertheless be modified verbally . . ."); 17A C.J.S. *Contracts* § 377(C) (1963).

²⁵333 N.E.2d 862 (Ind. Ct. App. 1975).

justify strict foreclosure under the qualifications recognized by the *Skendzel* case,²⁶ evidence offered in support of forfeiture in this decision would certainly qualify.

*D. Perfection of Security Interests Under the
Uniform Commercial Code*

How does a secured party perfect a security interest in a mobile home? If a mobile home is consumer goods he may file in the county of the debtor's residence;²⁷ if it is a fixture he may file in the fixture file of the county where the land is located;²⁸ if it is inventory he may file with the Secretary of State;²⁹ and if it is a motor vehicle he may perfect on the certificate of title.³⁰ In order to be safe, the secured party may be well advised to perfect in each of these ways. The court of appeals avoided a thorough consideration of the problem in *Nicholson's Mobile Homes Sales, Inc. v. Schramm*,³¹ in which a seller took a purchase money security interest in a number of mobile homes from a debtor who placed them in space leased in a mobile home park. By definition, property held for lease is "inventory";³² thus the court determined that the secured party was required to perfect by filing a financing statement with the Secretary of State. The court failed to consider whether a mobile home is a "motor vehicle" under the Code. A lien on a "motor vehicle" must be noted on the title by a public official except in the case of "inventory held for sale."³³ The mobile home held for *leasing* hardly seems to be inventory held for *sale*. The court also failed to observe that the mobile home was placed upon

²⁶*Skendzel* limits forfeiture of land sale contracts to a few specific factual situations. Forfeiture is appropriate in the case of an abandoning absconding vendee, or when the vendee has paid only a minimal amount on the contract at the time of default and seeks to retain possession while the vendor is paying taxes, insurance and other upkeep of the premises. 261 Ind. at 240-41, 301 N.E.2d at 650.

²⁷IND. CODE § 26-1-9-401(1)(a) (Burns 1974). If purchase money security is involved, no filing is required subject to limited protection. *Compare id.* § 26-1-9-301(1)(d) *with id.* § 26-1-9-307(2).

²⁸*Id.* § 26-1-9-401(1)(b).

²⁹*Id.* § 26-1-9-401(e). *Cf.* *Taylor Mobile Homes v. Founder Inv. Corp.*, 238 So. 2d 116 (Fla. App. 1970).

³⁰IND. CODE § 26-1-9-302(3)(b), (4) (Burns 1974) (applicable "if a certificate of title is required under the statutes of this state . . .").

³¹330 N.E.2d 785 (Ind. Ct. App. 1975).

³²IND. CODE § 26-1-9-109(4) (Burns 1974).

³³*Id.* § 26-1-9-302(3)(b). The Indiana Certificate of Title law applies to "any motor vehicle, semitrailer or house car." *Id.* § 9-1-2-1 (Burns 1973). *Compare id.* § 9-1-1-2 (excluding trailers from the definition of "motor vehicle").

leased space, thus raising an issue as to whether it was a fixture.³⁴ Because of these omissions, the decision is of little aid to the mobile home financing industry. It would be wise when the vehicle is not held as inventory to perfect by local filing both as a fixture and as consumer goods, and also by official notation upon the certificate of title. Since the practice is to deal with mobile homes through the certificate of title, the industry as well as owners would be greatly benefited by a rule requiring perfection on the certificate of title.³⁵

E. Equipment Leases

There are advantages (and disadvantages) to the lease of equipment as distinguished from straight purchase or purchase with a security agreement securing the price.³⁶ The law governing the creation and regulation of these relationships often differs, for reasons which are technical rather than based upon analogy and sound legal reasoning.³⁷ An illustration of the advantages and disadvantages involved, as well as the technical differences in the law governing these relations, is *Angel v. Behnke*,³⁸ in which the court of appeals held that a lease of data processing and other equipment by a county was not subject to competitive bidding statutes which apply to "purchases." Examining a great body of disorganized legislation on competitive bidding, the court found

³⁴It has been held under pre-Code law that a mortgage on a structure added to property leased by the debtor under a lease in excess of three years is in effect a mortgage on lands. *Lincoln Nat'l Bank & Trust Co. v. Nathan*, 215 Ind. 178, 19 N.E.2d 243 (1939) (lease permitted removal of fixtures). One court found that a mobile home was a fixture. *George v. Commercial Credit Corp.*, 440 F.2d 551 (7th Cir. 1971) (mortgagee of land prevailed over trustee in bankruptcy).

³⁵*Accord*, *In re Radny*, 12 U.C.C. REP. SERV. 583 (W.D. Mich. 1973); *In re Merrill*, 9 U.C.C. REP. SERV. 755 (D. Neb. 1971); *In re Canter*, 8 U.C.C. REP. SERV. 252 (E.D. Tenn. 1970); *Recchio v. Manufacturers & Traders Trust Co.*, 316 N.Y.S.2d 915 (App. Div. 1970).

³⁶*Compare* *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 330 N.E.2d 785 (Ind. Ct. App. 1975), holding that equipment held for leasing is inventory under the Uniform Commercial Code. See IND. CODE § 26-1-9-109(4)(b) (Burns 1974), and a discussion of this case at text accompanying notes 31-35 *supra*. See also *Starke Memorial Hosp. v. Todd Equip. Leasing Co.*, 333 N.E.2d 925 (Ind. Ct. App. 1975).

³⁷*But see* *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 541 P.2d 1184 (Idaho 1975) (applying by analogy Uniform Commercial Code provisions on warranty to the commercial lease of goods).

³⁸337 N.E.2d 503 (Ind. Ct. App. 1975). The court held that a lease of equipment was not a "purchase" under the "bid" statute. IND. CODE § 5-17-1-1 (Burns 1974).

that since the bid statute which applies to state agencies³⁹ includes both the terms "rental" and "purchase" of equipment, use of the single term "purchase" in the statute applying to local government units indicated an intent, ephemeral to say the least, that this statute should not apply to lease of equipment without express language to that effect.

*F. Maturity and Discharge of Security Interests;
Subordination of Security*

Two recent decisions deal with acceleration clauses of the type commonly included in security agreements and mortgages. In *Cowan v. Murphy*⁴⁰ an installment note provided that if any payment became due or was in default for more than forty-five days "this note in its entirety shall become immediately due and payable."⁴¹ The court of appeals held that the statute of limitations began to run upon the expiration of the period after default in any installment, a result which would not have been reached had the instrument provided for optional acceleration.⁴² The case supports the generally accepted view that acceleration clauses depending upon default or other events should be couched in language making acceleration optional at the instance of the creditor, rather than providing for ipso facto acceleration. In *Universal C.I.T. Credit Corp. v. Shepler*,⁴³ the security agreement provided for acceleration without notice or demand if the holder considered the indebtedness of the collateral "insecure." As noted below,⁴⁴ the court held that such a clause must be exercised in good faith and that good faith is to be determined by an objective, "reasonable man" standard, with the debtor carrying the burden of proving the secured party's bad faith.

The duty of a subordinating secured party to preserve his security for the benefit of the subordinate was recognized by the court in *Daly v. Nau*.⁴⁵ The secured party assigned its security

³⁹IND. CODE § 4-13-2-11 (Burns 1974).

⁴⁰333 N.E.2d 802 (Ind. Ct. App. 1975). The court held that the statute of limitations begins to run as soon as any installment is in default for more than 45 days and acceptance of late payments does not operate as a waiver of a mandatory acceleration clause. On the issue of the possibility of waiver or estoppel based on acceptance of late payments, see text accompanying notes 21-26 *supra*. That partial payments after maturity may extend the statute of limitations, see IND. CODE § 34-1-2-12 (Burns 1973).

⁴¹333 N.E.2d at 803.

⁴²*Huston v. Fatka*, 30 Ind. App. 693, 66 N.E. 74 (1903).

⁴³329 N.E.2d 620 (Ind. Ct. App. 1975).

⁴⁴See discussion at text accompanying note 49 *infra*.

⁴⁵339 N.E.2d 71 (Ind. Ct. App. 1975).

interest in the debtor's assets to a third party after agreeing to subordinate its security to a creditor who loaned the debtor \$25,000. The court held that the creditor could recover from the secured party on a theory of interference with a contractual relation.⁴⁶ However, since the creditor failed to prove the value of the collateral released, the case was sent back for retrial on the issue of damages.⁴⁷

G. Remedies of a Secured Party Under Article 9 of the
Uniform Commercial Code

The right of a secured party to repossess arises only upon an event of default which must be spelled out in the security agreement and must occur before the remedy is pursued.⁴⁸ In *Universal C.I.T. Credit Corp. v. Shepler*,⁴⁹ the court recognized that when repossession occurs prior to an event of default the debtor may recover in trover the reasonable market value of the collateral at the time of the wrongful repossession plus interest and special damages if proved, and punitive damages if the repossession is oppressive.⁵⁰ Even though the security agreement makes nonpay-

⁴⁶The problem here is analogous to the situation in which a creditor releases security of the principal with respect to a surety. The surety is discharged to the extent of the value of the collateral. Compare *Crim v. Fleming*, 101 Ind. 154 (1884), with *Alsop v. Hutchings*, 25 Ind. 347 (1865) (release of security subject to marshalling by dominant lienholder released dominant lien to extent of value of the property).

⁴⁷It seems that there is a presumption that the collateral is equal to the amount of the debt and the burden of proving otherwise is upon the creditor who releases the collateral. Cf. *Mutual Benefit Life Ins. Co. v. Lindley*, 97 Ind. App. 575, 183 N.E. 127 (1933). In *Daly v. Nau* the court might well have cast the burden of proof upon the subordinating secured party since it was familiar with the collateral and related to the debtor.

⁴⁸Compare U.C.C. § 9-501(1), (2) with *id.* § 9-503.

⁴⁹329 N.E.2d 620 (Ind. Ct. App. 1975).

⁵⁰In *Lou Leventhal Auto Co. v. Munns*, 328 N.E.2d 734 (Ind. Ct. App. 1975) a secured party repossessed before default. In a replevin action the debtor recovered \$30 nominal damages and \$1500 punitive damages. In *Shepler*, the court recognized the general rule that the secured party repossessing before default is liable for the reasonable market value of the collateral at the time of the conversion. However, as observed in the concurring opinion, the amount of the indebtedness must be deducted from the award. 329 N.E.2d at 630 (Garrard, J., concurring). Accord, *Rosenzweig v. Frazer*, 82 Ind. 342 (1882); *Shortal v. Standerford*, 87 Ind. App. 167, 157 N.E. 109 (1927). See also *Cox v. Albert*, 78 Ind. 241 (1881) (holding that the debtor may recover the value of pledged collateral if converted by the pledgee and the debtor is not in default). The court in *Shepler* also recognized that the plaintiff in trover is entitled to interest upon his recovery to time of judgment. 329 N.E.2d at 624. As a general rule, the plaintiff in trover is not permitted to recover loss of use of the converted goods as an element of damages, since by

ment of installments an event of default, acceptance of late payments without giving the debtor a reasonable opportunity to bring himself current will forfeit the creditor's right to declare a default.⁵¹ Although these general principles were recognized by the *Shepler* court, an award of \$33,000 actual damages plus \$92,000 exemplary damages was reversed because the trial court failed to instruct the jury properly upon the right to repossess when the secured party deems himself insecure with respect to the debt or the collateral and the security agreement provides for that event. The Code specifies that such insecurity provisions must be exercised in good faith, but that the burden of proving bad faith is with the debtor.⁵² Although the addition of a concurring opinion clouds the precise holding, it now seems that the court will admit evidence and tender instructions in which lack of good faith⁵³ is

electing this remedy he has chosen to make the defendant a forced purchaser and is allowed only interest on the money claimed. *See, e.g.,* *Martinez v. Vigil*, 19 N. M. 306, 142 P. 920 (1914). However, the *Shepler* court recognized the Indiana rule that special damages may be awarded in trover if capable of reasonable proof. *Miller v. Long*, 126 Ind. App. 482, 131 N.E.2d 348 (1956) (plaintiff recovered for loss from flood when dam washed away because work could not be completed due to conversion of earthmoving machinery). The concurring opinion in *Shepler* indicated that the debtor could recover as special damages loss of use measured by loss of profits from an established lease of the equipment. 329 N.E.2d at 629 (Garrard, J., concurring). The concurring judge cited *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972), applying the Indiana rule in a case in which the plaintiff sought recovery alternatively for trover or breach of warranty. It seems that the court will limit the award of rental value or lost profits to the time reasonably necessary to replace the property when the suit is in trover. However, if the debtor pursues his remedy in replevin, he is entitled to reasonable rental value or loss of profits until possession is regained or until suit or judgment. *See, e.g.,* *General Motors Truck Co. v. Perry*, 99 Ind. App. 357, 192 N.E. 720 (1934); *Farrar v. Eash*, 5 Ind. App. 238, 31 N.E. 1125 (1892); *cf. Lou Leventhal Auto Co. v. Munns*, 328 N.E.2d 734 (Ind. Ct. App. 1975); *Wolff v. Slusher*, 314 N.E.2d 758 (Ind. Ct. App. 1974) (award of lost profit should be confined to loss of net profits). The lower court awarded punitive damages of \$92,000. Judge Garrard, concurring, found the award of punitive damages improper, but the majority made no finding on that issue. Punitive damages are proper in trover upon proof of malice, oppression or heedless disregard of the consequences. *See Nicholson's Mobile Home Sales, Inc. v. Schramm*, 330 N.E.2d 785 (Ind. Ct. App. 1975); *Monarch Buick Co., Inc. v. Kennedy*, 138 Ind. App. 1, 209 N.E.2d 922 (1965).

⁵¹329 N.E.2d at 627.

⁵²IND. CODE § 26-1-1-208 (Burns 1974).

⁵³"Good faith" is defined by the U.C.C. as "honesty in fact in the conduct or transaction concerned." *Id.* § 26-1-1-201(19). The court rejected a purely subjective test for determining "honesty in fact." 329 N.E.2d at 626. The concurring opinion attempted to define in general terms three situations in which a secured party or creditor acting in good faith would not accelerate the obligation because he deems himself insecure: when the insecurity clause

established by demonstrating that the secured party failed to make an honest and diligent effort to discover whether the security or debt was impaired, and that a reasonable man under the same set of circumstances, having made such an effort, would not have deemed himself insecure.

After default has occurred the secured party is permitted to repossess the collateral if he can do so without a breach of the peace.⁵⁴ Several dangers inherent in the exercise of this power were emphasized in *Nicholson's Mobile Home Sales, Inc. v. Schramm*,⁵⁵ a case in which the court determined that a junior secured party has no right to seize collateral which is in a senior lienholder's possession. The court found that the secured party's conduct—trespass upon the senior lienholder's property and assault and battery—during the course of its repossession of the collateral constituted a breach of the peace. The senior lienholder, a mobile home operator who held an artisan's lien on the collateral in his possession, was awarded punitive damages.

Once a secured party obtains possession of the collateral after default, he is permitted to dispose of it in accordance with provisions of article 9 of the Uniform Commercial Code.⁵⁶ As a general rule the UCC requires that he give notice of a sale to the debtor and conduct the sale in a commercially reasonable manner.⁵⁷ In *Magnavox Fort Wayne Employees Credit Union v. Benson*,⁵⁸ the debtor claimed that she was relieved of liability for an ensuing deficiency because the secured party had not given her notice of the sale. Although the court of appeals held that the secured party was not responsible for a sale held by an artisan to enforce his senior artisan's lien,⁵⁹ the court did not answer the question of whether a deficiency may be recovered by a secured party who

is used as an afterthought, when a reasonable man under all the circumstances known to the creditor would not have taken the action, and when a reasonable man motivated by "good faith" would not have taken the action under such circumstances without further preliminary investigation. See *Mineika v. Union Nat'l Bank*, 332 N.E.2d 504 (Ill. Ct. App. 1975) (seizure of auto in an arrest for possession of marijuana and dismissal of criminal charges did not justify acceleration).

⁵⁴IND. CODE § 26-1-9-503 (Burns 1974).

⁵⁵330 N.E.2d 785 (Ind. Ct. App. 1975). The jury in this case denied recovery to the wife for personal injuries, but awarded damages for what amounted to conversion of the property. The argument that punitive damages were improper when the defendant could be prosecuted criminally was rejected by upholding the lower court's ruling denying such an instruction to the jury.

⁵⁶IND. CODE § 26-1-9-504 (Burns 1974).

⁵⁷*Id.*

⁵⁸331 N.E. 2d 46 (Ind. Ct. App. 1975).

⁵⁹See discussion of artisans' liens *infra* at note 95.

fails to give notice to the debtor or comply with UCC provisions on resale. Two lines of authority now prevail in other jurisdictions. One holds that the noncomplying secured party cannot recover a deficiency.⁶⁰ The other allows recovery of a deficiency subject to reduction by the amount the market value of the collateral exceeded the resale price. Under this rule there is a presumption that the value of collateral is equal to the secured obligation, with the burden of proving otherwise upon the secured party.⁶¹ The UCC expressly allows the debtor equitable remedies against a threatened improper disposition of collateral and a right to recover his loss along with penalties when consumer goods are involved.⁶² However, the Code is silent as to whether a deficiency judgment will be allowed or denied when the requirements for resale are not met, and the problem remains open in Indiana.⁶³

H. Mechanics' Liens on Real Estate

A person furnishing work or materials for improvements upon real estate may secure a statutory mechanic's lien on the property under varying circumstances if notice of the lien is filed with the county recorder within sixty days after the work or materials

⁶⁰See, e.g., *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *affirmed on this point*, 335 F.2d 846 (3d Cir. 1964).

⁶¹See, e.g., *T. & W. Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (1969). Cases on the problem are collected in *United States v. Whitehouse Plastics*, 501 F.2d 692 (5th Cir. 1974). In addition to holding that the debtor has a right to defeat collection of a deficiency, all cases recognize the right of the debtor to collect damages resulting from noncompliance with resale provisions by the secured party. Under U.C.C. § 9-507 a statutory penalty is imposed when consumer goods are involved. *Walker v. V.M. Box Motor Co.*, 18 UCC REP. SERV. 1086 (Miss 1976). See Annot., 35 A.L.R.3d 1016 (1971).

⁶²U.C.C. § 9-507. This section allows recovery of "any loss" by the debtor or person entitled to notice of the sale. In the case of consumer goods, the penalty is the finance charge plus 10% of the cash price or the principal. The debtor may redeem from a purchaser at an improper sale after default unless the purchaser is protected in the case of a public sale as a purchaser without notice or in any other type of sale as a purchaser in good faith. U.C.C. § 9-504(4). See also § 9-506. It should be noted that § 9-507, giving remedies to the debtor, applies only after default. See § 9-501(1), (2), limiting part 5 of article 9 to cases in which the debtor is in default.

⁶³Pre-Code law in Indiana is not helpful on this question. See *Shortal v. Standerford*, 87 Ind. App. 167, 157 N.E. 109 (1927) (improper disposition treated as a conversion satisfying the debt "at least" to the full value of the property converted). For a general discussion of the rights of a secured party who disposes of collateral without complying with part 5 of article 9 see Henszey, *A Secured Creditor's Right to Collect a Deficiency Judgment Under UCC § 9-504: A Need to Remedy the Impasse*, 31 BUS. LAW. 2025 (1976).

are "furnished."⁶⁴ Three recent decisions have construed the statute as to when materials or work have been "furnished" for purposes of fulfilling the filing time limits. In *Stanray Corp. v. Horizon Construction, Inc.*,⁶⁵ the court of appeals reaffirmed the general rule that the mechanic supplying materials carries the burden of proving not only that the materials were sold for the purpose of being used in the particular improvement by the property owner or his representative, but that they were actually used in the project. Testimony of the owner that the materials were never ordered or used in the project and that the signature on a delivery order dated the last day for filing was not that of an authorized person supported the decision below denying a mechanic's lien, because notice was not filed within the statutory time. The court recognized, however, that the sixty-day period commences from the time of delivery and not from the time the materials were actually used in the project.⁶⁶ On the other hand, in *Van Wells v. Stanray Corp.*⁶⁷ the court of appeals recognized that a lien for delivered materials will be allowed when the materialman deals directly with the property owner who orders them for the project even though they are not actually used in the improvement.⁶⁸ This rule is based upon a theory of estoppel. The court also applied the rebuttable presumption that goods ordered for a particular project by an authorized individual and delivered to that project are actually used in the construction and the lien was allowed without proof that the materials delivered within sixty days before filing were, in fact, used. In *Gooch v. Hiatt*,⁶⁹ the court of appeals held that the sixty-day period for filing commenced from the time of corrective work done in good faith at the request of an owner who had not fully paid the contractor. In this case repairs were made upon a furnace and heating system some seven months after the construction was otherwise completed. The filing made within sixty days after completion of the repair was held sufficient.⁷⁰

⁶⁴IND. CODE § 32-8-3-1 (Burns 1973).

⁶⁵342 N.E.2d 645 (Ind. Ct. App. 1976).

⁶⁶*Foster Lumber Co. v. Sigma Chi Chapter House*, 49 Ind. App. 528, 97 N.E. 801 (1912).

⁶⁷341 N.E.2d 198 (Ind. Ct. App. 1976).

⁶⁸The court did not actually apply the rule here, because the property had been conveyed successively to two straw owners during the process of construction.

⁶⁹337 N.E.2d 585 (Ind. Ct. App. 1975).

⁷⁰*Accord, Potter v. Cline*, 316 N.E.2d 422 (Ind. Ct. App. 1974), discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1975 Survey of Recent Developments in Indiana Law, 9 IND. L. REV. 305, 330 (1975).

While a mechanic's lien may not be asserted against the owner unless he or his authorized agent has contracted for the work, the lien may be claimed on a theory of unjust enrichment when work under an invalid or indefinite express contract is performed at the owner's request or allowed to continue with his assent.⁷¹ The rule was applied by the trial court in *Marshall v. Ahrendt*,⁷² where the contractor, proceeding under what was determined to be an indefinite contract, was allowed to recover in unjust enrichment without regard to the alleged terms of an oral contract. The court of appeals, however, ordered entry of judgment upon uncontradicted evidence supporting the owner's counterclaim for damages resulting from a leaky roof.

*Glick v. Seufert Construction & Supply Co.*⁷³ made it clear that a subcontractor engaged by a prime contractor may not hold the owner upon a theory of unjust enrichment (although in a proper case, he may assert a mechanic's lien against the owner's property) without substantial proof of a direct, unqualified request to perform from the owner.⁷⁴ In *Glick* the sub was induced by the owner to continue performance after the prime had defaulted and abandoned the work. The trial court denied the quasi contractual recovery sought by the sub against the owner. The court of appeals affirmed the decision, noting that since the owner had paid the defaulting prime contractor who had engaged the sub, there was no unjust enrichment. To the dissenting judge and this writer the evidence without conflict established an undertaking by the owner to see that the sub was paid.⁷⁵

The Indiana statute provides for a general waiver of rights to a mechanic's lien when incorporated in a contract with the prime contractor. This waiver will bind subs as well if the contract is

⁷¹See, e.g., *Martin v. Martin*, 122 Ind. App. 241, 103 N.E.2d 905 (1962) (improvements furnished on basis of oral promise to convey property; although promise not enforceable because of failure to comply with statute of frauds, plaintiff was allowed mechanic's lien and recovered in quasi contract). Cf. *Dyer Constr. Co. v. Ellas Constr. Co.*, 153 Ind. App. 304, 287 N.E.2d 262 (1972).

⁷²332 N.E.2d 223 (Ind. Ct. App. 1975).

⁷³342 N.E.2d 874 (Ind. Ct. App. 1976).

⁷⁴This rule was also recognized in *Lake County Title Co. v. Root Enterprises, Inc.*, 339 N.E.2d 103 (Ind. Ct. App. 1975), in which it was held that an escrow agent who was required to obtain releases of mechanics' liens was not responsible for payments made by the owner to subs who had not properly recorded their liens. See Annot., 62 A.L.R.3d 288 (1975).

⁷⁵Conflicting evidence was introduced as to the precise words employed by the owner in requesting the sub to finish the job after he discontinued the work "until I find out who is going to pay me." 342 N.E.2d at 878 (Lybrook, J., dissenting).

recorded within five days after its execution.⁷⁶ However, it seems clear that either a prime contractor or a sub may totally or partially waive his lien by separate agreement.⁷⁷ Does a sub who delivers materials to a project under a contract in which he waives his right to a lien retain an insurable interest in the property? In *All Phase Construction Corp. v. Federated Mutual Insurance Co.*,⁷⁸ the court of appeals held that the materialman retained an insurable interest in dry-wall delivered and installed in the project and destroyed by fire before payment. Because the insured sub's right to payment was conditioned upon acceptance by the prime contractor, which had not occurred, the court found an economic loss substantiating an insurable interest.

There is an inherent risk that a prime contractor to whom progress payments are made has not paid subcontractors, materialmen, and laborers.⁷⁹ An alternative to the owner's supervision of the construction to assure that subs are paid is his release of funds through an escrow agent who, in turn, is required to obtain partial releases as payments are made to the prime.⁸⁰ The responsibilities of the escrow agent were graphically illustrated in a most carefully written opinion by Judge Staton in *Lake County Title Co. v. Root Enterprises*,⁸¹ a decision worthy of study by lawyers involved with problems of the construction industry. There, the owner-lessor agreed to furnish a maximum of \$35,000 to a lessee who, through a contractor or construction manager, undertook to build on the lessor's property. The funds were delivered to an escrow agent who agreed to make certain progress payments to the lessee's designee, the prime contractor, only after obtaining partial waiver of lien agreements from subs.⁸² When the lessee defaulted after

⁷⁶IND. CODE § 32-8-3-1 (Burns 1973).

⁷⁷*See, e.g.*, *Hammond Hotel & Improvement Co. v. Williams*, 95 Ind. App. 506, 176 N.E. 154, *on rehearing*, 178 N.E. 177 (1931) (contractor waiving lien bound though lien was not properly recorded and even though owner in default); *George B. Swift Co. v. Dolle*, 39 Ind. App. 653, 80 N.E. 678 (1907) (waiver by subcontractor).

⁷⁸340 N.E.2d 835 (Ind. Ct. App. 1976).

⁷⁹*See, e.g.*, *Bennett v. Pearson*, 139 Ind. App. 224, 218 N.E.2d 168 (1966). *Cf. Indianapolis Power & Light Co. v. Southeastern Supply Co.*, 146 Ind. App. 554, 257 N.E.2d 722 (1970) (involving lien on retainage held by owner).

⁸⁰There are other methods of avoiding the risk of double payment. One is for the owner to require a construction bond securing performance and payment of mechanics. He may also obtain a no-lien contract from the prime contractor. IND. CODE § 32-8-3-1 (Burns 1973).

⁸¹339 N.E.2d 103 (Ind. Ct. App. 1975).

⁸²The escrow agreement provided for payment to the lessee, who was to bear the risk of overruns in the cost only after obtaining "partial waiver of lien agreements on each pay out." *Id.* at 109. The agreement seemed to provide that subs entitled to payment should be determined from an affidavit pre-

most of the progress payments had been released, the lessor found that many contractors and materialmen had not been paid. The lessor, on his own, paid out an additional \$20,000 to these claimants. He then sought to hold the escrow agent liable in negligence for breach of its agreement to obtain the requisite waivers, as required by the escrow agreement. The appellate court held that the escrow agent was liable only for the claims of subs who held valid recorded mechanics' liens upon the property, and then only for the amount of their claims at the time the funds were released to the prime contractor. Thus his liability was properly limited to the loss caused by the acquisition of valid liens to the extent the liens would have been discharged had proper partial releases been obtained when the funds were disbursed. Payments made by the lessor-owner to contractors or materialmen who failed to record their liens within the sixty-day statutory period were found to be voluntary.⁶³ The court determined that no express or implied contractual liability existed between the lessor-owner and the subs, since the subs had contracted with the lessee or his prime contractor.⁶⁴

This case teaches that materialmen will find no blessing in an escrow arrangement unless they are clearly made beneficiaries of the disbursement of funds.⁶⁵ Careful drafting of the escrow agreement can also assure the owner that funds will be paid out only after partial releases are obtained from subs. This protection is somewhat limited, however, if the disbursement is dependent upon affidavits of the prime contractor which may have been falsified.⁶⁶

pared by the lessee listing all contractors hired on the building program at the time of the first pay out.

⁶³The trial court had held that if the owner-lessor had reimbursed a sub within 60 days after the last work or materials were furnished, the escrow agent who disbursed funds without procuring a partial release of amounts owing at the time of the pay out would be liable. The court on appeal apparently found either that all of the sub's work was furnished after the last pay out or that he was not listed as a contractor from whom releases were to be obtained. 339 N.E.2d at 115 n.13.

⁶⁴Without full consideration of the peculiar arrangement between the lessor and the lessee, and the lessee and its prime contractor, the court applied the general rule that the owner has no contract liability to subs. See discussion at note 74 *supra*. It could have been argued, or evidence might have established, that the lessor and lessee were joint venturers, and that the person in charge of the building was a contract manager who merely served as an agent of the lessee, the owner, or both. Compare *O'Hara v. Architects Hartung & Ass'n*, 326 N.E.2d 283 (Ind. Ct. App. 1975).

⁶⁵Although this escrow agreement did not do so, an escrow arrangement could provide for direct payment to subs. Cf. *Western Cas. & Sur. Co. v. State ex rel. Southeastern Supply Co.*, 146 Ind. App. 431, 256 N.E.2d 398 (1970) (bond of prime contractor construed to allow recovery by subs).

⁶⁶In this case pay outs were to be made upon conditions established by affidavit of the lessee or his designatee. It appeared that the identity of subs

An owner who is confronted by claims of subs because of an escrow's failure to obtain releases or partial releases may be faced with two lawsuits—one involving foreclosure of mechanics' liens and the other directly concerning his rights against the escrow agent.

A mechanic may recover the contract price from his principal if a price has been agreed upon,⁸⁷ but he must prove the reasonable value of work or material if he is a sub claiming against the owner⁸⁸ or is claiming upon an implied contract.⁸⁹ In *Building Systems, Inc. v. Rochester Metal Products, Inc.*,⁹⁰ the contractor sought recovery from his employer-owner under a cost-plus agreement. The court of appeals recognized that general testimony of the contractor or his bookkeeper as to the total value of his work and materials admitted over objection would be insufficient to establish value; but when received without objection or when supported by specific proof as to each item, the testimony is sufficient to go to the trier of fact. The court also recognized that when an itemized account is submitted to the owner and received without objections recovery may be allowed upon the theory of an account stated,⁹¹ but not when the submission is accompanied by a prompt objection or other conduct indicating that the owner is not bound.⁹²

*York v. Miller*⁹³ instructs that the parties appealing from

entitled to payment was also to be determined upon this affidavit. The court held that the escrow agent was not responsible for the accuracy of the documents upon which it relied. 339 N.E.2d at 112. See also *Richard's Lumber & Supply Co. v. National Bank*, 32 Ill. App. 3d 835, 336 N.E.2d 820 (1975), in which a lienholder had signed waivers of mechanics' liens in blank. The owner stole the waivers and procured a loan from the bank after completing the waivers. The court held for the bank.

⁸⁷*Peter & Burghard Stone Co. v. Marion Nat'l Bank*, 198 Ind. 581, 153 N.E. 472 (1926).

⁸⁸*Morris v. Louisville, N.A. & C. Ry.*, 123 Ind. 489, 24 N.E. 335 (1890). However, the price fixed by the contract between the sub and his employer will be prima facie evidence of the value of the work or materials against the owner. *Kendall Lumber & Coal Co. v. Roman*, 120 Ind. App. 368, 91 N.E.2d 187 (1950).

⁸⁹*Prewitt v. Londeree*, 141 Ind. App. 291, 216 N.E.2d 724 (1966). If suit is brought upon an express contract in which the price is liquidated against the owner, the plaintiff may elect to bring suit upon the implied-in-law promise. His recovery, however, is measured by the reasonable value of the benefit received by the defendant and is limited by and pro-rated against the contract price. Cf. *Esarey v. Buhner Fertilizer Co.*, 117 Ind. App. 291, 69 N.E.2d 755 (1946).

⁹⁰340 N.E.2d 791 (Ind. Ct. App. 1976).

⁹¹*Burns Constr., Inc. v. Valley Concrete*, 322 N.E.2d 404 (Ind. Ct. App. 1975).

⁹²*Accord, Jasper Corp. v. Manufacturer's Appraisal Co.*, 153 Ind. App. 457, 287 N.E.2d 781 (1972).

⁹³339 N.E.2d 93 (Ind. Ct. App. 1975).

mechanic's lien foreclosures must follow artificial and technical rules of appellate procedure, even in a case in which the judge has allowed litigation to continue endlessly after "final judgment."⁹⁴

I. Artisans' Liens

Section 9-310 of the UCC⁹⁵ accords super-priority status to an artisan who, in the ordinary course of his business, furnishes "services" or materials with respect to goods subject to a security interest, so long as he retains possession of the goods. The artisan's lien takes priority over prior perfected and unperfected security interests in the collateral.⁹⁶ Pursuant to this statute, the court of appeals held in *Magnavox Fort Wayne Employees Credit Union v. Benson*⁹⁷ that the possessory lien of a motor vehicle repairman took priority over a previously perfected security interest. The rule was again applied in *Nicholson's Mobile Home Sales, Inc. v. Schramm*,⁹⁸ in which the appellate court held that the possessory lien of a mobile home park operator for unpaid rent took priority over an unperfected purchase money security interest in the mobile

⁹⁴In this case, after a default foreclosure decree and after the time for filing an appeal, the trial court allowed intervention by the debtor's creditors. At the same time the debtor filed a Trial Rule 60(B) motion challenging the judgment. When the Rule 60(B) motion was denied, the debtor filed a motion to correct errors from which an appeal was taken. Four months later the court granted the claims of the intervenors. The court was puzzled by an appeal taken from a ruling upon a motion to correct errors entered four months before. However, it wisely considered the merits of the case, not as it related to the judgment, but as it concerned the manner of the sale held by the sheriff under it. The court determined that there was no requirement that the land be sold in parcels and that the evidence did not establish inadequacy of the price. Actually, it seems that the court treated the Rule 60(B) motion as an equitable remedy seeking relief from an improper sale. Compare *Bishop v. Moorman*, 98 Ind. 1 (1884) (equity properly restrained sheriff's sale). The case may stand for the proposition that a court of equity which has entered a decree ordering sale of property retains jurisdiction to review the conduct of the sale by motion or by independent action. The court's concern about the fact that the ruling on a motion to correct errors had occurred before the trial court had finished with its business again demonstrates that the requirement of a motion to correct errors as a condition to an appeal is not only confusing, but unwise.

⁹⁵IND. CODE § 26-1-9-310 (Burns 1974).

⁹⁶The statute was applied in *Yeager & Sullivan, Inc. v. Farmers Bank*, 317 N.E.2d 792 (Ind. Ct. App. 1974) (pig feeder); *Charlie Eidson's P&B Shop, Inc. v. Commercial Credit Plan, Inc.*, 146 Ind. App. 209, 253 N.E.2d 717 (1969). See generally Annot., 69 A.L.R.3d 1162 (1976).

⁹⁷331 N.E.2d 46 (Ind. Ct. App. 1975), also discussed in text accompanying notes 58-63 *supra*.

⁹⁸330 N.E.2d 785 (Ind. Ct. App. 1975). This case is also discussed in text accompanying notes 31-35 *supra*.

home. This conclusion was reached by finding that the operator's claim for rent was for "services" and thus within U.C.C. § 9-310. The court also determined that the debtor-lessee was a "guest" within the terms of a statute⁹⁹ giving a mobile home park operator the lien of an innkeeper on the property of his "guest" for rent.¹⁰⁰

The *Benson* case ventured into the uncharted area of the rights and duties of the artisan and junior secured parties when the artisan's lien is foreclosed under a statutory power of sale.¹⁰¹ Apparently the artisan failed to give notice to the debtor and failed to offer the collateral at "public auction" as required by statute.¹⁰² Instead he purchased the collateral at a private sale and, after deducting his claim from the sale price, remitted the balance to the junior secured party, who then sought recovery of the remaining deficiency against the debtor. The court properly held that because the secured party was not a party to the artisan's sale he was not bound to give notice and comply with the provisions of the Uniform Commercial Code.¹⁰³ However the secured party aided and abetted the artisan by furnishing him a repossession title.¹⁰⁴ The case does not clarify the duty of a junior secured party to exercise reasonable care to protect the debtor's interests when

⁹⁹IND. CODE § 13-1-7-33 (Burns 1973). This statute creates an innkeeper's lien upon the property of a guest of a mobile home park operator, and was read in conjunction with *id.* § 32-8-27-2, giving innkeepers a lien upon any article of value brought into a hotel. The court also held that the mobile home park operator's lien depended upon possession, which was found to exist in this case although the facts did not clearly show whether the operator had regained possession of the leased space, the mobile home, or both.

¹⁰⁰This decision disposes of the extremely strange case of *Highland Realty Corp. v. Indianapolis Morris Plan Corp.*, 136 Ind. App. 208, 199 N.E.2d 110 (1964), in which the court and the attorneys overlooked the statute creating a lien in the innkeeper's favor.

¹⁰¹IND. CODE § 9-9-5-6 (Burns 1973).

¹⁰²*Id.* This statute requires newspaper advertisement of the sale two times in successive weeks, 15 days' notice to the owner by registered mail, and sale at "public auction" to the highest bidder for cash. Purchase by the artisan is permitted. The statute also provides for issuance of a new certificate of title by the Secretary of State to the purchaser on proof of facts showing a proper sale.

¹⁰³Procedures for disposing of collateral by the secured party are specified in IND. CODE § 26-1-9-504 (Burns 1974) requiring that notice of the sale be sent to the debtor and that a sale be conducted in a commercially reasonable manner.

¹⁰⁴The repossession title was obtained by the junior secured party in the expectation of foreclosing its lien. After unsuccessfully requesting that the artisan surrender possession of the vehicle, the junior secured party kept the repossession title until the vehicle was sold and received the money remaining after satisfaction of the artisan's lien.

collateral is being sold by a senior lienholder,¹⁰⁵ nor the effect of a sale by an artisan who fails to give notice and sell at "public auction" as required by the artisan's lien statute.¹⁰⁶ A strong argument could have been made that the junior secured party who participated in the sale by surrendering a repossession certificate of title to the artisan owed a duty to the debtor to be certain that the artisan fulfilled legal requirements in conducting the sale.¹⁰⁷

Hornbook law states that an artisan's lien is a possessory lien which disappears when the lienholder voluntarily surrenders possession.¹⁰⁸ This rule was recognized by the court in *Hendrickson & Sons Motor Co. v. Osha*,¹⁰⁹ which held that an automobile mechanic relinquished his lien upon surrendering possession of the car to its owner. After having made a series of repairs on credit, the mechanic finally retained possession and asserted his lien, but the court held that the lien extended only to the last work performed and did not cover prior credit. However, the *Osha* court, in dictum, recognized a kind of nonpossessory artisan's lien by reconciling the effect of two Indiana statutes¹¹⁰ giving mechanics furnishing services and accessions a lien upon motor vehicles. Indiana Code section 32-8-31-3¹¹¹ requires the artisan to record notice of his lien in the miscellaneous records of the county where the work is done within sixty days of completion. Despite the fact that the statute does not expressly so provide, the court found that

¹⁰⁵See IND. CODE § 26-1-9-207 (Burns 1974) with respect to the duties of a secured party in possession, and discussion at notes 58-63 *supra*.

¹⁰⁶Unsuccessful efforts were made to sell the vehicle at an automobile auction and bids were taken from dealers, but the opinion indicates no evidence of a public auction of which the owner-debtor was given notice. The facts also failed to show that the junior secured party was given notice of a sale by public auction.

¹⁰⁷Because the secured party was in possession of the repossession certificate of title, it seems that he was under a duty to use reasonable care with respect to the title. Compare *White v. Household Finance Corp.*, 302 N.E.2d 828 (Ind. Ct. App. 1973). Evidence of compliance with the foreclosure provisions of the artisan's lien law is required as a condition to obtaining a new certificate of title. IND. CODE § 9-9-5-6 (Burns 1973). These points were not considered in the appeals court decision.

¹⁰⁸*Vaught v. Knue*, 64 Ind. App. 467, 115 N.E. 108 (1917).

¹⁰⁹331 N.E.2d 743 (Ind. Ct. App. 1975).

¹¹⁰One of these was the statute of the motor vehicle code which recognizes the possessory type of artisan's lien. IND. CODE § 9-9-5-6 (Burns 1973). The other statute, providing for recordation of notice of the lien, is *id.* § 32-8-31-3. These statutes, along with the common law lien, were found to coexist without conflict. 331 N.E.2d at 755.

¹¹¹IND. CODE § 32-8-31-3 (Burns 1973). The statutes include no provision recognizing the lien as dependent upon possession, and provide only for judicial foreclosure of the lien within one year after recordation of the notice of intent to hold the lien. *Id.* § 32-8-31-5.

this law, unlike other artisan statutes,¹¹² enables the artisan to retain his lien without keeping possession and also allows him to perfect his lien as against subsequent purchasers and creditors simply by recording the notice. This conclusion cannot withstand the light of day for several reasons. Constructive notice of liens on motor vehicles is generally provided by notation on the certificate of title by a public official.¹¹³ Furthermore, if constructive notice is imparted by means of recordation of the artisan's lien, every buyer or creditor obtaining an interest in a motor vehicle would be required to search the miscellaneous records of all ninety-two Indiana counties.¹¹⁴ Hopefully, this absurd result will invite the court to reconsider its ill-advised dictum when the matter comes up for decision. The requirement for recordation can be justified on the ground that it provides an evidentiary base for those claiming through foreclosure of an artisan's lien, one of the sound purposes of most recording statutes.¹¹⁵

J. Proceedings Supplemental to Execution—Right to Notice and Hearing

Failure of the court or the plaintiff to give the defendant and his garnishee notice and a hearing before entry of an order against the garnishee, contrary to the debtor's exemption rights,¹¹⁶ was considered in *Citizen's National Bank v. Harvey*.¹¹⁷ The failure

¹¹²Various statutes give artisans liens upon goods. In addition to the statutes cited at notes 110-11 *supra*, see *id.* § 32-8-30-1.

¹¹³IND. CODE § 26-1-9-302(3), (4) (Burns 1974).

¹¹⁴*Accord*, Note, *Certificate of Title as Notice of Liens upon Motor Vehicles*, 25 IND. L.J. 337, 348-49 (1950).

¹¹⁵One of the important purposes of recordation statutes is that recordation thereunder makes out a *prima facie* case of execution and validity of the transaction recorded. See, e.g., *Carver v. Carver*, 97 Ind. 497, 512 (1884).

¹¹⁶The court ordered payment of the maximum amount allowed under the garnishment provision of the Uniform Commercial Credit Code, IND. CODE § 24-4.5-5-105 (Burns 1974), which would have been 25% of the garnishee's weekly disposable earnings in excess of 30 times the minimum wage. However, since the entry of that order, the Indiana Supreme Court has held that the debtor is entitled to the highest exemption allowed under that law or the general exemption laws of Indiana. *Id.* § 34-2-28-1(d) (Burns 1973) has two limitations: if the debtor is a resident householder and the indebtedness arose out of a contractual obligation the allowable exemption is \$15 per week plus 90% of the balance of the debtor's weekly earnings. *Id.* § 34-1-44-7 exempts 90% of the income of a debtor who is not a resident householder. *Mims v. Commercial Credit Corp.*, 307 N.E.2d 867 (Ind. 1974). The *Mims* case also held that the court has an affirmative burden to allow the exemption when the defendant is not represented by counsel. See Townsend, *Secured Transactions & Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 254-57 (1974), for a discussion of the *Mims* case.

¹¹⁷339 N.E.2d 604 (Ind. Ct. App. 1976).

was held not a jurisdictional error rendering "void" an order in proceedings supplemental enforcing a judgment entered upon default of the defendant who failed to appear.¹¹⁸ The court held, however, that, subject to the defense of laches, the defendant could avoid the judgment upon general equitable grounds.¹¹⁹ Indiana Trial Rules provide, in effect, that if *A* sues *B* and asks for \$100, a default judgment of \$1,000 for failure to appear should not be allowed unless new service or notice of the additional claim is given to *B* and he is allowed to defend on the new claim.¹²⁰ Fair play seems to compel a similar result when a garnishment order is

¹¹⁸Since proceedings supplemental were deemed a continuation of the original lawsuit, of which the defendant was properly notified, the court held that the principal defendant was not, as a constitutional principle, entitled to a new summons or notice. The judgment therefore was held not "void" within the provisions of Trial Rule 60(B)(6). However, one may wonder how a judgment against a garnishee can ever be valid if it is issued without notice to the garnishee and a hearing. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Chesser v. Chesser*, 343 N.E.2d 810 (Ind. Ct. App. 1976) (party served by leaving of summons at old address and no evidence presented to show that copy was also sent by mail as required by IND. R. TR. P. 4.1 (A)(3), (B)).

The opinion made much of the fact that proceedings supplemental to execution is not a new action, but is a continuation of the original suit. The court appears to be half-right. Decisions properly indicate that the plaintiff may either proceed by independent suit or by motion for proceedings supplemental as provided by Trial Rule 69(E). *McCarthy v. McCarthy*, 297 N.E.2d 441 (Ind. Ct. App. 1973) (filing under a separate cause number as a separate action indicated as proper). See also Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 262-63 (1974); Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 241-44 (1973).

¹¹⁹The court applied the catch-all provision of Trial Rule 60(B)(8). Since the order in this case was a continuing one (*i.e.* to pay from weekly earnings) it could be argued that the court retains inherent power to modify such a decree under residual equity power. Compare *Wilson v. Wilson*, 349 N.E.2d 277 (Ind. Ct. App. 1976).

¹²⁰See IND. R. TR. P. 9(G) and 54(C). Notice of an application for a default judgment must be given only if the defendant has appeared. IND. R. TR. P. 55(B). Similarly, notice of a judgment need not be mailed by the clerk to parties in default for failure to appear. IND. R. TR. P. 72(D). Hence, if a default judgment for failure to appear is entered in excess of the prayer for relief, the defendant has no practical way of learning of the unexpected turn of events. Case law indicates that a party is entitled to some kind of notice and hearing in this kind of situation. *State ex rel. Brubaker v. Pritchard*, 236 Ind. 222, 228, 138 N.E.2d 233, 236 (1956) (court retained jurisdiction to punish defendant for contempt of order in original action "after notice to the party or his attorney"); *Smith v. Indiana State Bd. of Health*, 303 N.E.2d 50 (Ind. Ct. App. 1973) (contempt hearing held without giving attorney sufficient preparation time held to be denial of due process when proceedings were instituted after a decree obtained by proper service.)

entered without notice or hearing in the enforcement of a judgment granted on default of the defendant for failure to appear, especially when such relief is not sought in the original complaint. In fact, there is no reason why a plaintiff anticipating collection problems cannot include a prayer for supplemental relief in his original complaint if such is his intention.¹²¹ Hopefully, the *Harvey* decision will not encourage the practice of failing to give notice simply because the error, if any, was determined not to be jurisdictional. Although accompanied by a sad lack of judicial enthusiasm, the case clearly holds that some sort of notice and hearing must be afforded the debtor and garnishee in proceedings supplemental when judgment in the principal action is entered upon default for failure to appear. Conduct of the sort found in the *Harvey* case should be deterred with adequate punitive damages when judgment is wrongful and, if the practice persists, it should catch the eye of proper disciplinary authorities. A new rule clarifying the problem would be helpful.

K. Creditors' Rights Against Decedent's Estates

Suppose that *D*, a multimillionaire, drowns on January 1, his estate is opened with notice to creditors on January 10, his body recovered in July, and the funeral director thereafter prepares his body for burial, conducts the funeral and incurs expenses totaling \$5,000. The funeral director has no claim against his estate according to the questionable decision of the Indiana Court of Appeals in *Richardson v. Richardson*.¹²² The court based its decision on the ground that funeral expenses are designated as "claims" under a priority provision of the probate code.¹²³ The court thus found that funeral expenses, as "claims," must be filed within six months (now five) after the first published notice to creditors, provided that administration is opened within one year.¹²⁴ Although the case did not involve the facts posed above,

¹²¹IND. R. TR. P. 18(B) provides: "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two [2] claims may be joined in a single action . . ."

¹²²345 N.E.2d 251 (Ind. Ct. App. 1976). The funeral director had filed his claim with the domiciliary representative appointed in Florida. It appeared that the Florida estate would be insufficient to satisfy the claim if it were allowed. Compare *Hensley v. Rich*, 191 Ind. 294, 132 N.E. 632 (1921).

¹²³IND. CODE § 29-1-14-9 (Burns Supp. 1976). Actually, the general definition section defines "claims" as including funeral expenses. *Id.* § 29-1-1-3.

¹²⁴With certain exceptions, including expenses of administration and government claims, all "claims" must be filed within five months after the date of the first published notice to creditors, and in any case administration must be commenced within one year after death of the decedent. *Id.* § 29-1-14-1.

the decision supports the thesis of some laymen that all is not right in probate matters. Almost anyone on the street would agree that the cost of disposing of the body should take priority over most other claims and disbursements to heirs and devisees. Technically, omission of funeral expenses in the non-claim provision of the probate code expressly exempting expenses of administration and government claims indicates a legislative intent to exclude funeral expenses. But, in terms of common sense, the scheme of the code is not so precise as to invoke reliance on such a technical construction.¹²⁵

An award of money to a spouse in gross as alimony or property division may be proved against a decedent's estate even though payable in installments which are not yet due, according to *White v. White*,¹²⁶ a recent court of appeals decision which applied the divorce statute enacted prior to the present law. Nothing in the new no-fault divorce statute indicates that the result of this case will be changed.¹²⁷

Although a tort claim against an estate may be time-barred by the non-claim statute, recovery against the personal representative will be allowed to the extent of any liability insurance if the claim is not outlawed by the general statute of limitations.¹²⁸ In such cases a tort claimant may testify as to relevant transactions with the deceased, notwithstanding the dead man's statutes.¹²⁹ The reason for this exception to the dead man's statute is that a

¹²⁵Funeral expenses are expressly included within the general definition of "claims." *Id.* § 29-1-1-3. It seems that the court should have found a safety valve in the general definition section, which provides that "definitions . . . shall apply to words used in this Code unless otherwise apparent from the context." *Id.* (emphasis added). Allowance of funeral expenses rests upon the duty of the representative to see that they are paid without requiring aggressive action by the person entitled to payment. The same reasoning applies to costs of administration and distributions to heirs and devisees; all are rights against the estate rather than claims in this context.

¹²⁶338 N.E.2d 749 (Ind. Ct. App. 1975). For another discussion of this case, see Proffitt, *Domestic Relations*, *supra*.

¹²⁷Provisions for property settlement may not be revoked or modified. IND. CODE § 31-1-11.5-17 (Burns Supp. 1976). The court relied in part on this statute in determining that the award of a sum in gross, although payable in installments, did not cease on death of the obligor. The same section also provides that child support orders are not revoked by death of the parent, although they are modifiable. After the parent's death, a child support decree may be modified on petition of the parent's representative. No provision is made with respect to modification of maintenance orders in favor of a wife, but case law indicates that the order is modifiable. *See id.* § 31-1-11.5-9(c).

¹²⁸*Id.* § 29-1-14-1(f).

¹²⁹*See Jenkins v. Nachand*, 154 Ind. App. 672, 290 N.E.2d 763 (1972), in which the action against the representative was commenced after the plaintiff's tort claim was barred by the non-claim statute.

judgment enforceable only against the insurer will not deplete the estate. However, in *Crawford v. Wells*,¹³⁰ the court held that the tort claimant's act of testifying on his own behalf in litigation involving a claim not yet barred by the non-claim statute cannot be treated as a waiver of his right to recover in excess of policy limits. In such cases the representative must object to his testimony or he will be held to have waived the effect of the dead man's statute.

L. Bankruptcy

A claim for "alimony due or to become due or for maintenance or support of a wife or child" is excepted from the provisions of the bankruptcy act.¹³¹ When a wife is awarded the benefit or payments of money in divorce proceedings, the courts have had difficulty determining whether the obligation of the husband is "alimony" or something else. It often is assumed that if the settlement or decree awards her money in lieu of interests held by her in property it is not alimony.¹³² On the other hand, if its purpose is to provide support or is based upon need, her claim is alimony and therefore not dischargeable.¹³³ When the issue was presented to the Seventh Circuit Court of Appeals in *Nichols v. Hessner*,¹³⁴ the court reversed the lower court's holding that a settlement approved by decree of court awarding the wife \$1,000 per month for 120 months was alimony. The case was remanded with instructions for further findings on the extent to which the settlement and decree were based upon a division of marital property or upon income of the parties. That part of the agreement calling for payment to balance income of the parties would be alimony and not dischargeable. If payment was based only on a division of property of the marriage, it would be discharged. The case was decided by reference to the uncertain background of Indiana case law defining "alimony" prior to the current no-fault divorce law.¹³⁵

¹³⁰334 N.E.2d 869 (Ind. Ct. App. 1976) (representative substituted in action commenced before death of decedent).

¹³¹Bankruptcy Act § 17a(7), 11 U.S.C. § 35(a)(7) (1970).

¹³²See, e.g., *Abrums v. Burg*, 327 N.E.2d 745 (Mass. 1975).

¹³³See, e.g., *In re Ridder*, 79 F.2d 524 (2d Cir. 1935). Also included are provisions of a decree or settlement requiring payment of marital obligations. *In re Waller*, 494 F.2d 447 (6th Cir. 1974) (divorce decree holding wife harmless for prior debts held not dischargeable); *Poolman v. Poolman*, 289 F.2d 332 (8th Cir. 1961) (husband bound to make payments on home, not dischargeable).

¹³⁴528 F.2d 304 (7th Cir. 1976).

¹³⁵For recent decisions interpreting present Indiana law, see *Lizskai v. Lizskai*, 343 N.E.2d 799 (Ind. Ct. App. 1976) ("alimony" award held an improper designation), discussed in Proffitt, *Domestic Relations*, *supra*;

The present Indiana statute on disposition of property in divorce proceedings allows the court to consider "economic circumstances of the parties" and the "earnings or earning ability of the parties."¹³⁶ Maintenance is not allowed to a spouse unless the person is "physically or mentally incapacitated to the extent that the ability . . . to support himself or herself is materially affected."¹³⁷ *Nichols*, as a result, places a severe burden upon the courts which must now determine the extent to which the settlement or agreement represents a division of property and the extent to which an award of money was intended to make up a differential in the spouses' incomes. The court indicated that this is a matter which could be spelled out by the terms of a divorce settlement or decree.¹³⁸ However, it seems unlikely that bankruptcy should or will be one of the determinable considerations in divorce proceedings. When there is substantial property for division the spouse who is entitled to a money award may ask the court to impose a lien upon assets retained by the paying party and thus receive protection which will survive bankruptcy.¹³⁹ On the other hand, when there is little marital property any affirmative award is most likely to be granted because of need or inequality in earning power, so that the obligation will qualify as alimony under the bankruptcy law.

The *Nichols* court also held that interest accruing on the alimony claim is a non-dischargeable debt, but that an award of attorneys' fees to the spouse in an action for unpaid alimony by a court other than the divorce court was not alimony. Since attorneys' fees, when allowed, almost universally are regarded as a part of alimony,¹⁴⁰ there seems to be no basis for this curious result.

Temple v. Temple, 328 N.E.2d 227 (Ind. Ct. App. 1975) (wife not entitled to support although she suffered from grand mal epilepsy), *discussed in* Fox, *Domestic Relations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 197, 207 (1975).

¹³⁶IND. CODE § 31-1-11.5-11 (Burns Supp. 1976).

¹³⁷*Id.* § 31-1-9-10.

¹³⁸The label placed upon an award should not be determinative of whether it is a property settlement, maintenance agreement, or income adjustment. *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975).

¹³⁹IND. CODE § 31-1-11.5-15 (Burns Supp. 1976). *But see* Eppley v. Eppley, 341 N.E.2d 212 (Ind. Ct. App. 1976) (court properly declined to require security from husband ordered to pay wife).

¹⁴⁰*In re Corish*, 529 F.2d 1363 (7th Cir. 1976) (attorney's fees awarded to wife but ordered to be paid directly to her attorney, constituted a non-dischargeable debt in bankruptcy proceedings); *Jones v. Tyson*, 518 F.2d 678 (9th Cir. 1975). Cases also hold that an award of attorneys' fees arising from later enforcement of an alimony decree constitute alimony. *In re Hargrove*, 361 F. Supp. 851 (W.D. Mo. 1973) (attorneys' fees awarded in hearing on modification of divorce decree after bankruptcy). *Cf. In re Goden*, 411 F. Supp. 1076 (S.D. N.Y. 1976) (penalty for late payments held to be alimony).

This tends to force creditors with undischarged alimony claims to take their case back to the original divorce court when enforcement is necessary, a policy at war with the new power granted bankruptcy courts to determine dischargeability and fix liability on claims which they find not to be discharged.

A customer list that meets the requirements of a trade secret is a property right of the bankrupt owner which passes to the trustee taking over a going business.¹⁴¹ The Seventh Circuit Court of Appeals in *In re Uniservices, Inc.*,¹⁴² upheld a declaratory order that the chief executive officer of a corporation in a Chapter 10 proceeding could not compete within a radius of 75 miles¹⁴³ for a two-year period because of his familiarity with the customers of the corporation. The decision was based upon the fact that the officer and his family had sold the assets of the business with "trade routes, covenants and agreements" to the bankrupt some years prior to bankruptcy. Further, the information concerning customers and their habits and needs had been treated as highly confidential and valuable by the officer before and after Chapter 10 proceedings.¹⁴⁴ A limited covenant not to compete was implied from the confidential relationship between the officer and the bankrupt.¹⁴⁵

¹⁴¹*Cf.* *Sawilowsky v. Brown*, 288 F. 533 (5th Cir. 1923) (goodwill, including the right to use a trade name, can be sold with bankrupt's business). The Bankruptcy Act passes title to patents, copyrights and trademarks. 11 U.S.C. § 110 (1970).

¹⁴²517 F.2d 492 (7th Cir. 1975).

¹⁴³The order was restricted to an area within 75 miles of a line between Fort Wayne and Indianapolis, Indiana.

¹⁴⁴The court purported to weigh the interests of the officer to pursue gainful employment against the need of the business to protect confidential information while proceeding under a Chapter 10 bankruptcy. No injunction against the executive officer was issued, only a declaratory order.

¹⁴⁵It seems that the decision was not limited to protecting only customer lists as trade secrets. Liability was based upon the existence of a confidential relation between the seller of a business who continued as its chief executive officer and the buyer. By finding a contract for a limited period of two years, the court avoided drafting an order defining what information could be used. Decisions to this effect will also be found in other states. *Cf.* *Terminal Vegetable Co. v. Beck*, 8 Ohio App. 2d 231, 196 N.E.2d 109 (1964) (goodwill transferred to a buyer is a property right that must be respected by the seller for a time sufficient to permit the buyer to make the business customers his own). The decision in *Terminal Vegetable* rested upon *Westervelt v. Nat'l Paper & Supply Co.*, 154 Ind. 673, 57 N.E. 552 (1900), in which the court held that an employee's duty not to divulge a trade secret constituted an implied promise. That Indiana law would neither imply a promise not to compete nor hold that the confidential relation barring competition continues after the termination of employment, see *Epperly v. E. & P. Brake Bonding, Inc.*, 348 N.E.2d 75 (Ind. Ct. App. 1976). Indiana courts have not favored covenants not to compete. *Frederick v. Professional Bldg. Maintenance Indus.*,

Uniservices does not deal with the related problem involving a bankrupt's promise not to compete or his misuse of trade secrets. Inconclusive authority indicates that so long as only the right of competition is involved, a discharge in bankruptcy will relieve the bankrupt from covenants not to compete.¹⁴⁶ Liability for misuse of trade secrets or malicious prior violations of an agreement not to compete will not be affected by the wrongdoer's discharge in bankruptcy.¹⁴⁷

M. Miscellaneous—Attorneys' Fees; Truth in Lending Disclosures

Once again the Indiana Court of Appeals has construed a provision for reasonable attorneys' fees as not including an attorney's fee incurred in successfully defending a case on appeal.¹⁴⁸ If the decision stands for the proposition that it is "unreasonable" for a winning party to engage a lawyer to represent him on appeal, there may be some merit to the holding, for most lower court decisions are affirmed on appeal.¹⁴⁹ If the decision stands for the policy of barring contract provisions for attorneys' fees on appeal because such a provision tends to chill a party's right to take his case to a higher court¹⁵⁰ the court speaks with forked tongue.

Inc., 344 N.E.2d 299 (Ind. Ct. App. 1976); *Struever v. Monitor Coach Co.*, 294 N.E.2d 654 (Ind. Ct. App. 1973).

¹⁴⁶*Heyl v. Emery & Kaufman, Ltd.*, 204 F.2d 137 (5th Cir. 1953) (a list of policy dates kept by a bankrupt insurance agent held his personal property and trustee could not sell the list and thereby prevent bankrupt's solicitation of former customers). *Cf.* *Trask v. Susskind*, 376 F.2d 17 (5th Cir. 1976).

¹⁴⁷*National Homes Corp. v. Lester Indus., Inc.*, 336 F. Supp. 644 (W.D. Va. 1972) (prior award of punitive damages based on violation of a covenant not to compete was not discharged in bankruptcy because the award was based on willful and malicious property damage done by the bankrupt).

¹⁴⁸*Kagan v. Auto-Teria, Inc.*, 342 N.E.2d 890 (Ind. Ct. App. 1976) (denial of request for attorney fees accrued in defense of a judgment upon a promissory note which provided for "reasonable attorney fees"). *Accord*, *Willsey v. Hartman*, 150 Ind. App. 485, 276 N.E.2d 577 (1971). *Cf.* *Honey Creek Corp. v. WNC Development Co.*, 331 N.E.2d 452 (Ind. Ct. App. 1975) (award of attorney fees in judgment merged right to recover additional fees accrued on appeal).

On the other hand, attorneys' fees may be awarded a spouse for an appeal from a divorce, custody or support proceeding. *Linton v. Linton*, 336 N.E.2d 687, 339 N.E.2d 96 (Ind. Ct. App. 1975); *Inkoff v. Inkoff*, 306 N.E.2d 132 (Ind. Ct. App. 1974).

¹⁴⁹A cursory study of approximately 100 Indiana decisions in volumes 339 to 342 of West's *Northeastern Reporter*, Second Series, shows that an appellant's chance of obtaining relief upon appeal is about 30%; the appellee's chance of winning on appeal is about 70%. In *Bureau of Motor Vehicles v. Waller*, 339 N.E.2d 61 (Ind. Ct. App. 1975) the appellee, who did not appear by counsel or otherwise, won his case, with one judge dissenting.

¹⁵⁰See *State ex rel. Reilly v. United States Fid. & Guar. Co.*, 218 Ind. 89, 95, 31 N.E.2d 58 (1941) (bondsmen on appeal bond not liable for attorneys'

Probably nothing has operated to discourage appeals more than Trial Rule 59(G) and some of the disgraceful unresolved problems under it.¹⁵¹

In *Allen v. Beneficial Finance Co.*,¹⁵² the Seventh Circuit Court of Appeals found that the jumbled disclosures appearing in a statement made by a finance company in connection with a consumer credit loan were not in "meaningful sequence," and, therefore, did not meet the requirements of Regulation Z of the Federal Truth in Lending Act.¹⁵³ The fact that the disclosure forms were designed for multistate use on a national computer did not relieve the lender of his statutory liability to the borrower. Where but one disclosure statement was furnished to joint obligors as permitted by the regulations, each was entitled to recover the penalties provided by the law.¹⁵⁴

fees incurred in defending an appeal because to hold otherwise would deter appeals).

¹⁵¹Probably the best example of the unfairness of Trial Rule 59(G) and its application is the horrid predicament created by *Richards v. Crown Point Community School Corp.*, 256 Ind. 347, 269 N.E.2d 5 (1971) holding that a partial summary judgment was final. Subsequent decisions reach another result. See, e.g., *Stanray Corp. v. Horizon Constr., Inc.*, 342 N.E.2d 645 (Ind. Ct. App. 1976). The purpose of this uncertainty, particularly in view of the clarity of the rules with respect to finality of judgments on a part of the issues, can only be to discourage appeals and to make them unduly burdensome. Much of the difficulty could simply be eliminated by excluding the motion to correct errors as a condition to an appeal, leaving it optional and requiring a ruling on the motion within 10 days, as provided by the federal rules. Time for taking the appeal would be extended in case of the motion and computed from the time of the ruling on the motion or 10 days after the motion, whichever is less. Whether this suggestion is heeded or not, it is no understatement to observe that opinions under Trial Rule 59(G) have not added to the stature of the appellate courts.

¹⁵²531 F.2d 797 (7th Cir. 1976).

¹⁵³*Id.*, applying Fed. Reserve Bd. Reg. Z 12 C.F.R. § 226.6(a) (1976) and Public Position Letter No. 780, Fed. Reserve Bd. (April 10, 1974). Other Seventh Circuit decisions dealing with the Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1700 (Supp. IV 1974), include *Goldman v. First Nat'l Bank*, 532 F.2d 10 (7th Cir. 1976) (class action permitted in case involving open end credit where class readily ascertainable from defendant's records); *Tinsman v. Moline Beneficial Fin. Co.*, 531 F.2d 815 (7th Cir. 1976) (collateral described as "all of the consumer goods of every kind now owned or hereafter acquired by debtors in replacement" at debtor's residence held incompatible with U.C.C. § 9-204(2) and in violation of the Federal Truth in Lending Act).

¹⁵⁴531 F.2d at 805.