

XV. Secured Transactions and Creditors' Rights

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Indiana courts have written on a large number of issues involving secured transactions and creditors' rights in the last year, 1976-77. All are interesting, some deserving of great praise, and most have raised issues worthy of comment and discussion.¹ The United States Supreme Court has left a footprint on the rules governing some collection practices. Probably the most important decision is *Salem Bank & Trust Co. v. Whitcomb*,² which threatens to impose a hideous vicarious liability on public officers for the tortious acts of "fellow servants" after the state has shed its cloak of sovereign immunity. The case deserves careful re-examination.

A. Regulation of Financing Transactions

With respect to interest rates charged before the adoption of the Uniform Consumer Credit Code, the Indiana Court of Appeals continues to be "hoodwinked"³ by the deceptive nature of the so-called time price differential theory of usury laws. This time⁴ at least the rule was correctly applied by *Overbeck v. Sears, Roebuck & Co.*⁵ to a revolving charge account, thus allowing an unlimited finance charge imposed by a genuine seller. Consumers will be interested to know that justification for the principle was rationalized

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¹Probably the most imaginative opinion in the area of commercial law is Kruse, *Kruse & Miklosko v. Beedy*, 353 N.E.2d 514 (Ind. Ct. App. 1976), discussed at notes 75, 92, & 104 *infra* and accompanying text. The worst opinion in the view of this writer is *Overbeck v. Sears, Roebuck & Co.*, 349 N.E.2d 286 (Ind. Ct. App. 1976), which could have upheld allegedly illegal finance charges on a more sensible ground.

²362 N.E.2d 1180 (Ind. Ct. App. 1977), discussed at note 70 *infra* and accompanying text.

³The author used the term in Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 227 (1973), and reaffirms the statement today with equal vigor. Proof of the deceptive nature of the "time price differential" theory will be found in the Federal Truth in Lending Law, which was drafted in part to require full disclosure to consumers of finance charges and to require their equation into the "annual percentage rate" as mathematically specified in that law. 15 U.S.C. § 1605 (1970).

⁴The court of appeals applied the doctrine in *Standard Oil Co. v. Williams*, 153 Ind. App. 489, 288 N.E.2d 170 (1972), to a lender as distinguished from a supplier of goods, services and land—a radical and serious departure from the then generally recognized parameters of the doctrine.

⁵349 N.E.2d 286 (Ind. Ct. App. 1976).

on the unsubstantiated⁶ ground that interest rates were too low, leaving consumers only the hope that some comparable judicial doctrine was reserved for redrafting statutory limits on finance charges when they are too high. Under present law, ceilings on rates charged by sellers of goods, services, and land in consumer and consumer-related transactions are regulated by the Uniform Consumer Credit Code based upon "cash price."⁷ Hopefully, the continued sympathy demonstrated by the Indiana courts for lenders and the "time price differential" will not foretell a bloody battle over the meaning of the term "cash price," which from the consumer point of view will be construed to mean a "fair cash price," and to bankers and sellers "any cash price the seller wishes to set at any time."⁸

B. Real Estate Transactions

1. *Recording Statutes.*—An instrument transferring or creating an interest in land may be recorded if in proper form, and when recorded will serve as constructive notice to those who claim through the same chain of title. Thus, if *M* (mortgagor) is the purported owner of Blackacre who executes a mortgage in favor of *E* (mortgagee), which is properly recorded, *E* will be protected against subsequent purchasers from or through *M*. For recordation to constitute notice, *M*, by name, must be properly described in the mortgage. The land included within the mortgage must also be described. If *M* is identified by an incorrect name, or if the land is misdescribed, later bona fide purchasers from *M* will defeat *E* if *E*

⁶Very substantial rates could be charged on various kinds of loans and sales under Indiana law prior to the Uniform Consumer Credit Code. A discussion of the limits on finance charges and the effect under truth in lending with respect to revolving credit will be found in Townsend, *Open End Credit under the Truth in Lending Law*, 3 IND. LEGAL F. 105 (1969). Attention is called therein to the various Indiana statutes and regulations allowing interest charges in excess of an annual percentage of 8%. *Id.* at 105 n.4. In its opinion, which recognized that pre-Code rates were too low, the court failed to consider the prices charged by the seller, Sears, Roebuck, and whether they contained a hidden charge for credit transactions. One thing is certain: thousands of consumers were taking bankruptcy at this time, but there was a total lack of proof that Sears was suffering. A refund of overcharges to creditors may or may not have been a healthy thing. The principle purpose of the Uniform Consumer Credit Code was to fix outer limits on credit, leaving the market place to establish finance charges by full competition among (1) lenders, (2) retailers, and (3) retailer-lenders.

⁷Finance charges are computed on the "amount financed." IND. CODE § 24-4.5-2-111 (1976). Computations are then applied to this amount on "revolving charge accounts," *id.* §§ 24-4.5-2-108, -207, and other credit sales. *Id.* § 24-4.5-2-201.

⁸"Cash price" is defined by the Indiana Code as the "price at which the goods, services, or interest in land are offered for sale by the seller to cash buyers in the ordinary course of business," and the price stated in required disclosure statements by the seller is "presumed" to be the cash price. IND. CODE § 24-4.5-2-110 (1976).

relies upon the record as constructive notice of his interests.⁹ The mortgage or instrument recorded only serves as constructive notice of some right or interest in land.¹⁰ Consequently, if the mortgage grants *E* a security interest in *M*'s tractor, recordation will not serve as constructive notice to third persons of the security interest in the vehicle.¹¹ These principles are illustrated in casebook style by *Howard D. Johnson Co. v. Parkside Development Corp.*,¹² where the owner of a shopping center leased land in the center to a restaurant operator. The lease provided that the lessor would not lease space within 1,500 feet of the premises described in the first lease to another for restaurant purposes. A memorandum of the lease was recorded naming the parties and describing only the leased property without the restrictive covenant. When the landlord subsequently leased other property within the 1,500-foot radius to another tenant for restaurant purposes, the first tenant sought to enjoin the second. The court held (1) that the restrictive covenant was a covenant that ran with the land¹³ and therefore was recordable and binding on purchasers of the land, but (2) that the recorded memorandum of lease did not include the restrictive covenant of the landlord or describe the servient land, and (3) since the second tenant had gone into possession and made improvements in good faith, he should prevail. He was not charged with a duty to examine records relating to other property or to take notice of the probability of restrictive covenants in other leases in the shopping center.

The case incidentally may raise the question of why a lease ever should be recorded. The landlord's title is perfected without recording,¹⁴ and the tenant's possession is sufficient to put third persons on

⁹Failure to properly name the mortgagor or grantor will make recordation ineffective against a bona fide purchaser (bfp) from the mortgagor by an instrument that uses his proper name—i.e., the name included in the instrument by which he acquired title. *Johnson v. Hess*, 126 Ind. 298, 25 N.E. 445 (1890). A deed or mortgage describing other land will not put a subsequent purchaser from the grantor on constructive notice. See *Rinehardt v. Reifers*, 158 Ind. 675, 64 N.E. 459 (1902).

¹⁰See *Starz v. Kirsch*, 78 Ind. App. 431, 136 N.E. 36 (1922) (holding that restrictive covenant not arising out of a grant does not run with land and is not recordable).

¹¹See also *Fowler v. Hawkins*, 17 Ind. 211 (1861) (lessor retained lien on crop); cf. *Foster v. Augustanna College & Theological Seminary*, 92 Okla. 96, 218 P. 335 (1923) (assignment of mortgagee's interest not constructive notice to subsequent bfp assignee of note secured by mortgage).

¹²348 N.E.2d 656 (Ind. Ct. App. 1976).

¹³On this point the court overruled some old Indiana law. See Falender, *Property, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 232, 246 n. 73 (1977).

¹⁴The landlord's record ownership remains inviolate, and his title is perfected against all who purchase from or through the tenant. See, e.g., *Wiseman v. Hutchinson*, 20 Ind. 40 (1863).

notice of his rights.¹⁵ The case then points to one of the main reasons for recording: to give notice of restrictions upon other property as in this case, which teaches that the restriction or reference to it along with a description of the other property must be recorded to be perfected as against later purchasers of the restricted premises.¹⁶ However, there may be several dangers in recording a lease. Recordation may create a cloud on title when the lease is prematurely terminated or abandoned. It should be observed that *Howard Johnson* involved recordation of a memorandum of lease as permitted by a recent Indiana statute¹⁷ whose main purpose was to permit recordation without publication of lengthy leases in the records. The statute requires the memorandum to include essential provisions, including (1) execution and acknowledgment by lessor and lessee, (2) their names, (3) a specific legal description of the premises, (4) the term of the lease, and (5) options to renew and extend. It permits, but does not require, the inclusion of (1) options of the lessee to purchase, (2) restrictions upon use of the leased premises or other described land of the lessor, and (3) other terms in the lease.¹⁸ Because options to extend or renew¹⁹ must be included and since options to purchase,²⁰ restrictive covenants, and other terms²¹ of the lease may be included, a legislative intent is reflected that these matters affecting the land should run with the land, as in the case of restrictive covenants.²² Purchasers from the landlord and

¹⁵*E.g.*, *McClellan v. Beatty*, 115 Ind. App. 173, 53 N.E.2d 1013 (1944); *Willard v. Bringolf*, 103 Ind. App. 16, 5 N.E.2d 315 (1936).

¹⁶Thus, when an easement is reserved under the terms of a deed, the dominant estate should also be described. *E.g.*, *Lennertz v. Yohn*, 118 Ind. App. 443, 79 N.E.2d 414 (1948). When a recorded lease imposes restrictions upon a tenant favorable to other premises, that property should also be described—at least to put subsequent assignees of the tenant on constructive notice of the extent of the restriction.

¹⁷IND. CODE § 17-3-49-1 (1976). The statute was adopted in 1967.

¹⁸*Id.* Descriptions of real estate are required to be a "specific legal description," except that a survey or plot plan may be used to describe parts of a building or larger tract adequately described.

¹⁹An option to extend a lease has been held not to be a covenant that runs with the land in favor of the tenant's assignee. *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E.2d 199 (1952).

²⁰Indiana case law has indicated that an option to purchase is not a covenant that runs with the land. *See Bandy v. Myers*, 141 Ind. App. 220, 227 N.E.2d 183 (1967). *But see Raco Corp. v. Acme-Goodrich, Inc.*, 235 Ind. 67, 131 N.E.2d 144 (1956). It has been held that an assignee of the tenant under a lease option is charged with the payment of rent so long as he occupies the land. *Hunter v. Smith*, 92 Ind. App. 609, 172 N.E. 926 (1930); *Baltes Land, Stone & Oil Co. v. Sutton*, 25 Ind. App. 695, 57 N.E. 974 (1900).

²¹A provision in a lease for attorney's fees has been held not to run with the land. *Levin v. Munk*, 97 Ind. App. 118, 169 N.E. 82 (1929) (holding assignee of tenant liable for rent, which ran with the land, but not attorney's fees).

²²*See* notes 19-21 *supra* and accompanying text.

transferees of the tenant thus may be bound by these covenants which have not always been running with the land, at least if they are recorded. *Howard Johnson* did not deal with the problem arising when terms of the lease with respect to properly described property in the memorandum are omitted or incorrectly described. It seems logical that a purchaser from the landlord or tenant is charged with the duty of checking the original lease for the existence of terms that are not required to be included in the memorandum and, if omitted, matters required by the statute to be included. But a bona fide purchaser should be protected against errors in terms that are stated.²³ All purchasers would be wise, in a practical sense, to demand examination of the original lease and make thorough inquiry as to modifications²⁴ before they commit themselves—at least until these questions are settled by litigation or statutory revision.

Title lawyers should carefully study *Union State Bank v. Williams*,²⁵ which holds that a deed or conveyance in the chain of a purchaser's title reciting or showing an executory consideration creates a cloud upon the title. The vendor in such case holds a vendor's lien as security for the performance due, and the disclosure of this fact in the title papers through which the purchaser claims title puts him on inquiry to ascertain the status of that lien. The case also points up the need for filing *lis pendens* notice of litigation seeking to establish an unperfected interest in property, in this case a vendor's lien.²⁶ The lawyer who overlooks this security device may find himself on the wrong end of a malpractice suit.²⁷

Recording statutes never replace the requirement of actual knowledge or notice when required by some rule of law.²⁸ This prin-

²³By way of analogy consider the mortgage for \$500, which is erroneously recorded for \$200. Case law holds that a bona fide purchaser from the mortgagor may safely assume that the mortgage is for no more than \$200. The purchaser is not required to examine the original. *Osborn v. Hall*, 160 Ind. 153, 66 N.E. 457 (1903).

²⁴Purchasers in good faith relying upon recorded covenants or executory obligations, which run with or are charges upon the land, take subject to any parol, unrecorded modifications between the original parties. *Scott v. Stetler*, 128 Ind. 385, 27 N.E. 721 (1891); *Shuey v. Latta*, 90 Ind. 136 (1883) (extension of time by mortgagee effective against junior lien); *Graber v. Duncan*, 79 Ind. 565 (1881).

²⁵348 N.E.2d 683 (Ind. Ct. App. 1976).

²⁶Any lawyer conducting litigation to foreclose perfected liens or to establish claims in property may be wise to file *lis pendens* notice when litigation tolls the statute of limitations, which otherwise would bar the action. See IND. R. TR. P. 63.1.

²⁷In *Williams*, *lis pendens* notice of an action by the vendor to establish his unperfected lien was not filed. A later mortgagee with notice of the suit did not cut off the lien. The case is discussed at note 49 *infra* and accompanying text.

²⁸Thus, advances made under an optional open-end mortgage will take priority over an intervening title that has been recorded unless the advance is made with actual knowledge of the intervening claim. Recordation of the intervening claim is not sufficient. *Schmidt v. Zahndt*, 148 Ind. 447, 47 N.E. 335 (1897).

principle was applied to a life tenant who claimed title by adverse possession against the remainderman. In *Piel v. DeWitt*,²⁹ it was recognized that adverse possession cannot commence until the remainderman has actual notice of the adverse claim, and recordation of an affidavit that the life tenant claimed the whole was insufficient to meet this requirement of the law.

2. *Mortgages: Describing the Debt.*—Ordinarily a mortgage secures a debt, which as a practical matter should be described in the mortgage instrument.³⁰ But a mortgage is effective with a “basket” clause covering all existing and future debts of the mortgagor.³¹ It is clear that the mortgage may be effective without a debt at all, in which case it may serve as a charge in a transaction in which the mortgagor is given the option of paying or losing the property.³² A mortgage may secure a prior debt³³ or the debt of a third party,³⁴ and it may be effective as a gift when the obligation it purports to secure is not supported by consideration.³⁵ There is some indication that a mortgage may be effective although it does not refer to any kind of obligation, so long as parol evidence establishes the obligation or charge intended to be secured.³⁶ Parties to a mortgage may modify the obligation to the disadvantage of known junior lienholders.³⁷ If the debt secured is designated but misdescribed, it may be corrected by reformation,³⁸ but a bona fide purchaser from

²⁹351 N.E.2d 48 (Ind. Ct. App. 1976).

³⁰In consumer transactions, federal law demands that the amount of the debt must be disclosed in a disclosure statement. 12 C.F.R. § 226.8(c), (d) (1977) (amended March 23, 1977).

³¹See, e.g., *Sparrenberger v. National City Bank (In re Woodruff)*, 272 F.2d 696 (7th Cir. 1959); cf. *Hancock County Bank v. American Fletcher Nat'l Bank & Trust Co.*, 150 Ind. App. 513, 276 N.E.2d 580 (1972) (parol evidence established modification by parties of pledge agreement).

³²See *Kerfoot v. Kessner*, 227 Ind. 58, 84 N.E.2d 190 (1949).

³³See *Buck v. Axt*, 85 Ind. 512 (1882). A mortgage on land given to secure a prior debt is not taken for value. *Adams v. Vanderbeck*, 148 Ind. 92, 45 N.E. 645 (1896), *rehearing denied*, 148 Ind. 92, 47 N.E. 24 (1897).

³⁴See *Post v. Losey*, 111 Ind. 74, 12 N.E. 121 (1887); cf. *American Sav. & Loan Ass'n v. Hoosier State Bank*, 337 N.E.2d 486 (Ind. Ct. App. 1976) (savings account of owner given to secure debt of principal).

³⁵*Geothe v. Gemlin*, 256 Mich. 112, 239 N.W. 347 (1931) (parents made gift of note and mortgage to daughter—mortgage effective as charge on land for amount of note that was unenforceable). Even if the note is illegal, the mortgage may be enforced. *Paulausky v. Polish Roman Catholic Union*, 219 Ind. 441, 39 N.E.2d 440 (1942).

³⁶*Bach v. First Nat'l Bank*, 99 Ind. App. 590, 193 N.E. 696 (1935) (absolute deed intended as a mortgage secured not only original obligation but a new one later agreed to by the parties).

³⁷E.g., *Shuey v. Latta*, 90 Ind. 136 (1883).

³⁸*Leedy v. Nash*, 67 Ind. 311 (1879). See *Citizens' Nat'l Bank v. Judy*, 146 Ind. 322, 329, 43 N.E. 259, 265 (1896). Since the consideration for a unilateral instrument may always be proved, it seems that proof of the indebtedness secured does not violate the

the mortgagor is protected as against proof that the obligation was something greater.³⁹ A somewhat different version of the debt aspect of a mortgage was presented by *Pioneer Lumber & Supply Co. v. First-Merchants National Bank*,⁴⁰ where the mortgage recited that it was given to secure a \$20,000 note of even date executed by the mortgagors.⁴¹ In fact, the mortgagors did not execute a note at all, but pursuant to the financing arrangement, advances were made by the mortgagee to the mortgagors' contractor who ultimately executed a note to the bank for the amount recited in the mortgage. The advances were used to complete a home the contractor was building for the mortgagors. In effect, the court held that although the debt was misdescribed, the mortgage, in fact, secured the note of the contractor who had been paid with advances from the mortgagee with the mortgage becoming primarily charged for the indebtedness. Consequently, when a subcontractor attempted to impress a mechanic's lien upon the mortgagors' obligation owing to the contractor, the court held that the latter had been paid by way of setoff, and the notice of the lien came too late—an unusual transaction, but a good solution.

3. *Absolute Deed as a Mortgage*.—Older than the hills is the rule that if *M* deeds property to *E*, parol evidence is admissible to prove that the transaction was intended to secure a debt.⁴² In equity this creates a mortgage, and if the indebtedness is paid, *M* may force a reconveyance in equity.⁴³ So long as *M* remains in possession, *E* must foreclose his mortgage by judicial sale.⁴⁴ These principles were misapplied in *Moore v. Linville*,⁴⁵ where the mortgagee was

statute of frauds. IND. CODE § 32-2-1-2 (1976). *Hays v. Peck*, 107 Ind. 389, 8 N.E. 274 (1886). *But see* *Christian v. Highlands*, 32 Ind. App. 104, 69 N.E. 266 (1903). If the consideration is stated in grant or promissory form, parol evidence may be inadmissible. *See* Annot., 84 A.L.R. 347 (1933).

³⁹*Osborn v. Hall*, 160 Ind. 153, 66 N.E. 457 (1903).

⁴⁰349 N.E.2d 219 (Ind. Ct. App. 1976).

⁴¹Note that the language in the mortgage was not promissory in character so as to integrate any prior or contemporaneous agreement. *See* note 38 *supra*.

⁴²*E.g.*, *Huffman v. Foreman*, 323 N.E.2d 651 (Ind. Ct. App. 1975), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305, 310-12 (1975).

⁴³The remedy of the debtor is a bill to redeem. *Calahan v. Dunker*, 51 Ind. App. 436, 99 N.E. 1021 (1912). A strict tender is not required where the mortgagee or grantee is in possession. *Doyle v. Ringo*, 180 Ind. 348, 102 N.E. 18 (1913). The grantor may also seek an accounting or a declaration of rights upon disputed instruments without tender when the mortgagee is in possession. *Brown v. Follette*, 155 Ind. 316, 58 N.E. 197 (1900).

⁴⁴*Crumbaugh v. Smock*, 1 Blackf. 314 (Ind. 1824); *Barber v. Barber*, 117 Ind. App. 156, 70 N.E.2d 185 (1946); *White v. Redenbaugh*, 41 Ind. App. 580, 585, 82 N.E. 110, 112 (1907) ("Appellant must be considered as the mortgagee out of possession . . . and the same rules are applicable as if it had been a mortgage in the ordinary form.").

⁴⁵352 N.E.2d 846 (Ind. Ct. App. 1976).

allowed to enforce strict foreclosure by ejectment against the mortgagor in possession. This type of forfeiture was justified on the ground that *M* was asserting an equitable title without doing equity—*i.e.*, tendering or paying the indebtedness. The court erroneously applied the shielding rules of equitable discretion as a sword,⁴⁶ and in this respect the decision was totally wrong. Had *E* been in possession of the property, the decision would have been supported by authority that would deny affirmative relief in equity to the mortgagee out of possession—*i.e.*, to the extent that *M* was guilty of “unclean hands,” laches, or a failure to do equity.

4. *Vendor's Liens; Deeds in Consideration of Support; Equitable Liens.*—An unpaid vendor who conveys land is given an equitable vendor's lien on the property to secure the vendee's executory obligation.⁴⁷ The vendor's lien is a law-implied type of security originated at a time when a creditor could not levy execution upon the land, making the vendor's legal remedy inadequate and justifying the lien. Today, the lien may be defended upon the ground that only a congenital idiot would sell land on credit, and if he is not mentally incapacitated, equity in its mercy should provide him with the lien.⁴⁸ The lien again was recognized in *Union State Bank v. Williams*,⁴⁹ where the vendor conveyed land to the vendees who by the terms of the deed were to pay taxes, vendor's insurance, and heat bills, and by separate agreement promised to pay \$5,000. The vendees later executed a mortgage to a bank, and the question of priorities arose between the vendor, who claimed a vendor's lien for the unperformed obligations of the vendees, and the bank, who advanced funds to the vendees under a recorded mortgage. The court held that the vendor held a lien as security for the vendees' duty to pay taxes, insurance, and heat bills, and this lien was perfected in-

⁴⁶*Mott v. Fiske*, 155 Ind. 597, 58 N.E. 1053 (1900) (debtor in possession under equitable mortgage not bound by laches). The court erroneously applied *Ferguson v. Boyd*, 169 Ind. 537, 81 N.E. 71 (1907), which permitted strict foreclosure against a mortgagor who had long abandoned the premises. The *Ferguson* court determined that the mortgagor was barred by laches and an agreement surrendering his rights. None of these circumstances were present in *Moore*.

A court of equity very well could have refused to quiet title had the debtor sought affirmative relief. See *Cassell v. Lowry*, 164 Ind. 1, 72 N.E. 640 (1904). *But cf.* *Kerfoot v. Kessener*, 227 Ind. 58, 81, 84 N.E.2d 190, 200 (1949) (holding void a provision defeating the right of redemption). *But cf.* *Raub v. Lemon*, 61 Ind. App. 59, 108 N.E. 631 (1915) (after release of mortgagor's rights, mortgagee allowed to bring ejectment).

⁴⁷*Huffman v. Foreman*, 323 N.E.2d 651 (Ind. Ct. App. 1975) (applying lien to conditional buyer of real estate who reconveyed it by informal transfer to conditional seller), discussed in *Townsend*, 1975 *Survey*, *supra* note 42, at 307-09.

⁴⁸A similar lien is not granted to a seller of goods who often sells on credit. *Johnson v. Jackson*, 152 Ind. App. 643, 284 N.E.2d 530 (1972).

⁴⁹348 N.E.2d 683 (Ind. Ct. App. 1976).

asmuch as this obligation appeared in the title through which the bank claimed its lien. The bank thus had constructive notice of the lien for what the court denominated "support."⁵⁰ With respect to the vendees' obligation to pay \$5,000, which did not appear in the deed, the vendor's lien was given priority as being first in time. The mortgagee would not be entitled to priority unless it was a bona fide purchaser. Since suit had been commenced to establish that the vendor's lien was pending at the time of the mortgage and since the bank had knowledge of the litigation, the court below correctly gave the vendor priority.⁵¹ The court pointed out an error on the part of the vendor's attorneys who initiated the suit to enforce the vendor's lien: failure to record *lis pendens* notice of the suit, which would have perfected the lien as against subsequent purchasers.⁵² No legal malpractice liability resulted because the bank had notice of facts that put it under a duty to make further inquiry, justifying a finding that it was not a bona fide purchaser. *Williams* is a thorough, well-written opinion.

*Paidle v. Hestad*⁵³ recognized another type of equitable lien arising in favor of a co-owner who makes improvements, pays taxes or joint liens upon the property, or makes other similar payments constituting expenditures in excess of his share. In seeking partition and contribution from his co-owners, equity provides him with a lien upon the interest of the others, which may be foreclosed in the same manner as other liens on realty. In this case, the lien survived administration of the estate of the defendant cotenant as against beneficiaries who were not bona fide purchasers.

5. *Conditional Sales Contracts.*—Conditional sales vendors continue to seek their pound of flesh by asserting forfeiture despite the Indiana Supreme Court rule favoring judicial foreclosure against a purchaser who has made substantial payments and who has not abandoned the premises.⁵⁴ In *Ogle v. Wright*,⁵⁵ a lower court decision

⁵⁰In recognizing the vendor's lien for support, the court overruled language in *Brunner v. Terman*, 150 Ind. App. 139, 275 N.E.2d 553 (1972), criticized in *Townsend, 1973 Survey*, *supra* note 3, at 229.

⁵¹The court applied the standard of reasonable care in determining notice or lack of good faith—*i.e.*, knowledge that would put a reasonable and prudent man on inquiry is sufficient to put a purchaser on notice of the unperfected vendor's lien. In this case, knowledge of the lawsuit between vendor and vendee was sufficient to put the bank on notice.

⁵²See IND. CODE §§ 34-1-4-2, -8 (1976); *Wilson v. Burgett*, 131 Ind. 245, 27 N.E. 749 (1891).

⁵³348 N.E.2d 678 (Ind. Ct. App. 1976), discussed at note 203 *infra* and accompanying text.

⁵⁴The pioneer decision upon this proposition is *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921, *on mandate to enforce order*, 263 Ind. 337, 330 N.E.2d 747 (1975).

⁵⁵360 N.E.2d 240 (Ind. Ct. App. 1977).

awarding forfeiture was reversed where the purchaser had agreed to erect a mobile home on other property of the vendor for which he was to be credited \$10,000 and required to pay the balance of \$8,500 in installments. After the purchaser had installed the mobile home with a defective sewer system (corrected by the vendor for \$2,800), and after the purchaser had continued to make his installment payments, the vendor gave notice of cancellation. The court determined that since the purchaser had made substantial performance, forfeiture was improper. The case was returned to the lower court for foreclosure, and the vendor was to be allowed damages for the defective sewer plus the balance due on the contract with interest.

In *Bartlett v. Wise*,⁵⁶ the defaulting sixty-eight-year-old conditional buyer, who had paid one-third of the principal over a ten-year period, vacated the premises because of a stroke and defaulted for nine months, during which time the property was damaged by fire and repaired by the purchaser. In a suit by the buyer for specific performance, the vendor successfully counterclaimed for cancellation and possession at the trial court level. The court of appeals reversed, finding forfeiture inequitable under the circumstances.

Forfeiture was denied in *Nelson v. Butcher*⁵⁷ because of waiver. There the conditional vendors obtained possession by posting bond at the threshold of an ejectment action initiated against vendees from whom the vendors had accepted chronically late and lagging payments.⁵⁸ The suit came twenty-one days after notice to vacate. A decision of forfeiture was reversed upon the ground that the evidence established that late payments beyond the contractual grace period were accepted, and in accordance with established law, there was no proof that the vendors had given specific notice that they would no longer be indulgent unless the purchasers brought themselves current within a specified reasonable time. An anti-waiver clause in the contract was disregarded.⁵⁹ The court also held

⁵⁶348 N.E.2d 652 (Ind. Ct. App. 1976).

⁵⁷352 N.E.2d 106 (Ind. Ct. App. 1976).

⁵⁸The vendor brought ejectment under the old ejectment statute, which was noted as probably unconstitutional in *Smeekens v. Bertrand*, 262 Ind. 50, 311 N.E.2d 431 (1974).

⁵⁹The contract contained the clause: "Failure or delay of the Owner to exercise any option or remedy hereunder for any default . . . shall not operate as a waiver . . . to pursue such option or remedy for the same or any subsequent default at any time thereafter." Although not considered in this decision, the clause was interpreted as inapplicable to waivers of "earlier" defaults in *Pierce v. Yochum*, 330 N.E.2d 102, 112 (Ind. Ct. App. 1975), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 315 (1976). The court indicated that had late payments been received within the grace period of 60 days allowed by the contract, no waiver would have been indicated since such payments were made on time.

that the trial court should have allowed the purchasers damages on their counterclaim. The fact that they vacated the premises when the ejectment suit was initiated did not moot the case but was justified apparently as an anticipatory breach by the vendors.⁶⁰

That a conditional purchaser is the equitable owner of the property was recognized by *Fail v. LaPorte County Board of Zoning Appeals*,⁶¹ which allowed the purchaser to petition for a zoning variance. The purchaser was allowed to claim hardship even though he knew of the zoning restriction when he purchased. He succeeded to the rights of the vendor.

C. Security Interests in Personal Property

1. *Liability of Filing Officers and Employees.*—In connection with filings under Article 9 of the U.C.C., a filing officer or his employee may commit mistakes by improperly filing a financing statement⁶² or by erring in the search of the records upon a request for information.⁶³ In either case, a proper filing is effective when accepted, and the secured party is protected.⁶⁴ A person who then procures a record search that fails to disclose a validly filed financing statement will have a claim against the person who improperly filed the financing statement or the one who improperly conducted the search of the records, depending upon who made the error.⁶⁵ To

⁶⁰*Cf. Smeeckens v. Bertrand*, 262 Ind. 50, 311 N.E.2d 431 (1974) (wrongful act of obtaining possession by the vendor was treated as an anticipatory repudiation or breach, justifying the purchaser in rescinding by later action).

⁶¹355 N.E.2d 455 (Ind. Ct. App. 1976). *Cf. Bowen v. Metropolitan Bd. of Zoning Appeals*, 317 N.E.2d 193 (Ind. Ct. App. 1974) (lessee, and not lessor, was the "owner" who could apply for zoning variance).

⁶²The filing officer who receives a filing is required to enter the filing in the appropriate index in a proper sequence and in accordance with rules adopted by the Secretary of State. INDIANA SECRETARY OF STATE, INDIANA RULES AND REGULATIONS FOR THE ADMINISTRATION OF THE UNIFORM COMMERCIAL CODE 32-40 (1972).

⁶³*Id.* at 46-65 (proper search procedures).

⁶⁴A financing statement is filed upon presentation for filing and tender of the filing fee or acceptance of the statement by the filing officer. IND. CODE § 26-1-9-403 (1976). Hence, third persons are bound by the filing even though improperly indexed. *McMillan v. First Nat'l Bank & Trust Co. (In re Fowler)*, 407 F. Supp. 799 (W.D. Okla. 1975).

⁶⁵Since the filing is effective upon tender with proper fees or acceptance, failure of the filing officer to properly place the filing in the records is the cause of loss to third party purchasers relying on the omission in the record. *See Reeder v. State ex rel. Harlan*, 98 Ind. 114 (1884) (recorder who failed to index recorded mortgage liable to purchaser who searched and relied upon records); *Mechanics Bldg. Ass'n v. Whitacre*, 92 Ind. 547 (1883) (release entered on wrong mortgage later certified as paid—recorder liable to person who relied upon certification).

If the filing officer is requested to make a search of the records and fails to uncover information sought, he is liable to the person making the request. *Compare Johnson v. Schloesser*, 146 Ind. 509, 45 N.E. 702 (1897) *with State ex rel. Lowry v.*

recover, it seems that he must prove fault, and in this he may be aided by presumptions. If there is a filing in an improper place or the filing is lost, a presumption may arise to the effect that the officer as of the time of filing was at fault, although the possibility that the omission or misfiling could have occurred under a later filing officer's regime may rebut the presumption.⁶⁶ If requested information is inaccurately taken from the records, fault upon the party providing the information is made apparent.⁶⁷ The person who claims injury must show that he reasonably relied upon the information furnished and the extent of his damages.⁶⁸ The foregoing estimate of responsibilities of those who file and furnish filing information has not clearly been determined by case law, but two matters have received attention. An insurance fund has been established by the state of Indiana to cover losses resulting from negligence of filing officers and their employees.⁶⁹

*Salem Bank & Trust Co. v. Whitcomb*⁷⁰ held that a filing officer, including the Secretary of State and the Director of the U.C.C. Division, could be held liable for negligence in filing or furnishing requested filing information.⁷¹ In a cloud of darkness and ambiguity, the opinion of

Davis, 96 Ind. 539 (1884) (both holding a recorder failing to record or improperly recording a conveyance liable to the person causing it to be recorded when his interest was defeated by a bona fide purchaser).

It is questionable whether he would be liable to a third person who relied upon information made to another who requested it. *See Mechanics Bldg. Ass'n v. Whitacre*, 92 Ind. 547 (1883) (indicating no liability unless recorder required by law to furnish information). Upon request the filing officer is required by law to furnish information. IND. CODE § 26-1-9-407(2) (1976). Hence, it can be argued that third persons should be permitted to rely upon it. *Id.* § 26-1-9-410.

⁶⁶*Cf. Keenan Hotel Co. v. Funk*, 93 Ind. App. 677, 177 N.E. 364 (1931) (when goods in possession of a bailee are lost or injured, there arises a presumption that the bailee is at fault). If a financing statement is filed while A is filing officer, and it is overlooked by A-2, who succeeds him, because it is not filed alphabetically or is missing, a plaintiff will have difficulty in establishing which officer was at fault. *Cf. Pittsburgh, C., C. & St. L. R.R. Co. v. Larosa*, 75 Ind. App. 475, 131 N.E. 22 (1921) (goods passing through two carriers—presumed last carrier at fault).

⁶⁷*See Reeder v. State ex rel. Harlan*, 98 Ind. 114 (1884).

⁶⁸*Cf. Continental Nat'l Bank v. Discount & Deposit State Bank*, 199 Ind. 290, 157 N.E. 433 (1927) (collecting bank liable only for loss resulting from negligence).

⁶⁹IND. CODE § 26-1-9-401(6) (1976) (primary source of payment of judgments against filing officers or their employees for failure to properly file or furnish correct information to be made from general fund not exceeding \$100,000 per fiscal year). This act was made retroactive in the sense that it applies to all judgments "recovered or to be recovered."

⁷⁰362 N.E.2d 1180 (Ind. Ct. App. 1977).

⁷¹The qualified privilege of public "officer" to wreak havoc with the citizenry as a result of his good faith dumbness, negligence, or wrongs committed in the performance of his "discretionary" duties was recognized but not applied. *Cf. Board of Comm'rs v. Briggs*, 337 N.E.2d 852 (Ind. Ct. App. 1975) (function of a filing officer or employee to furnish correct information was determined to be "ministerial").

the court of appeals indicated that vicarious liability of the Secretary of State and his Director would not extend to negligence of "officers" or to those who become servants of the public as distinguished from servants of the officer; however, liability would extend to negligence of "deputies."⁷² Because the court seemed to have some doubt as to the status of the Director and the status and identity of the employee responsible for omitting a filed financing statement from information furnished on request to the plaintiff, who allegedly advanced credit in reliance thereon, the court reversed the decision below, which granted summary judgment to the filing officers. The muddy water shed by this opinion as to the vicarious liability of a public "officer" for acts of his deputies and employees hopefully cries out for a re-examination of the whole doctrine in light of the generally accepted principle that the state and governmental units have become responsible for the acts of officers and employees. No public officer or employee today, without regard as to how he is characterized, has either a sufficient "deeper pocket" or control over those who work with, for, or under him—"fellow servants" in a broad sense—to justify the imposition of vicarious liability, unless of course either the particular wrongful acts of the "fellow servant" are directed by him, he participates therein, or he is guilty of fault in hiring or deploying those in his charge.⁷³ In short, it is absurd to hold the Governor, the Secretary of State, a judge, or anyone else in government service vicariously liable for "his" deputies or employees. It is a good guess that this is what the judge in *Whitcomb* wanted to say. He left the door open with a "muddy" opinion

⁷²362 N.E.2d at 1184. It has been a tradition to impose vicarious liability upon a sheriff for the wrongful acts of his deputies. *Magenheimer v. State ex rel. Dalton*, 120 Ind. App. 128, 90 N.E.2d 813 (1950).

⁷³Few decisions will be found imposing vicarious liability upon public officers for acts of their employees, except in the case of a sheriff. If liability was allowed, one ground for doing so was that the real employer, the state, was immune from liability. But sovereign immunity now has been repudiated in Indiana. *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972). If the officer is, in effect, a sub-agent between the state and "his" deputy or employee, under traditional rules of agency, he should not be held vicariously liable. RESTATEMENT (SECOND) OF AGENCY § 358 (1957).

As a condition to qualification for office and to establish the "deeper pocket," officers commonly are required to furnish bond or a surety, and the terms of the bond sometimes are conditional upon his responsibility for those who work for him. See *Halbert v. State ex rel. Board of Comm'rs*, 22 Ind. 125 (1864) (originating long-followed rule that treasurer and his bondsman were liable for losses of funds due to a burglary through no fault of the treasurer). The bond, of course, offers no protection to the officer, since he must reimburse his bondsman for losses paid. See *Fidelity & Cas. Co. v. McNamara*, 127 W. Va. 731, 36 S.E.2d 402 (1945). Few decisions will be found where reimbursement by the bondsman is sought against the vicariously liable officer.

on the issue,⁷⁴ and hopefully the doctrine of vicarious liability for public servants will disappear along with the privilege of the king's "officers" to blunder in the exercise of discretionary functions.

2. *Creation and Perfection of Security Interests in Personal Property.*—Two recent cases dealt with the status of a seller who has contracted to sell securities when he remains in possession of the securities (stock certificates). In *Kruse, Kruse & Miklosko v. Beedy*,⁷⁵ the seller's interest was characterized as a "security interest" securing the buyer's obligation to pay, thus subjecting the transaction to the remedies provisions of Article 9 of the U.C.C.⁷⁶ In this case, the stock certificates were turned over to an escrow agent to be retained until payment by the buyer, who was given voting rights and control over the assets of the corporation whose shares were involved.⁷⁷ In *Ralston Purina Co. v. Detwiler*,⁷⁸ the seller agreed to make delivery of the stock in blocks as the buyer paid the promised installments. The seller then assigned his contract rights to a lender, who perfected by filing with respect to the contract right and prevailed over the seller's creditor who subsequently pro-

⁷⁴On remand it seems the State of Indiana, the party primarily liable, should be named a defendant. See IND. CODE § 26-1-9-401(6) (1976).

The state is liable for the act of the state employee furnishing incorrect filing information. See *Hudleasco, Inc. v. State*, 396 N.Y.S.2d 1002 (Ct. Cl. 1977) (wrong held to be a "ministerial" duty for which state was liable if fault established).

⁷⁵353 N.E.2d 514 (Ind. Ct. App. 1976).

⁷⁶The court determined that the seller had exercised his right to rescind under U.C.C. § 9-505(2). This aspect of the case is discussed at note 92 *infra* and accompanying text.

⁷⁷By way of comparison, it is significant that a seller of goods in possession has rights in the nature of a security interest along with contractual remedies as provided in Article 2 of the U.C.C. IND CODE § 26-1-2-703 (1976). His lien or right to keep or dispose of the goods is not subject to the Article 9 provisions applicable to security interests with respect to the requirement of a written security agreement, filing, and remedies on default. *Id.* § 26-1-9-113.

No similar provision will be found in Articles 3 or 8, dealing with sellers of negotiable instruments and securities. *Cf. id.* § 26-1-8-107 (allowing seller to recover price in certain cases). Hence, the contract rights of sellers and buyers of securities and instruments are governed by common law principles and possibly provisions of Article 2, by analogy. *Cf. Stock Clearing Corp. v. Weis Sec., Inc. (In re Weis Sec.)*, 542 F.2d 840 (2d Cir. 1976) (court applied provision of Article 2 of Code to sale of securities).

In *Beedy*, had the court applied common law rules or Article 2 provisions, it would have been required to determine if the contract provision giving the seller the right to keep the stock and payments (\$70,000 of a total price of \$385,000) upon the buyer's default constituted a penalty. Compare *Melfi v. Griscer Indus., Inc.*, 141 Ind. App. 607, 231 N.E.2d 54 (1967) with IND. CODE § 26-1-2-718 (1976). Since the transaction was denominated as creating a sale with a security interest in favor of the seller, this issue was eliminated.

⁷⁸364 N.E.2d 180 (Ind. Ct. App. 1977).

ceeded against the stock and the buyer. The court held, in effect, that although a security interest in securities and instruments cannot be perfected without possession,⁷⁹ a secured party's interest in the seller's rights under a contract to sell stock in his possession is perfected by filing—at least as against a subsequent lien creditor in certain cases. The case is discussed elsewhere from the standpoint of lien creditors.⁸⁰

3. *Remedies of Parties to Secured Transactions.*—One of the remedies of a secured party when the debtor defaults is to bring suit upon the debt.⁸¹ Suppose he does so but repossesses the collateral before or during suit. May the debtor require a reduction in the amount of recovery or a delay in enforcement of the judgment until the secured party exhausts his remedies against the collateral? *Roberts v. Watson*⁸² seemed to answer the question with a qualified “no” where a landlord with a security interest in the tenant's equipment obtained possession of the land and equipment during his suit to recover rent. In reversing the judgment below as erroneously allowing recovery for future rent and subtraction of the value of the collateral from the landlord's recovery for past due rent,⁸³ the court of appeals, on remand, allowed the landlord to propose to keep the goods in satisfaction of the indebtedness;⁸⁴ and if the proposal was rejected by the debtor, the court authorized a commercially reasonable sale⁸⁵ with the proceeds to be applied to the judgment. Alternately, the landlord could choose to have the rent judgment

⁷⁹The U.C.C. provides that a security interest in instruments (which includes negotiable instruments and securities) cannot be perfected by filing except as to proceeds in limited situations not applicable to this case. IND. CODE § 26-1-9-304(1) (1976). Except for the cases involving returned merchandise, the Code does not squarely deal with competing claims of third parties to goods or instruments in the possession of a debtor or contract rights arising when the debtor has contracted to sell the goods that remain in his possession. Compare *id.* § 26-1-9-306 (involving competing security interests in returned merchandise and proceeds thereof consisting of accounts and chattel paper) with *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261, 288 N.Y.S.2d 525 (Sup. Ct. 1968) (perfected security interest in proceeds from inventory and debtor's assignee of chattel paper arising from sale of goods that remained in debtor's possession).

⁸⁰See discussion at note 149 *infra* and accompanying text.

⁸¹IND. CODE § 26-1-9-501 (1976).

⁸²359 N.E.2d 615 (Ind. Ct. App. 1977).

⁸³The rent damages below, which included rent not yet due, were modified on appeal.

⁸⁴This remedy is permitted by IND. CODE § 26-1-9-505(2) (1976). This remedy is discussed at note 91 *infra* and accompanying text.

⁸⁵IND. CODE § 26-1-9-504 (1976) governs the requirement for sale or disposal of collateral by the secured party. Whether failure to comply with the Code wipes out the indebtedness or makes him liable in damages or both has not been resolved in Indiana. For a discussion of this problem, see Townsend, 1976 *Survey*, *supra* note 59, at 321-22.

entered and enforced by way of execution⁸⁶ or choose a new trial on the issue of damages.⁸⁷ The court seems to have said to the landlord: You may take the judgment for rent as determined on appeal and enforce it by execution or through your U.C.C. remedies against the repossessed collateral with accountability for the collateral or its disposal to be determined in future proceedings; or you may claim a new trial on the supposition that you may have either rightfully or wrongfully pursued Code remedies some time before judgment, which must be relitigated on the issue of damages upon retrial.⁸⁸ This indicates that if a secured party brings suit upon the debt alone, and prior thereto or during the course of the litigation the secured party injures or disposes of the collateral, the debtor may protect himself by compulsory or permissive counterclaim; and after judgment he may guard against loss by proceedings to prevent improper enforcement

⁸⁶If the secured party recovers judgment, he may levy upon the collateral if it has not been previously sold. He does not lose his lien by the levy. IND. CODE § 26-1-9-501(5) (1976). He also may levy on other property. The remand order in this case did not specify what assets of the tenant should be subject to levy.

⁸⁷The remand order seems to have indicated that if the landlord (secured party) elected to proceed against the collateral with his U.C.C. remedies, he could not enforce the judgment by way of execution until the Code remedies were exhausted. This would avoid the unseemly situation of the secured party selling collateral and moving against other assets by way of execution at the same time. The Code provides that the remedies are "cumulative," but not necessarily that they are concurrent. The order thus did no violence to the terms of the U.C.C.

⁸⁸Case law under the Code generally supports the right of the secured party to hold or repossess collateral while he sues on the debt. *McCullough v. Mobiland, Inc.*, 139 Ga. App. 260, 228 S.E.2d 146 (1976) (pledgee allowed to recover on debt although he retained possession of collateral); *Peoples Nat'l Bank v. Peterson*, 7 Wash. App. 196, 498 P.2d 884 (1972), *aff'd*, 82 Wash. 822, 514 P.2d 159 (1973) (after repossession, secured party allowed to sue on debt and foreclose).

A large number of decisions, however, hold that when a secured party holds or regains possession of the collateral and fails to take affirmative action by an offer to rescind or a resale of the collateral, recovery upon the indebtedness may become improper upon a theory of (1) an election of remedies, (2) an election or offer to rescind accepted by the debtor, or (3) under the rule denying him a deficiency when a sale is not conducted in a commercially reasonable manner and as required by the Code. *Liberty Loan Corp. v. Wallace (In re Wilson)*, 390 F. Supp. 1121 (D. Kan. 1975) (having obtained an in personam judgment without asserting its security interest, secured party is precluded under principles of *res judicata* from bringing a subsequent action to enforce its security); *Moran v. Holman*, 13 U.C.C. REP. SERV. 206 (Alas. 1973) (after repossession, secured party sued on debt—recovery denied under evidence showing misuse of collateral or retention for excessive period of time); *Michigan Nat'l Bank v. Marston*, 29 Mich. App. 99, 185 N.W.2d 47 (1970) (indicating that if repossessing secured party failed to dispose of collateral properly within reasonable time, secured party could not recover on debt).

of the judgment.⁸⁹ In the latter case, Indiana allows him to raise the issue by motion.⁹⁰

Still another remedy of the secured party when the debtor has defaulted is to propose his intent to rescind in writing—*i.e.*, to keep the collateral and payments received and give up any right to a deficiency. Collateral and prior payments may be kept in satisfaction of the obligation if notice is sent by a secured party in “possession” to the debtor who does not object in writing within thirty days.⁹¹ This provision of the U.C.C. was applied in *Kruse, Kruse & Miklosko v. Beedy*,⁹² where the seller of stock placed it in escrow with a provision in the contract that upon default by the buyer-debtor of his duty to make payments when due, the rights of the buyer should terminate and the seller “shall immediately be entitled to recover the same” and the buyer shall “upon any such default forfeit and surrender all right and claim to any and all payments.”⁹³ After the buyer had paid \$70,000 and then later defaulted, the seller sent him written notice to the effect that if the breaches continued for thirty days, the rights of the buyer to the stock should terminate with a “surrender” of all payments made.⁹⁴ This was held by the court of appeals to constitute a written proposal to rescind, and the seller was found to be a secured party in “possession” even though the stock certificates were held by an escrow agent.⁹⁵ Since the buyer did not reject the proposal within thirty days, the seller-secured party was allowed to regain the stock and keep the payments.

Leases of equipment are often used as financing devices, and frequently a transaction denominated as a lease in fact constitutes a sale to the lessee with a security interest in the lessor, thus subjecting him to the remedies and other provisions of the U.C.C.⁹⁶ In a case of

⁸⁹If the secured party has disposed of the collateral and is accountable for the proceeds, or if he is liable for improper disposition of, or injury to, the collateral at the time of the debtor's answer pleading, it seems that the debtor must file a counterclaim, or at least he must establish his rights during the course of litigation. See IND. R. TR. P. 13(A). See also IND. R. TR. P. 64(C).

⁹⁰*Id.*

⁹¹IND. CODE § 26-1-9-505 (1976). This provision does not apply where the collateral is consumer goods and the debtor has paid 60% or more of the cash price or loan.

⁹²353 N.E.2d 514 (Ind. Ct. App. 1976).

⁹³*Id.* at 518.

⁹⁴The buyer of the stock (debtor) took possession and control of the corporate property under the arrangement and through the fact that he had purchased the controlling interest.

⁹⁵Under U.C.C. § 9-305, a secured party is deemed to have possession of collateral in the possession of a bailee from the time of notification to the bailee of his interest. The escrow agent who held the stock certificates in this case was to deliver them upon fulfillment of the contract, and this was held to give the seller possession. *Accord*, *Barney v. Rigby Loan & Inv. Co. (In re Barney)*, 344 F. Supp. 694 (D. Idaho 1972).

⁹⁶If a lessee is given the option to become owner upon performing the lease or by paying a nominal sum in addition to the rent, decisions uniformly hold the transaction

first impression in Indiana, *Loudermilk v. Feld Truck Leasing*⁹⁷ determined, without discussion, that a truck lease did not create a security interest and allowed the lessor upon default of rent to recover and keep the leased property and all payments as provided in the agreement. Since the lease agreement also allowed the lessor to retake possession without terminating the lease, the court held that the repossessing lessor could recover rent after repossession so long as the equipment was held available to the lessee.⁹⁸ The court did not consider the obligation of the lessor to mitigate damages after repossession.⁹⁹

The final chapter in *Ertel v. Radio Corp. of America*¹⁰⁰ was written to the effect that an account debtor may set off his damages arising out of the account as against an assignee of the account.¹⁰¹

to be a sale with the seller retaining a security interest subject to the provisions of the U.C.C. *E.g.*, *Woco v. Benjamin Franklin Corp.*, 20 U.C.C. REP. SERV. 1015 (D.N.H. 1976). Parol proof of an option to purchase for a nominal or no additional consideration may be admissible to establish a security interest. *In re Walter W. Willis, Inc.*, 313 F. Supp. 1274 (N.D. Ohio 1970). *But cf.* *Equitable Leasing Computer Sys. v. Clements (In re Financial Computer Sys., Inc.)*, 474 F.2d 1258 (9th Cir. 1973) (oral agreement within statute of frauds).

The importance of the commercial lease of goods or equipment is indicated by two current decisions involving taxation of the parties. *Compare* *Indiana Dep't of State Revenue v. Indianapolis Transit System*, 356 N.E.2d 1204 (Ind. Ct. App. 1976) *with* *Indiana Dep't of State Revenue v. Associated Beverage Co.*, 353 N.E.2d 544 (Ind. Ct. App. 1976).

⁹⁷358 N.E.2d 160 (Ind. Ct. App. 1976).

⁹⁸Equipment leases allowing a lessor to recover rent and keep the equipment upon breach by the lessee usually are held unenforceable as a penalty or as unconscionable. *E.g.*, *Arco Bag Co. v. Facings, Inc.*, 111 Ill. App. 2d 110, 151 N.E.2d 438 (1958); *cf.* *Fairfield Lease Corp. v. Umberto*, 7 U.C.C. REP. SERV. 1181 (Civ. Ct. N.Y. 1970) (lessor with right to accelerate and keep equipment). Provisions for liquidated damages will be upheld if reasonable. *See also* *Siletz Trucking Co. v. Alaska Int'l Trading Co.*, 467 F.2d 961 (9th Cir. 1972); *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 361 N.E.2d 1015, 393 N.Y.S.2d 365 (1977).

⁹⁹*Krieger & Shurn, Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 637-41 (1977), discusses the problem of mitigation when a landlord of real estate retakes the property and suggests that mitigation should be required.

¹⁰⁰354 N.E.2d 783 (Ind. Ct. App. 1976).

¹⁰¹The law to be applied in this case was resolved in *Ertel v. Radio Corp. of America*, 261 Ind. 573, 307 N.E.2d 471 (1974). On the latest appeal the court allowed the account debtor who received defective machines to set off damages measured by the cost involved in making repairs and the price paid for machines that were not reparable less their junk value.

Prior case law held that a debtor was not required to interpose a truth-in-lending claim as a setoff to an action upon the debt as a compulsory counterclaim. *Daughtrey v. First Bank & Trust Co.*, 435 F. Supp. 218 (N.D. Ind. 1977) (debtor who failed to set up violation in state court action by creditor allowed to recover penalty in later federal action). Prior law also permitted the creditor to offset its claim in an action by the debtor to recover truth-in-lending penalties. *Binnick v. Avco Financial Services, Inc.*, 435 F. Supp. 359 (D. Neb. 1977) (setoff of claim discharged by debtor's bankruptcy where

While the Truth-in-Lending remedies for nondisclosure must be sought within one year from the time of violation, an Indiana decision held that a violation prosecuted under Indiana law may be interposed as a setoff against the creditor at any time by the debtor or his surety.¹⁰²

The risk of accidental loss or injury to collateral falls upon the debtor absent agreement otherwise.¹⁰³ This rule was applied against a buyer of stock certificates that were turned over to an escrow agent by the seller as security for the price when substantial assets of the corporation, whose stock was involved, were destroyed by fire.¹⁰⁴

Other current decisions recognize the right of a secured party to accelerate both the obligation and an event of default under an insecurity clause where the obligation is further secured by binding a surety without giving him an opportunity to cure the default.¹⁰⁵

D. Creditors' Rights

1. *Regulation of Collection Practices.*—Curbs on collection practices in the case of consumer credit have been imposed by the Fair Debt Collection Practices Act.¹⁰⁶ This new federal law is discussed elsewhere in this Survey.¹⁰⁷

2. *Mechanic's Liens.*—Rejection of the doctrine of sovereign immunity for tort by decisional law did not repeal the judge-made rule

debtor sought to recover penalty for truth-in-lending violation). *But cf.* *Newton v. Beneficial Fin. Co.*, 558 F.2d 731 (5th Cir. 1977) (setoff of claim discharged by debtor's bankruptcy denied in suit by debtor to recover truth-in-lending penalty).

¹⁰²*Holmes v. Rushville Prod. Credit Ass'n*, 355 N.E.2d 417 (Ind. Ct. App. 1976). The case applied IND. CODE § 24-4.5-5-205 (1976) of the Uniform Consumer Credit Code expressly allowing setoff of refunds and penalties allowed under the law. Indiana law otherwise limits recovery for violation of disclosure requirements to one year after the violations. *Id.* § 24-4.5-5-203(5) (1976).

Under the Federal Truth-in-Lending Law, the action to recover penalties and damages must be brought within one year of the violation, but setoff is not permitted until after the amount of the creditor's liability has been fixed by judgment. 15 U.S.C. § 1640(e),(h) (1970 & Supp. V 1975). The setoff provision was added October 28, 1974.

¹⁰³*Cf.* IND. CODE § 26-1-9-207 (1976) (which applies where secured party in possession).

¹⁰⁴*Kruse, Kruse & Miklosko, Inc. v. Beedy*, 353 N.E.2d 514 (Ind. Ct. App. 1976). This case is discussed at notes 1, 75 & 92 *supra* and accompanying text. However, when the transaction in *Beedy* was rescinded pursuant to U.C.C. § 9-505(2), the loss of assets was absorbed by the secured party who, nevertheless, got to keep payments made by the debtor.

¹⁰⁵*Holmes v. Rushville Prod. Credit Ass'n*, 353 N.E.2d 509, *remanded on other grounds on rehearing*, 355 N.E.2d 417 (Ind. Ct. App. 1976). The problem of acceleration under an insecurity clause (as when the lender deems himself insecure) was discussed in *Townsend*, 1976 *Survey*, *supra* note 59, at 318-20.

¹⁰⁶Pub. L. No. 95-109, 91 Stat. 874 (1977).

¹⁰⁷*See Bepke, Contracts, Commercial Law, and Consumer Law*, 1977 *Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 100, 111-19 (1977).

to the effect that mechanic's liens cannot be obtained on real estate owned by the state or its subdivisions.¹⁰⁸ Another decision recognized the statutory lien allowed a subcontractor against funds owing to the prime by the owner contracting with him,¹⁰⁹ but denied the lien when notice to the owner was received after the owner's obligation had been discharged by a right of setoff against the prime.¹¹⁰

3. *Artisan's Liens.*—The lien of an artisan is lost if the work is done on credit terms allowing the owner to pay after the services are completed,¹¹¹ and also if the artisan refuses delivery after an excessive charge is demanded for release of the property.¹¹² Artisan's liens on several items of property usually are construed as general liens, prohibiting the owner of several lien items from claiming a part for paying for the services ascribed only to that part.¹¹³ These matters were involved in *Yoder Feed Service v. Allied Pullets, Inc.*,¹¹⁴ where the owner of chickens entrusted them to a grower who was to be paid on the basis of each chicken after they were picked up by the owner. However, the grower was required by oral agreement to buy feed for which no arrangement was made under the original written contract, and he refused delivery when the owner

¹⁰⁸*Repp & Mundt, Inc. v. Hitzelberger Supply Co.*, 353 N.E.2d 547 (Ind. Ct. App. 1976). *But cf. Middleton Motors, Inc. v. Indiana Dep't. of State Revenue*, 366 N.E.2d 226 (Ind. Ct. App. 1977) (elimination of sovereign immunity terminated use of no estoppel against state). On public construction, subcontractors are protected by statutory provisions requiring the state or subdivision to require a surety whose liability is conditioned both upon performance and payment of subcontractors. *E.g.*, IND. CODE § 5-16-5-2 (1976). In certain cases, subcontractors may impress a lien upon funds owing by the government organization. *Id.* § 5-16-5-1.

¹⁰⁹IND. CODE § 32-8-3-9 (1976).

¹¹⁰*Pioneer Lumber & Supply Co. v. First Merchants Nat'l Bank*, 349 N.E.2d 219 (Ind. Ct. App. 1976) (setoff allowed to the extent of credit furnished the contractor by the owner through his mortgage executed in favor of a bank, which advanced the funds to the contractor). The case is discussed at note 40 *supra* and accompanying text. In *Pioneer Lumber*, the subcontractor lost his right to a lien on the land because he failed to notify the owner-intended occupant within 14 days after the work commenced, as required by law. IND. CODE § 32-8-3-1 (1976).

¹¹¹*Newark Slip Contracting Co. v. New York Credit Men's Adjustment Bureau*, 186 F.2d 152 (2d Cir. 1951). *See Welker v. Appleman*, 44 Ind. App. 699, 90 N.E. 35 (1909).

¹¹²*Mockford v. Iles*, 217 Ind. 137, 26 N.E.2d 42 (1940); IND. CODE §§ 26-1-7-209(4), 26-1-7-307(3) (1976). If the owner pays the artisan who is demanding excessive charges, he may recover his money on a theory of unjust enrichment for economic duress. *Lafayette & Indpls. R.R. v. Pattison*, 41 Ind. 312 (1872).

¹¹³*Cf. Mockford v. Iles*, 217 Ind. 137, 26 N.E.2d 42 (1940) (lien on goods for storage did not cover charges for moving); *Bierly v. Royse*, 25 Ind. App. 202, 57 N.E. 939 (1900) (lien of sawyer on lumber secured general account owing by owner). A lien may be specific. *Compare* provision of the U.C.C. applying to warehousemen's liens, IND. CODE § 26-1-7-209 (1976), *with* provision applying to carrier's liens, *id.* § 26-1-7-307.

¹¹⁴359 N.E.2d 602 (Ind. Ct. App. 1977).

tendered \$4,700 for the feed bill of \$4,956.22. The grower demanded that he be paid in full for the feed and the chickens. The court of appeals allowed the owner to recover in trover on the theory that the grower had no lien for feed since under the general contract, payment was not due the grower until twenty-one days after removal, and because the grower refused to make delivery until he was paid in full—a demand which was excessive.¹¹⁵ The duty of the grower to make partial delivery upon partial tender was not considered.

4. *Federal Tax Liens.*—Under the Federal Tax Lien Act,¹¹⁶ a security interest in the taxpayer's property may be defeated by a subsequent recorded tax lien if a "judgment lien" could take priority over the security interest under state law.¹¹⁷ In *Dragstrem v. Obermeyer*,¹¹⁸ the Seventh Circuit Court of Appeals dealt with this problem, and in the course of its opinion it reached the correct result but grossly misrepresented the status of Indiana law. The "kicker" in that case arose because the secured party held an unperfected security interest in the debtor's corn crop. The debtor-taxpayer sold the crop to a buyer who became his account debtor, and to protect his rights the secured party brought suit against the account debtor to impress his security interest upon the fund owing as proceeds of his security interest in the crop.¹¹⁹ Shortly thereafter, the United States was interpleaded and intervened in the action, and six days later it recorded notice of its tax lien. The question before the court was whether the secured party, who had filed suit against the account debtor, had such a perfected interest that it would be protected against a subsequent hypothetical "judgment lien" under local law.¹²⁰ The court noted that in Indiana a

¹¹⁵Subject to a setoff for the amounts owing to the grower, the owner was awarded damages measured by the value of the chickens at the time and place of delivery. Evidence of value in Ohio, where the chickens were to have been sold, was held improper.

¹¹⁶I.R.C. §§ 6321-6326.

¹¹⁷The Internal Revenue Code provides that the federal tax lien shall "not be valid as against any . . . holder of a security interest . . . until notice thereof . . . has been filed." I.R.C. § 6323(a). By definition a security interest comes into being only when (1) there is an obligation, (2) secured by contract, (3) the property is in existence, and (4) it has "become protected under *local law* against a subsequent judgment lien arising out of an *unsecured obligation*." I.R.C. § 6323(h)(1) (emphasis added). The Code further deals with certain super-priorities and special problems concerned with future obligations and after-acquired collateral not relevant here.

¹¹⁸549 F.2d 20 (7th Cir. 1977).

¹¹⁹Under U.C.C. § 9-306, the security interest in the corn crop continued in the account, which in this case was over \$30,000. *E.g.*, *In re Mid State Wood Prods. Co.*, 323 F. Supp. 853 (N.D. Ill. 1971); *Fort Collins Prod. Credit Ass'n v. Carroll Dairy*, 553 P.2d 95 (Colo. App. 1976); *Matthews v. Arctic Tire, Inc.*, 7 U.C.C. REP. SERV. 369 (R.I. 1970).

¹²⁰The court held that the term "judgment lien" was used in a hypothetical sense so that even though under Indiana law (which is the case) an unperfected security in-

hypothetical judgment creditor could obtain an execution lien upon the obligation of the account debtor simply by causing execution to be delivered to the sheriff¹²¹ and for this reason the United States was given priority.¹²²

The statement as to Indiana law was wrong because a statute prohibits execution upon a chose in action unless the debtor surrenders it up.¹²³ However, the holder of a judgment could impress a lien upon the account debtor by initiating proceedings supplemental against the debtor and naming the account debtor as garnishee.¹²⁴ If this "judgment lien" would take priority over the secured party who had previously initiated judicial proceedings to establish his lien, the result reached was correct. However, Indiana has long recognized that a secured party or owner may perfect his rights to property in the possession of another by bringing suit to establish his in rem title and then filing *lis pendens* notice of the litigation.¹²⁵ Upon adoption

interest in personal property may be defeated by a subsequent judgment lien creditor without knowledge—the question of the government's knowledge is irrelevant. *Fred Kraus & Sons, Inc. v. United States*, 369 F. Supp. 1089 (N.D. Ind. 1974), discussed in Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 261 (1974). The term was held to be co-extensive with "lien creditor" as defined in U.C.C. § 9-301.

¹²¹The Indiana statute allows an execution lien on personal property subject to execution as of the time the writ is delivered to the sheriff. IND. CODE § 34-1-34-9 (1976).

¹²²The court did not reach the following problem. Suppose that a federal tax lien arises, as it does, at the time of assessment. It is not recorded. Later the secured party acquires a security interest on the same property and perfects with knowledge of the tax lien, but before it is recorded. Who takes priority? *Cf. United States v. Beaver Run Coal Co.*, 99 F.2d 610 (3d Cir. 1938) (secured party with knowledge takes priority).

¹²³Unless "given up" by the judgment debtor no execution or execution lien can be asserted against choses in action. IND. CODE § 34-1-36-6 (1976) (emphasis added). No lien attaches, therefore, until "given up" by the judgment debtor. *Beckman Supply Co. v. Newell*, 68 Ind. App. 679, 118 N.E. 962 (1918); *Steele v. McCarty*, 130 Ind. 547, 30 N.E. 516 (1892). This same rule probably applies to personal property in the hands of a bailee or third party. *E.g., Moorman v. Quick*, 20 Ind. 67 (1863); *Williams v. Smith*, 7 Ind. 559 (1856). The rule is especially applicable when the personal assets are in the custody of a court as in this case. *Stout v. LaFollette*, 64 Ind. 365 (1878); *Winton v. State*, 4 Ind. 321 (1853).

If the debtor must surrender the chose in action in order for the property to become subject to execution or to an execution lien, upon surrender the lien procured becomes, in essence, a consensual security interest and probably is not a "judgment lien." See the comparable provision of § 60a(4) of the Bankruptcy Act, 11 U.S.C. § 96a(4) (1970) (lien by judicial proceedings defined as one arising in "ordinary course of such proceedings").

¹²⁴*Pouder v. Tate*, 132 Ind. 327, 30 N.E. 880 (1892); *Union Bank & Trust Co. v. Vandervoort*, 122 Ind. App. 258, 101 N.E.2d 724 (1951).

¹²⁵Compare IND. CODE §§ 34-1-4-1 to -3 (1976) with *id.* §§ 34-1-4-8 to -9. The purpose of the statute providing for recordation of *lis pendens* litigation concerning property is to afford notice to subsequent purchasers and creditors. *Carr v. Stebbins*, 292 F. 747 (7th Cir. 1923).

of the new Indiana Rules of Civil Procedure, Trial Rule 63.1 expressly broadened the *lis pendens* rule to cover personal property and provided a means by which a secured party or owner could perfect his interest—*i.e.*, by filing notice of his pending action against the property through the filing machinery of the U.C.C.¹²⁶ In this case, the secured party who sought to enforce his rights against the account debtor in proceeds of the corn crop apparently failed to file notice of *lis pendens*. Thus, under Article 9 of the U.C.C. it could be argued that the security interest remained unperfected against the tax lien until (1) judgment against the account debtor, (2) filing under Article 9, (3) filing of *lis pendens* notice of the suit, or (4) payment by the account debtor.¹²⁷ Since under Article 9 a hypothetical “lien creditor” would prevail, there is support for the decision.

5. *Tax Sales.*—Failure of a county auditor to comply with statutory procedures by omitting the address of transferees when the property was entered for taxation as real property and failure to give them notice of the proceeding are grounds for invalidating the tax sale. In *Long v. Anderson*,¹²⁸ the Seventh Circuit rejected

After default, a secured party with a security interest in accounts may enforce his rights by action against the account debtor. IND. CODE § 26-1-9-502 (1976).

¹²⁶IND. R. TR. P. 63.1(C) was adopted to take care of the unperfected secured party's problem in this case. By bringing suit to establish his unperfected security interest, he may perfect by filing *lis pendens* notice, using the filing machinery of the U.C.C. He may also perfect when possession of the property is taken by him or by a “court officer.” Under the facts of this case, the account debtor ultimately paid some \$30,000 into court to be distributed as interests were determined by the ultimate judgment as between the secured party and the United States. Had the money been paid into court before the federal tax lien was recorded, the secured party would have prevailed under Trial Rule 63.1(C)—at least if it had been paid over before the United States had intervened.

Had the secured party filed *lis pendens* notice of his claim it is clear that he would have prevailed over a subsequent recorded tax lien. *Cf.* *First Nat'l Bank v. Hill*, 412 F. Supp. 422 (N.D. Ga. 1976) (bank from whom embezzler had stolen funds filed suit and *lis pendens* on assets of embezzler traced from thefts—bank prevailed over later recorded tax lien). In a state where no *lis pendens* notice is provided, it seems that in judicial proceedings by a secured party or owner to subject assets held by a taxpayer, constructive trust should prime their rights over a tax lien, if for no other reason than that the general rule of “first in time, first in right” should apply. *Dennis v. United States*, 372 F. Supp. 563 (E.D. Va. 1974).

¹²⁷Had the secured party or a third person obtained possession of the funds owing by the account debtor, his interest would have been perfected. IND. CODE § 26-1-9-305 (1976); IND. R. TR. P. 63.1(C). The secured party could have perfected by filing with respect to the account that was proceeds. *Compare* IND. CODE § 26-1-9-302(1) (1976) with *id.* § 26-1-9-306(3)(b). A secured party or owner who obtains judgment against a person holding funds of the taxpayer will prevail under the terms of the Internal Revenue Code protecting “judgment lien creditors” as against unrecorded tax liens. I.R.C. § 6323(a); *All-Temp, Inc. v. Williams*, 341 F. Supp. 872 (E.D. Mo. 1972). *See* RESTATEMENT OF CONTRACTS § 173(b)(ii) (1932).

¹²⁸536 F.2d 739 (7th Cir. 1976). The auditor in this case was aware that all tax notices and notices of the sale were not received, all of which indicated a flagrant

equitable considerations with respect to good faith compliance by the auditor, the public notice to all owners of tax assessments, and the ensuing consequences for failure to pay taxes on time.

6. *Exemptions.*—Two important changes in the state exemption laws were made by the 1977 General Assembly. Amounts of the general exemption law were raised to a total of \$6,000, with a limit of \$5,000 from realty, \$2,000 from tangible personal property, and \$100 from intangible property.¹²⁹ The former exemption from income and profits (\$15 plus ninety percent of amounts above that sum)¹³⁰ was deleted from this law, the effect of which will be to make the exemption provisions of the Uniform Consumer Credit Code¹³¹ controlling. Under the latter law, the debtor may now claim as exempt from weekly wages thirty times minimum wages plus seventy-five percent of amounts above that amount. The effect will be to eliminate the advantage allowed to the debtor under *Mims v. Commercial Credit Corp.*,¹³² which gave him the highest exemption of the two laws.

7. *Attachment and Garnishment—The “Dead Beat” Jurisdiction Case.*—If *D* (debtor), who resides in Washington, owes *C* (creditor) money arising from a transaction that occurred in New York, and if *D* owns a farm and a bank account located in Indiana, it long has been the traditional rule that *C* can obtain jurisdiction over *D* to the extent of his property in Indiana without personal service in Indiana by attaching the real estate and attaching and garnishing the Indiana bank in which *D* had the account.¹³³ Of course, *C* was required to give *D* adequate notice of the action,¹³⁴ and because of a United States Supreme Court decision just two years ago, a hearing upon

violation of due process and the ruling of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The decision, however, was based upon statutory non-compliance and Indiana law.

¹²⁹IND. CODE § 34-2-28-1 (Supp. 1977). Exemption is now limited to a “debtor domiciled” in the state and remains restricted to contract actions. *Id.* The real estate exemption may be limited to the personal or family residence. *Id.*

¹³⁰*Id.* § 34-2-28-1(d) (1976) (amended 1977).

¹³¹*Id.* § 24-4.5-5-105 (1976). Exemptions under this law are not limited to debtors domiciled in Indiana and to contract actions. It does not apply to support orders, alimony and attorney fee awards therein when specified in the awarding decree. For further discussion on this point, see notes 180-82 *infra* and accompanying text.

¹³²261 Ind. 591, 307 N.E.2d 867 (1974), discussed in Townsend, 1974 Survey, *supra* note 120, at 255-57.

¹³³This basis of jurisdiction was rooted in the two famous decisions of *Pennoyer v. Neff*, 95 U.S. 714 (1877), and *Harris v. Balk*, 198 U.S. 215 (1905). The doctrine of these cases was recognized as a basis for jurisdiction in Indiana. *Transcontinental Credit Corp. v. Simkin*, 150 Ind. App. 666, 277 N.E.2d 374 (1972).

¹³⁴Service by publication ordinarily was not adequate notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

the probability of recovery was to be promptly afforded *D*.¹³⁶ In *Shaffer v. Heitner*,¹³⁶ the same Court has knocked out this procedure as a violation of due process and will require *C* to first obtain a judgment in a state where *D* can be personally served or in a state with sufficient contacts to meet the requirements of *International Shoe Co. v. Washington*.¹³⁷ It seems that if the judgment is first obtained in such a state, it may be enforced by attachment or attachment and garnishment in Indiana. The effect of this decision is a serious impairment to legitimate creditors and a boon to "dead beat" debtors—especially when a liquidated type of claim is involved, and litigation over the merits is not a matter of serious concern.¹³⁸ Since the case does not eliminate attachment as a basis of jurisdiction, once a proper in personam judgment is obtained, its effect will be to decrease the options of the creditor and to increase the "dead beat's" opportunities for keeping his property away from the creditor. The Supreme Court decision seems to be based upon the supposition that litigation in the jurisdiction of dominant contacts, the debtor's residence or the place where he may be personally served, if fairer and less costly than in the state where the debtor is caching his property, a supposition that deserves more substantial proof than is demonstrated in the opinion. By placing emphasis upon the ephemeral contact theory of jurisdiction and by putting in jeopardy countless judgments and titles in property, the case recaptures the spirit of the common law procedure system.

The federal statute prohibiting "attachment, injunction or execution against" a federal banking association or its property before final judgment¹³⁹ was held inapplicable to a preliminary injunction brought by a mortgagor to prohibit the bank from conducting a private foreclosure sale in *Third National Bank v. Impac Ltd.*¹⁴⁰ This statute was construed by the United States Supreme Court as being aimed at prohibiting preferences to creditors, and therefore did not apply to a national bank's debtor seeking injunctive relief from im-

¹³⁶North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), discussed in Townsend, 1975 Survey, *supra* note 42, at 321.

¹³⁶97 S. Ct. 2569 (1977). For an in-depth discussion of this case, see Harvey, *Civil Procedure and Jurisdiction*, 1977 Survey of Recent Developments in Indiana Law, 11 IND. L. REV. 51, 51-52 (1977).

¹³⁷326 U.S. 310 (1945). Indiana accepts the outer limits of jurisdiction based upon contacts under its long-arm rule. IND. R. TR. P. 4.4.

¹³⁸The case assumes that litigation upon the merits is the principal matter of concern when jurisdiction in rem is involved. This supposition is in error except where the plaintiff is enforcing a contingent type of claim. In other words, in rem jurisdiction serves a legitimate purpose—*i.e.*, collection.

¹³⁹12 U.S.C. § 91 (1970).

¹⁴⁰97 S. Ct. 2307 (1977).

proper foreclosure. The Court approved a prior decision¹⁴¹ holding that a national bank may be made garnishee in an attachment proceeding involving litigation between third parties.

8. *Execution and Proceedings Supplemental*.—Suppose that a judgment creditor causes execution or process to be issued to a sheriff, but the debtor's property, subject to execution, attachment, or replevin is located in his house, garage, or business establishment. May the sheriff search the premises for assets?¹⁴² A recent decision of the United States Supreme Court, *G.M. Leasing Corp. v. United States*,¹⁴³ indicates that unauthorized entry into and search of a building in an effort to find assets of the debtor will subject the officer to liability for an unlawful search and seizure in violation of the fourth amendment. Although the case held that the search of a business office by Internal Revenue Service representatives in the enforcement of a jeopardy tax assessment violated the Constitutional prohibition against unlawful searches and seizures,¹⁴⁴ its rationale certainly is applicable to the conduct of the sheriff and public officers in quest of assets subject to execution, attachment, and replevin. Before entry into a private building, the decision indicates that the officer must act under a warrant. While no express statutory procedure is available to an Indiana judgment creditor for obtaining a search warrant for civil purposes,¹⁴⁵ it is clear that a court acting under its inherent equitable powers in proceedings supplemental, or other pending civil litigation, may issue an order authorizing a search after submission of affidavits or evidence showing probable cause that property subject to process is located within a building or enclosure within the protection of the fourth amendment.¹⁴⁶ The rule articulated in *G.M. Leasing Corp.* does not prohibit

¹⁴¹*Id.* at 2312 (citing with approval *Earle v. Pennsylvania*, 178 U.S. 449 (1900)).

¹⁴²It seems that the common law allowed seizure of goods in a business establishment, but not in a home. *Page Seed Co. v. City Hardware Store*, 96 N.H. 359, 77 A.2d 35 (1950).

¹⁴³429 U.S. 338 (1977).

¹⁴⁴In holding the fourth amendment rule against unlawful searches and seizures applied to corporate defendants as well as buildings used for business, the court found historical evidence that the Constitutional provision was adopted to protect against tax collectors. *Id.* at 355.

¹⁴⁵*Cf.* IND. CODE § 35-1-6-1 (1976) (allowing search warrant for "property the possession of which is unlawful"). The replevin statute allows the sheriff carrying out a writ of replevin to break into buildings. *Id.* § 34-1-9.1-10. It does not require the writ to be issued upon probable cause that the property subject to process is in the building, a requirement that seems to be inferred from *G.M. Leasing Corp.*

¹⁴⁶It should be noted that proceedings supplemental are available to reach assets of the debtor that he refuses to apply towards payment of the judgment. IND. CODE § 34-1-44-2 (1976). After a hearing, the court may issue an order that the property be applied towards the judgment. *Id.* § 34-1-44-7. This should be sufficient authority to authorize a search for assets by the sheriff upon a finding by the court of probable

the executing officer from seizing goods and property on the public streets, parking lots, or other public places not involving the right of privacy. Surely it will apply to a search of safe deposit boxes and private enclosures in which case an appropriate court order based upon probable cause must be obtained.¹⁴⁷ Logically, the rule will also apply to a search for property that has been concealed on the person and may even prohibit seizure of wearing apparel without an appropriate court order based upon probable cause.¹⁴⁸

*Ralston Purina Co. v. Detwiler*¹⁴⁹ dealt with the interesting question of how a judgment creditor may reach the debtor's interest in corporate stock. Stock for which no certificate has been issued may be subjected to execution by levy upon the records of the corporation.¹⁵⁰ Under the U.C.C., no levy is effective with respect to issued stock until the certificate is seized, but equitable remedies are available to compel surrender or seizure.¹⁵¹ Until levy, however, the creditor obtains no execution lien upon the shareholder's interest according to *Detwiler*. The decision posed an interesting problem of priorities between a judgment creditor (for alimony) against stock owned by a debtor who had contracted to sell it in installments. As each installment purchase price was paid by the buyer, a proportionate amount of the stock was to be delivered. As security for a loan, the debtor then assigned his contract rights to a lender, who perfected by filing.¹⁵² The judgment creditor thereafter had caused execution to issue on her judgment, but no levy was made upon the stock or the certificates in the debtor's possession. During the time

cause. However, probable cause should be based upon facts, not information and belief. *Hamrick v. Ashland Fin. Co.*, 423 F. Supp. 1033 (S.D.W.Va. 1976).

¹⁴⁷*Cf.* *O'Connor v. McManus*, 71 N.D. 88, 299 N.W. 22 (1941) (safe deposit box opened after court order); *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 148 N.E. 185 (1925) (order issued authorizing sheriff to enter safe deposit box upon production in court of an affidavit showing that defendant owned lot).

¹⁴⁸*Cf.* *Mack v. Parks*, 74 Mass. (8 Gray) 517 (1858) (sheriff with writ of execution could not wrest jewelry being worn by defendant under common law limitations upon execution).

¹⁴⁹364 N.E.2d 180 (Ind. Ct. App. 1977).

¹⁵⁰*Compare* IND. CODE § 34-1-36-5 (1976) *with id.* § 26-1-8-317.

¹⁵¹*Id.* § 26-1-8-317.

¹⁵²The secured party conservatively filed in three places—with the Secretary of State, in the county of the debtor's residence, and in the county of the "location" of the corporation. It should be noted that a security interest in an instrument, including a security, cannot be perfected by filing but can be perfected by possession. IND. CODE § 26-1-9-304(1) (1976). It could be argued that a security interest in a contract right for the sale of an instrument or security likewise cannot be perfected by filing, but the court, in effect, held otherwise. The court recognized that an outright sale of a "contract right" by definition was a security interest for purposes of perfection. *Id.* § 26-1-9-102.

when the contract to sell the stock was executory in part and the judgment debtor apparently was in possession of the stock certificates, the judgment creditor finally sought to impress a lien upon the debtor's interests by means of proceedings supplemental to execution.

Detwiler held that the lender, who held a security interest in the contract to sell the stock certificates, took priority with respect to the stock and to the contract right to money owing to the debtor under his contract to sell the stock. In reaching this conclusion, the court failed to deal with the rights of the buyer under his contract to purchase the stock certificates in the judgment debtor's (seller's) possession, and the fact that the only practical means of perfecting a security or other interest, or a buyer's interest in securities and negotiable instruments, is by possession. The buyer had only a contract right to the stock certificate, probably enforceable by specific performance, thus creating an equitable title in him.¹⁵³ Although this equitable right was enforceable against the seller, the U.C.C. does not deal with priorities between nonpossessing buyers or persons claiming an equitable interest in instruments or securities and subsequent lien creditors of the seller-owner in possession.¹⁵⁴ Most of the current decisions under the Code dealing with equitable titles to goods hold that a good faith lien creditor will not cut off the rights of one holding an equitable title,¹⁵⁵ a result likely to be followed in Indiana.¹⁵⁶ Hence, assuming that the judgment creditor obtained a

¹⁵³Thus, if *S*, the owner and possessor of a share of stock in a close corporation, contracts to sell it to *P*, either party may enforce the contract by specific performance if the legal remedy is inadequate as in this case where it is difficult to prove damages. Compare IND. CODE § 26-1-8-107 (1976) with *id.* § 26-1-8-315(3). See *Doss v. Yingling*, 95 Ind. App. 494, 172 N.E. 801 (1930) (court enjoined sale of stock contrary to agreement because the legal remedy was inadequate); Annot. 22 A.L.R. 1032 (1923). *P* does not hold a security interest in the stock absent a written security agreement or a transfer of possession.

¹⁵⁴Bona fide purchasers are protected as against adverse claims. IND. CODE § 26-1-8-301 (1976).

¹⁵⁵U.C.C. § 2-403 in effect describes the owner of an equitable interest as one with a right to avoid a "voidable title" and protects only a bona fide purchaser from the holder of a voidable title. IND. CODE § 26-1-2-403 (1976). A lien creditor is not protected, but in reaching this result, state common law outside the Code usually is applied. *E.g.*, *In re Federal's, Inc.*, 553 F.2d 509 (6th Cir. 1977) (one of the latest decisions discussing the problem).

¹⁵⁶Indiana common law decisions hold that a creditor obtaining a lien by judicial proceedings will not cut off an equitable title to goods. *Frontier Nat'l Bank v. Salinger*, 72 Ind. App. 479, 126 N.E. 40 (1920) (attaching creditors); *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491, 51 N.E. 105 (1898) (assignee for benefit of creditors). An equitable or other owner of a stock certificate who entrusts another with possession of the certificate fully endorsed or in the latter's name may be estopped to deny title against creditors who actually advance credit in reliance upon the appearance of ownership. *Conrad v. Olds*, 110 Ind. App. 208, 37 N.E.2d 297 (1941).

lien by initiating proceedings supplemental against the debtor (a point that is doubtful until a court order to turn it over has been carried out),¹⁵⁷ the buyer holding a title first in time would have been entitled to the stock as against the judgment creditor and non bona fide purchasers if and when he completed payments of the installments. That being the case, it can be argued that the only asset remaining with the judgment debtor with reference to the judgment creditor and third parties was a contract right, which the court correctly determined had been assigned to and perfected by the secured party before the judgment creditor obtained a lien or rights by proceedings supplemental. Under the Code, a prior perfected security interest will take priority over a subsequent lien creditor,¹⁵⁸ and this in effect is what the case finally held, even if the rationale was not quite complete. The question still remains a bit vague as to the rights of a prior equitable title in an instrument or goods as against a subsequent good faith lien creditor of the debtor, but the actual holding of this case seems to protect the prior equitable title.

In *State ex rel. Travelers Insurance Co. v. Madison Superior Court*,¹⁵⁹ the Indiana Supreme Court indicated that a garnishee in proceedings supplemental to execution must raise the issue of his nonliability by answer, thus allowing him a change of venue within ten days after answer.¹⁶⁰ This seems to run counter to the rule that further pleadings are not required,¹⁶¹ which would make the time for filing for an automatic change of venue run from the time the proceedings were initiated.¹⁶² The case may be limited to its peculiar

¹⁵⁷In proceedings supplemental, a judgment creditor who is seeking to have assets of the debtor applied to his claim or who is making a garnishee a party obtains a lien upon the property or obligation of the garnishee. With respect to the obligation or funds held by the garnishee, the lien becomes effective when the garnishee is served and has an opportunity to act. Compare *Union Bank & Trust Co. v. Vandervoort*, 122 Ind. App. 258, 101 N.E.2d 724 (1951) with IND. CODE § 26-1-4-303 (1976). Where as in this case the question of title to a negotiable instrument or security in the possession of the judgment debtor is involved, there is some doubt that a lien is obtained until the property is seized or surrendered. Compare *Neifeld v. Steinberg*, 438 F.2d 423 (3d Cir. 1971) (no lien by attachment until seizure) with *Knapp v. McFarland*, 457 F.2d 881 (2d Cir. 1972) (seizure prevented judgment debtor from challenging attachment; rule requiring seizure for protection of third parties); *Brown v. Fisher*, 35 Ind. App. 549, 74 N.E. 632 (1905) (obligor on negotiable instrument not subject to garnishment until protected against third parties).

¹⁵⁸The governing section of the Uniform Commercial Code is IND. CODE § 26-1-9-201 (1976), which the court failed to cite. Under that provision, a prior perfected security interest will take priority over subsequent purchasers and creditors.

¹⁵⁹354 N.E.2d 188 (Ind. 1976).

¹⁶⁰IND. R. TR. P. 76(2).

¹⁶¹*Id.* 69(E).

¹⁶²*Id.* 76(3).

facts, which arose because the “garnishee” was brought into the proceedings by a cross complaint filed by the judgment debtor.¹⁶³

9. *Enforcement of Equity Decrees: Alimony and Support*—Enforcement of support and alimony decrees payable in installments of specified amounts has been the subject of a series of recent opinions. It is now settled that alimony decrees (as distinguished from support orders) for a sum certain cannot be enforced by contempt even if the total is payable in installments. In *Shaunki v. Endsley*,¹⁶⁴ the Indiana Supreme Court applied the constitutional provision against imprisonment for “debt” in reaffirming this result.¹⁶⁵ On the same ground, the court of appeals in *Kuhn v. Kuhn*¹⁶⁶ disallowed contempt against a father who was delinquent in prior support payments after the children in whose favor the support was granted became emancipated. The court held that the obligation became a debt within the same constitutional provision.¹⁶⁷ On the other hand, *Strawser v. Strawser*,¹⁶⁸ inconsistently and erroneously held that the proceeding to enforce the decree after emancipation was not a debt for purposes of the statute of limitations.¹⁶⁹ Both of the foregoing

¹⁶³Because the court more or less out of hand overruled *Automobile Underwriters, Inc. v. Camp*, 217 Ind. 328, 28 N.E.2d 68 (1940), which involved the garnishment of an insurer (as was the case in *Travelers Ins. Co.*) by the judgment creditor, it seems that *Travelers Ins. Co.* applies to all garnishees raising objection to their liability. It is interesting to compare a line of cases holding that no change of venue of right is allowed in contempt proceedings seeking enforcement of an equitable decree. *E.g.*, *Linton v. Linton*, 336 N.E.2d 687 (Ind. Ct. App. 1975).

¹⁶⁴362 N.E.2d 153 (Ind. 1977).

¹⁶⁵IND. CONST. art. 1 § 22. This conclusion is not new. However, origin of the rule may stem from the broad rule of equity that will not grant extraordinary relief when legal or statutory remedies are adequate—*i.e.*, the remedies of execution and proceedings supplemental are adequate. *Marsh v. Marsh*, 162 Ind. 210, 70 N.E. 154 (1904).

¹⁶⁶361 N.E.2d 919 (Ind. Ct. App. 1977).

¹⁶⁷The case followed *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952), which held that upon emancipation, the obligation for past due support becomes a debt within the meaning of the constitutional provision against imprisonment for debt.

¹⁶⁸364 N.E.2d 791 (Ind. Ct. App. 1977).

¹⁶⁹The case held that the action to procure the new judgment was an action for “injuries to personal property” and barred in two years. In this sense, the case is clearly wrong. Conceptually, the right to enforce overdue support payments has almost always been treated as the enforcement of a judgment or debt (for which the applicable statute of limitations is ten or six years). *E.g.*, *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952); *Kniffen v. Courtney*, 148 Ind. App. 358, 266 N.E.2d 72 (1971) (giving full faith and credit to support decree of Kentucky as a “debt,” evidenced by the record). For historical reasons characterization of an equitable decree as a judgment or debt has been slow. *Compare Elliott v. Ray*, 2 Blackf. 31 (Ind. 1826) (chancery not a court of record for purposes of full faith and credit); *McCarthy v. McCarthy*, 308 N.E.2d 429 (Ind. Ct. App. 1974) (judgment of foreign alimony decree for overdue installments did not merge original decree for amounts not yet due); *Princeton Coal & Mining Co. v. Gilchrist*, 51 Ind. App. 216, 99 N.E. 426 (1912) (recognizing bill to carry execution of equitable decree into execution) *with Hansford v. Van Auken*, 79 Ind. 302

decisions, along with *Owens v. Owens*,¹⁷⁰ contributed to the invention of another rule to the effect that a decree payable in installments cannot be enforced until a second judgment thereon establishes the amount due. Imposing a needless expense in time and effort upon the suffering spouse, this strange doctrine is neither supported by precedent nor common sense except in the rare case where the original decree providing for support fails to specify the amount payable.¹⁷¹ Finally, *Uhrich v. Uhrich*¹⁷² determined that an award of alimony for a fixed amount and a decree payable in installments was not a "judgment for the payment of money or costs" that became a lien upon the judgment debtor's real estate when properly docketed.¹⁷³ The case determined only that the judgment was not a lien for future installments, leaving open the question of whether or not the decree would constitute a lien for past due installments when docketed or becoming due after docketed.¹⁷⁴

(1881) (alimony decree for money is a "debt of record" upon which an action will lie to recover such "debt").

¹⁷⁰354 N.E.2d 350 (Ind. Ct. App. 1976).

¹⁷¹If the party against whom enforcement of an installment decree is sought claims that he has performed, he may assert his rights by motion. *IND. R. TR. P. 13(M)*. *Strawser v. Strawser*, 364 N.E.2d 791 (Ind. Ct. App. 1977), discussed at note 168 *supra* and accompanying text, involved an action by the wife to recover support incurred before and after a prior divorce decree in which no support was awarded and after criminal probation ordering \$42 bi-weekly support to be paid to the wife for support of children. Since the duration of the probation was not stated, the obligation to pay support was so indefinite that a separate action was necessary for enforcement. *But see Matthews v. Wilson*, 31 Ind. App. 90, 67 N.E. 280 (1903) (court refused enforcement of a nonliquidated, general order to pay support as a judgment lien after 10 years—based in part on the theory of laches).

Failure to pay an installment decree for support has been held to be enforceable by contempt proceedings against the defaulting party. *Kerr v. Kerr*, 194 Ind. 140, 141 N.E. 305 (1923); *Perry v. Pernet*, 165 Ind. 67, 74 N.E. 609 (1905) (civil contempt for non-payment of support order not imprisonment for debt). However, before arrest or punishment, the defaulting party is entitled to notice and hearing upon the question of his default or misconduct. *Smith v. Indiana State Bd. of Health*, 158 Ind. App. 446, 303 N.E.2d 50 (1973) (14-hour notice of hearing inadequate); *cf. Denny v. State*, 203 Ind. 682, 182 N.E. 313 (1932) (no attachment of body until notice and hearing in contempt proceedings).

¹⁷²362 N.E.2d 1163 (Ind. Ct. App. 1977) (Staton, J., dissenting).

¹⁷³*Id.* at 1164. An unconditional judgment for the payment of money is a lien upon the debtor's realty in the county where properly docketed. *IND. CODE* §§ 34-1-45-2, 34-1-43-1 (1976). An equitable decree for the outright payment of money becomes a lien upon realty. *Martin v. Berry*, 159 Ind. 566, 64 N.E. 912 (1902) (deficiency judgment in lien foreclosure); *Rosenberg v. American Trust & Sav. Bank*, 86 Ind. App. 552, 156 N.E. 411 (1927) (alimony decree).

¹⁷⁴Prior case law holds that a decree providing for support payable in installments being subject to modification does not constitute a judgment lien for the future payments until a new judgment for past due installments is obtained and properly entered in the judgment docket. *Myler v. Myler*, 137 Ind. App. 605, 210 N.E.2d 446

Several prophylactic measures should be considered by a lawyer procuring a support or alimony decree payable in installments if it appears that enforcement will be a problem. The court awarding alimony or support may be asked to impress a lien upon the debtor's property to secure the payments.¹⁷⁵ There is no reason why this could not cover existing and after-acquired property.¹⁷⁶ The decree should provide for perfection in the appropriate records, and perfection should be carried out as authorized.¹⁷⁷ In the case of default of an alimony decree in a lump sum payable in installments, the decree might well provide for acceleration, a device which is impractical in the case of support payments. The problem may be illustrated as follows. Suppose a lien is created upon the husband's house to secure an alimony decree of \$10,000 payable in 100 monthly installments and to secure \$200 monthly support for the period of the infancy of two children. How will the lien be enforced when the judgment debtor is partially in default for two months? Will the whole property be sold to pay \$600? One vehicle would be to provide or allow acceleration if payments are not brought current before foreclosure, and this procedure is proper when the property cannot be sold in parcels.¹⁷⁸ Another would be to provide for foreclosure and sale of the whole collateral with surplus funds held in trust until the whole obligation is satisfied. The problem here may be one of the reasons for the holding that an installment judgment does not constitute a lien upon real estate.¹⁷⁹

(1965). Prior case law indicated or at least left open the possibility that a non-modifiable support order in designated installment amounts would support a judgment lien. See *Rosenberg v. American Trust & Sav. Bank*, 86 Ind. App. 552, 156 N.E. 411 (1927). The present Indiana Code provides for subsequent modification in certain situations. IND. CODE § 31-1-11.5-17 (1976) (orders for alimony or property settlement are not subject to modification except in the case of fraud).

¹⁷⁵IND. CODE § 31-1-11.5-15 (1976). See *Eppley v. Eppley*, 341 N.E.2d 212 (Ind. Ct. App. 1976) (applying prior law). For a case where the court awarding alimony enjoined the husband from transferring his interest in property, see *Boshonig v. Boshonig*, 152 Ind. App. 688, 285 N.E.2d 684 (1972).

¹⁷⁶While the court cannot base an alimony award upon future assets such as wages, it may provide for installment payments from future earnings. Compare *Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977) with *White v. White*, 338 N.E.2d 749 (Ind. Ct. App. 1975).

¹⁷⁷Decrees relating to land may be recorded in the lis pendens record and become perfected when recorded. IND. CODE § 34-2-27-1 (1976). Decrees establishing rights in personal property may be perfected by filing in the lis pendens file. IND. R. TR. P. 63.1(C), (D).

¹⁷⁸Upon foreclosure of a mortgage payable in installments without acceleration, statutes require the property to be sold in parcels. If this is not practicable the whole is to be sold with the proceeds applied to principal. If interest is not provided, the principal is reduced by a discount at legal interest rates. IND. CODE §§ 34-1-53-8 to -10 (1976). This procedure is applicable to all liens on real estate. IND. R. TR. P. 69(C).

¹⁷⁹The matter was briefly considered by Judge Staton in *Uhrich v. Uhrich*, 362

The court may order an assignment of the debtor's wages in proceedings to enforce an alimony or support decree under the provisions of a recent statute,¹⁸⁰ and no reason appears why this could not be done in the original decree. However, it now appears that the debtor-spouse is entitled to a weekly exemption from disposable earnings of thirty times minimum wages plus seventy-five percent of the excess unless the original or amending alimony decree, or the original or modifying support order, specifies a greater percentage.¹⁸¹ In the case of alimony, it is probable that no more than the lesser of the amount of weekly disposable earnings in excess of thirty times minimum wages or twenty-five percent of total weekly disposable earnings may be taken from wages, as provided under the Federal Truth-in-Lending Act.¹⁸² Enforcement of overdue sup-

N.E.2d 1163, 1165 (Ind. Ct. App. 1977) (Staton, J., dissenting), where he suggested that a claim for unmatured installments for alimony against a deceased husband could be allowed, discounted at present value, as provided in the Probate Code. IND. CODE § 29-1-14-3 (1976). In *Risk v. Thompson*, 237 Ind. 642, 147 N.E.2d 540 (1958), the court of equity refused specific performance against a vendee promising to pay money in installments. The court held that it would be improper to award a lump sum in damages by computing its present value. *But see White v. White*, 338 N.E.2d 749 (Ind. Ct. App. 1975).

¹⁸⁰IND. CODE § 31-1-11.5-13(e) (Supp. 1977).

¹⁸¹*Id.* § 24-4.5-5-105 (1976) also provides that the exemption shall not apply to any order of any court for the support of any person. Nor shall this provision apply to decrees awarding alimony or attorney's fees therein when the decree awarding such support, alimony, or attorney's fees specifies the amount or percentage of the disposable earnings to be applied thereon.

Prior law allowed a debtor the greater exemption between the general exemption law, IND. CODE § 34-2-28-1 (1976) (amended 1977), and the provision of the Uniform Consumer Credit Code, *id.* § 24-4.5-5-105 (1976), allowing an exemption from weekly disposable earnings of 30 times minimum wages plus 75% of amounts in excess thereof. *Mims v. Commercial Credit Corp.*, 261 Ind. 591, 307 N.E.2d 867 (1974). The provision of the general exemption law allowing an exemption from weekly income of \$15 plus 90% of excess was repealed by deletion, effective October 1, 1977. IND. CODE § 34-2-28-1 (Supp. 1977). *See* discussion at notes 129-32 *supra* and accompanying text.

Under prior law, it was clear that enforcement of an alimony decree was subject to applicable exemption provisions (at least if the original decree did not specify otherwise). *Clay v. Hamilton*, 116 Ind. App. 214, 63 N.E.2d 207 (1945). This case applied IND. CODE § 34-1-44-7 (1976), limiting garnishment in proceedings supplemental to 10% of income. Case law has not determined whether this limitation will apply to restrict the amounts subject to garnishment as allowed by *id.* § 24-4.5-5-105. Prior decisions indicating or holding that the general exemption statutes applicable only to contract actions did not apply to support orders or alimony are irrelevant since neither statute is confined to contract actions. *Cf. Menzie v. Anderson*, 65 Ind. 239 (1879) (alimony judgment not founded upon contract for purposes of general exemption statute).

¹⁸²This exemption does not apply in the case of "any order for the support of any person." 15 U.S.C. § 1673(b) (1970). Note that no exception is made for alimony, which under Indiana law is based primarily on property distribution, not support.

port and alimony installments otherwise may be pursued by execution and proceedings supplemental along with other remedies available to judgment creditors,¹⁸³ and hopefully the rule requiring a new judgment as a condition to enforcement will be dropped by the same magic that brought it into being.

10. *Bankruptcy*.—Several bankruptcy decisions originating in Indiana deserve mention. Actions in state court to recover damages against a trustee, his attorney, and other persons connected with a bankruptcy case were enjoined by the bankruptcy court on the theory that the issues had been litigated in the bankruptcy proceedings and were precluded by judgment.¹⁸⁴ The power to enjoin state court proceedings to protect the finality of a bankruptcy determination was recognized and applied in a case where the parties injured by the state proceedings should also have claimed damages as well.¹⁸⁵

In re Alliance Beverage Co.,¹⁸⁶ recognized the rule that payment to a creditor within four months of bankruptcy constitutes a preference to a surety with knowledge (in this case corporate officers). The case determined that the bankruptcy court lacked summary jurisdiction to avoid the preference.

11. *Receiverships*.—A receivership is a severe, extraordinary remedy and is not granted without proof of substantial need. Toward this end, Indiana law was fairly well settled that an owner seeking ejectment could not get a receiver appointed. Since he could get immediate relief after posting bond and requesting a hearing, or obtaining the protection of a counter-bond from the defendant,¹⁸⁷ his legal remedy was adequate.¹⁸⁸ This rule was ignored in *United*

¹⁸³*Cf. Ralston Purina Co. v. Detwiler*, 364 N.E.2d 180 (Ind. Ct. App. 1977) (alimony decree enforceable against debtor's common stock).

¹⁸⁴*Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976).

¹⁸⁵A good case for malicious prosecution against the person initiating the state action is indicated by the facts of *Woodmar Realty, id. Compare Snider v. Lewis*, 150 Ind. App. 30, 276 N.E.2d 160 (1971) (recovery for a malicious prosecution of civil case in federal court was allowed in a state action) *with Gore v. Gorman's, Inc.*, 143 F. Supp. 9 (W.D. Mo. 1956) (malicious civil prosecution against creditor suing on claim discharged in bankruptcy).

¹⁸⁶420 F. Supp. 437 (N.D. Ind. 1976).

¹⁸⁷In ejectment, the plaintiff may obtain possession by posting bond and establishing a probability of recovery unless a counter-bond is posted by the defendant. IND. CODE §§ 32-6-1.5-1 to -12 (1976).

¹⁸⁸*Meacham v. Sanders*, 233 Ind. 182, 118 N.E.2d 126 (1954). *But see Bitting v. Ten Eyck*, 85 Ind. 357 (1882). Injunctive relief to regain possession is also usually denied when the plaintiff has the remedy of ejectment and is pursuing it. *Detamore v. Roberts*, 223 Ind. 12, 57 N.E.2d 585 (1944); *Heugel v. Townsley*, 213 Ind. 339, 12 N.E.2d 761 (1938).

States Aircraft Financing, Inc. v. Jankovich,¹⁸⁹ where the lessor of a municipal airport intervened in an ejectment action in which the lessee had procured possession pendente lite by posting bond from its assignee in possession who was also in default. The lessor sought ejectment and the appointment of a receiver. On appeal, the appointment of a receiver was sustained in the interests of preserving the continued operation of the airport—in the teeth of the fact that the lessee was able to post a \$300,000 bond against its assignee, and apparently upon the unstated ground that the municipality would have been unable to maintain the airport if possession had been awarded to it on its cross action of ejectment. If the municipality ultimately loses on the merits, its potential liability to the other parties is left unclear because no security is required of a creditor seeking the appointment of a receiver, a contrary rule being applicable if the preliminary relief had been granted in ejectment.¹⁹⁰ In any event, if the municipality ultimately wins on the merits, it must face its responsibility of running the airport.

The order of appointment usually commissions a receiver to recapture assets for the benefit of creditors and interested parties.¹⁹¹ Assets in the debtor's possession at the time of appointment pass to the custody of the receivership court. Hence, the debtor who fails to make them available to the receiver and third persons intermeddling with such property may be subjected to a turnover order and an accounting by the receivership court in summary proceedings.¹⁹² Third persons claiming title to property in the custody of the receivership court must file a reclamation petition with the court controlling the property, where rights will be determined speedily

¹⁸⁹365 N.E.2d 783 (Ind. Ct. App. 1977).

¹⁹⁰It seems that a municipality may have been required to furnish bond under the ejectment statute. See ch. 9, § 1, 1931 Ind. Acts 14 (repealed 1969). No bond or security is generally required of a party seeking a receiver pendente lite, but this is subject to question, since the receivership involves what is, in effect, a preliminary injunction. See IND. R. TR. P. 65(C). While no bond is required of municipalities and governmental branches seeking a preliminary injunction, liability will be imposed if the government ultimately loses on the merits. IND. R. TR. P. 65(C).

¹⁹¹The general power of a receiver over property and to bring suit to recover assets is recognized by IND. CODE § 34-1-12-7 (1976).

¹⁹²*Kist v. Coughlin*, 222 Ind. 639, 656, 57 N.E.2d 199, 205, modified on other grounds, 222 Ind. 659, 57 N.E.2d 586 (1944) (receiver "has the authority to request the court to exercise summary jurisdiction over persons or corporations who deny or interfere with his right to possession, where the property is constructively in his possession"); *Universal Credit Co. v. Talcott (In re Savage)*, 213 Ind. 228, 12 N.E.2d 141 (1938) (indicating that person intermeddling with assets that pass to assignee for benefit of creditors could be held in contempt). This also is the rule in bankruptcy. Cf. *Worthington v. Danning (In re Goldstein, Samuelson, Inc.)*, 517 F.2d 324 (10th Cir. 1975) (bankruptcy court had summary jurisdiction over funds in hands of bankrupt's agent at the time of the petition).

in the exercise of equity power.¹⁹³ But what of claims of the receiver over funds owing to the debtor by third persons or the debtor's assets in the possession of third parties at the time of receivership? How should the receiver go about establishing his rights? This question was posed in *McCollum v. Malcomson*,¹⁹⁴ where the receivership court had ordered a stranger in possession to show cause why he should not turn over property or pay money to the receiver. After a summary hearing on short notice, the trial court ordered the stranger to pay \$25,000.¹⁹⁵ On appeal, the court of appeals held that a receiver or liquidator must pursue his remedies against third persons indebted to the debtor or in possession of receivership assets at the time of appointment by full plenary proceedings in a proper court as if he were the debtor or creditor whom he represents. Summary procedures followed by the trial court were improper. A similar rule is recognized in bankruptcy¹⁹⁶ where practice recognizes that a person improperly subjected to summary proceedings may waive his right to a plenary hearing in another court.¹⁹⁷ While this issue was not considered by *McCollum*,¹⁹⁸ a litigant confronted with improper summary procedures would be wise to make prompt objec-

¹⁹³*Cf. Fletcher Sav. & Trust Co. v. American State Bank*, 196 Ind. 118, 147 N.E. 524 (1925) (claimant had right in "equity" to funds held by receivership debtor but carried burden of proof). This is the rule applied in liquidation of decedents' estates. *Isbell v. Heiny*, 218 Ind. 579, 33 N.E.2d 106 (1941). *But cf. Collinson v. McNutt*, 231 Ind. 605, 108 N.E.2d 700 (1952). It also is the rule in bankruptcy. *Grimstad v. Red Owl Stores (In re Cabezal Supermarket, Inc.)*, 406 F. Supp. 345 (D.N.D. 1976) (trustee sold property subject to reclamation).

¹⁹⁴358 N.E.2d 177 (Ind. Ct. App. 1976).

¹⁹⁵The receiver over assets of a corporation contended that officers of the corporation had contracted in their individual names to purchase land from the defendant-vendor and had made a down payment to the vendor of \$25,000 with corporate funds. When the defendant refused installment payments from the receiver, he was ordered to show cause why he should not pay \$25,000 to the receiver. A hearing was held 14 days later, and 5 days after the hearing the court order directed the vendor to pay the sum to the receiver. *Id.* at 178-79.

¹⁹⁶The general rule in bankruptcy is that title to assets not in the actual possession of the debtor at the time of the petition must be resolved by plenary proceedings brought by the trustee in the right of the bankruptcy debtor. To this rule a number of exceptions have been recognized, including (1) waiver by failure to object, (2) cases where the claim of the third party is colorable or without substance, (3) cases where the third party has filed a claim and the trustee asserts his right by setoff, and (4) special statutory provisions. The rule was recently recognized in *Pressler v. Haab (In re Alliance Beverage Co.)*, 420 F. Supp. 437 (N.D. Ind. 1976) (liability of officers of a debtor corporation for breach of fiduciary duties to be determined by plenary proceedings).

¹⁹⁷*Cline v. Kaplan*, 323 U.S. 97 (1944). Failure to object by first pleading or motion constitutes a waiver under the new rules in Bankruptcy. Bankruptcy Rule 915.

¹⁹⁸The issue was raised in a direct appeal that did not decide the merits, but the point at which objection to the summary procedure was made was not stated in the opinion.

tion at the hearing in the receivership court to avoid the possibility of waiver.

Two other recent decisions recognize the receivership as an extraordinary remedy that should not be taken lightly. In one, the Indiana Supreme Court granted prohibition against a court appointing a receiver without service of notice upon the debtor.¹⁹⁹ In the other,²⁰⁰ the court of appeals reversed a trial court decision that denied the appointment of a receiver over a surviving partner who failed to account and make disclosure to the representative or beneficiaries of the decedent's estate, contrary to the mandate of a statute providing for a receiver.²⁰¹ However, the court sent the case back for a complete audit without specifically directing the appointment of a receiver.

12. *Creditors' Rights in Decedents' Estates.*—A general creditor must file his claim within the statutory time frame (*i.e.*, five months after the first published notice of administration, which must be commenced within one year of death) or lose his rights against the decedent's estate.²⁰² *Paidle v. Hestad*²⁰³ applied a recognized exception or qualification to the rule that allows a secured creditor to pursue his rights in rem against property furnished by the decedent. His lien or claim to the property need not be filed with the estate and will survive administration.²⁰⁴ In this case, a co-owner made improvements upon land and paid taxes in excess of his share. His claim of contribution was recognized as an equitable lien upon the land that survived administration without the need for filing a claim.²⁰⁵ However, a lienholder's interest that is unperfected may be cut off by a bona fide purchaser from the representative, heir, or devisee,²⁰⁶ and in the case of personal prop-

¹⁹⁹*State ex rel. Mammoth Dev. & Constr. Consultants, Inc. v. Superior Court*, 357 N.E.2d 732 (Ind. 1976).

²⁰⁰*Pearson v. Hahn*, 352 N.E.2d 767 (Ind. Ct. App. 1976).

²⁰¹IND. CODE § 23-4-3-5 (1976).

²⁰²*Id.* § 29-1-14-1. Exceptions to this rule are recognized throughout the Probate Code. See note 204 *infra*.

²⁰³348 N.E.2d 678 (Ind. Ct. App. 1976).

²⁰⁴The Indiana Probate Code expressly provides that the statute requiring claims to be filed shall not "prevent any action or proceeding to enforce any mortgage pledge or other lien upon property of the estate." IND. CODE § 29-1-14-1(e) (1976). This follows pre-Code law. *Beach v. Bell*, 139 Ind. 167, 38 N.E. 819 (1894). It is interesting to note that a perfected lien upon property passing to a trustee in bankruptcy or a receiver will survive administration if no claim is filed or if his title is not barred by proceedings in the liquidation, in meeting due process requirements, or estoppel. Compare *Martin v. Adams Brick Co.*, 180 Ind. 181, 102 N.E. 831 (1913) (receivership) with *Griffin v. Franklin Fin. Co.*, 139 Ind. App. 513, 221 N.E.2d 362 (1966) (bankruptcy).

²⁰⁵See discussion at note 53 *supra*.

²⁰⁶A bona fide purchaser at the representative's sale will take priority over an unperfected lien upon land. *Vincennes Sav. & Loan Ass'n v. St. John*, 213 Ind. 171, 12

erty, possibly by the representative, if the estate is insolvent.²⁰⁷ He may also be barred by administration proceedings dealing with the property if he is a party or bound on principles of estoppel. In its broadest connotation, the case stands for the rule that a legal or equitable interest in property will withstand death and administration unless barred by proceedings meeting due process or commercial principles protecting purchasers and creditors.²⁰⁸ In *Leazenby v. Clinton County Bank & Trust Co.*,²⁰⁹ the court of appeals also recognized the "Dacey Trust" (revocable trust) as a vehicle by which the settlor can cheat his wife out of her statutory rights. Followed to its disgraceful conclusion, a settlor of a revocable trust may also use the device to cheat creditors,²¹⁰ which raises the hope that this decision will promptly be reversed.

E. Suretyship

Several recent decisions dealt rather cavalierly with interesting problems of suretyship. The oral promise of an officer of a parent corporation to stand good for credit furnished a subsidiary corpora-

N.E.2d 127 (1938). A bona fide purchaser from an heir or devisee will cut off a prior unperfected lien upon land. *Meikel v. Borders*, 129 Ind. 529, 29 N.E. 29 (1891); *Guynn v. Wabash County Loan & Trust Co.*, 53 Ind. App. 391, 101 N.E. 738 (1913).

²⁰⁷Under the U.C.C., an unperfected security interest in personal property will be cut off by a lien creditor who becomes such without knowledge. IND. CODE § 26-1-9-301(1)(b) (1976). A "representative" of creditors will cut off the unperfected security interest if any creditor he represents is without knowledge. A representative of a decedent's estate is not expressly included as a "representative" within the above statute. *See id.* § 26-1-9-301(3). However, a representative of an insolvent decedent's estate is defined as a "creditor." *Id.* § 26-1-1-201(12). One decision holds that an unperfected security interest will not be defeated by creditors, without knowledge, represented in an insolvent estate. *Estate of Hinds*, 8 U.C.C. REP. SERV. 3 (Cal. App. 1970). This decision is highly questionable.

²⁰⁸*Pattison v. Hogston*, 90 Ind. App. 59, 157 N.E. 450 (1927). The Probate Code requires "claims" to be filed within the appropriate time limitations but excludes enforcement of liens. *See* IND. CODE § 29-1-14-1(e) (1976). However, it is doubtful that an action to establish rights to property is a "claim" within the meaning of the Code. *Id.* § 29-1-1-3 (defined as including "liabilities of a decedent which survive, whether arising in contract or in tort or otherwise"). *Cf. Isbell v. Heiny*, 218 Ind. 579, 33 N.E.2d 106 (1941) (proceeding by owner to reclaim property in decedent's estate not a "claim"). *See also* *Rush v. Kelley*, 34 Ind. App. 449, 73 N.E. 130 (1905). Case law has not made it clear whether or not the owner of an equitable title must establish his rights by filing a claim. *Compare* *Sheldmyer v. Bias*, 112 Ind. App. 522, 45 N.E.2d 347 (1942) (holding only that action of damages against vendor contracting to sell land must be presented as a claim) *with* *Rowley v. Fair*, 104 Ind. 189, 3 N.E. 860 (1885) (trust funds passing to representatives continued to be held by latter in same capacity).

²⁰⁹355 N.E.2d 861 (Ind. Ct. App. 1976).

²¹⁰A beneficiary of a trust with a power to appoint for his own benefit who was not the settlor was allowed to thumb his nose at creditors in *Irwin Union Bank & Trust Co. v. Long*, 160 Ind. App. 509, 312 N.E.2d 908 (1974). *See* Bankruptcy Act, § 70a(3), 11 U.S.C. § 110(a)(3) (1970).

tion was upheld against the parent,²¹¹ as well as a surety's oral assent to a modification of the principal's obligation to the creditor.²¹² The Seventh Circuit Court of Appeals sustained liability upon a revocable continuing guaranty by the chief shareholder and his wife on behalf of the principal corporation with respect to credit later furnished by the creditor after the principal had merged with another corporation that became publicly owned.²¹³ The case stands for the proposition that if *S* (surety) makes an offer to *C* (creditor) to become surety for *A* corporation, *C* may accept *S*'s offer by advancing credit to *B* corporation into which *A* has merged.²¹⁴ While the

²¹¹*Burger Man, Inc. v. Jordan Paper Prods. Inc.*, 352 N.E.2d 821 (Ind. Ct. App. 1976). In this case, the seller furnished paper products to *B* corporation, a wholly owned subsidiary of *C*. The president of *B*, who was a director of *C*, promised that *C* would stand good for merchandise furnished. The court held (1) that *C* was liable on the theory that the interlocking operations permitted piercing the corporate veil, particularly because *B* had conveyed property to *C* shortly before suit; and (2) that the statute of frauds provisions of the U.C.C. applicable to the sale of goods did not apply because the goods furnished were specially manufactured for the buyer. See IND. CODE § 26-1-2-201 (1976). The court did not directly raise the statute of frauds issue insofar as *C*'s promise was that of a surety. However, the "main purpose" rule recognized in Indiana should have been applicable to the promise of the parent corporation. L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 143-44 (1950). See also *Board of Comm'rs v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N.E. 612 (1891). The surety promise of the parent corporation on behalf of its subsidiary is not ultra vires. *Kelly, Glover & Vale, Inc. v. Heitman*, 220 Ind. 625, 44 N.E.2d 981 (1942). *But cf. In re B-F Building Corp.*, 182 F. Supp. 602 (N.D. Ohio 1960) (principal and surety corporations owned by same directors and officers).

²¹²*Holmes v. Rushville Prod. Cred. Ass'n*, 353 N.E.2d 509, *modified on other grounds*, 355 N.E.2d 417 (Ind. Ct. App. 1976). The evidence established and the decision held that the surety orally assented to a modification of the repayment schedule for the loan made to the principal, but it seems that the statute of frauds question was not raised as to this point. The statute would not apply. *Everley v. Equitable Sur. Co.*, 190 Ind. 274, 130 N.E. 227 (1921). *Holmes* did hold that the written promise of a surety stating that it covered "an additional advance" met statute of frauds requirements with respect to a subsequently revised payment schedule on the ground that this promise incorporated by reference a later revised payment schedule. It appears, however, that this was treated as an advance waiver of payment terms.

²¹³*Cargill, Inc. v. Buis*, 543 F.2d 584 (7th Cir. 1976). The court cited IND. CODE § 23-1-5-5 (1976), which makes the surviving corporation liable for obligations of the merged corporations. This provision, however, was not applicable, since the credit for which suit was brought had been advanced to the new corporation after it was organized.

²¹⁴The decision was based upon the fact that the sureties (husband and wife) on the continuing guaranty offer were major shareholders in *A* corporation and *B* corporation in which it was merged, so that both the old and the new were "family" owned. On this, the chauvinistic opinion was in error. The husband was both the major shareholder and actor in the corporation, but the wife apparently owned only one share. She was held liable with her husband. The opinion also incorrectly defined a continuing guaranty as a contract. It is an offer to the principal until accepted by performance.

general rule is that if a creditor releases collateral the surety is discharged to the extent of the value of the security,²¹⁵ *Holmes v. Rushville Production Credit Association*²¹⁶ held that advance consent to "any partial release of the collateral" contained in the note signed by the surety constituted an exception to the rule. The creditor, who allowed the principal to sell most of the collateral and dissipate a part of the proceeds, was allowed to recover the resulting deficiency.²¹⁷

Indiana adheres to an old, questionable, and uncertain rule to the effect that a surety upon a "collateral contract of guaranty" will be discharged to the extent of ensuing injury unless the creditor gives him timely notice of default by the principal.²¹⁸ *Bowyer v. Clark Equipment Co.*,²¹⁹ applied this rule to an obligor on a continuing type of suretyship contract where the principal, who was a machinery dealer, had become delinquent upon his account with the creditor who supplied him merchandise. The surety was discharged when he was not informed of the default until after the principal became insolvent.²²⁰ The case is especially interesting because after default, the principal had brought himself current while solvent and then later defaulted on his accounts with the creditor at a time when he was insolvent. Hence, it was arguable that failure to give notice of the first default did not result in loss. Since the principal was insolvent at the time of the second default, no loss resulted from failure to give the surety notice of the first default. The court held otherwise. In another decision involving the guarantor of a lease of trucks,²²¹ the court found that the lessor-creditor had given the guarantor timely notice of the principal-lessee's default.

²¹⁵IND. CODE § 26-1-3-606 (1976).

²¹⁶353 N.E.2d 509, *modified on other grounds*, 355 N.E.2d 417 (Ind. Ct. App. 1976).

²¹⁷*Cf.* *White v. Household Fin. Corp.*, 158 Ind. App. 409, 302 N.E.2d 828 (1973) (consent to release of collateral by surety did not constitute consent to release of the proceeds from its sale).

²¹⁸*Cf.* *Timberlake v. J.R. Watkins Co.*, 138 Ind. App. 554, 209 N.E.2d 909, (1965) (adopting position of *Restatement of Suretyship* to the effect that the policy of differentiating contracts of suretyship and guaranty by label is improper).

²¹⁹357 N.E.2d 290 (Ind. Ct. App. 1976). The case also held that a waiver of presentment and notice of dishonor did not constitute a waiver of the defense arising because of failure to give notice of default.

²²⁰*Cf.* *Mitchell v. St. Mary*, 148 Ind. 111, 47 N.E. 224 (1897) (waiver of presentment, protest, etc., held not to constitute a waiver of the creditor's obligation to bring prompt suit against defaulting principal as required by statute governing indorser's liability on nonnegotiable paper).

²²¹*Loudermilk v. Feld Truck Leasing Co.*, 358 N.E.2d 160 (Ind. Ct. App. 1976).