

XV. Secured Transactions and Creditors' Rights

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The last year has produced at least forty decisions related to secured transactions and creditors' rights encompassing a wide spectrum of substantive and procedural problems. Some positive contributions were made to this area of the law. Most significant on the affirmative side are cases recognizing the contract to execute a mortgage as a valid security device,¹ preserving the integrity of *Skendzel v. Marshall*,² denying set off of an old debt by a bank against a deposit of proceeds from collateral covered by a perfected security agreement,³ placing voluntary liens held by the United States on a par with other lienholders in the priority scale by adopting state law as the federal rule,⁴ permitting an optional motion to correct errors from proceedings supplemental,⁵ facilitating enforcement of support orders by execution,⁶ granting a surviving tenant by the entirety exoneration and marshaling rights to satisfy a lien upon the property for a debt of the decedent,⁷ and protecting subcontractors on a surety bond when the owner-creditor defaults.⁸ On the negative side, judges deserve encouragement to do better as a result of decisions abusing consumer legislation,⁹ imposing vicarious liability on filing officers for negligence of subagents,¹⁰ permitting abusive and

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¹*Prell v. Trustees of Baird & Warner Mortgage & Realty Investors*, 386 N.E.2d 1221 (Ind. Ct. App. 1979). See notes 36-43 *infra* and accompanying text.

²261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *construed in Morris v. Weigle*, 383 N.E.2d 341 (Ind. 1978). See notes 45-49 *infra* and accompanying text.

³*Citizens Nat'l Bank v. Mid-States Dev. Co.*, 380 N.E.2d 1243 (Ind. Ct. App. 1978). See notes 57-73 *infra* and accompanying text.

⁴*United States v. Kimbell Foods, Inc.*, 99 S. Ct. 1448 (1979). See notes 112-16 *infra* and accompanying text.

⁵*Hudson v. Tyson*, 383 N.E.2d 66 (Ind. Ct. App. 1978). See notes 139-42 *infra* and accompanying text.

⁶*Kuhn v. Kuhn*, 389 N.E.2d 319 (Ind. Ct. App. 1979). See notes 153-54 *infra* and accompanying text.

⁷*In re Estate of Smith*, 388 N.E.2d 287 (Ind. Ct. App. 1979). See notes 172-78 *infra* and accompanying text.

⁸*Culligan Corp. v. Transamerica Ins. Co.*, 580 F.2d 251 (7th Cir. 1978). See notes 186-90 *infra* and accompanying text.

⁹*Streets v. M.G.I.C. Mortgage Corp.*, 378 N.E.2d 915 (Ind. Ct. App. 1978), to the extent the case placed the burden of proof upon the debtor with respect to attorney's fees, and the decision's cavalier treatment of disclosure requirements. See notes 18-31 *infra* and accompanying text.

¹⁰*Mobile Enterprises, Inc. v. Conrad*, 380 N.E.2d 100 (Ind. Ct. App. 1978)

highly offensive collection practices,¹¹ denying enforcement of a contractual promise by the owner to help a subcontractor recover payments due from the prime contractor,¹² and determining that a woman contracting for construction of a day care center in her home is not entitled to advance notice of a mechanic's lien by a subcontractor because the construction did not involve a "family dwelling."¹³ The Indiana legislature also has busied itself by legislating in this area of the law, but its attention has been mainly attracted by special interests representing lenders and creditors.¹⁴

A. Consumer Legislation

Most consumer protection afforded by the Indiana Uniform Consumer Credit Code is denied to credit purchasers of land and to mortgagors whose loan is "primarily secured by an interest in land."¹⁵ By definition the credit or loan qualifying for this exemption must not carry a finance charge in excess of ten percent.¹⁶ In 1979, the Indiana legislature raised this maximum to fifteen percent for loans¹⁷ in what must be classified as both an inflationary and anti-consumer move. *Streets v. M.G.I.C. Mortgage Co.*¹⁸ also dealt with this provision and found that it excluded first mortgagees on loans "primarily secured by an interest in land" from the licensing requirements of the Code since such loans are not consumer loans.¹⁹

(secretary of state); *VanNatta v. Crites*, 381 N.E.2d 532 (Ind. Ct. App. 1978) (Commissioner of Bureau of Motor Vehicles). See notes 74-83 *infra* and accompanying text.

¹¹*Kaletha v. Bortz Elevator Co.*, 383 N.E.2d 1071 (Ind. Ct. App. 1978). A companion type of case encouraging extrajudicial harassment by a form of retaliatory discharge deserves an all time "golden fleece" award: *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979). These cases are briefly considered at notes 90-92 *infra* and accompanying text.

¹²*Hormuth Drywall & Painting Serv., Inc. v. Erectioneers, Inc.*, 381 N.E.2d 490 (Ind. Ct. App. 1978). See notes 97-101 *infra* and accompanying text.

¹³*Wiggin v. Gee Co.*, 386 N.E.2d 1218 (Ind. Ct. App. 1979). See notes 102-06 *infra* and accompanying text.

¹⁴For example, bankers and lenders received special treatment by a revision of the Uniform Consumer Credit Code [hereinafter referred to as the U.C.C.C. or Code] expanding exemptions from the law. See IND. CODE § 24-4.5-3-105 (Supp. 1979). See notes 15-17 *infra* and accompanying text. Bankers also received special treatment regarding garnisheed bank accounts. See IND. CODE § 28-1-20-1 (Supp. 1979). See notes 143-50 *infra* and accompanying text.

¹⁵IND. CODE §§ 24-4.5-3-105, -2-104(2)(b) (1976). Such sales and loans are subject to disclosure and remedies provisions. It is this writer's opinion that such loans qualify as "consumer related" loans and credit sales and are subject to regulation thereunder. See §§ 24-4.5-2-602, -3-602.

¹⁶*Id.* § 24-4.5-3-105 (1976) (amended 1979).

¹⁷*Id.* § 24-4.5-3-105 (Supp. 1979).

¹⁸378 N.E.2d 915 (Ind. Ct. App. 1978).

¹⁹*Id.* at 918.

The court in *Streets* applied the Code rule allowing a debtor to set off penalty claims arising from the lender's failure to make proper disclosures against an action upon the loan,²⁰ thus tolling the one-year limitation for enforcing such claims.²¹ Although not articulated by the decision, it seems that the court applied Indiana Code disclosure rules which adopt by reference the disclosure requirements of Regulation Z under the federal truth-in-lending law.²² Unless reduced to judgment, such a setoff is not permitted when the debtor asserts nondisclosure rights solely by force of the federal regulations and law.²³ The court also found that the disclosure requirement of the "annual percentage rate" was doubly conspicuous when set forth in bold, but smaller, type.²⁴ On the other hand, an acceleration clause for late payment of installments was not unconscionable and need not have been conspicuously disclosed.²⁵

The debtor in *Streets* complained that an allowance of attorney's fees to a second mortgagee violated a Uniform Consumer Code provision permitting recovery of reasonable attorney's fees with respect to a consumer loan only when the agreement provides for "payment . . . after default and referral to an attorney not a salaried employee of the lender."²⁶ The court correctly assumed that a loan by a second mortgagee was not exempt from provisions applicable to consumer loans.²⁷ Exempt loans are loans "primarily secured by an interest in land,"²⁸ which by definition require the value of the debtor's interest in the land at the time of the loan, less prior liens, to be "substantial in relation to the amount of the

²⁰IND. CODE § 24-4.5-5-205 (1976). See also *Holmes v. Rushville Prod. Credit Ass'n*, 355 N.E.2d 417, 417 (Ind. Ct. App. 1976).

²¹378 N.E.2d at 919. The court in *Streets* also applied IND. R. TR. P. 13(J), which provides for the effect of statute of limitations and other discharges at law. *Id.*

²²*Id.* at 920. Disclosure requirements of the U.C.C.C. and Regulation Z are not identical, but the Code provides that disclosure requirements meeting Z requirements meet Code requirements *E.g.*, IND. CODE § 24-4.5-3-301(2) (1976). It appears that the court thus applied U.C.C.C. disclosure requirements as defined by reference to federal law.

²³Federal law prohibits interposition of disclosure penalties by way of setoff unless reduced to judgment. 15 U.S.C. § 1640(h) (1976).

²⁴378 N.E.2d at 920. Regulation Z requires "annual percentage rate" and "finance charge" to be printed more conspicuously than other disclosures which are required to be conspicuous. Fed. Reserve Bd. Reg. Z, 12 C.F.R. § 226.6(a) (1979). The court upheld the percent sign in ordinary print without such conspicuousness. *Id.* at 920.

²⁵*Id.* at 919. Substantial authority holds that the right to accelerate must be conspicuously disclosed. *Cf. St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977) (recognizing four divergent views taken by the courts).

²⁶IND. CODE § 24-4.5-3-404 (1976).

²⁷378 N.E.2d at 920-21.

²⁸IND. CODE § 24-4.5-3-105 (Supp. 1979).

loan."²⁹ The court erred, however, in placing upon the debtor the burden of affirmatively pleading and proving that the attorney's fees were paid to a salaried employee of the lender.³⁰ The decision also failed to reveal whether the agreement for attorney's fees was by its terms limited to "reasonable" attorney's fees and to a non-salaried employee, a requirement expressly imposed by the Code in the case of consumer loans.³¹

In other recent decisions, a not-for-profit hospital was held not to be a creditor subject to the Truth in Lending Act,³² savings banks were permitted to accept and service checking drafts,³³ and a town was entitled to a branch bank in the interest of securing competition for the only other bank in the community.³⁴ The second decision was based upon administrative practice, and the third was founded upon a principle of sound economics widely respected outside banking circles, at least. Finally, a decision by the United States Supreme Court permitted national banks located in one state to charge the maximum interest allowable under the laws of that state upon any loan with respect to out-of-state charges by out-of-state borrowers upon the bank's credit card.³⁵ The interest was allowed even though it exceeded charges permitted by the state of the borrower.

B. Real Estate Transactions

1. Effect of Grantee's Promise to Execute a Mortgage; Vendor's Lien.—An unpaid vendor of land with a claim for the pur-

²⁹*Id.* It is doubtful that the debtor's interest in the case of a second mortgage will ever be substantial in relation to the loan unless the debtor's interest, less prior liens at the time of the second mortgage loan, exceeds the amount of the loan. Traditional banking practice recognizes real estate security as substantial only when its worth exceeds the loan by a fair margin. *E.g.*, *id.* § 28-1-13-7 (1976 & Supp. 1979) (allowing banks to invest in real estate when loan does not exceed two-thirds of its value).

³⁰378 N.E.2d at 920-21. Since all of the facts establishing that the attorney representing the lender are within the peculiar knowledge of the lender, placing the burden of pleading upon the debtor is both unfair and unsupported by authority.

³¹One of the purposes of the U.C.C.C. was to require full disclosures to debtors. IND. CODE § 24-4.5-3-404 (1976) clearly authorizes the agreement when it provides that the fees are "reasonable," incurred "after default," and referred "to an attorney not a salaried employee of the lender." Because of the off-hand, careless way in which the issue was handled in this case, it is difficult to understand why *amicus curiae* was limited to another issue in the case. 378 N.E.2d at 917 n.1. On the matter of attorney's fees, the case is a bad one and should not be followed.

³²*Bright v. Ball Memorial Hosp. Ass'n*, 463 F. Supp. 152, 155 (S.D. Ind. 1979) (construing 15 U.S.C. §§ 1601-1677 (1976) (as amended)).

³³*Terre Haute Sav. Bank v. Indiana State Bank*, 380 N.E.2d 1288 (Ind. Ct. App. 1978) (upholding decision of the Indiana Department of Financial Institutions); *accord*, IND. CODE § 28-6-1-16.5(a)(5) (Supp. 1979).

³⁴*Department of Financial Insts. v. Wayne Bank & Trust Co.*, 385 N.E.2d 482 (Ind. Ct. App. 1979) (reversing finding of the Indiana Department of Financial Institutions).

³⁵*Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

chase price retains an equitable vendor's lien which, if unperfected, will be defeated by a bona fide purchaser.³⁶ The vendor's lien does not arise in favor of a seller of personal property.³⁷ But suppose that upon termination of a partnership, land owned by the partnership is conveyed by the partnership to one of the partners for an executory consideration payable to the other. Does the latter have a vendor's lien as security for the unpaid price? *Prell v. Trustees of Baird & Warner Mortgage & Realty Investors*,³⁸ dealt with this problem and the clever contention that because this amounted to a sale of a partner's interest in partnership land, which is personal property, no vendor's lien arose.³⁹ Without deciding the vendor's lien issue, the court held that when real or personal property is obtained in exchange for the grantee's written executory promise to execute a mortgage on the described property, the transaction constitutes an equitable mortgage which may be enforced by the vendor in equity.⁴⁰ The court recognized that the equitable mortgagee's interest could be perfected by proper recordation of the contract in the miscellaneous records following recordation of the deed, so that a subsequent bona fide purchaser from the vendee would be charged with constructive notice of the vendor's equitable mortgage as defined in the contract.⁴¹ The case simply recognizes that a grantor

³⁶See Townsend, *Secured Transactions and Creditors' Rights, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305 (1975).

³⁷*Johnson v. Jackson*, 152 Ind. App. 643, 284 N.E.2d 530 (1972). Thus, a seller of goods on credit has no lien upon the goods sold unless a security interest is retained. Cf. *First Nat'l Bank of Elkhart County v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203 (1972) (recognizing right of seller to rescind in case of voidable title in certain cases).

³⁸386 N.E.2d 1221 (Ind. Ct. App. 1979).

³⁹*Id.* at 1225. In a parallel situation, *Huffman v. Foreman*, 163 Ind. App. 263, 323 N.E.2d 651 (1975), held that a vendee releasing or conveying his interest in a land contract for an executory consideration held a vendor's lien for the unpaid price. This problem is discussed in Townsend, *supra* note 36, at 307-09, suggesting that a mortgagee releasing his rights (otherwise considered as personal property) should also have a vendor's lien for the unpaid consideration. Similar considerations should apply to a partner releasing his rights in partnership realty to other partners for an executory consideration, especially when the agreement is part of a termination arrangement between the grantor-partnership and grantee-partner.

⁴⁰386 N.E.2d at 1227-28. A contractual promise to execute a mortgage, if in writing and meeting formal requirements and for an executed consideration, will generally be specifically enforced in equity when performance becomes due. *Hamilton v. Hamilton*, 162 Ind. 430, 70 N.E. 535 (1904); *Brown v. Brown*, 103 Ind. 23, 2 N.E. 233 (1885). An unwritten promise to execute a mortgage, however, falls within the Statute of Frauds. *Irwin v. Hubbard*, 49 Ind. 350 (1874).

⁴¹386 N.E.2d at 1228. The court did not actually decide that the recordation of the prior contract to execute a mortgage in favor of the vendor-partner, after the execution and recordation of the absolute deed conveying the property to the vendee, would constitute constructive notice of the equitable mortgage. This was left to determination by the lower court upon facts which showed that the contract was "placed in the Miscellaneous Drawer," leaving open possible questions of whether or not the contract was in recordable form and recorded in the proper records. The court did decide that

who executes a deed pursuant to a contract binding the grantee to execute a mortgage on the property, as security for the executory consideration promised to him, holds an equitable mortgage—not a vendor's lien.⁴² Assuming that the contract is in recordable form and properly recorded, the grantor holds a perfected interest of which subsequent purchasers are charged with constructive notice.⁴³

2. *Conditional Sales Contracts—Forfeiture.*—A vendor under a real estate conditional sales contract was denied forfeiture as a remedy when the purchaser of agricultural land had paid nearly thirty percent of the price. Pursuant to the now nationally famous case of *Skendzel v. Marshall*,⁴⁴ the Indiana Supreme Court in *Morris v. Weigle*⁴⁵ ordered the vendor to proceed with his remedy of foreclosure, analogizing his interest to that of a mortgagee who is

the lower court erred in holding that the only method of perfecting a vendor's lien was through *lis pendens* notice, as permitted by *Union State Bank v. Williams*, 348 N.E.2d 683 (Ind. Ct. App. 1976) (holding that a vendor's lien was perfected when the executory consideration for it was recited in the deed). 386 N.E.2d at 1228. If the contract had been properly recorded, it seems that it should serve as constructive notice of the defeasance in favor of the grantor-partner. See IND. CODE § 32-1-2-17 (1976). Recordation of a land contract in recordable form between grantor and grantee, after recordation of the deed executed pursuant to the contract, is constructive notice that the consideration for the deed is executory. Purchasers after recordation of the contract are thus put on notice of the vendor's lien. *Case v. Bumstead*, 24 Ind. 429 (1865). It seems that a contract to execute a mortgage is properly recorded in the miscellaneous records, although no statute makes this clear. Compare IND. CODE § 17-3-39-2 (1976), and *id.* § 32-1-2-32, with *id.* § 32-1-2-31. Other statutes provide for a separate deed record and separate mortgage record. *Id.* § 17-3-39-5. Cases in which it was held that an instrument must be recorded in the proper record in order to serve as constructive notice are archaic and should be discarded, especially in view of modern statutes permitting the use of a single record. Compare *id.* §§ 17-3-3-1 to -4 with *Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N.E. 37 (1912) (deed recorded in miscellaneous records ineffectively recorded).

⁴²Whether expressed in the conveyance or created by contract with the conveyance, the creation of the lien by express reservation or by contract is inconsistent with a vendor's lien which arises by implication of law. *Lucas v. Hendrix*, 92 Ind. 54 (1883).

⁴³A grantor may by express language reserve a mortgage in the instrument of transfer, in which case the lien is perfected with or without recording of the deed. *Warford v. Hankins*, 150 Ind. 489, 50 N.E. 468 (1898). Of course the lien may be perfected by suit and *lis pendens* notice. *Union State Bank v. Williams*, 348 N.E.2d 683 (Ind. Ct. App. 1976). The grantor's possession should constitute perfection against purchasers becoming such while he is in possession. See *Townsend*, *supra* note 36, at 305-07.

⁴⁴261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974). *Skendzel v. Marshall* has been recognized as a leading case in at least two nationally recognized casebooks. See K. YORK & J. BAUMAN, *REMEDIES CASES AND MATERIALS*, 974 (3d ed. 1979); J. CRIBBET & C. JOHNSON, *CASES AND MATERIALS ON PROPERTY*, 1115 (4th ed. 1978).

⁴⁵383 N.E.2d 341 (Ind. 1978).

limited to judicial foreclosure.⁴⁶ In reaching this conclusion, the court overruled the court of appeals,⁴⁷ which earlier had found that the purchaser, who continued to farm the property through a tenant, had abandoned the property when he failed to pay an annual installment because of a breakdown in communications during his stay in Brazil as a representative of the United States Government and Purdue University.⁴⁸ A dissent by two members of the court⁴⁹ is sad because it ignores forty years of developing contract and commercial law that has succeeded in putting good faith and fairness in the market place.

3. *Release of Mortgage or Lien; Accord and Satisfaction.*—A debtor may execute a deed of mortgaged or lien property to the mortgagee or lienholder in satisfaction of the underlying indebtedness.⁵⁰ In *Homemakers Finance Service, Inc. v. Ellsworth*,⁵¹ the mortgagor executed and delivered a deed to the mortgagee with a recital that the deed was “accepted in full satisfaction of any and all sums due and owing from the grantor to the grantee.”⁵² In an action upon the indebtedness and the mortgage for foreclosure, the court held that the mortgagor carried the burden of proving payment⁵³ and that proof of mere delivery of the deed and keys to the property was not sufficient to establish a prima facie case of acceptance of the terms.⁵⁴ In short, the debtor may not make a prima facie case of payment by deeding the collateral to the lienholder with a stipulation that the deed is in full settlement of all debts. He must come forth with other evidence establishing the grantee’s assent by a response, such as his assumption of possession of the collateral, the creditor’s expressed assent to its terms, or recordation of the conveyance.⁵⁵

4. *Foreclosure.*—A summary judgment in favor of a mortgagee in a foreclosure action, to which the mortgagor unsuccessfully asserted a counterclaim for breach of a promise to loan, was held to

⁴⁶*Id.* at 342.

⁴⁷375 N.E.2d 677 (1978), discussed in Townsend, *Secured Transactions and Creditors’ Rights, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 294-95 (1979).

⁴⁸375 N.E.2d at 679.

⁴⁹383 N.E.2d at 345 (Pivarnik, J., & Givan, C.J., dissenting).

⁵⁰*Lamb v. Thieme*, 367 N.E.2d 602 (Ind. Ct. App. 1977); *Black v. Krauss*, 119 Ind. App. 529, 85 N.E.2d 647 (1949).

⁵¹380 N.E.2d 1285 (Ind. Ct. App. 1978).

⁵²*Id.* at 1287.

⁵³*Id.* Although the mortgagor did not affirmatively plead payment as required by IND. R. TR. P. 8(c), the court allowed the issue to be raised at the trial.

⁵⁴*Id.* at 1287.

⁵⁵For a case in which payment was proved by an admission of the lienholder who took a transfer of collateral, see *Lamb v. Thieme*, 367 N.E.2d 602 (Ind. Ct. App. 1977).

constitute a bar as *res judicata* in a later action to enforce the alleged promise.⁵⁶

C. Security Interests in Personal Property

1. *Proceeds; Setoff; Security Interests and Transactions Excluded by Article 9.*—A security interest in collateral extends to proceeds received for the property which, if perfected in the original, continues to be perfected in identifiable proceeds.⁵⁷ If the proceeds consist of negotiable documents, chattel paper, or instruments received in exchange, special rules deal with priorities between the secured party and transferees of the paper or instruments.⁵⁸ If proceeds are made up of money, land, bank accounts, insurance or other collateral either excluded or not covered by Article 9 of the Code,⁵⁹ however, a serious problem of priorities arises between the secured party on one side and a transferee of these kinds of proceeds.⁶⁰ A similar problem is posed when the transferee of proceeds claims a right of setoff, which is also excluded from the provisions of Article 9. In an effort to resolve this conflict with

⁵⁶*Richards v. Franklin Bank & Trust Co.*, 381 N.E.2d 115 (Ind. Ct. App. 1978). Failure of the court to make findings as required by Trial Rule 56 without challenge on a motion to correct error or an appeal was held not to effect the finality and validity of the judgment. *Id.* at 118. The court also held that where total judgment as distinguished from partial summary judgment was entered, findings were not required. *Id.*

⁵⁷U.C.C. § 9-306(3) [hereinafter referred to as the Uniform Commercial Code or Code]. If the original security interest is not perfected by a financing statement covering "proceeds," the security in proceeds is lost unless perfected within 10 days after receipt by the debtor. *Id.*

⁵⁸U.C.C. §§ 9-308, -309 (protecting a holder in due course of a negotiable instrument; a bona fide purchaser of a security; a negotiatee of a negotiable document; a purchaser of chattel paper and non-negotiable instruments who gives new value without knowledge in regular course; and a purchaser of chattel paper for new value in the regular course of business with or without knowledge).

⁵⁹Exclusions are listed in U.C.C. § 9-104, including, in addition: landlord's liens; statutory liens; wages; equipment trusts; certain sales of accounts, chattel paper and contract rights; judgments; interests in real estate other than fixtures; and tort claims. Money is not specifically dealt with by the Code, but by definition "goods" does not include money. U.C.C. § 9-105(1)(f).

⁶⁰Some courts hold that priorities between a secured party claiming deposits in a bank account as proceeds and the rights of the bank are determined by common law principles. *See, e.g., Middle Atl. Credit Corp. v. First Pa. Banking & Trust Co.*, 199 Pa. Super. Ct. 456, 185 A.2d 818 (1962). *Cf. Commercial Discount Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974) (innocence of bank in asserting setoff for loan made before proceeds were deposited held to be irrelevant and setoff denied). It has been indicated that the 1972 proposed amendments to the Code which recognize that proceeds traced to a bank account are covered by a security agreement will be governed by priority rules of Article 9—at least to the extent of denying the bank a right of setoff of a prior debt. *See Domain Indus., Inc. v. First Sec. Bank & Trust Co.*, 230 N.W.2d 165 (Iowa 1975). However, the new law, which Indiana has not yet adopted, does not regulate priorities between setoff and proceeds deposited in a bank account.

respect to setoff, Judge Garrard in *Citizens National Bank v. Mid-States Development Co.*⁶¹ boldly amended the Code by holding that priorities between the secured party claiming funds in a bank account and the bank's claim of setoff would be determined by Article 9.⁶² Priority was given to the prior perfected security interest in an egg inventory covering proceeds which were deposited in a bank account as against a setoff asserted by the bank upon a previously incurred obligation owing by the debtor to the bank.⁶³ The bank was apparently aware of the secured party's claim to the proceeds.⁶⁴ In reaching its decision, the court relied upon the general validation provision of Article 9: "Except as otherwise provided by this act . . . a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."⁶⁵ Although the court reached a correct solution, its reasoning is questionable because the first clause of the validation section was ignored. When proceeds consist of collateral which is not covered or excluded by Article 9, it seems clear that as between debtor and secured party, the security interest should be recognized.⁶⁶ But priorities between the secured party and third parties who deal with the proceeds remain to be determined by common law principles, influenced in a large part by business practice and analogy to Code Rules.⁶⁷ For example, had the bank in good faith made a fresh

⁶¹380 N.E.2d 1243 (Ind. Ct. App. 1978).

⁶²*Id.* at 1248.

⁶³*Id.* at 1248-49.

⁶⁴Shortly after the setoff was asserted, the debtor filed in bankruptcy under Chapter XI. For some unexplained reason, the bank funds of over \$100,000 never became a part of the bankruptcy estate, presumably because the security interest was valid as against the trustee or the setoff was not challengeable as a preference. Actually, the funds should have passed to the trustee as a preference, in which case the claim of the secured party should have been denied under U.C.C. § 9-306(4), because proceeds deposited in a bank account are limited to net proceeds deposited within 10 days before bankruptcy. See *Fitzpatrick v. Philco Fin. Corp.*, 491 F.2d 1288 (7th Cir. 1974), discussed in Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 245-47 (1974).

⁶⁵380 N.E.2d at 1248 (quoting IND. CODE § 26-1-9-201 (1976)).

⁶⁶Dissent upon this point is almost totally lacking in the case law. Security interests in collateral included in Article 9 also cover proceeds even when the proceeds are of a form excluded from Article 9. *Domain Indus., Inc. v. First Security Bank & Trust Co.*, 230 N.W.2d 165 (Iowa 1975) (setoff); *Commercial Discount Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974) (setoff). An expectancy in a lawsuit recovery is included in Article 9 even though the right to recovery after judgment is not so included. *In re Estate of Hill*, 27 Or. App. 893, 557 P.2d 1367 (1976). Pre-Code law recognized that a security interest in a note and mortgage becoming real estate upon foreclosure continued in the land. *Walner v. Capron*, 224 Ind. 267, 66 N.E.2d 64 (1946) (as between lender and debtor, the collateral was treated as retaining its original character).

⁶⁷See U.C.C. § 1-103.

advance to the debtor after deposit of the proceeds, a good argument for giving the bank priority can be made, either upon common law principles,⁶⁸ a theory analogous to the super priority accorded to a purchase money security interest under the Code,⁶⁹ or the Code rule allowing account debtors to interpose their claims arising before notification by the secured party.⁷⁰ If proceeds consist of money, a bona fide purchaser taking possession should be protected over a prior security interest whether it is perfected or not.⁷¹ A similar result should follow when proceeds are traced to land—purchasers being protected under rules applicable to real estate transactions.⁷²

Another convoluted series of problems will arise when a transferee of collateral excluded from Article 9 claims a right to proceeds as against a later security interest therein.⁷³ Here again the courts

⁶⁸The pre-Code law denied the bank a right of setoff against proceeds when the bank's claim accrued before the funds were deposited. *Peoples State Bank v. Caterpillar Tractor Co.*, 213 Ind. 235, 12 N.E.2d 123 (1938); *Fletcher Am. Nat'l Bank v. Federal Sec. Co.*, 94 Ind. App. 379, 168 N.E. 599 (1929). This conclusion was reached upon the theory that the bank had not changed position or given value. The cases assume that had a fresh advance been made by the bank after the proceeds were deposited, the bank would take priority.

⁶⁹Purchase money types of security interests are given a super priority over prior security interests in a number of situations. U.C.C. §§ 9-312(3), (4). Similar rules give a super priority to work and additions furnished by artisans and to security interests in fixtures and accessions. U.C.C. §§ 9-310, -313, -314.

⁷⁰While a depository bank is not an "account debtor," the position of the bank is almost identical. See *Rowland v. American Fed. Sav. & Loan Ass'n*, 523 S.W.2d 207 (Tenn. Ct. App. 1975). Under § 9-318, a security interest in accounts, contract rights, general intangibles, and possibly chattel paper is taken subject to the account debtor's claims against the debtor if they arise out of the transaction or accrue before notification. *Chase Manhattan Bank v. State*, 40 N.Y.2d 590, 357 N.E.2d 366 (1976). The bank is protected if it pays proceeds to the debtor or his designee unless the secured party complies with the adverse claim statute. IND. CODE § 28-1-20-1 (Supp. 1979). Cf. U.C.C. § 4-303 (rule for determining priority for notice, stop-order, legal process, and setoff).

⁷¹*E.g., compare Transamerica Ins. Co. v. Long*, 318 F. Supp. 156 (W.D. Pa. 1970) (thief paying taxes with stolen money passed good title to the United States), with *Porter v. Roseman*, 165 Ind. 255, 74 N.E. 1105 (1905) (creditor taking stolen money in payment not a purchaser for value cutting off rights of owner).

⁷²The common law rule was that an owner of converted personal property could trace it to real estate, and that a bona fide purchaser of the real estate would cut off his claim. *Metropolitan Cas. Ins. Co. v. S.J. Peabody Lumber Co.*, 99 Ind. App. 307, 192 N.E. 323 (1934) (owner of funds defeated by person acquiring mechanic's lien upon land in which funds invested). Judgment lien creditors, however, would not prevail. Cf., *Moore v. Thomas*, 137 Ind. 218, 36 N.E. 712 (1894) (judgment is a lien only on the judgment debtor's interest in realty and is subject to all equities in favor of third parties).

⁷³Cf. *McIlroy Bank v. First Nat'l Bank*, 252 Ark. 558, 480 S.W.2d 127 (1972) (security interest in note converted to judgment). A war of priorities will also arise between security interests in collateral which are excluded from the Code because another person claims a statutory lien, a landlord's lien, or an account, contract right or chattel paper under a transfer excluded by the Code. See U.C.C. § 9-104(b), (c), (f). Thus, priorities between a security interest in goods on which a conflicting landlord's

must turn to common law and principles derived from common law, simply because the Code did not choose to deal with these kinds of problems.

2. *Liability of Filing Officers and the Commissioner of the Bureau of Motor Vehicles.*—Two decisions recognized the liability of filing recording officers for the negligence of their employees resulting in losses to persons relying upon the proper performance of duties. One case⁷⁴ held that liability could be imposed for giving to the plaintiff incorrect information that no financing statements were outstanding against a debtor.⁷⁵ In the other,⁷⁶ a transferee of a motor vehicle recovered from the Indiana Bureau of Motor Vehicles and its commissioner for failure to note upon the certificate of title an alleged lien against the original owner. Although it appeared that the debtor had executed no security agreement,⁷⁷ the court imposed liability for the amount of a previous judgment procured by the alleged secured party against the transferee.⁷⁸

The conclusion of the court that the failure to include the lien upon the title was the proximate cause of a substantial, and questionable, judgment, to which the bureau and the commissioner were

lien is claimed are resolved by common law principles, including analogy to Code principles. *Peterson v. Ziegler*, 39 Ill. App. 3d 379, 350 N.E.2d 356 (1976).

⁷⁴*Mobile Enterprises, Inc. v. Conrad*, 380 N.E.2d 100 (Ind. Ct. App. 1978). In this case the secretary of state, the director of the Uniform Commercial Code Division, and their bondsman were named as parties defendant.

⁷⁵*Id.* at 104. Advice was given over the telephone despite the administrative rule that filing information is not required to be given by telephone. IND. ADMIN. RULES & REGS. Rule (26-1-9-408)-10 (Burns 1976). The court reversed the lower court's dismissal of the complaint and returned the case for determination of the issues of negligence and contributory negligence. 380 N.E.2d at 104.

⁷⁶*VanNatta v. Crites*, 381 N.E.2d 532 (Ind. Ct. App. 1978). *Cf.* *National Bank & Trust Co. v. United States*, 589 F.2d 1298 (7th Cir. 1978) (United States not liable to the secured party for seizure and sale of a motor vehicle when the purchaser was erroneously given a clear certificate of title by the Bureau of Motor Vehicles), *discussed in text* accompanying note 117 *infra*.

⁷⁷The alleged lienholder in this case had given the motor vehicle to his granddaughter as a wedding present. A lien for \$1000 in favor of her father was noted on the title which was then transferred to the donee. A new certificate was issued over the signature of the donee and her husband when they applied for a title, with the application showing no liens. The Bureau of Motor Vehicles overlooked the lien on the title and issued a clear certificate which was ultimately transferred to the plaintiff, who subsequently brought suit against the commissioner. The court failed to consider that the notation of a lien on the title by the secured party is insufficient as a security agreement. *See White v. Household Fin. Corp.*, 158 Ind. App. 394, 302 N.E.2d 828 (1973).

⁷⁸381 N.E.2d at 539. The judgment in favor of the secured party in this case was thus erroneous. Although the court did not admit the judgment as proof of its correctness, the court seemed to hold it relevant for the purpose of showing that as a result of the negligence of the bureau, the purchaser of the vehicle was put to a lot of trouble. Damages thus should have been limited to the trouble resulting, such as attorney's fees, rather than the amount of the judgment.

not parties, is unique. The court implies that an official who neglects to record a spurious lien is proximately responsible to a purchaser for the risks and trouble of an ensuing lawsuit successfully or unsuccessfully pursued against him.⁷⁹ Because the state is liable for its employees in these cases, the imposition of vicarious liability upon department heads not otherwise at fault conflicts with basic agency principles.⁸⁰ To the extent that these cases impose liability upon supervising officers or employees solely on the basis of their vicarious responsibility for acts of employees, both cases are wrong.

Current legislation has added to the burdens of the Bureau of Motor Vehicles by requiring tax liens to be recorded upon its records and titles,⁸¹ and odometer readings to be furnished on title transfers.⁸² New legislation also allows the bureau to require an individual applying for a certificate of title to include his social security number.⁸³

3. *Miscellaneous Decisions.*—A promise by an auto franchiser to the bank financing the inventory of a franchisee that the franchiser would repurchase current models if the franchise were terminated created a third party beneficiary contract right in the franchisee to compel the franchiser to take back the vehicles.⁸⁴ For tax purposes, gross income is not received by a seller of goods to the extent that the buyer assumes a security interest or lien upon the property.⁸⁵ The insurer is under no duty to give a conditional buyer of land notice of the expiration of an insurance policy, but such a duty may rest with the agent.⁸⁶ Two decisions⁸⁷ indicate that when, as between

⁷⁹*Id.* at 538. A new form of action, negligent disparagement of title by omission, seems to have been invented. Sparse precedent on the subject limits liability to intentional torts disparaging title or property. *E.g.*, *May v. Anderson*, 14 Ind. App. 251, 42 N.E. 946 (1895).

⁸⁰An agent is not vicariously liable for the acts of a subagent under him. RESTATEMENT (SECOND) OF AGENCY § 358 (1957). The position of this writer on the subject is discussed in Townsend, *Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 253, 262-65 (1978).

⁸¹IND. CODE § 6-8-3-17 (Supp. 1979). The bureau is required to check lists of unpaid tax warrants for gross income, sales, use, and adjusted gross income taxes, and enter a lien upon the title of any assignee thereof.

⁸²*Id.* § 9-1-2-1.

⁸³*Id.* § 4-1-8-1.

⁸⁴*Fiat Distribs., Inc. v. Hidbrader*, 381 N.E.2d 1069, 1071 (Ind. Ct. App. 1978).

⁸⁵*Indiana Dep't of State Revenue v. Northern Ind. Steel Supply Co.*, 388 N.E.2d 596 (Ind. Ct. App. 1979) (no tax payable when purchase paid or settled with secured party).

⁸⁶*Augustine v. First Fed. Sav. & Loan Ass'n*, 384 N.E.2d 1018, 1021 (Ind. 1979) (holding in fact that in a suit by the vendee against the insurance agent, the latter could not implead and hold the insurer liable). This decision also invented a technical and bad rule to the effect that depositions must be "published" before they may be considered for purposes of summary judgment. *Id.* at 1020. Lawyers should take note of the rule, however controversial it may be.

⁸⁷*Morsches Lumber, Inc. v. Probst*, 388 N.E. 2d 284 (Ind. Ct. App. 1979) (agree-

two parties with a common risk, one agrees to procure insurance, ensuing insurance coverage has the implied effect of limiting the liability of each for negligence to the other. Application of this principle did not concern, in these cases, lienholder and debtor, but the principle may reach this far.⁸⁸ The court of appeals recognized that a security interest may be created in future rents to be earned under an existing lease.⁸⁹

D. Creditors' Rights

1. *Collections Practices.*—The arsenal of remedies available to creditors was enlarged by *Kaletha v. Bortz Elevator Co.*,⁹⁰ authorizing debtor harassment by publication of deadbeat status in the most vulnerable way—to business associates and clients. Another unfortunate decision, *Martin v. Platt*,⁹¹ encourages another form of extrajudicial witness harassment by allowing a supervisor to discharge employees who reported to superiors the supervisor's criminal conduct in taking kickbacks. Not only do these decisions reflect a shortage of legal research,⁹² they also exhibit a lack of humanitarian considerations which make bankruptcy a way of life and unionization the main tool of employee protection.

2. *Mechanics' Liens.*—Three fairly clear issues are settled by Indiana law governing construction contracts. One is that a prime contractor's subcontractor cannot recover a personal judgment from

ment of contractor to insure barn being built for owner); *Woodruff v. Wilson Oil Co.*, 382 N.E.2d 1009 (Ind. Ct. App. 1978) (lease agreement requiring lessor to insure).

⁸⁸These cases are tied to the rule that if one of the parties procures insurance for the benefit of both, the insurer paying one of them should not be allowed to subrogate against the other who is at fault. This principle may be applicable to the lienholder-debtor relationship as well. See *Lititz Mut. Ins. Co. v. Barnes*, 248 F.2d 241 (5th Cir. 1957) (insurer had no right of subrogation against mortgagor).

⁸⁹*In re Estate of Smith*, 388 N.E. 2d 287 (Ind. Ct. App. 1979). This is one of the few Indiana cases recognizing a lien in future rents. For another aspect of this case, see notes 176-78 *infra* and accompanying text.

⁹⁰383 N.E.2d 1071 (Ind. Ct. App. 1978). The act of the creditor in writing to the debtor's business client was held not to be "outrageous," a requirement which the court held to be an essential element of the tort of intentional infliction of emotional distress. *Id.* at 1075.

⁹¹386 N.E.2d 1026 (Ind. Ct. App. 1979). The employees who were fired by the supervisor for reporting his taking of kickbacks brought suit against the employer and the supervisor. Summary judgment was sustained because the employment was at will and no damages could be shown. *Id.* at 1028.

⁹²The first decision was based upon a law review article written by a prominent authority in 1939. 383 N.E.2d at 1075 (citing Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939)). The second decision ignored the significant array of authority in other jurisdictions allowing damages to an employee at will injured by a defendant who induced his employer to discharge the employee without justification. *E.g.*, Annot., 26 A.L.R.2d 1227 (1952).

the owner for unpaid performance when there is no privity of contract between the owner and the subcontractor.⁹³ This rule was illustrated by *Indianapolis Raceway Park, Inc. v. Curtiss*,⁹⁴ in which a tenant, as a part of its rent, agreed with the landlord to install lighting on the property. When the tenant's contractor (the subcontractor) was not paid, he failed to perfect a mechanic's lien on the property but later sued the landlord in unjust enrichment. Recovery was denied because the evidence failed to show that the work was requested by the landlord, that the subcontractor expected the landlord to pay, that a wrong was committed, or that the landlord actively assented.⁹⁵ Another settled issue is that the subcontractor may assert a nonpromissory lien upon the owner's interest in the land benefited to the extent of the reasonable value of his performance rendered to the prime contractor, provided he properly complies with and records notice of his lien under the mechanic's lien statute.⁹⁶ The third rule is that if the owner promises to pay the subcontractor for his performance and if the promise is supported by consideration, he will be responsible to the subcontractor. Accordingly, the owner promising to pay a subcontractor who, in reliance thereon, failed to record his otherwise valid mechanic's lien, has been held liable upon his promise on a theory of promissory estoppel.⁹⁷ This third principle was ignored in *Hormuth Drywall & Painting Service, Inc. v. Erectioneers, Inc.*⁹⁸ wherein the subcontractor, in reliance upon the owner's promise, had failed to record his lien.⁹⁹ Liability of the owner was denied due to his unilateral belief that the subcontractor had no lien because the prime was operating

⁹³See *Glick v. Seufert Constr. & Supply Co.*, 342 N.E.2d 874 (Ind. Ct. App. 1976) (promise to plumber's subcontractor not inferred when the general contractor said he would "try to help [the sub] get his money").

⁹⁴386 N.E.2d 724 (Ind. Ct. App. 1979) (citing extensive authority).

⁹⁵*Id.* at 727. It is generally recognized that an owner or landlord actively assenting to construction work may have his interest in the land subjected to a lien. *E.g.*, *Mann v. Schnarr*, 228 Ind. 654, 95 N.E. 2d 138 (1950). Liability in such cases is predicated upon estoppel or change of position and not necessarily upon a theory of unjust enrichment. It should also be noted that this kind of estoppel and unjust enrichment liability involves different concepts. 386 N.E.2d at 727.

⁹⁶IND. CODE § 32-8-3-1 (Supp. 1979). A lien may be claimed as far removed from the owner as a subcontractor of a subcontractor. *Stephens v. Duffy*, 41 Ind. App. 385, 83 N.E. 268 (1908).

⁹⁷*Lawshe v. Glen Park Lumber Co.*, 375 N.E.2d 275 (Ind. Ct. App. 1978), *discussed in* *Townsend*, *supra* note 47, at 306-07.

⁹⁸381 N.E.2d 490 (Ind. Ct. App. 1978). The case actually involved the claim of the subcontractor of a subcontractor against the prime contractor and the owner, who had orally promised that they would assist the former to collect from the first subcontractor who had defaulted.

⁹⁹The uncontested evidence suggested an implied promise either to pay or to assist with collection. *Id.* at 492.

under a no-lien contract.¹⁰⁰ The no-lien contract, however, was ineffective with respect to the subcontractor because it was not recorded. The case will go down in history as one of the few instances in which the court refused to enforce a promise because of the unilateral mistake of the promisor that facts were not present which would induce acceptance or reliance thereon. In its anxiety to uphold the lower court decision, the court also refused to consider the claim of a third party beneficiary contract between the prime and the owner for the benefit of the subcontractor because it was not raised in the pleadings.¹⁰¹ This case should not have been published.

Notice of intent to hold a mechanic's lien must be given by subcontractors to an owner who occupies or intends to occupy the property as a resident within time limits provided by the mechanic's lien statute.¹⁰² *Wiggin v. Gee Co.*¹⁰³ dealt with what appeared to be a subcontractor furnishing materials to a contractor who was building an addition to the occupied home of the owner for purposes of a child day care center. The owner was not given notice of the intent to hold a lien on the property, and the subcontractor duly perfected a mechanic's lien for unpaid materials furnished to the contractor on the job. The female owner, who had paid most of the contract price to the contractor, objected. The court held that because the day care center was not a "family dwelling," the statutory notice was not required to be given the owner.¹⁰⁴ If the case stands, it seems that a homeowner paying his contractor for paving his driveway is not entitled to notice from the subcontractor if the driveway is to be used wholly or partially for an automobile used in the homeowner's business. As a precedent, the case stands out as an absurdity for its failure to consider the predominant use of the property, and to some it will be regarded as a kind of sexist opinion, inasmuch as it discourages home employment.¹⁰⁵ The statute is intended to protect the homeowner from unexpected liens after he pays the prime contractor, unless he is given notice of the intended lien shortly after the work commences. This case qualifies only a pure domestic as a homeowner, a requirement more restrictive than the statute itself.¹⁰⁶

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²IND. CODE § 32-8-3-1 (Supp. 1979). The 1978 version is discussed in Townsend, *supra* note 47, at 305.

¹⁰³386 N.E.2d 1218 (Ind. Ct. App. 1979).

¹⁰⁴*Id.* at 1220.

¹⁰⁵The dissent appears to agree with this assessment. *Id.* at 1220-21 (Garrard, J., dissenting).

¹⁰⁶The statute also applies to a *double* as well as a single occupancy dwelling. IND. CODE § 32-8-3-1 (Supp. 1979).

Other mechanic's lien cases permitted recovery of attorney's fees in foreclosure cases,¹⁰⁷ recognized that foreclosure of a person's interest is without jurisdiction unless he is made a party,¹⁰⁸ placed criminal liability for deception on a contractor who had received payment after signing a false statement that all subcontractors had been paid,¹⁰⁹ and denied enforcement of a lien when the lienholder failed to carry his burden of proof that notice of the lien was recorded within sixty days after the last work or materials are furnished, as required by statute.¹¹⁰ The latter case exemplifies the burden carried by the party with the burden of proof on appeal when the trier of fact has determined the facts against him below, a matter of great importance to contractors who sometimes must establish each detail of their claim. The decision on the one side allowed the trier of fact to deny proof of services and materials when invoices were delivered and accepted without objection, and on the other side permitted the trier to treat similar invoices determinative as an account stated and even allowed the court to ignore time cards and invoices establishing performance within recordation time as "incidental."¹¹¹ The need for careful and documented recordkeeping by contractors cannot be better illustrated.

3. *Liens of Federal Government.*—It has long been an accepted rule that a prior inchoate lien, valid under state law against subsequent parties, will be defeated by a contractual security interest taken in the property by or on behalf of the United States government. This rule has often been applied to defeat mechanic's and artisan's liens and security interests covering advances after the federal security interest attached, which would otherwise take priority under state law.¹¹² The Supreme Court, in *United States v. Kimbell Foods, Inc.*,¹¹³ rejected the doctrine and held that a contractual lien of the government under the Small Business and the

¹⁰⁷*Fox v. Galvin*, 381 N.E.2d 103 (Ind. Ct. App. 1978). For a discussion of another issue in this case, see note 204 *infra* and accompanying text.

¹⁰⁸*Id.*

¹⁰⁹*Pappas v. State*, 386 N.E.2d 718 (Ind. Ct. App. 1979).

¹¹⁰*Contech Architects & Eng'rs, Inc. v. Courshon*, 387 N.E.2d 464 (Ind. Ct. App. 1979). See IND. CODE § 32-8-3-1 (1976 & Supp. 1979).

¹¹¹*Id.* at 466.

¹¹²*E.g.*, *Willow Creek Lumber Co. v. Porter County Plumbing & Heating, Inc.*, 572 F.2d 588 (7th Cir. 1978); *McCullough Constr. Co. v. Agricultural Prods. Corp.*, 437 F. Supp. 404 (N.D. Ind. 1977). These cases were criticized in Townsend, *supra* note 47, at 310. These decisions will probably no longer be valid law.

¹¹³99 S. Ct. 1448 (1979). The case recognized that Congress may fix priorities. In reaching its conclusion, the Court noted that the Federal Tax Lien Act of 1966, 26 U.S.C. § 6323 (1976), was enacted with the intent that state law should determine the priority to be given to federal tax liens unless its application would impair federal operations. 99 S. Ct. at 1463-64.

Farmers Home Administrations should be governed by priorities under state law.¹¹⁴ Because the government under these programs was operating in an established area of commercial law and because there was no need for a uniform federal rule, priorities should be governed by local law which does not discriminate against the United States.¹¹⁵ State law was applied to give priority to a security interest in inventory perfected before the lien securing a government loan arose, but covering a future indebtedness and collateral acquired after perfection of the insured loan, and to an artisan's lien upon farm equipment over a prior perfected security interest claimed by the government.¹¹⁶ This is a landmark decision worthy of careful study by commercial lawyers who will welcome the government as an equal partner when it engages in commercial affairs.

The Seventh Circuit held¹¹⁷ that the owner of a perfected security interest in a motor vehicle could not recover from the United States for seizing and selling the property under a tax lien junior to the security interest of the secured party who was not given notice of the sale.¹¹⁸ The purchaser acquired only the interest of the debtor, even though he was given a clear certificate of title through an error of the Bureau of Motor Vehicles.¹¹⁹

4. *Judgment Liens.*—Indiana statutes provide that a money judgment may be entered and indexed in the judgment docket, and thereupon it becomes a lien upon all the debtor's land located in the county.¹²⁰ Parasitic legislation¹²¹ allows the state to record in the judgment docket the undertaking of a condemnee and his surety to repay funds withdrawn when exceptions are made to an appraisal in a condemnation case. The state is then given a lien upon all the real estate of the obligor or obligors in the county from the date of recordation. In *State v. Cox*,¹²² the court held that a subsequent purchaser of land from the condemnee, whose undertaking was recorded, took title subject to the state's lien for money to be returned if the judgment should go for less than the appraised amount paid into court.¹²³ The court properly rejected a technical argument that

¹¹⁴99 S. Ct. at 1465.

¹¹⁵*Id.* at 1459.

¹¹⁶*Id.* at 1461.

¹¹⁷*National Bank & Trust Co. v. United States*, 589 F.2d 1298 (7th Cir. 1978).

¹¹⁸*Id.* at 1304.

¹¹⁹*Id.* at 1302.

¹²⁰IND. CODE § 34-1-43-1 (Supp. 1979). The lien continues for 10 years from the time of entry and indexing. *Id.* § 34-1-45-2.

¹²¹IND. CODE § 32-11-1-8 (1976). Other legislation uses the judgment docket as the means of securing liens on real estate. *E.g., id.* § 6-6-2-10(b) (procedure for collecting fuel tax).

¹²²377 N.E.2d 1389 (Ind. Ct. App. 1978).

¹²³*Id.* at 1391.

because the general judgment lien statute required a statement or transcript of a "judgment," recordation of the undertaking¹²⁴ was insufficient to constitute a lien.¹²⁵ Unfortunately, the case cited with approval dictum in a supreme court decision¹²⁶ which overlooked the purpose of the Indiana law requiring the separate filing of a transcript or statement of the judgment.¹²⁷ The clerk is not required to and should not automatically enter judgments in the judgment docket, mainly because the statute in present form was passed to assure that state judgment liens would arise in the same manner as federal judgment liens entered under the same statute.¹²⁸ A contrary interpretation would mean that federal judgments would become judgment liens in the whole judicial district without entry into state records, a fact which accounts for the present form of the Indiana judgment lien statute.

5. *Assets Subject to Creditor Process.*—Most intangible rights cannot be subjected to sale on execution unless given up by the debtor.¹²⁹ However, *Coldren v. American Milling Research & Development Institute, Inc.*¹³⁰ recognized that such property may be subjected to creditor process through proceedings supplemental to execution.¹³¹ In this case, the court held that a debtor's interest in a pa-

¹²⁴However, the case did not consider whether the entry in the judgment docket met the relevant data requirements of the judgment lien statute sufficiently to serve as constructive notice. The general judgment lien statute relevantly requires date of entry and entry under the names of debtors alphabetically. IND. CODE § 34-1-43-1 (1976). Presumably, these requirements had been met.

¹²⁵377 N.E.2d at 1392. It was argued that the interest of the state should have been perfected by filing *lis pendens* notice of condemnation proceedings. The court recognized this as an alternative device for securing the condemnor. *Id.*

¹²⁶*Id.* (citing *Watson v. Strohl*, 220 Ind. 672, 46 N.E.2d 204 (1943)).

¹²⁷The decision was criticized for this dictum in Hurley, *When is a Judgment a Lien?*, 20 IND. L.J. 293 (1945).

¹²⁸Under a congressional statute, federal judgments become liens in the district in which rendered unless states provide for recordation with the same treatment as state judgments. 28 U.S.C. § 1962 (1976); *Rhea v. Smith*, 274 U.S. 434 (1927). It should be pointed out that the practice of clerks to enter judgments in the judgment docket is expensive and needless unless judgment creditors desire the entry to be made. The 1979 legislature unfortunately adopted a statute providing for a judgment docket in Marion County Municipal Court and providing that municipal judgments "shall" be entered therein, thereby becoming liens upon real estate in the county. IND. CODE § 33-6-1-24 (Supp. 1979) (repealing provision requiring plaintiff to file written request for entry). Fairly interpreted, the statute indicates that the "shall" refers to entry as in the case of circuit and superior court judgments in which entry is made only upon application. The statute, however, should be clarified by amendment to make certain that automatic entry is not required.

¹²⁹*See* IND. CODE § 34-1-36-6 (1976).

¹³⁰378 N.E.2d 870 (Ind. Ct. App. 1978).

¹³¹In this case *A*, the owner of a patent and licensing agreement with *C*, was sued by *B*, who recovered judgment and who purchased the patent and licensing agreement. *B* then moved to dismiss a pending suit by *A* against *C* for breach of the licensing

tent right and licensing agreement with a third person could be subjected to sale in proceedings supplemental to satisfy the claim of a creditor.¹³²

Indiana courts continue to be troubled by the question of whether pension rights are sufficiently vested to be subject to property division in divorce proceedings. In one decision, a pension plan was found to be vested and subject to consideration as property;¹³³ in the other it was not.¹³⁴ Another case recognized, but not without difficulty, that a remainder interest in property vesting before or during marriage is transferable by way of property settlement.¹³⁵ Although these cases involve social issues not usually involved in debtor-creditor relationships, they provide assistance by analogy in defining assets subject to creditor process.¹³⁶

6. *Proceedings Supplemental to Execution.*—In Indiana, a motion to correct error is not required in an appeal from an order in proceedings supplemental to execution.¹³⁷ The time for taking the appeal thus runs from the time of the order.¹³⁸ But suppose that a motion to correct error is filed, and ultimately the court rules against the motion. May an appeal be taken within time limits measured

agreement. The court held that by purchase, *B* became the real party in interest and could dismiss the suit.

¹³²378 N.E.2d at 872.

¹³³*Libunao v. Libunao*, 388 N.E.2d 574 (Ind. Ct. App. 1979) (husband stipulated that interest in Keogh retirement plan was 100% vested and that pension and profit sharing funds were 70% vested; court stated that property division order could consider the future value of unvested pension, but actual distribution must be based on present vested interest?). *Accord*, *In re Marriage of Hirsch*, 385 N.E.2d 193 (Ind. Ct. App. 1979).

¹³⁴*Goodwill v. Goodwill*, 382 N.E.2d 720 (Ind. Ct. App. 1978) (award for division of husband's railroad retirement pension held improper because husband had no vested right to payment of pension).

¹³⁵*Kuhn v. Kuhn*, 385 N.E.2d 1196 (Ind. Ct. App. 1979) (as a part of property settlement, husband conveyed to children a remainder interest which was vested at the time but which was represented as an expectancy). *See In re Marriage of Hirsch*, 385 N.E.2d 193 (Ind. Ct. App. 1979) (husband's remainder interest in a trust held of no pecuniary value subject to distribution).

¹³⁶Cases basing marital property rights on social factors are, of course, irrelevant. *Cf. In re Marriage of McManama*, 386 N.E.2d 953 (Ind. Ct. App. 1979) (money expended for law school education of husband considered as marital property); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978) (court could consider future earning potential of husband).

¹³⁷IND. R. TR. P. 59(G). *See Protective Ins. Co. v. Steuber*, 370 N.E.2d 406, 410-11 (Ind. Ct. App. 1977).

¹³⁸An appeal is initiated by filing a praecipe for the record within 30 days after the ruling on motion for a new trial. IND. R. APP. P. 2(A). The appeal then must be submitted by filing the record within 90 days from entry of the ruling on the motion to correct errors, whichever is later, or 30 days in the case of an interlocutory order. *Id.* 3(B).

from the time of the ruling on the motion for a new trial? In *Hudson v. Tyson*,¹³⁹ Judge Shields, in a scholarly opinion, allowed the appeal as timely by treating, in effect, the motion to correct error as an optional course which could be taken by the aggrieved party.¹⁴⁰ Her opinion points to a fact upon which scholars and lawyers are generally agreed—that in all cases the motion to correct error should be allowed only as an optional remedy preceding appeal—that is, optional with either of the parties, or the judge, on his motion. It should not be a condition to any appeal when the parties or the trial judge do not assert it. The case also held that a judgment against a garnishee was not an interlocutory order from which an appeal must be submitted within thirty days, but that an appeal perfected within the regular ninety-day period allowed from final judgments was proper.¹⁴¹ A dissent arguing for speedier appeals from these types of proceedings lost sight of the fact that the garnishee was seeking the appeal¹⁴² and that the imposition in this case of a \$6500 penalty for an error of judgment as to what constitutes an interlocutory order, upon which even judges cannot agree, is unduly severe.

The 1979 legislature amended the banker's adverse claim statute to protect a garnishee bank in the case of proceedings supplemental to execution.¹⁴³ Under this law, the judgment creditor shall provide the garnishee bank with notice of the proceedings, the unpaid amount of the judgment, and identifying information about the judgment defendant to enable the bank to verify him as its depositor.¹⁴⁴ The judgment creditor shall also serve the bank with an order issued by a court with jurisdiction.¹⁴⁵ Upon service, the bank "shall" restrict withdrawal of the amount then or thereafter on deposit, not exceeding the amount of the unpaid judgment, for sixty days

¹³⁹383 N.E.2d 66 (Ind. Ct. App. 1978). In this case judgment was entered Sept. 9, a motion to correct error was filed on Oct. 27 and overruled on Dec. 17, and the praecipe for the record was filed Dec. 17.

¹⁴⁰*Id.* at 71-72.

¹⁴¹*Id.* at 73. In this case, submission to the appellate tribunal was proper if within 90 days from the ruling on the motion to correct errors although not submitted within the 90 day period from the final judgment. If no optional motion to correct error is made, submission must be made within 90 days of judgment. *Id.* at 72.

¹⁴²The position of the garnishee in proceedings supplemental is quite different from that of the plaintiff and defendant in the principal action. The garnishee is entitled to a change of venue but other parties are not. *Compare* *State ex rel. Travelers Ins. Co. v. Madison Superior Court*, 265 Ind. 287, 354 N.E.2d 188 (1976), *with* *State v. Endsley*, 379 N.E.2d 440 (Ind. 1978). The garnishee may claim a right to trial by jury on his liability. *McCarthy v. McCarthy*, 156 Ind. App. 416, 297 N.E.2d 441 (1973). Hence, the judgment against him is final, if it is not continuing in nature.

¹⁴³IND. CODE § 28-1-20-1 (1976 & Supp. 1979).

¹⁴⁴*Id.* § 28-1-20-1(a) (Supp. 1979).

¹⁴⁵*Id.* § 28-1-20-1(a)(1) (1976 & Supp. 1979).

without liability to any person.¹⁴⁶ The statute applies to joint deposits but it makes no provision for notice to the joint owner who is not the judgment defendant.¹⁴⁷ If no further order is received from the court, the restriction on withdrawals shall be removed after sixty days.¹⁴⁸ The bank is thus freed of responsibility in honoring the rights of the depositor before notice and after the effective notice is terminated.

Under this new law, the judgment creditor with a motion for proceedings supplemental should request and procure an order from the court ordering the garnishee bank to answer and, when appropriate, to appear at the hearing or answer interrogatories. The proposed order should include the following: A notice that garnishment proceedings have been initiated in the court; the unpaid amount of the judgment; a description of the judgment defendant by correct name or names together with his residential and employment address, and any other information necessary to clarify the defendant's identity, such as marital partner, social security number and the like; and the garnishee's responsibilities under the law. The court should direct that the order be served with summons upon the garnishee bank and that the plaintiff serve a copy of the order and other papers upon the judgment defendant, if he can be found, or show the reason he is unable to do so.¹⁴⁹ This should be sufficient to meet the requirements of the statute. However, if it is determined that the account is joint, the plaintiff would be wise to make the joint owner a party and serve a copy of the order upon him with summons advising him of his rights.¹⁵⁰ If a final order is not to be forthcoming within sixty days, it seems that the court has inherent power upon request to continue the freeze for successive sixty-day

¹⁴⁶*Id.* § 28-1-20-1(a)(4) (Supp. 1979).

¹⁴⁷*Id.* § 28-1-20-1(a).

¹⁴⁸*Id.* § 28-1-20-1(a)(4).

¹⁴⁹The judgment debtor is not entitled to notice and hearing before issuance of the order. However, he is entitled to notice pursuant to Trial Rule 5 of the motion and order and other papers in the case. If the original judgment is entered after a default for failure to appear, he should be entitled to service of process along with the order and other papers in the case, although a decision of the court of appeals holds to the contrary. See generally Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 331-33 (1976). For an excellent discussion of the entire problem, see Note, *Trial Rule 69(E): Proceedings Supplemental to Execution*, 11 IND. L. REV. 873 (1978).

¹⁵⁰*Cf.* Field v. Malone, 102 Ind. 251, 1 N.E. 507 (1885) (attachment); First Nat'l Bank v. Croman, 288 Mich. 370, 284 N.W. 912 (1939) (proceedings to reach joint safe deposit box); Hanebrink v. Tower Grove Bank & Trust Co., 321 S.W.2d 524 (Mo. App. 1959) (joint savings account). Although the new statute protects the garnishee bank in case of a joint account, the statute does not protect a joint owner who is not named as a party. IND. CODE § 32-4-1.5-12 (1976) (last sentence).

periods until the rights of the parties are determined by a final judgment in the proceedings.

Effective September 1, 1979, an employer required to make deductions from disposable earnings of an employee for a judgment debt may deduct a fee measured by the greater of eight dollars or two percent of the deduction, one-half to be deducted from the payment to the creditor and the other half from the payment to the employee.¹⁵¹ The fee may be collected only once for the judgment debt, but it may be equally apportioned over the pay periods.¹⁵²

7. *Enforcement of Divorce and Support Decrees.*—It now seems to be settled that overdue installments under a support order or property settlement decree may be enforced by execution or proceedings supplemental as other judgments are enforced, without prior judicial proceedings, and that the ten-year statute of limitations runs on each installment as it becomes due. In clarifying these principles, the court in *Kuhn v. Kuhn*¹⁵³ recognized that enforcement of support orders by way of contempt must be preceded by notice and hearing.¹⁵⁴ Fears expressed in prior decisions that without judicial proceedings a spouse might be subjected to excessive execution were found to be mythical in view of available remedies. Indiana procedure allows the injured party to seek a stay of enforcement by motion.¹⁵⁵ The court in *In re Marriage of Honkomp*,¹⁵⁶ however, erroneously denied the husband the right to setoff against overdue child support payments an obligation of the wife to the husband.¹⁵⁷ A foreign support order may be enforced under the Uniform Reciprocal Enforcement of Support Act¹⁵⁸ by informal procedures analogous to proceedings supplemental, and when confirmed, the foreign order becomes, in effect, an Indiana decree.¹⁵⁹ Inasmuch as a

¹⁵¹IND. CODE § 24-4.5-5-105(4) (Supp. 1979).

¹⁵²*Id.* If apportioned, no fee may be less than one dollar except during the final pay period. *Id.*

¹⁵³389 N.E.2d 319 (Ind. Ct. App. 1979). For the unsatisfactory state of the prior Indiana law on the subject, see Townsend, *supra* note 80, at 281-85.

¹⁵⁴389 N.E.2d at 321.

¹⁵⁵"Satisfaction of a judgment or credits thereon may be ordered, for sufficient cause, upon notice and motion." IND. R. TR. P. 13(M).

¹⁵⁶381 N.E.2d 881 (Ind. Ct. App. 1978).

¹⁵⁷*Id.* at 882.

¹⁵⁸IND. CODE §§ 31-2-1-1 to -39 (1976 & Supp. 1979).

¹⁵⁹Prior case law held that when suit was brought upon a foreign support order, the Indiana order merged only the delinquent installments. Hence, upon future defaults, suit was brought again upon the foreign decree. *McCarthy v. McCarthy*, 159 Ind. App. 540, 308 N.E.2d 429 (1974). The Uniform Act, in effect, makes the foreign decree an Indiana decree for past as well as future defaults. But the original decree remains enforceable in the state of origin, subject to credits for payments made under the Indiana decree. *Banton v. Mathers*, 159 Ind. App. 634, 309 N.E.2d 167 (1974) (modification of order in foreign state not binding on originating state).

change of venue is not permitted from proceedings supplemental and enforcement of support orders,¹⁶⁰ the court denied a change sought by the delinquent in a suit to enforce a Pennsylvania support order.¹⁶¹

8. *Attachment*.—Prior to the now famous case of *Shaffer v. Heitner*,¹⁶² an Indiana court could exercise jurisdiction over a nonresident by attaching or garnishing property within the state. Subject to a requirement of reasonable notice, the court was then empowered to enter judgment limited to the extent of the value of property within the state.¹⁶³ Under *Shaffer*, however, the plaintiff must either obtain personal jurisdiction over the defendant by service or appearance in Indiana, or show that the claim arose out of sufficient contacts with Indiana to justify jurisdiction under *International Shoe Co. v. Washington*,¹⁶⁴ or the plaintiff's cause of action must have been reduced to judgment in a jurisdiction in which these requirements were met. This last exception was recognized in *Hexter v. Hexter*,¹⁶⁵ in which the plaintiff sought enforcement of a foreign judgment for arrearages of support by subjecting the defendant's interest in an Indiana estate to payment of the judgment. The court noted that Indiana had in rem jurisdiction to award relief to the extent of the Indiana property without meeting the contacts requirement, and without personal service or appearance in Indiana.¹⁶⁶

9. *Receivership*.—It is well established that a general creditor cannot obtain a receiver over the assets of an individual and that the courts lack jurisdiction for this purpose. The appointment of a receiver may be challenged by writ of mandate and prohibition.¹⁶⁷ Whether this rule applies to a partnership creditor seeking a receivership over partnership assets is not clear.¹⁶⁸ In *State ex rel. Petty v. Superior Court*,¹⁶⁹ the court held that when a receiver had been appointed over the assets of a partnership at the instance of a

¹⁶⁰IND. CODE § 31-1-2-37 (1976).

¹⁶¹*State ex rel. Greebel v. Endsley*, 379 N.E.2d 440 (Ind. 1978).

¹⁶²433 U.S. 186 (1977), discussed in Townsend, *supra* note 80, at 275-76.

¹⁶³*Transcontinental Credit Corp. v. Simkin*, 150 Ind. App. 666, 277 N.E.2d 374 (1972).

¹⁶⁴326 U.S. 310 (1945). For a decision recognizing that Indiana residency gave the court jurisdiction for divorce, but that other contacts in the state were insufficient to adjudicate property rights, see *In re Marriage of Rinderknecht*, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

¹⁶⁵386 N.E.2d 1006 (Ind. Ct. App. 1979).

¹⁶⁶*Id.* at 1007. The court also found that an appearance by defendant's counsel corrected any deficiency in service of process. *Id.* at 1009.

¹⁶⁷*State ex rel. Makar v. St. Joseph County Circuit Court*, 242 Ind. 339, 179 N.E.2d 285 (1962).

¹⁶⁸*Zechiel v. Firemen's Fund Ins. Co.*, 61 F.2d 27 (7th Cir. 1932) (indicating court had jurisdiction to appoint a receiver over partnership at instance of creditor).

¹⁶⁹378 N.E.2d 822 (Ind. 1978).

creditor and the assets sold, objections by the partners must be raised by an appeal.¹⁷⁰

A mind-boggling new statute governing liquidation and rehabilitation of insurance companies was adopted by the 1979 legislature.¹⁷¹ The law includes comprehensive provisions which parallel in many respects the federal bankruptcy law prior to 1979, an indication that insurance liquidations belong in bankruptcy where they are presently excluded.

10. *Creditors' Rights in Decedents' Estates.*—When specific property upon which there is a lien is devised, the devisee takes the property subject to the lien, in the absence of other provisions.¹⁷² But when property on which there is a lien passes to a surviving tenant by the entirety, joint tenant,¹⁷³ or to a survivor by force of contract,¹⁷⁴ it is less clear whether the survivor takes subject to the lien. In the case of entireties property, the survivor may recover contribution when the parties are jointly liable upon a lien or mortgage for which the property is security.¹⁷⁵ *In re Estate of Smith*¹⁷⁶ dealt with an unusual aspect of this problem. *H* executed a mortgage and note in favor of *E* on Tract *A*, and secured the obligation by pledging rents from Tract *B*. *H* later conveyed Tract *A* to *H* and *W* as tenants by the entireties. On the death of *H*, the court held that *W* could force the representative to apply the rents from Tract *B* towards payment of the mortgage.¹⁷⁷ In other words, a person tak-

¹⁷⁰*Id.* at 823. The time for taking an appeal is within 10 days from appointment. IND. CODE § 34-1-12-10 (1976).

¹⁷¹IND. CODE §§ 27-9-1-1 to -6 (Supp. 1979).

¹⁷²*Id.* § 29-1-17-9 (1976).

¹⁷³*In re Estate of Linker*, 30 Colo. App. 25, 488 P.2d 1128 (1971) (surviving joint tenant entitled to contribution); *contra*, *Ratte v. Ratte*, 260 Mass. 165, 156 N.E. 870 (1927) (surviving joint tenant not entitled to contribution).

¹⁷⁴That the surviving beneficiary of a pledged life insurance policy may pay the pledgee and claim subrogation to the rights of the creditor against the estate of the insured, *see Walzer v. Walzer*, 3 N.Y.2d 8, 143 N.E.2d 361 (1957).

¹⁷⁵*Keil v. Keil*, 51 Del. 351, 145 A.2d 563 (1958); *McLochlin v. Miller*, 139 Ind. App. 443, 217 N.E.2d 50 (1966) (survivor entitled to exoneration from estate of decedent to extent to one-half of lien); *Magenheimer v. Councilman*, 76 Ind. App. 583, 125 N.E. 77 (1919) (survivor paying lien indebtedness recovered contribution from estate of decedent).

¹⁷⁶388 N.E.2d 287 (Ind. Ct. App. 1979).

¹⁷⁷*Id.* at 290. A related situation is found in *First Nat'l City Bank v. Phoenix Mut. Life Ins. Co.*, 364 F. Supp. 390 (S.D.N.Y. 1973), in which *H* assigned insurance policies and *H* and *W*, as tenants by the entireties, executed a mortgage on a house to *E* Bank as security for a loan. The insurance exceeded the amount of the loan. After *H*'s death, the United States sought to enforce a tax lien filed before *H* died and to compel *E* Bank, under a theory of marshaling, to satisfy its lien out of the entireties property so that the federal tax lien could be paid from the insurance proceeds. Marshaling was denied and the wife's right to have the bank loan paid from the insurance was affirmed. *Id.* at 392-93.

ing by nontestamentary survivorship may force the representative to apply other assets to pay a lien on the property when the obligation is that of the deceased and not that of the survivor. On a theory of subrogation or exoneration, the nontestamentary survivor thus becomes a creditor of the decedent's estate to the extent of the latter's obligation or duty of contribution. The case stands for three propositions. One is that the survivor may force the decedent's estate to pay the latter's share of the obligations secured by the survivorship property from other assets of the estate. Another is that if the decedent is primarily liable upon the debt, the survivor may require the decedent's estate to satisfy the whole debt. The third proposition is that by application of the principle of marshaling, the survivor may require that other collateral be exhausted first when the decedent's obligation or share of the obligation is secured by collateral in addition to the survivorship property. Although the case is limited to the husband and wife relationship and entireties survivorship rights, no convincing reason appears why it should not extend to other parties and other survivorship rights.¹⁷⁸

11. *Bankruptcy*.—In a bankruptcy, real property is taken by the trustee subject to a mortgage. Rents of a substantial amount are collected by the trustee. Is the mortgagee entitled to the rents? In *Butner v. United States*,¹⁷⁹ the Court held that the right to rents accruing during bankruptcy proceedings is determined by state law.¹⁸⁰ Upon this point, Indiana law is not clear, but it seems that if the mortgage specifically covers rents which accrue upon default, an Indiana mortgagee would be able to claim the rents as against the trustee.¹⁸¹ The effect of the decision seemingly will not be changed by the Bankruptcy Reform Act of 1978.¹⁸²

¹⁷⁸For a similar problem recently arising in bankruptcy, see *In re Jack Green's Fashions for Men—Big and Tall, Inc.*, 597 F.2d 130 (8th Cir. 1979). *D* corporation, which was indebted to *E*, executed a security interest on corporate property. *H*, a principal stockholder, and his wife *W* also secured the debt by a mortgage on entireties property. The court held that, on bankruptcy of *D*, the trustee, under principles of marshaling, could compel *E* to exhaust the security in entireties property before asserting its right to the corporate security. The court overlooked the right of *W*, and possibly *H* as well, to exoneration or marshaling for the purpose of compelling *E* first to satisfy its claim from the principal obligor, *D* corporation.

¹⁷⁹99 S. Ct. 914 (1979) (court applied North Carolina law).

¹⁸⁰*Id.* at 919.

¹⁸¹*Hemstock v. Wood*, 113 Ind. App. 112, 44 N.E.2d 1016 (1942); *Cline v. Massey*, 92 Ind. App. 605, 169 N.E. 882 (1930).

¹⁸²Pub. L. No. 95-598, §§ 101-411, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-151326). Rents from estate property pass to the estate in bankruptcy. 11 U.S.C. § 541(a)(6). If a valid security interest in property covers rents or profits, the latter arising after the commencement of the case will be included in the security in accordance with nonbankruptcy law "except to the extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." *Id.* § 552(b).

Some claims will not be discharged in bankruptcy. Examples are those based upon misrepresentation, false pretenses, or malicious acts.¹⁸³ If the claim is reduced to judgment before bankruptcy, the creditor in proceedings opposing discharge of the judgment may bring in evidence to establish that the underlying claim is based upon these kinds of wrongdoing making the judgment non-dischargeable. These principles were recognized and applied by the United States Supreme Court in *Brown v. Felsen*,¹⁸⁴ in which the creditor had introduced the issue of fraud and misrepresentation in the state action upon the debtor's guaranty leading to stipulations and a judgment without indication that liability was based upon the fraud. The creditor was allowed again to assert the misrepresentation as a basis for challenging dischargeability of his judgment. The court determined that the policy of the bankruptcy act requiring or permitting questions of dischargeability to be settled by proceedings in bankruptcy negated application of principles of res judicata in bankruptcy insofar as the same issues might have been litigated in the state action leading to the judgment. Whether a pre-bankruptcy judgment actually litigating and affirmatively deciding the same issues involved in determining dischargeability would bar the creditor or debtor in bankruptcy on principles of estoppel was left open by the decision.¹⁸⁵

12. *Suretyship; Construction Contracts.*—Three important decisions dealt with security devices as they concern construction contracts. One involved the general rule of suretyship discharging a surety when the creditor materially breaches his obligation towards the principal, particularly when the breach enhances the risks assumed by the surety.¹⁸⁶ The court in *Culligan Corp. v. Trans-america Insurance Co.*¹⁸⁷ held that the rule did not apply to release

¹⁸³Section 17 of the old Bankruptcy Act and § 523(a) of the Bankruptcy Code of 1978 set forth the particular claims which are not discharged in bankruptcy. Compare 11 U.S.C. § 35 (repealed 1978), with *id.* § 523(a) (1978). The creditor is required to apply to the bankruptcy court for a determination of non-dischargeability only with respect to grounds based upon intentional wrongs under both laws, but with respect to other grounds jurisdiction of the bankruptcy court to determine dischargeability is left optional with either the debtor or creditor. *Id.* § 35(b)(2) (repealed 1978); 11 U.S.C. § 532 (c) (1978); Bankruptcy Rule 409(a), (b).

¹⁸⁴99 S. Ct. 2205 (1979).

¹⁸⁵The issue of estoppel by judgment was left hanging by an inconclusive footnote citing opposing authorities. 99 S. Ct. at 2213 n.10.

¹⁸⁶When the breach by the creditor is material and the principal elects to rescind, the surety cannot be held upon his promise. *Board of Comm'rs v. Hill*, 115 Ind. 316, 327-31, 16 N.E. 156, 161-62 (1888) (owner failed to pay contractor who quit construction—surety released). If, however, a breach by the creditor is immaterial or treated as immaterial, the surety is limited to setoff when permitted. *Walcutt v. Clevite Corp.*, 13 N.Y.2d 48, 191 N.E.2d 894 (1963). Cf. IND. R. TR. P. 13(K)(3)(b) (surety may assert as a counterclaim "any claim owned by the person against whom he has recourse").

¹⁸⁷580 F.2d 251 (7th Cir. 1978).

the surety on its payment bond running to third-party, subcontractor beneficiaries when the owner was in default to the principal contractor.¹⁸⁸ In this case the owner, whose contract called for the surety bond, failed to pay for work owing to the prime contractor, who defaulted. As a consequence, a subcontractor was also unpaid by the prime. The surety's defense, that the owner-promisee defaulted and thereby caused the loss, was rejected by the court on the ground that the promise of the surety to pay suppliers and subcontractors is independent, and not conditioned upon performance by the owner-promisee.¹⁸⁹ The court recognized that the necessary prompt payment to subcontractors on construction projects is placed in peril when retainages are wrongfully withheld from the prime contractor in the payment cycle.¹⁹⁰

In *Clow Corp. v. Ross Township School Corp.*,¹⁹¹ a subcontractor became indebted to a supplier of materials on several construction projects, one of which was covered by a surety payment bond. A partial payment made to the supplier was apportioned among the debts incurred in all the projects. When the subcontractor became insolvent, the supplier sued the surety, who claimed that the portion of the payment traced to the project upon which it was surety must be applied on the obligation owing by the subcontractor for work furnished on that project. The court recognized that although Indiana case law did not require a supplier to apply construction funds upon an indebtedness arising therefrom,¹⁹² Illinois law was to the

¹⁸⁸*Id.* at 253. It seems that the surety who is compelled to pay the subcontractor-beneficiaries may recover from the creditor-owner who improperly fails to withhold funds. See *Fort Worth Independ. School Dist. v. Aetna Cas. & Sur. Co.*, 48 F.2d 1 (5th Cir. 1931); *National Sur. Co. v. County Bd. of Educ.*, 15 F.2d 993 (4th Cir. 1926) (the creditor-owner wrongfully paid retainages to principal contractor who squandered funds). Cf. *Alvord & Swift v. Stewart M. Muller Constr. Co., Inc.*, 46 N.Y.2d 276, 385 N.E.2d 1238 (1978) (subcontractor may also recover from the owner if his breach knowingly interferes with the prime contractor's performance to the subcontractor).

¹⁸⁹580 F.2d at 254. See *Glades County v. Detroit Fidelity & Sur. Co.*, 57 F.2d 449, 451 (5th Cir. 1932). Indiana cases cited by the court involved a failure of the creditor-owner to retain funds as required by the contract. *E.g.*, *Equitable Sur. Co. v. United States*, 234 U.S. 448 (1914); *Connecticut v. State ex rel. Stutsman*, 125 Ind. 514, 25 N.E. 443 (1890); *United States Fidelity & Guar. Co. v. American Blower Co.*, 41 Ind. App. 620, 84 N.E. 555 (1908) (agreement altering the duty of performance as between the principal contractor and the owner will not discharge subcontractor-beneficiaries or release the surety).

¹⁹⁰580 F.2d at 254. In support of its opinion, the court cited with approval, *Midland Eng'r Co. v. John A. Hall Constr. Co.*, 398 F. Supp. 981 (N.D. Ind. 1975) (requiring payment of retainage to subcontractors within a reasonable time, even though such payment was conditioned upon payment of retainage by the owner to the prime contractor).

¹⁹¹384 N.E.2d 1077 (Ind. Ct. App. 1979).

¹⁹²*Id.* at 1081. See *Western & S. Indem. Co. v. Cramer*, 104 Ind. App. 219, 10 N.E.2d 440 (1937). When a prime contractor is indebted to a subcontractor on several

contrary.¹⁹³ Because the prime contractor, the subcontractor, and the supplier were all from Illinois, the contracts were executed there, and payments and deposits were made in that state, the law of Illinois controlled even though the contract had been performed in Indiana for an Indiana school authority.¹⁹⁴

As a general rule, a debtor bound on several obligations to a creditor may designate how a partial payment made by him shall be applied; if he does not do so, the creditor may make the choice; and if neither makes the application, the law will do it, usually to the least secured.¹⁹⁵ The owner or surety upon a construction contract may protect himself by specifying that payments made under the contract must be applied to contract obligations.¹⁹⁶ Statutes in some states have impressed such payments as a trust fund to be so applied.¹⁹⁷ Whether it is within the fair expectation of the parties to a construction project that funds paid down the line to contractors and subcontractors must be held in trust and applied towards unpaid suppliers may rest in custom and usage in the trade, and this may not be sufficiently certain to justify a rule of law.¹⁹⁸

projects and makes payment from funds received from the owner upon one of them, neither he nor the subcontractor has a duty to apply the funds to the obligation incurred on that project, even though it enables the subcontractor to claim a mechanic's lien upon the property. *Shea v. Peoples Coal & Cement Co.*, 93 Ind. App. 302, 161 N.E. 849 (1931). By statute a contractor or subcontractor who accepts payment and who is indebted to his suppliers on the project is guilty of a Class D felony if he fails to notify his creditor, and the creditor suffers loss as a consequence. IND. CODE § 32-8-3-15 (Supp. 1979). It has not yet been determined whether this will impose a trust upon payments made.

¹⁹³384 N.E.2d at 1081 (following *Alexander Lumber Co. v. Aetna Acc. & Liab. Co.*, 296 Ill. 500, 129 N.E. 871 (1921)). The traditional view is that payments made from the construction project or traced to it need not be applied towards construction debts incurred in favor of suppliers. *Standard Oil Co. v. Day*, 161 Minn. 281, 201 N.W. 410 (1924). Many cases impose an obligation upon the supplier to apply payments traced to the project if the supplier knows or has reason to know where the payment came from. *United States v. Roelof Constr. Co.*, 418 F.2d 1328 (9th Cir. 1969); *United States v. Wibco, Inc.*, 396 F. Supp. 1253 (1975).

¹⁹⁴384 N.E.2d at 1082. The court applied the conflicts of law rule in *Barber v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945).

¹⁹⁵*See generally* *Mid-Continent Supply Co. v. Atkins & Potter Drill. Corp.*, 229 F.2d 68 (10th Cir. 1956).

¹⁹⁶A duty or trust could be established by a contract provision or by check payable to the contractor and the supplier. If the supplier being paid has knowledge or constructive knowledge of the source of payment and the restriction upon it, he must apply the payment to the construction project. *See United States ex rel. Carroll v. Beck*, 151 F.2d 964 (6th Cir. 1945); *State ex rel. Palmer Supply Co. v. Walsh & Co.*, 575 P.2d 1213 (Alaska 1978).

¹⁹⁷*See, e.g., In re Ketchum*, 409 F. Supp. 743 (S.D.N.Y. 1975) (contractor violating statute denied discharge in bankruptcy).

¹⁹⁸*Cf. Chicago Bridge & Iron Co. v. Reliance Ins. Co.*, 46 Ill. 2d 522, 264 N.E.2d 134 (1970) (holding that a surety would not be released when partial lien waivers showing

Ideal Heating Co. v. Falls & Noonan, Inc.,¹⁹⁹ held that a subcontractor upon a public construction project could recover from the surety and from the retainage held as against the prime contractor, on the basis of his contract price.²⁰⁰ Unlike his counterpart claiming a mechanic's lien, who must prove the reasonable value of his performance, the subcontractor may recover for his work at the contract rate.²⁰¹

13. *Miscellaneous.*—The fixing of attorney's fees when provided by contract or statute occupied no little time of the courts during the last year. Case law established that although requested findings of fact upon the amount of the fees are not required,²⁰² an award based upon illegal bar association schedules, which had been admitted into evidence, was proper;²⁰³ the expertise of the trial judge justifies an award by him without proof as to the value of attorney's fees;²⁰⁴ proof establishing a reasonable contingent fee supported a noncontingent promise to pay attorney's fees;²⁰⁵ and such fees must be tendered when incurred, even though suit has not been commenced.²⁰⁶

The procedures for foreclosure of one type of artisan lien on motor vehicles was clarified by current legislation providing notice to owners and other lienholders of record, and facilitating a transfer of the title certificate to the purchaser.²⁰⁷

payment were taken by the contractor from suppliers, upon proof that the lien waivers were taken as a matter of custom and usage before payment). If usage establishes that contract funds are used for payment of nonproject obligation of suppliers, a trust without further agreement would seem unlikely.

¹⁹⁹378 N.E.2d 946 (Ind. Ct. App. 1978).

²⁰⁰*Id.* at 948.

²⁰¹*Id.*

²⁰²*Greiner v. Greiner*, 384 N.E.2d 1055, 1057 (Ind. Ct. App. 1979) (divorce case).

²⁰³*Id.* at 1058.

²⁰⁴*Fox v. Galvin*, 381 N.E.2d 103, 108 (Ind. Ct. App. 1978) (\$2,000 awarded on \$6,500 mechanic's lien in exhaustive opinion).

²⁰⁵*Streets v. M.G.I.C. Mortgage Corp.*, 378 N.E.2d 915, 920-21 (Ind. Ct. App. 1978). In this case the court also misapplied requirements of the U.C.C.C. with respect to attorney's fees. See notes 18, & 30-31 *supra* and accompanying text.

²⁰⁶*Motor Dispatch, Inc. v. Buggie*, 379 N.E.2d 543, 546 (Ind. Ct. App. 1978).

²⁰⁷IND. CODE § 9-9-5-6 (Supp. 1979).