

XV. Secured Transactions & Creditors' Rights

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Over fifty cases involving serious problems of secured transactions and creditors' rights were decided by the Indiana appellate courts last year. Most concern complex fact situations and difficult questions of law. Fourteen dealt with substantially new and previously unresolved interpretations of the mechanics' lien statute.¹ Outstanding opinions dealt with the obligations of debtors transferring lien property;² the risks of a secured party using self help after declaring a premature default;³ the duty of a mechanic asserting a lien to give timely notice to the owner of homestead property;⁴ the effect of recording notice of intent to claim a mechanics' lien on entireties property by naming one spouse;⁵ and an assortment of problems illustrating the versatility of proceedings supplemental as a remedy for reaching assets of the debtor.⁶ Two decisions resolved important matters of policy which, in the opinion of this writer, deserve careful reconsideration. In one, the Indiana Supreme Court⁷ determined that an installment support order was not a "judgment," thereby requiring delinquencies to be liquidated by a new action before enforcement and application of the fifteen year statute of limitations to such proceedings. The effect will be to place an unreasonable burden on divorcees with children and to allow delinquent orders to fester for an unreasonable length of time. The other decision, from the court of appeals,⁸ has the effect of discouraging

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¹These cases are discussed in the text accompanying notes 85-141 *infra*.

²*Boswell v. Lyon*, 401 N.E.2d 735 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 45-47 *infra*.

³*Van Bibber v. Norris*, 404 N.E.2d 1365 (Ind. Ct. App. 1980), *discussed in* text accompanying notes 67-74 *infra*.

⁴*Mid-America Homes v. Horn*, 396 N.E.2d 879 (Ind. 1979). This and another excellent decision on the problem are discussed in the text accompanying notes 117-125 *infra*.

⁵*Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). This case is discussed in the text accompanying notes 104-07 *infra*.

⁶At least five excellent decisions in this category will be found at notes 153-68 and accompanying text.

⁷*Kuhn v. Kuhn*, 402 N.E.2d 989 (Ind. 1980), *vacating and remanding* 389 N.E.2d 319 (Ind. Ct. App. 1979). The case is discussed in text accompanying notes 173-82 *infra*.

⁸*Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). The case is discussed in text accompanying notes 114-16 *infra*.

lenders from making loans to assist an owner in financial difficulty on a construction project. This questionable result was achieved by subordinating a mortgage lender whose funds were applied to pay off mechanics' liens to other mechanics on the project who were not paid.

New legislation⁹ expanded the Indiana exemption law and replaced an alternative exemption allowed under the Bankruptcy Code of 1978.

A. Secured Transactions

1. *Formalities in Creation—Mortgages and Conditional Sales Contracts of Real Estate.*—Ordinarily a conveyance must be in writing, signed by the grantor, describe the property and contain words of grant. Parol evidence is admissible to show that the instrument was not delivered or intended to be effective, that a signature is a forgery or unauthorized, or that the transaction was procured by misrepresentation, duress, or as a result of mistake.¹⁰ These formal matters of creation which may be raised as between the parties to the transaction are fully applicable to mortgages. An educational decision illuminating several aspects of these problems, *Moehlenkamp v. Shatz*,¹¹ dealt with the procedural framework in which a co-mortgagor contended that her signature on a note and mortgage was unauthorized or a forgery. The issue of non-execution was properly raised under the Indiana trial rules by a sworn plea of non est factum, which then placed the burden of going forward with evidence of lack of authority on the mortgagor.¹² However, in this case the court found that the defending mortgagor impliedly had authorized her husband to sign the note and mortgage on entireties property in light of his long practice to conduct her business with her tacit approval.¹³ The authenticity of her signature also was supported by the fact that the mortgage referring to the note was acknowledged. Although consideration is not required to support a mortgage¹⁴ or establish the validity of a negotiable note given for

⁹IND. CODE § 34-2-28-0.5 (Supp. 1980), discussed in text accompanying notes 142-52 *infra*.

¹⁰*E.g.*, *Reinskopf v. Rogge*, 37 Ind. 207 (1871) (execution ineffective where mortgagor drunk).

¹¹396 N.E.2d 433 (Ind. Ct. App. 1979).

¹²IND. R. TR. P. 9.2(B). In this case the plea of *non est factum* was not filed in the responsive pleading as required by the rule. *Id.* 9(B). The plaintiff was barred from asserting the defendant's delay in filing the plea because of his failure to raise the issue at the trial.

¹³396 N.E.2d at 437.

¹⁴*Goethe v. Gmelin*, 256 Mich. 112, 239 N.W. 347 (1931) (mortgage effective as gift although note secured by it was ineffective).

the prior indebtedness of any person,¹⁵ the court found that the note and mortgage were supported by consideration insofar as they were given to replace a prior debt of the husband upon which the wife was not liable.¹⁶

Formation of a conditional sales contract, which has many attributes of a mortgage in Indiana, is sometimes governed by the rules of offer and acceptance or a meeting of the minds. Accordingly, *Wallace v. Rogier*¹⁷ recognized that parol evidence is admissible to show that a fully signed conditional sales contract is a sham and ineffective where it was prepared to enable the purchaser to obtain a loan.¹⁸ Other recent decisions recognized that a conditional sales contract may be rescinded when it has been procured by false material misrepresentations of fact¹⁹ and reformed when an error in the description resulted from mutual mistake.²⁰ The court in *Bixwood, Inc. v. Becker*²¹ recognized that an option to sell land created an interest in land, and held that upon failure of performance by the purchaser the vendor was entitled to bring an action to quiet title and cancel the recorded contract.²²

2. *Real Estate—Priorities.*—A lien or interest in land may be perfected as against subsequent purchasers by recordation,²³ by reservation in the instrument of transfer through which title is claimed,²⁴ or by possession.²⁵ In a dubious opinion, the court of ap-

¹⁵IND. CODE § 26-1-3-408 (1976).

¹⁶396 N.E.2d at 438-39.

¹⁷395 N.E.2d 297 (Ind. Ct. App. 1979).

¹⁸Invalidity was proved by the testimony of the lawyer who prepared the conditional sales contract for the parties. The vendors were allowed to eject the purchasers in possession as tenants at sufferance.

¹⁹*Shuee v. Gedert*, 395 N.E.2d 804 (Ind. Ct. App. 1979). The purchasers prevailed on their counterclaim for rescission and restitution in the vendor's action for specific performance. Evidence established that the vendors of a mobile home park had misrepresented that utilities were properly installed, taxes were approximately \$2500 less than they were in fact, and income was more than that generated by the business.

²⁰*Liestikow v. Hoosier State Bank*, 394 N.E.2d 225 (Ind. Ct. App. 1979).

²¹391 N.E.2d 646 (Ind. Ct. App. 1979). The case reinforces the turnaround of Indiana law which at one time held that an option to purchase land created no interest in the land until the option was exercised. *Compare* *Raco Corp. v. Acme-Goodrich, Inc.*, 235 Ind. 67, 131 N.E.2d 144 (1956) (The modern view finds that such an option creates a covenant.) *with* *Koehring v. Boman*, 194 Ind. 433, 142 N.E. 117 (1924) (The former view found that "a mere option to purchase land could not vest in the holders any title at all, whether by entireties or otherwise, so long as the option had not been exercised.")

²²391 N.E.2d at 648-49.

²³194 Ind. at 437, 142 N.E. at 118. *E.g.*, IND. CODE §§ 32-1-2-16 to -18 (1976).

²⁴*E.g.*, *Warford v. Hawkins*, 150 Ind. 489, 50 N.E. 468 (1898).

²⁵*E.g.*, *McClellan v. Beatty*, 115 Ind. App. 173, 53 N.E.2d 1013, 55 N.E.2d 327 (1944). *See also* *Mishawaka St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433, 196 N.E. 85, (1935) (applying the questionable "lazy banker" rule holding that the banker was not charged with notice of two days possession).

peals may have added another method of perfection to this list. In *Berrey v. Jean*,²⁶ the title of the adverse possessor which was not perfected on the records or, arguably, by possession prevailed against a later bona fide purchaser from the record owner whose title had been cut off by the adverse possessor.²⁷ In *Fenley Farms, Inc. v. Clark*,²⁸ the court held that a purchaser was charged with knowledge of the possessory status of the land, including the claim of the public to a visible roadbed. Another decision²⁹ discussed elsewhere recognized the rule that when record title is taken by husband and wife they become owners as tenants by the entirety, and one cannot transfer his interest without the other. However, the case held that if the record shows a conveyance or transfer by one of the spouses, further inquiry by a purchaser may be required to ascertain if the transfer is authorized before the purchaser will be a bona fide purchaser.³⁰

3. *Conditional Sales Contracts of Real Estate—Contracts and Options.*—Under the doctrine of *Skendzel v. Marshall*,³¹ it has been settled Indiana law that the rights of a purchaser under a conditional sales contract are those of an equitable owner and essentially those of a mortgagor where a substantial part of the price (more than a minimal amount) has been paid. Consequently, upon default by the purchaser, the vendee must proceed by judicial foreclosure as in the case of mortgages. Strict foreclosure, as provided by the contract, thus is not permitted, at least in the absence of abandonment or circumstances establishing that the security is seriously impaired due to waste or non-payment of taxes. This rule was reaffirm-

²⁶401 N.E.2d 102 (Ind. Ct. App. 1980). In this case the land was acquired by adverse possession for use as a cemetery. Perfection by possession could have been found from the fact that some gravestones were on a part of the property which was marked by a fence on three sides. Hence, a purchaser may have been put on notice from these facts.

²⁷Some older decisions held that an adverse title need not be recorded or perfected since the prior owner had nothing to convey. *E.g.*, *Schall v. Williams Valley R.R.*, 35 Pa. 191 (1860). However, since the adverse possessor may perfect his title by possession, suit and lis pendens notice, or by affidavits which may be filed establishing his title of record as against prior record owners, *see* IND. CODE §§ 17-3-47-1 to -3 (1976), he should not be allowed to set up his title against a later bona fide purchaser from the prior owner unless he does so.

²⁸404 N.E.2d 1164 (Ind. Ct. App. 1980). The roadway was claimed on the grounds of public use for 20 years under IND. CODE § 8-20-1-15 (1976).

²⁹*Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). This case is discussed in the text accompanying notes 104-07 *infra*.

³⁰*See* 402 N.E.2d at 45.

³¹261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *on mandate to enforce order*, 263 Ind. 337, 330 N.E.2d 747 (1975).

ed and applied by the court of appeals in *McLendon v. Safe Realty Corp.*³² in which the purchaser who was current on installments, but delinquent on payment of taxes, had assigned his rights to another purchaser. The court determined that although the property was vacant, it was not abandoned by the purchaser who did not abscond.³³ The court indicated that whether or not a vendee has paid a substantial amount upon the contract must be determined by his equity in the property, which in turn is dependent upon the amount owing in relation to the value of the property at the time of foreclosure.³⁴ Because there was no proof of value, the court determined that payments of \$7,276 on a principal amount of \$10,000, enhanced by unpaid taxes which brought the latter to \$17,935, established a payment of forty per cent of the contract price and therefore more than a minimal amount. In another decision³⁵ the court upheld a pretrial order of the lower court treating an action by the vendor under a conditional sales contract for forfeiture as an action to foreclose the lien in accordance with the rule of *Skendzel v. Marshall*.³⁶ *Boswell v. Lyon*³⁷ demonstrates that the position of the vendor under the *Skendzel* doctrine may be enhanced by allowing him to recover a deficiency judgment against the purchaser when the property is insufficient to satisfy the obligation. On the other hand, *Hawkins v. Marion County Board of Review*³⁸ repudiates the underpinnings of *Skendzel* by holding that a conditional purchaser of real estate is neither indebted on a "mortgage" nor is he one who "owns real property" within the meaning of a statute³⁹ allowing a \$1,000 mortgage exemption.⁴⁰ By denying the tax exemption and finding no denial of equal protection to conditional buyers of real estate, the court of appeals ignored common knowledge that the conditional sale is a poor man's security device. The effect of the court's opinion is in fact a pervasive discrimination against the very poor.⁴¹

³²401 N.E.2d 80 (Ind. Ct. App. 1980).

³³*Id.* at 83.

³⁴*Id.*

³⁵*Leistikow v. Hoosier State Bank*, 394 N.E.2d 225 (Ind. Ct. App. 1979) (action for strict foreclosure filed prior to *Skendzel* but decided after *Skendzel*).

³⁶26 Ind. 226, 301 N.E.2d 641 (1973).

³⁷401 N.E.2d 735 (Ind. Ct. App. 1980).

³⁸394 N.E.2d 957 (Ind. Ct. App. 1979) (at the time the exemption was claimed the purchaser had paid \$5,325 on a price of \$6,750).

³⁹*Id.* at 959.

⁴⁰IND. CODE § 6-1.1-12-1 (Supp. 1980).

⁴¹394 N.E.2d at 959-60. The homestead credit allowed to owners of residential property for 1980 and thereafter may be claimed by contract purchasers. IND. CODE § 6-1.1-20.9-2 (Supp. 1980). In 1975 the statute allowing the \$1000 exemption was amended to include contract purchasers who have agreed to pay the taxes. Act of April 24,

4. *Effect of Transfers by Parties to a Security Transaction.*—A transfer of the collateral by a mortgagor, conditional purchaser, or lien debtor may have an important impact on the obligations of the parties. In Indiana if the property is sold “subject” to the lien or without a provision for the assumption of the indebtedness secured, the property becomes primarily liable for the obligation secured and the transferor remains liable as a surety.⁴² If the transferee assumes the obligation, he, along with the property, is primarily charged and the seller becomes a surety.⁴³ In no case is the transferor relieved of his liability upon the obligation unless the lien creditor accepts the new owner in lieu of the original debtor under an articulated agreement amounting to a novation—an arrangement that is rare.⁴⁴ This problem was reviewed by Judge Buchanan in a classic casebook type opinion, *Boswell v. Lyon*,⁴⁵ which should be studied by students of the law. There V sold land to P1 on a conditional sales contract providing that transfers by the purchaser would be allowed only with the written consent of the vendor. Later P1 assigned his interest to P2 who assumed the contract, and V in writing “hereby consent[ed]” to the assignment. Still later, P2 similarly assigned to P3, and V similarly assented in writing to this transfer. When P3 failed to make payments, V foreclosed on the property naming P1, P2 and P3 as parties. After judgment was entered against P1, P2 and P3 on the debt, a sale of the property was ordered. On appeal, P1 claimed that when V consented to the transfers, P1 was released from the

1975, Pub. L. No. 39, § 1, 1975 Ind. Acts 182 (currently codified at IND. CODE § 6-1.1-12-1 (Supp. 1980)).

⁴²*Mutual Benefit Life Ins. Co. v. Lindley*, 97 Ind. App. 575, 183 N.E. 127 (1932). Compare *Company Gross Income Tax Div. v. Crown Dev. Co.*, 231 Ind. 449, 109 N.E.2d 426 (1952) (A purchaser of real estate who assumes a mortgage indebtedness becomes the principal debtor and the grantor acts as a surety.) with *Rauch v. Circle Theatre*, 374 N.E.2d 546 (Ind. Ct. App. 1978) (lessee’s assignment of a lease did not discharge its duty under the lease to the lessor).

⁴³The rule was recognized by two recent decisions: *Shuee v. Gedert*, 395 N.E.2d 804 (Ind. Ct. App. 1979) (where the court recognized in a footnote that the land was primarily liable for the debt, *id.* at 806 n.4); *Foremost Life Ins. Co. v. Department of Ins.*, 395 N.E.2d 418 (Ind. Ct. App. 1979) (paying surety entitled to subrogation). The transferee assuming a lien or debt may be held on his promise by the lienholder as a third party creditor beneficiary. *Helms v. Kearns*, 40 Ind. 124 (1872). If the deed or conveyance shows that a grantee assumes a lien or debt, parol evidence usually will not be admitted to show another prior or contemporaneous arrangement. See generally *Annot.*, 94 A.L.R. 1319 (1935). Parol evidence is admissible to show that a grantee did not assent to the provision. *Metzger v. Huntington*, 139 Ind. 501, 37 N.E. 1084, *rehearing denied* 39 N.E. 235 (1894). Parol evidence is admitted even if the conveyance is made with warranty. *Whicker v. Hushaw*, 159 Ind. 1, 64 N.E. 460 (1902).

⁴⁴*Navin v. New Colonial Hotel*, 228 Ind. 128, 90 N.E.2d 128 (1950) (vendor could not be required to accept purchaser’s assignee in lieu of purchaser where vendor did not agree).

⁴⁵401 N.E.2d 735 (Ind. Ct. App. 1980).

obligation. The court properly held that absent an agreement by the vendor meeting the requirements of a novation, P1 remained liable as a surety on the obligation.⁴⁶ Further, the vendor's consent to the second assignment without P1's approval did not affect the obligation of P1 or release P1 from his suretyship obligation to pay.⁴⁷

The court in *Brendonwood Common v. Franklin*⁴⁸ held that the restrictive covenants imposing a duty to pay assessments for the upkeep of roads and making the obligation a lien upon the various lots in the Brendonwood subdivision ran with the land and bound successive lot owners.⁴⁹ A provision for attorneys' fees also ran with the land and was secured by the lien.⁵⁰ Other recent cases determined that a mortgagee in the mortgage banking business who assigns mortgages to banks, then collects the mortgage payments as an agent for the banks, and turns over the payments to an escrow account is not liable for intangible taxes,⁵¹ or for gross income taxes on interest received and then transmitted to the assignee banks.⁵²

5. *Remedies of a Secured Party Under the Uniform Commercial Code—Repossession by Self Help; Event of Default.*—Upon an event of default, a secured party, under the express provisions of the Uniform Commercial Code, may repossess the collateral and toward this end may exercise self help if this can be done without breach of peace unless there is an agreement to the contrary.⁵³ The court applied this provision in *Census Federal Credit Union v. Wann*⁵⁴ and held that the secured party committed no breach of the peace by repossessing a motor vehicle at 12:30 a.m. from the parking lot of the debtor's apartment building without contacting the debtor or others.⁵⁵ A prior demand for a return of the collateral had been made and refused. While the court indicated that the secured party may not break into homes, other buildings or enclosed spaces or commit a crime to repossess, no wrong is committed by taking

⁴⁶*Id.* at 743-45.

⁴⁷The first purchaser argued that he was released as surety when the vendor consented to the second assignment on the theory that the obligation was altered. This contention was rejected on the obvious ground that the vendee's risk was diminished by a new obligor who assumed the obligation.

⁴⁸403 N.E.2d 1136 (Ind. Ct. App. 1980).

⁴⁹*Id.* at 1141.

⁵⁰*Id.* at 1143. The case without citation thereto seems to overrule *Levin v. Munk*, 97 Ind. App. 118, 169 N.E. 82 (1929), which held that a covenant in a *lease* to pay attorney's fees does not run with the land.

⁵¹*Meridian Mortgage Co. v. State*, 395 N.E.2d 433 (Ind. Ct. App. 1979).

⁵²*Indiana Dep't of Revenue v. Waterfiled [sic] Mortgage Co.*, 400 N.E.2d 212 (Ind. Ct. App. 1980).

⁵³IND. CODE § 26-1-9-503 (1976).

⁵⁴403 N.E.2d 348 (Ind. Ct. App. 1980).

⁵⁵*Id.* at 351.

the property off a street, parking lot or unenclosed space without contest from the debtor or another person.⁵⁶ In other words, a sneaky repossession made without breaking into an enclosure is not a breach of the peace, particularly if it is preceded by demand for return of the collateral.⁵⁷

On the other hand, a secured party who repossesses collateral in breach of the peace or before an event of default is a converter; if his actions are made knowingly or maliciously, he may be held for punitive damages as well.⁵⁸ This principle was applied in *Van Bibber v. Norris*⁵⁹ in which the secured party and its assignee had repossessed a mobile home before installments were overdue, and the secured party had disposed of the contents of the home which apparently were not covered by the security agreement.⁶⁰ The court upheld substantial punitive damages in different amounts against each party.⁶¹

The time at which a default occurs thus becomes important for determining when the secured party may repossess and proceed with this remedy. This time is fixed by the terms of the security agreement.⁶² Most agreements allow the secured party at his option to accelerate the indebtedness and assert default if and when the debtor fails to pay an installment on time. However, if the secured party accepts late installments, a long line of Indiana security decisions hold that he cannot accelerate the indebtedness and claim an event of default until he notifies the debtor of his intent to do so

⁵⁶*Id.*

⁵⁷For an excellent review of authorities on self help, see Knauer, *Acceleration and Default*, RIGHTS AND REMEDIES OF AN INDIANA CREDITOR VI-16 to VI-22 (1980).

⁵⁸The converting secure party may mitigate damages by deducting the unpaid indebtedness. See Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 319 n.50 (1976).

⁵⁹404 N.E.2d 1365 (Ind. Ct. App. 1980) (an excellent opinion of over twenty pages by Judge Young).

⁶⁰In this case the secured party, who was the seller of the mobile home, had assigned the contract to a bank under an agreement to repurchase. The seller repossessed at the request of the bank before any installment was overdue, and ultimately the debtor sued both parties for conversion of the home and its contents. *Id.* at 1369-71.

⁶¹The court below, without a jury, awarded damages of \$5,000 for the home, \$10,000 for the contents against both parties, and punitive damages of \$30,000 against the seller and of \$10,000 against the assignee. *Id.* at 1369.

⁶²Article 9 of the Uniform Commercial Code does not fix the time of default, so that the event of default must be fixed by the security agreement. The Uniform Consumer Credit Code for purposes of delinquency charges, allows the debtor a ten day grace period before an overdue installment under a precomputed consumer credit sale or loan is in default. IND. CODE §§ 24-4.5-2-203, -3-203 (1976). However, those sections do not add a ten day grace period to the time of payment for purposes of default under Article 9 of the Code.

and gives the latter a reasonable time in which to bring the obligation current.⁶³ This rule was applied in *Van Bibber v. Norris*⁶⁴ where the repossessing secured party had accepted fifty-seven past due payments, thirty-seven of which were delinquencies, as determined by the bank's internal policies.⁶⁵

Many security agreements contain provisions attempting to avoid the foregoing rule of waiver.⁶⁶ *Van Bibber* held that an anti-waiver provision in a security agreement was invalid for the basic reason that the secured party's acceptance of late payment spoke louder than the words in the contract.⁶⁷ The court recognized that anti-waiver provisions are unconscionable and implied that a secured party who invokes the clause is guilty of bad faith.

Another common acceleration provision used in security agreements is the so-called insecurity clause which allows acceleration when the secured party deems himself insecure. The Uniform Commercial Code invalidates the secured party's exercise of rights under these clauses unless done in good faith, but the Code puts the burden of proving bad faith upon the debtor.⁶⁸ Case law has eased this unreasonable burden by allowing the debtor to prove facts or lack of facts known to the creditor from which a reasonable person acting in good faith could find indebtedness or payment insecure.⁶⁹ In *Van Bibber* the secured party claimed the right to repossess a mobile home under this kind of insecurity clause when it learned that the debtor was in jail on a drug charge. On appeal the court of appeals held that the lower court could reasonably find that an acceleration was in bad faith when it was based upon the secured

⁶³Cases applying or recognizing this rule of waiver have been considered in the following survey articles of the INDIANA LAW REVIEW: Townsend, *Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252, 261 (1978) [hereinafter cited as Townsend, 1977 Survey]; Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 315 (1976) [hereinafter cited as Townsend, 1976 Survey]; Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 231 (1973) [hereinafter cited as Townsend, 1973 Survey].

⁶⁴404 N.E.2d at 1373.

⁶⁵In this case the installment claimed as a basis for acceleration and default was due on October 30. The assignee bank directed the seller-assignor to repossess on November 9 (within the 10 day grace period granted by the bank). The seller repossessed on November 20 without a demand for payment from the debtor. *Id.* at 1371.

⁶⁶*E.g.*, *Pierce v. Yochum*, 330 N.E.2d 102 (Ind. Ct. App. 1975) (construing anti-waiver clause as applicable to future, but not past payments); *Nelson v. Butcher*, 352 N.E.2d 106 (Ind. Ct. App. 1976) (anti-waiver clause ignored by court).

⁶⁷404 N.E.2d at 1374.

⁶⁸IND. CODE § 26-1-1-203 (1976).

⁶⁹*Universal C.I.T. Credit Corp. v. Sheplar*, 164 Ind. App. 516, 329 N.E.2d 620 (1975), discussed in Townsend, 1976 Survey, *supra* note 63 at 310.

party's bare knowledge of the criminal charge without further inquiry as to guilt or the effect of the criminal charge upon payment of the obligation;⁷⁰ the creditor knew that seventy per cent of the purchase price had been paid; and the value of the collateral exceeded the indebtedness which was secured by the suretyship obligation of the assignor of the contract.⁷¹ The secured party was not allowed to buttress his case by proof of facts of which he had no knowledge at the time of his decision to accelerate. *Van Bibber* stands for the proposition that a secured party taking advantage of an insecurity clause because the debtor is in jail runs the risk of an expensive lawsuit when he repossesses the collateral, unless his decision is also based on other facts making it reasonable to suppose that he will not be paid or his security is impaired.

Lenders should take note of one other point made by *Van Bibber*. The court indicated that in any case of acceleration, the secured party is bound by the general requirement of good faith which cuts across all transactions under the Code.⁷² One ground for acceleration and default under the security agreement in that case was the creation of an "encumbrance" by the debtor. It was proved that a third party had obtained a restraining order preventing the debtor from removing the collateral from a mobile home park—apparently to protect the park's right to an artisan's lien for back rent. Although the court determined that the record did not establish the restraining order to be an encumbrance, the court nonetheless held that the injunction could not be claimed as a basis for a default unless the secured party relied upon the encumbrance.⁷³ Absent reliance, the secured party did not meet the requirement of good faith as imposed by section 1-203 of the Uniform Commercial Code.⁷⁴

6. *Mortgage Foreclosure*.—A foreclosure action by a mortgagee or lienholder is an equitable proceeding. If suit is brought upon the note or indebtedness in the same action, the whole case is drawn into equity under the court's clean up power and decided without a jury.⁷⁵ If the debtor counterclaims for damages on a legal

⁷⁰404 N.E.2d at 1377.

⁷¹The court recognized that an installment was overdue for less than 10 days at the time of acceleration. However, as noted above, this ground for default had been waived. *See also* *Holmes v. Rushville Prod. Credit Ass'n*, 170 Ind. App. 509, 353 N.E.2d 509 (1976), *amended on other grounds on rehearing*, 170 Ind. App. at 518-19, 357 N.E.2d at 734, *transfer denied*, 267 Ind. 454, 371 N.E.2d 379 (1978) (where acceleration was upheld although the obligation was secured by a surety but other facts indicated that security was impaired).

⁷²404 N.E.2d at 1373. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." IND. CODE § 26-1-1-203 (1976).

⁷³404 N.E.2d at 1374-75.

⁷⁴*Id.* at 1372-73.

⁷⁵*Carmichael v. Adams*, 91 Ind. 526 (1883). It has been held that if a third party is

cause of action, that claim too will be decided by the equity court without a jury.⁷⁶ These principles were recognized in *Farmers Bank & Trust Co. v. Ross*⁷⁷ in which the mortgagor in a mortgage foreclosure action filed a counterclaim for breach of a contract to loan money. The court submitted all the issues to an advisory jury and entered judgment on the decision of the jury. The appellate court held that all the issues were triable in equity, and while an advisory jury was proper, a judgment for the mortgagee on the debtor's counterclaim was reversed because it appeared from the record that the trial judge felt that he was bound to follow the jury verdict.⁷⁸

Once foreclosure proceedings have commenced under a properly recorded mortgage or lien, persons acquiring an interest in the property from the mortgagor pending the suit (*lis pendens*) need not be made parties and are bound by the judgment or decree.⁷⁹ One recent decision recognized the rule,⁸⁰ and another held that the court must allow the transferee to intervene in the proceedings.⁸¹

*Warner v. Webber Apartments, Inc.*⁸² held that a mortgagee may forego his right to foreclose on the mortgage and may instead recover upon the written promise contained in the mortgage instrument to pay the secured indebtedness.⁸³ Although foreclosure was not sought,⁸⁴ the case also allowed recovery of attorneys' fees which were provided for within the promise to pay the indebtedness.

a surety on the mortgage note, the surety, claiming a defense that he was not bound on the note by a plea of *non est factum*, is entitled to a jury trial upon proper request. *Hartlep v. Murphy*, 197 Ind. 222, 150 N.E. 312 (1926).

⁷⁶*Henning v. Rieth-Riley Constr. Co.*, 141 Ind. App. 99, 226 N.E.2d 350 (1967) (foreclosure of mechanic's lien).

⁷⁷401 N.E.2d 74 (Ind. Ct. App. 1980).

⁷⁸*Id.* at 76.

⁷⁹*Zilky v. Carter*, 226 Ind. 396, 81 N.E.2d 597 (1948). However, foreclosure or litigation involving an unperfected lien or interest in real estate does not constitute *lis pendens* notice as against bona fide purchasers unless *lis pendens* notice is filed as provided by statute. IND. CODE §§ 34-1-4-1, -2 to -3, -8 (1976).

⁸⁰*Braun v. Loshe*, 390 N.E.2d 189 (Ind. Ct. App. 1979) (assignee of vendee bound by judgment against vendee seeking specific performance).

⁸¹*Maisel and Assocs. v. Camden Corp.*, 398 N.E.2d 1366 (Ind. Ct. App. 1980) (purchaser from mortgagee allowed to intervene in action to set aside sale under foreclosure action).

⁸²400 N.E.2d 1180 (Ind. Ct. App. 1980).

⁸³*Id.* at 1181. Foreclosure of the lien without a prayer for a deficiency or recovery upon the debt will bar a later suit for a deficiency. *Mutual Benefit Life Ins. Co. v. Bachtenkircher*, 209 Ind. 106, 198 N.E. 81 (1935). Older cases allowing the mortgagee to recover judgment upon the debt and later foreclose upon the mortgage securing the debt when the judgment is not paid are questionable. *Compare Kozanji v. Petroff*, 215 Ind. 286, 19 N.E.2d 563 (1939) with *Muncie Nat'l Bank v. Brown*, 112 Ind. 474, 14 N.E. 358 (1887).

⁸⁴400 N.E.2d at 1182.

B. Creditors' Rights

1. *Mechanics' Liens—In General.*—The Indiana mechanics' lien statute⁸⁵ protects a class of persons described as subcontractors, materialmen and laborers and equipment lessors of the prime contractor and his subcontractors.⁸⁶ An established common law rule, that the statute does not extend to materialmen furnishing materials and goods to other materialmen, was recently recognized and applied in *City of Evansville v. Verplank Concrete & Supply, Inc.*⁸⁷ In that case, Verplank furnished the beams and cement to a materialman who had agreed to supply the beams to the contractor; the materialman did not agree to perform any work at the site.⁸⁸ While a mechanic's lien generally cannot be procured against governmental property,⁸⁹ *Verplank* held that the mechanics' lien statute protected materialmen performing under the contract of a trustee financing a parking garage on lands leased by a municipality with pledged income bonds.⁹⁰ The court explained the exception on the basis that the statute authorizing the project did not require a surety protecting suppliers of work and materials as in the case of "public" contracts.⁹¹

A materialman must prove that materials furnished to a project were used in the construction. One qualification to this rule is that a presumption of use arises from proof that the materials were delivered at the construction site. This qualification was recently applied in *Templeton v. Sam Klain & Sons, Inc.*⁹²

⁸⁵IND. CODE § 32-8-3-1 (Supp. 1980).

⁸⁶*Compare* *Wood v. Isgrigg Lumber Co.*, 71 Ind. App. 64, 123 N.E. 702 (1919) with *Nash Eng'r Co. v. Marcy Realty Corp.*, 222 Ind. 396, 54 N.E.2d 263 (1944) and *Stephens v. Duffy*, 41 Ind. App. 385, 83 N.E. 268 (1908), *aff'g*, 41 Ind. App. 385, 81 N.E. 1154 (1907) (applying an earlier version of IND. CODE § 32-8-3-1 (1980)).

⁸⁷400 N.E.2d 812 (Ind. Ct. App. 1980).

⁸⁸*Id.* at 820. If a security interest is retained by the seller furnishing goods to a materialman, it seems that the lien could not be asserted against the owner who is a buyer in the ordinary course of business. *See* IND. CODE § 26-1-9-307(1) (1976); *cf.* *Puritan Eng. Corp. v. Robinson*, 207 Ind. 58, 191 N.E. 141 (1934) (a materialman claiming a lien must show that his materials were furnished for the specific purpose of use in the building on which he claims a lien).

⁸⁹*Repp & Mundt, Inc. v. Hitzelberger Supply Co.*, 353 N.E.2d 547 (Ind. Ct. App. 1976).

⁹⁰400 N.E.2d at 818.

⁹¹The project was authorized by a statute providing for the financing of city economic and pollution development facilities. IND. CODE § 18-6-4.5-1 (1976 & Supp. 1980). This was determined not to be "public" construction for which surety bonds are required to protect suppliers, because the construction was not paid for with "funds derived from taxation or from special assessments." *Id.* § 5-16-5-2.

⁹²400 N.E.2d 1198 (Ind. Ct. App. 1980). Another exception to the rule estops the owner to deny that materials were used in the construction when ordered by him. *Van Wells v. Stanray Corp.*, 341 N.E.2d 198 (Ind. Ct. App. 1976).

In enforcing a mechanic's lien, the mechanic is entitled to attorneys' fees, but not if the owner has paid in full.⁹³ This principle was recognized in *Templeton* in which the court found that payment had not been made in full but held that attorneys' fees incurred in successfully defending the lien on appeal could not be recovered.⁹⁴

2. *Notice by Subs to Owners.*—The statutory provision requiring subs claiming liens against "owner-occupied" real estate to give written notice to the owner within thirty days of commencement of the performance (sixty days in the case of new construction)⁹⁵ was held applicable to a conditional buyer temporarily driven from his home when it was partially destroyed by fire and when the materialman furnishing supplies for the repair failed to give the required notice to the absent buyer.⁹⁶ In another decision, *Mid-America Homes v. Horn*,⁹⁷ the Indiana Supreme Court sensibly defined the term "owner" entitled to notice under this provision to mean the owner contracting with the prime contractor—not a record owner who is not a party to the construction under which the lien is claimed.⁹⁸ In doing so, the court reversed the court of appeals which had held that notice to the vendor who had contracted to sell the land to a purchaser was sufficient because he was the record owner and that notice to the vendee who had contracted with the prime contractor was not required.⁹⁹ The supreme court properly pointed out that the purpose of this notice requirement is to alert the original contracting party that subs under the prime contractor plan to claim a lien if they are not paid. This permits the contracting party to take steps to assure proper application of his payments under the contract. Notice to a record owner who is not a contracting party will not achieve that purpose. The case also reinforces an old principle in mechanic's lien law to the effect that subs who have no contractual relation or rights with the owner must link their claims by connecting intervening contracts to the owner. Hence, notice

⁹³IND. CODE § 32-8-3-14 (1976).

⁹⁴400 N.E.2d at 1202-04.

⁹⁵IND. CODE § 32-8-3-1 (Supp. 1980).

⁹⁶*Barker v. Brownsburg Lumber Co.*, 399 N.E.2d 426 (Ind. Ct. App. 1980). This case involved the old statute requiring notice within five days (fourteen if new construction) of commencement. The time limits have been extended by a 1977 amendment. Act of Apr. 12, Pub. L. No. 310, § 1, 1977 Ind. Acts 1424 (currently codified at IND. CODE § 32-8-3-1 (Supp. 1980)).

⁹⁷396 N.E.2d 879 (Ind. 1979).

⁹⁸*Id.* at 883.

⁹⁹377 N.E.2d 657, 659-60 (Ind. Ct. App. 1978), criticized in, Townsend, *Secured Transactions and Creditor's Rights*, 1978 *Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 305-06 (1979).

must go to the owner in this chain of privity of which subs must be aware.

*Henderlong Lumber Co. v. Zinn*¹⁰⁰ also dealt with the same notice provision. A late notice was given to the owner by a sub who claimed that the lien nonetheless should be effective with respect to performances rendered after the notice was received. The court rejected this argument on the obvious ground that the statute, as a condition precedent to the lien, required the notice to be given within the specified time after the "first delivery of labor performed."¹⁰¹ The sub who furnished materials also sought to uphold the notice as partially effective by claiming that deliveries were made under separate contracts, thus qualifying those deliveries timely made under separate contracts. The evidence did not support this contention and the court in effect found that all deliveries were made under one contract.¹⁰²

3. *Recording Notice of Mechanic's Lien.*—Notice of the mechanic's lien against real estate describing the property and naming the owner must be filed in duplicate with the recorder within sixty days of the last performance by the mechanic.¹⁰³ This statute seems designed to accomplish at least three separate objectives. One is to fix a time period during which a lien may be claimed. Another is to provide the means for getting to the owner belated notice of the lien which is claimed. This second objective is accomplished by a provision that the county recorder mail a required duplicate copy to the named owner. Still a further purpose is to provide a form of record notice of the lien to purchasers from the

¹⁰⁰406 N.E.2d 310 (Ind. Ct. App. 1980). This case dealt with the statute when it required the five day notice in the case of an old contract and the fourteen day notice in the case of a new contract. IND. CODE § 32-8-3-1 (1976) (current version at IND. CODE § 32-8-3-1 (Supp. 1980)).

¹⁰¹406 N.E.2d at 312 (based upon IND. CODE § 32-8-3-1 (1976) (current version at IND. CODE § 32-8-3-1 (Supp. 1980)) (emphasis in original)).

¹⁰²406 N.E.2d at 313. In granting summary judgment for the owner, the court held that the supplier carried the burden of proving that performances were made under different contracts, a burden which was not supported by invoices showing deliveries upon different dates. *Id.* Case law supports the proposition that recording provisions of the mechanics' lien law must be separately satisfied with respect to work and materials furnished under separate contracts. *Saint Joseph's College v. Morrison, Inc.*, 158 Ind. App. 272, 302 N.E.2d 865 (1973) (holding that one recorded notice for separate contracts was sufficient if notice was recorded within the statutory time for each contract but that tacking to enlarge the time would not be permitted). On this basis, the argument in the *Zinn* case that a materialman under separate contracts must give notice to the owner under time limits with respect to each separate contract is logical, if not practical.

¹⁰³IND. CODE § 32-8-3-3 (1976). This means that transferees must take notice of construction in progress and for 60 days after completion.

owner and to protect purchasers and creditors who deal with the owner when the notice is not properly and timely filed. An interesting problem arose in *Beneficial Finance Co. v. Wegmiller Bender Lumber Co.*,¹⁰⁴ where the prime contractor contracted with owners who owned the land as tenants by the entireties. The court held that a notice by an unpaid sub naming only the husband as owner was sufficient to meet the notice requirements of the statute.¹⁰⁵ The notice was certainly sufficient to notify the owners of the lien since the husband had contracted with the prime as agent for the wife.¹⁰⁶ In holding that the notice was sufficient to put purchasers and creditors upon notice of the lien, the third objective of the statute, the decision clarified an important problem in title and recordation law arising where one of two tenants by the entireties executes a deed, mortgage, or other instrument transferring entireties property without the other party being named.¹⁰⁷ The case, although involving a mechanic's lien notice, suggests that the conveyance by one spouse is sufficient to put purchasers and creditors on constructive notice that the transfer may have been authorized by the non-named entireties party. Title lawyers should carefully

¹⁰⁴402 N.E.2d 41 (Inc. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (Ind. Ct. App. 1980). On rehearing the case, the court held that the recorded notice of a lien need not describe or identify the type of ownership of the named owner.

¹⁰⁵402 N.E.2d at 46. In resolving the problem, the court embarked upon an unnecessary, unclear line of reasoning whether or not the court should be prejudiced against the mechanics' lien statute by giving it a strict or liberal construction. This action raises the unsavory possibility that perhaps the decision was based upon the judge's hatred or love for this law.

¹⁰⁶*Id.* Another recent decision recognizes that the husband may, as established by rules of implied or apparent authority, be authorized to bind the wife in conveyances of entireties property. *Moehlenkamp v. Shatz*, 396 N.E.2d 433 (Ind. Ct. App. 1979), *discussed in text* accompanying note 11.

¹⁰⁷402 N.E.2d at 46. Normally a recorded transfer by an owner outside the record chain of title is not constructive notice of the rights of the transferee. Thus, if M, holding under an unrecorded contract with V, gives a mortgage to E which is recorded and five years later M acquires record title, a later bona fide purchaser from M is not put on constructive notice of the mortgage. *Sinclair v. Guzenhauser*, 179 Ind. 78, 98 N.E. 37 (1912), *aff'd on rehearing*, 179 Ind. 67, 100 N.E. 376 (1913); *Bingham v. Kirkland*, 34 N.J. Eq. 229 (1881). *See also*, *Tefft v. Munson*, 57 N.Y. 97 (1874). The question thus arises, where a deed is made to H and W as tenants by entireties, whether a transfer by one of the spouses alone is outside the chain of title since neither may convey without the other until the relation is terminated. Because the relation may be terminated by parol circumstances, such as death, divorce, or agreement, it seems that purchasers must take note of recorded transfers by one of the parties. *Compare* *Simmons v. Parker*, 61 Ind. App. 403, 112 N.E. 31 (1916) (mortgage by husband alone is constructive notice of purchase-money vendor's lien and put purchaser on duty of inquiry) *with* *Brower v. Witmeyer*, 121 Ind. 83, 22 N.E. 975 (1889) (purchaser of first recorded mortgage was required to determine whether holder took with notice of a purchase-money mortgage acquired prior in time but recorded subsequently).

take note of this. The general rule that both husband and wife must join in transfers of entireties property does not mean that a record conveyance by one party is facially ineffective. A transfer by one may be effective, and purchasers must make further inquiry into this possibility when a conveyance or transfer by one is of record or, as in this case, when notice of a mechanic's lien names only one of the spouses.

4. *Priorities of Mechanics' Liens.*—A properly recorded mechanic's lien on real estate relates back to the time the work first commenced,¹⁰⁸ and from that point the lien will take priority over subsequent or intervening mortgages and conveyances.¹⁰⁹ However, by the terms of the same statute the mechanic will share pro rata with prior and subsequent mechanic's liens.¹¹⁰ This of course lays the groundwork for a possible circuitry of lien problem when the lien of one mechanic takes priority over a later mortgage, and the lien of another mechanic commences after the same mortgage. In all probability, the mortgage will and should be defeated by both liens if they are properly recorded.¹¹¹ If the mortgage is promptly recorded, however, and if the loan made under the intervening mortgage is in fact applied to payment of mechanics with perfectable liens, the mortgagee should to that extent be subrogated to the equal priority status of those mechanics actually paid. The reasons for such action include avoiding unjust enrichment, avoiding an hideous circuitry problem, and resolving fairly an important problem of construction financing when the owner needs new funds during progress of the work.¹¹² Unfortunately, this result, announced by two well entrenched Indiana cases,¹¹³ was rejected by *Beneficial Finance Co. v. Wegmiller*

¹⁰⁸IND. CODE § 32-8-3-5 (1976).

¹⁰⁹*Id. See, e.g.,* Northwestern Loan & Inv. Ass'n v. McPherson, 23 Ind. App. 250, 54 N.E. 130 (1899). A prior mortgage or lien as a general rule will take priority over subsequent mechanics' liens absent waiver or estoppel. *See, e.g.,* Robert Hixon Lumber Co. v. Rowe, 83 Ind. App. 508, 149 N.E. 92 (1925). However, subsequent mechanics with a lien upon buildings erected by them may remove the structures. IND. CODE § 32-8-3-2 (1976).

¹¹⁰IND. CODE § 32-8-3-5 (1976).

¹¹¹For a circuitry of lien problem between successive mortgages and an intervening mechanic's lien, see Thorpe Block Sav. & Loan Ass'n v. James, 13 Ind. App. 522, 41 N.E. 978 (1895), where there was no equality of priority problem.

¹¹²If a mortgagee advances funds to pay off prior mechanic's liens, equity will subrogate the mortgagee to those liens to prevent unjust enrichment. *Mishawaka, St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433, 196 N.E. 85 (1935); *Warford v. Hankins*, 150 Ind. 489, 50 N.E. 468 (1898). Prior liens will be deferred to purchase money security interests to avoid unjust enrichment. *But see, Houston v. Houston*, 67 Ind. 276 (1879) (purchase money lien took priority over judgment lien).

¹¹³*Ward v. Yarnelle*, 173 Ind. 535, 91 N.E. 7 (1910); *McLaughlin Mill Supply Co. v. Laundry Serv.*, 95 Ind. App. 693, 184 N.E. 429 (1933) (where only some of competing mechanic's lienholders had notice of mortgage).

Bender Lumber Co.,¹¹⁴ in which the court deferred the recorded mortgage to a materialman although the mortgage loan was used to pay other mechanics.¹¹⁵ Prior case law to the contrary was distinguished on the apparent ground that the mortgagee should share in priority only if the circumstances showed notice to or waiver by the competing mechanics.¹¹⁶ This decision will not have a favorable impact on the financing of construction and should be overruled.

Purchasers generally must take notice of pending or recent construction because a mechanic's lien relates back to the time of commencement of the work; the lienholder has sixty days from the completion of work within which to record his mechanic's lien; and the mechanic's lien will take priority from time of commencement if notice of the lien is properly recorded.¹¹⁷ The rule of relation back operates to the further advantage of the mechanic's lienholder against the owner or purchaser from the owner when the lienholder is called back and directed by the owner to correct defective work or complete the project. The mechanic then has sixty days after that completion in which to file notice of his lien.¹¹⁸ The Indiana statute, however, contains a special provision protecting a purchaser of a single or double family dwelling for his own occupancy if he purchases innocently, without notice, and for value before notice of the lien is recorded.¹¹⁹ This provision was applied in *Riggins v. Sadowsky*¹²⁰ in which an unpaid subcontractor had furnished work and materials for the owner's single family dwelling but had not recorded notice of his lien. The property was then sold to a purchaser who took possession; thereafter, the sub made some repairs at the purchaser's request. The sub then filed notice of his lien for his prior services within sixty days of the corrective work. The court, in reversing the decision below which had upheld the lien, held that the lienholder carried the burden of proving that he had filed notice of his lien prior to the purchase or that the purchaser was not a bona fide purchaser.¹²¹ Established decisions allowing notice of the lien to be recorded within sixty days after corrective work demanded by the owner¹²² were properly held inapplicable to

¹¹⁴402 N.E.2d 41 (Ind. Ct. App.), *rehearing denied*, 403 N.E.2d 1150 (1980).

¹¹⁵402 N.E.2d at 48.

¹¹⁶*Id.*

¹¹⁷*Id.* at 46-47. See IND. CODE § 32-8-3-5 (1976).

¹¹⁸See note 103 *supra*.

¹¹⁹IND. CODE § 32-8-3-1 (1976 & Supp. 1980). The statute protects the good faith purchaser if he records his deed before the notice of lien is recorded.

¹²⁰403 N.E.2d 1152 (Ind. Ct. App. 1980).

¹²¹*Id.* at 1155-56.

¹²²*E.g.*, *Potter v. Cline*, 161 Ind. App. 349, 353, 316 N.E.2d 422, 425 (1974) (recogniz-

an innocent purchaser for value of a single or double dwelling for his own occupancy who was not aware of the unpaid bill owing to the prime mechanic when he requested the corrective work.¹²³ The burden of proving lack of good faith was correctly placed upon the lien-claimant because the purchaser apparently had paid a commercially reasonable value.¹²⁴ It is likely that the mechanic should have lost for another reason not discussed by the case. It did not appear from the facts that he had given the requisite written notice of intent to hold a lien within the thirty or sixty day period from the time of the corrective work to the purchaser who was an owner-occupant of a single or family dwelling. This requirement would seem reasonably applicable under these circumstances.¹²⁵

5. *Mechanic's Lien on Retainage.*—A sub may assert a mechanic's lien upon funds owing by the owner to the prime by notifying the owner in writing of his claim without filing record notice of the lien.¹²⁶ A recent decision¹²⁷ held that the bringing of suit by the sub does not fulfill this notice requirement and indicated that if a lien upon the fund is to be obtained, it will not exist until the formal notice is given.¹²⁸ Another case, *Blade Corp. v. American*

ing rule that completion of work under a separate contract did not extend time for filing notice of lien under another contract). Prior to the statutory provision protecting the bona fide purchaser, it was held that a purchaser who requested completion or corrective work under a construction contract of the vendor took subject to the relation back lien if the lien was recorded within 60 days after the completion of the corrective work. *Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762 (1896). See generally, Townsend, *Secured Transactions and Creditors' Rights, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305, 330-31 (1975).

¹²³403 N.E.2d at 1155-56.

¹²⁴See IND. R. TR. P. 9.1(D) which was not cited in the decision.

¹²⁵See statute and discussion at note 95 *supra* and accompanying text. Because the purchaser is a new and different kind of owner-occupant, it seems that a mechanic should be required to give him written notice of his intent to claim a lien arising out of corrective work.

¹²⁶IND. CODE § 32-8-3-9 (1976).

¹²⁷*Zeigler Bldg. Materials, Inc. v. Parkison*, 398 N.E.2d 1330 (Ind. Ct. App. 1980) (materialman, by intervention in a suit by owner against the counterclaiming prime who had been discharged in bankruptcy, claimed a right to funds owing by owner to prime—court failed to recognize that the only right of a materialman-creditor of the bankrupt to do this would have been on the basis of a lien upon the fund owing by the owner to the prime).

¹²⁸*Id.* at 1332. In this case a materialman claimed a right to funds owing by the owner to the prime contractor under whom the materials were furnished. The materialman intervened in a suit against the counterclaiming prime who had been discharged in bankruptcy. The court was unable to find a theory upon which the materialman could make a claim to the fund after the bankruptcy discharge of the prime contractor. It is submitted that this could have been sustained if the materialman had a valid, perfected lien upon the fund by virtue of the mechanic's lien statute. See, *Avco Fin. Co. v. Erickson*, 132 Ill. App. 2d 868, 270 N.E.2d 111 (1971).

Drywall, Inc.,¹²⁹ held that a proper notice of lien upon an obligation of the owner to the prime is ineffective if the owner's right of setoff against the prime contractor equals or exceeds the amount owing by the owner.¹³⁰ The owner's setoff consisted of payments and damages incurred as a result of the prime's default and abandonment of the work prior to the owner's receipt of notice.¹³¹ Although the sub may claim a lien upon amounts owing to the contractor, an owner contracting with a prime for construction is not personally bound to a sub (subcontractors, laborers and materialmen contracting with the prime) supplying work or materials.¹³² A provision in the contract between the owner and the prime that the prime will pay the subs does not contractually bind the owner to such parties, although, according to another recent case,¹³³ it will obligate the prime to subs who are not in privity with him as third party beneficiaries. Another current decision¹³⁴ recognized that a tenant may hold the landlord upon his promise to reimburse the tenant for improvements even though the tenant's notice of mechanic's lien was filed too late. The point is thus made that a mechanic with a promise of payment from the owner may have a remedy to enforce his lien and the promise as well, so that if one fails the other may prevail.

6. *Application of Payment from Construction Fund.*—A contractor often deals with a materialman or subcontractor who fur-

However, the case properly seems to hold that unless notice is given the owner before bankruptcy, the lien may not be claimed after the petition is filed, apparently because it does not relate back to the commencement of performance. *Accord*, *Lockridge v. Brockman*, 137 F. Supp. 383 (N.D. Ind. 1956); 11 U.S.C. § 545(2) (1978) (unperfected statutory lien voidable if ineffective against bona fide purchaser); *Id.* § 547(c)(6). *But cf.*, *id.* § 546(b) (protecting lien which relates back).

¹²⁹*Blade Corp. v. American Drywall, Inc.*, 400 N.E.2d 1183 (Ind. Ct. App. 1980). Another decision found that the setoff was not proved. *Templeton v. Sam Klain & Son, Inc.*, 400 N.E.2d 1198 (Ind. Ct. App. 1980).

¹³⁰400 N.E.2d at 1186-87.

¹³¹It was determined that retainages by the owner were exceeded by expenses of completion incurred after the default and notice. The court indicated that as against lien notices against the fund, contractually provided retainages of the owner could be withheld until completion. *Id.* at 1186.

¹³²Because privity is lacking between the owner or subs, the latter may not recover absent a binding direct or third party beneficiary promise of the owner. *E.g.*, *Indianapolis Raceway Park, Inc. v. Curtiss*, 386 N.E.2d 724, 727 (Ind. Ct. App. 1979), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 381-82 (1980) [hereinafter referred to as Townsend, *1979 Survey*].

¹³³*Zeigler Bldg. Materials, Inc. v. Parkison*, 398 N.E.2d 1330 (Ind. Ct. App. 1980).

¹³⁴*Malbin & Bullock, Inc. v. Hilton*, 401 N.E.2d 719 (Ind. Ct. App. 1980) (where landlord transferred funds realized from sale of leased property to escrow account for payment in case tenant won mechanic's lien suit, held that tenant recovering personal judgment against landlord could reach account by proceedings supplemental).

nishes supplies or work on several projects with different owners. Suppose that the owner on one project pays a contractor who uses the funds to make a partial payment to a materialman or subcontractor to whom the contractor is obligated on that project as well as on other projects. Must the money be applied to the project from whence the funds were generated? In *Templeton v. Sam Klain & Son, Inc.*,¹³⁵ the court of appeals recognized the basic rule that a debtor making a partial payment on two or more debts may direct application to one or the other; if he does not, the creditor may apply it as he sees fit; and if the creditor does not do so, the law will apply it to the least secured, or to the creditor's advantage, and in other cases to the oldest debt.¹³⁶ In this case, a materialman applied the funds deposited in a general account toward the oldest obligation owing by the contractor—another project. The court held that the creditor was under no obligation to apply the payments to the construction on the property of the owner who made payment since the materialman was unaware of the source of the funds.¹³⁷ The creditor was not bound by the deception of the contractor who indorsed check payments certifying payment of all materialmen and deposited them in his general account. The court indicated that the result might have been different had proof, which was lacking, established that the funds represented by the owner's restrictively indorsed check were in fact the ones used to make the payment, and that the creditor had knowledge of that fact.¹³⁸ Because mechanic's lienholders have the inchoate right to a lien upon those funds¹³⁹ and because criminal laws require disclosure of unpaid liens upon receipt of payment,¹⁴⁰ good faith should require the payee with knowledge of the source to apply the payment toward the contract generating the funds.¹⁴¹

¹³⁵400 N.E.2d 1198 (Ind. Ct. App. 1980).

¹³⁶*E.g.*, *McCauley v. Holtz*, 62 Ind. 205, 207 (1878).

¹³⁷400 N.E.2d at 1202. A similar result was reached in *Western & Southern Indem. Co. v. Cramer*, 104 Ind. App. 219, 10 N.E.2d 440 (1937), where a surety upon public construction contended that a materialman was required to apply payments from the surety's project towards obligations incurred on that project. *Contra*, *Clow Corp. v. Ross Township School Corp.*, 384 N.E.2d 1077 (Ind. Ct. App. 1979), *discussed in Townsend, 1979 Survey, supra* note 132, at 395.

¹³⁸400 N.E.2d at 1202.

¹³⁹Upon notice to the owner, a mechanic may obtain a lien upon retainages. IND. CODE § 32-8-3-9 (1976). *See generally* discussion at note 126 *supra* and accompanying text.

¹⁴⁰IND. CODE § 32-8-3-15 (Supp. 1980).

¹⁴¹*See Townsend, 1979 Survey, supra* note 132, at 396 n.196. Statutes in some states make payments received by a contractor, trust funds to be applied towards the construction obligations. *E.g.* *Romero v. Romero*, 535 F.2d 618 (10th Cir. 1976); *In re Morris Ketchum, Jr. & Assocs.*, 409 F. Supp. 743 (S.D.N.Y. 1975). These cases denied

7. *Exemptions.*—The 1980 legislature modified the general exemption statute in four principal respects.¹⁴² First, the total amount of exemption was increased to a new limit of \$10,000; the increase is to include real estate or personal property constituting the debtor's personal or family residence to a value of \$7,500; other real estate or tangible personal property to a value of \$4,000; intangible personal property to \$100 with an exclusion of debts and income owing; and unlimited amounts for professionally prescribed health aids.¹⁴³ Second, joint debtors' individual entireties interests in real estate or personal property constituting the debtor's personal or family residence may be claimed to a value of \$7,500 (with the \$10,000 total limit on this and other exempt property).¹⁴⁴ This changes prior decisional law disallowing joint debtors the right to claim entireties property exempt as against joint creditors.¹⁴⁵ Third, the option to claim the exemptions specified by the Bankruptcy Code was rejected, so that only Indiana exemptions may be claimed in bankruptcy.¹⁴⁶ A fourth provision¹⁴⁷ seems to make entireties real property exempt without limitation in bankruptcy proceedings, except in the case of joint or consolidated cases involving both spouses. To the extent that this final provision makes a special exemption rule for bankruptcy, it is clearly at war with the federal

discharge to a bankrupt misapplying proceeds. *Contra, In re Dloogoff*, 600 F.2d 166 (8th Cir. 1979).

Payment received by a contractor under the Miller Act must be applied toward contract obligations. *St. Paul Fire & Marine Ins. Co. v. United States*, 309 F.2d 22 (8th Cir. 1962) (opinion by Judge Blackmun), *cert. denied*, 372 U.S. 936 (1963).

Indiana case law holds that the owners of equitable trust funds may reclaim them from an innocent creditor who applies them towards an antecedent debt. *Peoples State Bank v. Caterpillar Tractor Co.*, 213 Ind. 235, 12 N.E.2d 123 (1938) (pre-existing debt is not value sufficient to constitute payee of money a bona fide purchaser). However, if a negotiable instrument is used to pay a prior debt, the payee may be a holder in due course, and if so, will take free of claims to the instrument. IND. CODE §§ 26-1-3-303(b), -305(1) (1976).

¹⁴²Act of Mar. 3, 1980, Pub. L. No. 196, § 1, 1980 Ind. Acts 1625 (currently codified at IND. CODE § 34-2-28-0.5 (Supp. 1980) (effective April 1, 1980)).

¹⁴³IND. CODE § 34-2-28-0.5-2(a)-(d) (Supp. 1980).

¹⁴⁴*Id.* § 34-2-28-1(a).

¹⁴⁵*Sharpe v. Baker*, 51 Ind. App. 547, 96 N.E. 627 (1911), *petition for rehearing overruled*, 99 N.E. 44 (1912).

¹⁴⁶IND. CODE § 34-2-28-0.5, -1 (Supp. 1980). The act was carelessly drafted to allow only exemptions permitted by Indiana law and by inference to exclude non-Code federal exemptions, which of course the Indiana legislature cannot do. To this extent the provision is invalid.

¹⁴⁷*Id.* § 34-2-28-1(e). This subsection makes exempt:

Any interest the debtor has in real estate held as a tenant by the entireties on the date of the filing of the petition for relief under the bankruptcy code, unless a joint petition for relief filed by the debtor and spouse, or individual petitions of the debtor and spouse are subsequently consolidated.

law and ineffective. Hence, if any sensible interpretation is to be made of the statute, it seems that it was intended to make entireties property exempt for the purpose of eliminating the doubt existing under section 541 of the Code whether the bankrupt's interest in entireties property, whatever it is, will pass to the estate.¹⁴⁸ If made exempt by state law, then the substantial effect is to give entireties property the same status it had under prior Indiana and bankruptcy law—providing that the exemption is claimed. The reference in the exemption statute to joint bankruptcies was probably included to indicate that as under prior law,¹⁴⁹ joint creditors of husband and wife should be allowed to reach entireties property (subject, however, to the homestead exemption). If so construed, this means that the rights of joint and individual creditors with respect to entireties property will effectively remain as they were before the new code, except for the \$7,500 homestead exemption allowed each spouse against joint creditors. Thus if H takes bankruptcy, owning by the entireties a home worth \$40,000 and has joint creditors with claims of \$20,000, then the bankrupt and his wife may claim as exempt \$15,000. The joint creditors may reach what is left of the home whether administered in or out of bankruptcy or as a joint bankruptcy. The balance (\$5,000) may be claimed as exempt as against the individual creditors whether or not H's interest passes to the estate. Individual creditors may not reach the wife's interest in the property which may be claimed as either exempt or as not subject to creditor process. This can be litigated in H's bankruptcy or in a joint bankruptcy.¹⁵⁰ This solution, of course, is highly speculative.

It should be noted that when a state exemption is allowed or claimed in bankruptcy, its parameters are still controlled by the federal law. Thus, although the general Indiana exemption law is

¹⁴⁸Under the Bankruptcy Code it is not clear whether the interest of a debtor, whatever it may be, will pass to the estate in bankruptcy under § 542 of the Code. Under the proposed interpretation of the Indiana exemption law, the entireties owner will be placed in the same position that he was in before its adoption by allowing husband and wife either to claim the exemption allowed by Indiana law or to claim that his interest in the assets does not pass to the trustee. For an excellent discussion of this problem under the Code see Note, *The Bankruptcy Code of 1978 and Its Effect upon Tenancies by the Entireties*, 13 IND. L. REV. 761 (1980).

¹⁴⁹Under prior law entireties property did not pass as estate property since it was owned by the marital unit. But joint creditors could reach it. *First Nat'l Bank of Goodland v. Pothuisje*, 217 Ind. 1, 25 N.E.2d 436 (1940). In the case of husband and wife consolidated bankruptcies, some referees allowed entireties to be administered so that joint creditors would be paid. The same will be true under the Code. See generally, *In re Jeffers*, No. 79-30724 (N.D. Ind. Feb. 19, 1979) (unpublished opinion of Judge Rodebaugh).

¹⁵⁰11 U.S.C. § 725 (Supp. II 1978).

limited to contract actions and is made inapplicable to judgments acquired before October 1, 1977, the Code prescribes that the exempt property is "not liable during or after the case for any debt of the debtor" that is provable in bankruptcy.¹⁵¹ Most tort claims are now provable in bankruptcy.¹⁵²

8. *Proceeding Supplemental to Execution.*—In the enforcement of a judgment by proceedings supplemental, the court may order the debtor's property of all types applied toward the indebtedness, providing that the property is transferable and subject to creditor process. The order may extend to persons with respect to obligations and funds of the debtor, and it may direct payments of unspecified amounts and payments made dependent upon conditions. Authority for this extraordinary and necessary power is derived from statute and from inherent equity power to afford remedies where execution is not adequate.¹⁵³ The workability of this broad power of the court is beautifully illustrated by a group of recent decisions. In *Deetz v. McGowan*,¹⁵⁴ a creditor with a judgment for over \$100,000 procured an order against the judgment debtor directing proceeds from the sale of the latter's land to be deposited in an escrow savings account. Pending appeal from the order, the judgment debtor died, and her personal representative claimed the funds to satisfy priority creditors of the estate. The court held that the escrow order in proceedings supplemental created a lien thereon which took priority over estate creditors.¹⁵⁵ *Hudson v. Tyson*¹⁵⁶ allowed a tort creditor with a judgment of \$10,000 against a bail bonding company to garnish a deposit of \$75,000 which was required by law¹⁵⁷ to be given to the insurance commissioner to assure payment of bond forfeitures.¹⁵⁸ Although the deposit was held to secure payment of bond forfeitures which had a first priority, the court allowed the fund to be "attached," subject to payment when it was established that contingent charges against the fund and the company which had ceased business were less than the deposit.¹⁵⁹ In *Malbin & Bullock, Inc. v.*

¹⁵¹*Id.* § 522(c) (Supp. III 1979).

¹⁵²*Id.* § 502. Although the Indiana exemption law excepts judgments entered before October 1, 1977, such claims also will be discharged under the Code for the same reason.

¹⁵³IND. CODE §§ 34-1-44-1 to -8 (1976); IND. R. TR. P. 69(E).

¹⁵⁴403 N.E.2d 1160 (Ind. Ct. App. 1980).

¹⁵⁵*Id.* at 1165. A lienholder's interest in the collateral will survive administration. *Paide v. Hestad*, 169 Ind. App. 370, 348 N.E.2d 678 (1976).

¹⁵⁶404 N.E.2d 636 (Ind. Ct. App. 1980). In this case a bail bondsman shot a bonded client while attempting to bring him in on a bench warrant. The client recovered a judgment against the bondsman and his principal insurance company.

¹⁵⁷IND. CODE § 35-4-5-35 (1976).

¹⁵⁸404 N.E.2d at 642.

¹⁵⁹*Id.* at 641.

Hilton,¹⁶⁰ a tenant who sought to establish a mechanic's lien and instead recovered a personal judgment against a corporate owner of real estate was allowed to garnish an escrow account established with the owner's funds to protect a subsequent purchaser of the property. Garnishment was permitted, although the escrow was created by the successor shareholders to whom all the assets of the corporate owner had been transferred.¹⁶¹ *American Underwriters, Inc. v. Curtis*¹⁶² allowed a tort creditor who obtained a default judgment to garnish the debtor's liability insurer.¹⁶³ In this case the insurer, after a hearing in proceedings supplemental, raised the defenses that the policy was conditioned by statute on a judgment rendered against the insured "after actual trial"¹⁶⁴ and that liability could not be sustained where judgment was procured by the claimant without notifying the liability insurer of the suit. The court disallowed the "actual trial" defense because it was raised too late¹⁶⁵ and determined that nothing in the statute required the tort claimant to notify the insurer of the suit.¹⁶⁶ Finally, *Arnold v. Dirrim*¹⁶⁷ recognized that proceedings supplemental may be used as a vehicle to reach assets which have been fraudulently conveyed by the debtor.¹⁶⁸

Until a judgment is final, it may not be enforced by execution or proceedings supplemental.¹⁶⁹ A questionable application of this rule

¹⁶⁰401 N.E.2d 719 (Ind. Ct. App. 1980). Although the court denied a lien to the creditor, a judgment based upon the contract between the owner and tenant was upheld on pleadings which requested foreclosure of a mechanic's lien.

¹⁶¹The court had no trouble in allowing garnishment of assets which passed to the successor shareholders of the corporation, although the basis for the holding was not made clear.

¹⁶²392 N.E.2d 516 (Ind. Ct. App. 1979).

¹⁶³*Id.* at 517-18; *accord*, *Allstate Ins. Co. v. Morrision*, 146 Ind. App. 497, 256 N.E.2d 918 (1970).

¹⁶⁴IND. CODE § 9-2-1-5(c) (1976 & Supp. 1980).

¹⁶⁵The Indiana Supreme Court has indicated that defenses of a garnishee in proceedings supplemental must be pleaded. *State ex rel. Travelers Ins. Co. v. Madison Superior Court*, 265 Ind. 287, 354 N.E.2d. 188 (1970).

¹⁶⁶392 N.E.2d at 519. Another recent decision recognizes that the liability insurer has no direct fiduciary duty or obligation to settle with a third party injured by the insured at least before judgment against the insured. *Winchell v. Aetna Life & Cas. Ins. Co.*, 394 N.E.2d 1114 (Ind. Ct. App. 1979) (insurer also insured plaintiff). *Accord*, *Bennett v. Slater*, 154 Ind. App. 67, 289 N.E.2d 144 (1972) (where insurer failed to settle within policy limits, beneficiary with excess judgment against insured could not bring direct suit against insurer), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 243 (1973).

¹⁶⁷398 N.E.2d 442 (Ind. Ct. App. 1979), *discussed at* text accompanying notes 198-200 *infra*.

¹⁶⁸398 N.E.2d at 447.

¹⁶⁹*De Later v. Hudak*, 399 N.E.2d 832 (Ind. Ct. App. 1980) (order to pay marital debt had not become final).

was applied in *Kuhn v. Kuhn*.¹⁷⁰ The court held that decrees awarding future support payments of definite amounts could not, when later in default, be enforced by execution or proceedings supplemental until the amount was liquidated by a court judgment or decree.¹⁷¹ In making installment decrees unenforceable until further litigation establishes the amount in default, the Indiana Supreme Court has imposed an expensive and harsh burden of relitigation upon the many thousands of mothers who must contend with delinquent support payments.¹⁷² Whether the *Kuhn* rule will apply to property division and other awards payable in fixed installments was not made clear by the case.

9. *Enforcement of Property Division and Support Orders*.—The supreme court in *Kuhn v. Kuhn*¹⁷³ held that an order for periodic support payments of definite amounts is not a final order, so that before it may be enforced by execution or contempt, a new decree or judgment determining the amount of default must be procured.¹⁷⁴ In a sense the court was correct in recognizing that for some purposes, at least, a support order is not final. It may prospectively be modified by later court order;¹⁷⁵ it terminates on emancipation or when the child reaches twenty-one¹⁷⁶ and possibly upon the death of the spouse procuring the award or the death of the child.¹⁷⁷ However, the award is final for purposes of appeal and enforcement by contempt proceedings.¹⁷⁸ The court justified its new rule on the ground that a contrary result would make support orders for future

¹⁷⁰402 N.E.2d 989 (Ind. 1980), *considered at* text accompanying notes 173-85 *infra*.

¹⁷¹402 N.E.2d at 991. For a discussion of the decision of the court of appeals permitting enforcement of delinquent installments under a support order without a further order liquidating the amount due, *see* Townsend, 1979 *Survey*, *supra* note 132, at 390.

¹⁷²One reason for the decision was the possibility, apparently instilled by *amicus curiae*, that installment support orders would constitute judgment liens on real estate if such orders were considered judgments, a possibility which has been rejected by prior case law and current legislation. *See* discussion at text accompanying notes 179-81 *infra*.

¹⁷³402 N.E.2d 989 (Ind. 1980). For a similar result *see* *De Later v. Hudak*, 399 N.E.2d 832 (Ind. Ct. App. 1980) (where proceedings supplemental were denied because the amount owing under a decree to pay a marital debt had not been fixed).

¹⁷⁴402 N.E.2d at 991.

¹⁷⁵IND. CODE § 31-1-11.5-17 (1976).

¹⁷⁶*Id.* §§ 31-1-11.5-12, -17.

¹⁷⁷*See* *Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. Ct. App. 1980) (arrearages could not be recovered by stepfather after mother committed suicide—court indicated that right passed to mother's estate).

¹⁷⁸Before contempt orders are entered, the court, after notice and hearing, must find evidence of a violation of the order. *Denny v. State*, 203 Ind. 682, 182 N.E. 313 (1932). Contempt is proper for failure to pay support. *Rager v. Rager*, 222 Ind. 443, 54 N.E.2d 261 (1944).

support payments, liens on property.¹⁷⁹ The 1980 legislature met this concern by prohibiting a court from creating a lien on real estate until the amount delinquent has been fixed by judgment or a copy of the order finding the amount delinquent has been entered upon the *lis pendens* docket.¹⁸⁰ Also, prior case law holds that property division and support orders directing installment payments do not serve as basis for a judgment lien—at least before the amount owing is fixed.¹⁸¹ Finally, the court relied upon a statutory provision permissively allowing a court to enter a judgment for unpaid support. This, however, overlooks the fact that this law is simply a restatement of well-recognized equitable power¹⁸² and in the teeth of another statute allowing a decree to be enforced “by all remedies available for enforcement of a judgment including but not limited to contempt. . . .”¹⁸³ The court also held that since enforcement of a delinquent support order is not an action upon a judgment (for which the limitation is ten years) the general catch-all statute of limitations of fifteen years applied to bar the remedy.¹⁸⁴ The court failed to consider whether the remedy is equitable and governed by laches and other equitable rules of discretion.¹⁸⁵ The decision thus will not only make enforcement of delinquent payments expensive and difficult, but also will allow family feuds and litigation to simmer for unnecessarily long periods of time.

Other decisions held that the right to collect overdue support payments awarded to a wife pass to her estate when she dies;¹⁸⁶ that unvested pension rights can be considered in a property division award,¹⁸⁷ a result seemingly repudiated by 1980 legislation defining

¹⁷⁹402 N.E.2d at 990-91.

¹⁸⁰Act of Feb. 27, 1980, Pub. L. No. 181, § 1, 1980 Ind. Acts 1574 (currently codified at IND. CODE § 31-1-11.5-13(f) (Supp. 1980)).

¹⁸¹*Uhrich v. Uhrich*, 362 N.E.2d 1163 (Ind. Ct. App. 1977) (property division payable in installments); *Myler v. Myler*, 137 Ind. App. 605, 210 N.E.2d 446 (1965) (support installments).

¹⁸²Suit may be brought upon an equitable decree to enforce it as in the case of a judgment. *Hansford v. Van Auken*, 79 Ind. 302 (1881); *Princeton Coal & Mining Co. v. Gilchrist*, 51 Ind. App. 216, 99 N.E. 426 (1912). Courts have inherent power to issue orders assisting in the enforcement of judgments and decrees. *Wilson v. Wilson*, 169 Ind. App. 530, 349 N.E.2d 277 (1976).

¹⁸³IND. CODE § 31-1-11.5-17(a) (Supp. 1980).

¹⁸⁴The Indiana statute of limitations applicable to “judgments” is ten years. IND. CODE § 34-1-2-2(6) (1976). The statute is not limited to judgments for the payment of money, nor is the statute limited to legal judgments. Hence, the court’s failure to apply the limitations statute applicable to “judgments” is a newly created and erroneous holding that a support order is not a judgment.

¹⁸⁵The doctrine of laches may be applicable. See *Matthews v. Wilson*, 31 Ind. App. 90, 67 N.E. 280 (1903) (laches applied to enforcement of lien decreed in favor of wife).

¹⁸⁶*Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. Ct. App. 1980).

¹⁸⁷*Irwin v. Irwin*, 406 N.E.2d 317 (Ind. Ct. App. 1980) (holding that the unvested pension could be considered in arriving at the proportion of division but not as a part

marital property as including "a present right to withdraw pension or retirement benefits";¹⁸⁸ and that a property division decree giving the husband a lien upon property going to the wife to be paid when the wife decides to sell the property is invalid as improperly delegating authority to the wife.¹⁸⁹

10. *Attachment and Garnishment.*—While non-residence of the defendant is grounds for attachment and attachment and garnishment in Indiana,¹⁹⁰ due process, under the rule of *Shaffer v. Heitner*,¹⁹¹ limits jurisdiction in such cases to situations in which the defendant appears, is personally served within Indiana, is subject to Indiana jurisdiction because of sufficient contacts as required by *International Shoe Co. v. Washington*,¹⁹² or where the plaintiff is suing on a judgment meeting the foregoing requirements.¹⁹³ Prior to *Shaffer* it was assumed that *in rem* jurisdiction could be obtained over a tort creditor by attachment and garnishment of his liability insurer in any state where the insurer could be served pursuant to the well known case of *Seider v. Roth*.¹⁹⁴ However, the rule of *Seider v. Roth* was overruled by the United States Supreme Court in *Rush v. Savchuk*.¹⁹⁵ There, a resident of Minnesota brought suit against a resident of Indiana for injuries received in an accident in Indiana by serving and naming the liability insurer of the defendant as garnishee. Because the plaintiff had no direct cause of action against the insurer and other grounds of jurisdiction required by *Shaffer* were not met, an *in rem* judgment for the plaintiff was reversed.¹⁹⁶

of the property awarded). *Accord*, *Libuano v. Libuano*, 388 N.E.2d 574 (Ind. Ct. App. 1979). Irwin also held that a workmen's compensation award received (*but apparently owing before separation*) after final separation should not be included in the property awarded. The 1980 legislature redefined "final separation," the date for determining marital property as the date of the filing of the petition. Act of Feb. 28, 1980, Pub. L. No. 180, § 2, 1980 Ind. Acts 1573 (currently codified at IND. CODE § 31-1-11.5-11 (Supp. 1980)).

¹⁸⁸Act of Feb. 28, 1980, Pub. L. No. 180, § 1, 1980 Ind. Acts 1573 (currently codified at IND. CODE § 31-1-11.5-2(d) (Supp. 1980)).

¹⁸⁹*Henderson v. Henderson*, 401 N.E.2d 73 (Ind. Ct. App. 1980). Other cases, however, upheld a support decree to be adjusted annually by the consumer price index, *Branstad v. Branstad*, 400 N.E.2d 167 (Ind. Ct. App. 1980), and until the child completes his undergraduate college education diligently pursued, *Brokaw v. Brokaw*, 398 N.E.2d 1385 (Ind. Ct. App. 1980). But a property division award conditioned on non-remarriage of the wife was held unlawful. *Wilhelm v. Wilhelm*, 397 N.E.2d 1079 (Ind. Ct. App. 1979).

¹⁹⁰IND. R. TR. P. 64(B).

¹⁹¹433 U.S. 186 (1977).

¹⁹²326 U.S. 310 (1945).

¹⁹³The subject is a lively one. *See, e.g., Townsend*, 1979 *Survey*, *supra* note 132, at 391.

¹⁹⁴17 N.Y.2d 111, 216 N.E.2d 312 (1966).

¹⁹⁵100 S. Ct. 571 (1980).

¹⁹⁶*Id.* at 573-74.

11. *Fraudulent Conveyances.*—A creditor may avoid transfers of property subject to creditor process if the transfer was not for fair consideration and was made with intent to defraud creditors by a debtor who is or thereby becomes insolvent.¹⁹⁷ In *Arnold v. Dirrim*,¹⁹⁸ the remedy was allowed in favor of successful members of a class action in which judgment was recovered against a corporate director for violation of the Indiana Securities Act.¹⁹⁹ During the course of the litigation and shortly after commencement of the trial, the director sought to avoid collection of the judgment by a series of transactions in which he conveyed all of his property for inadequate consideration to a family corporation, to his wife, and to a spendthrift trust in which he reserved a joint right to income for life. A finding of intent to defraud creditors was supported by numerous badges of fraud including the contemporaneous, hurried character of the transfers, the inadequacy of consideration, and the fact that the transfers, all made during the pendency of the lawsuit against him, were to close family members with some benefits retained by the debtor. The court further recognized that a transfer for a fair consideration may be avoided as fraudulent if it is taken by the transferee with knowledge of the fraud.²⁰⁰ The donor's intent also was deemed established by a sanction imposed for failure to submit to a deposition. Insolvency was inferred from the debtor's testimony at the trial that he had no assets.

12. *Bulk Sales.*—*Malbin & Bullock, Inc. v. Hilton*²⁰¹ seems to recognize that proceeds from a bulk sale of inventory may be reached by a creditor of the seller through proceedings supplemental.

13. *Receiverships—Statutory Liquidators.*—Liquidation of banks, insurance companies, and the like have been regulated by statutes in most states, leaving control of assets and administrative matters to statutory liquidators whose domiciliary title must be given full faith and credit by other states.²⁰² *Hudson v. Tyson*,²⁰³

¹⁹⁷IND. CODE § 32-2-1-14 (1976).

¹⁹⁸398 N.E.2d 442 (Ind. Ct. App. 1979).

¹⁹⁹*Id.* at 450. In a companion case the Indiana Court of Appeals affirmed the class action judgment in a decision which should be carefully studied by corporate directors. *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979).

²⁰⁰398 N.E.2d at 447. *See*, IND. CODE § 32-2-1-17 (1976).

²⁰¹401 N.E.2d 719 (Ind. Ct. App. 1980) (holding that proceeds of inventory held by shareholders to whom assets were transferred could be reached—ground not clear).

²⁰²The fountainhead case is *Relfe v. Rundle*, 103 U.S. 222 (1880). However, the title of a foreign liquidator is subject to local policy of other states allowing creditors to reach local assets. *Clark v. Williard*, 294 U.S. 211 (1935). *Cf.*, *O'Malley v. Hankins*, 207 Ind. 589, 194 N.E. 168 (1935) (Indiana refused local ancillary receiver for local assets and creditors).

²⁰³404 N.E.2d 636 (Ind. Ct. App. 1980).

however, allowed an Indiana creditor to reach the assets²⁰⁴ of a foreign insurance corporation allegedly in control of a California liquidator when the debtor corporation failed to prove the judgment vesting the foreign representative with title.²⁰⁵ An important decision of the Indiana Supreme Court²⁰⁶ held that a statute requiring the filing of insurance company liquidations with the Marion County Circuit Court is a venue law under Indiana Trial Rule 75, so that commencement in the wrong court was not jurisdictional nor subject to challenge by mandate.²⁰⁷ A well thought out interpretation of the priority provisions of the insurance liquidation statute is to be found in *Foremost Life Insurance Co. v. Department of Insurance*²⁰⁸ in which an insurer, who was secondarily liable upon policies reinsured with an insolvent Indiana insurance company,²⁰⁹ sought to share a class three priority given to insureds and policyholders.²¹⁰ The court held that the insurer under the reinsurance agreement was not an "insured" or "policyholder" entitled to a third priority, but to the extent that the insurer paid its policyholders covered by the reinsurance agreement, it was entitled to that status by way of subrogation to the priority class.²¹¹ However, upon equitable principles, subrogation against other policyholders of the third priority was deferred until all policyholders entitled to that priority had been paid in full.²¹²

²⁰⁴In this case a creditor was allowed to reach a deposit required by an insurer for the benefit of a particular class of creditors of which the creditor was not a member. *Id.* at 642. Indiana may properly protect local creditors by requiring foreign insurers to deposit funds for their benefit. *Fischer v. American United Life Ins. Co.*, 314 U.S. 549 (1942).

²⁰⁵404 N.E.2d at 641. A person suing upon or relying upon a foreign judgment must prove it by introducing a certified copy or by admissions. *Shane v. Koehler*, 168 Ind. App. 552, 343 N.E.2d 818 (1976).

²⁰⁶State *ex rel.* *Indiana Life & Health Ins. Guar. Ass'n v. Superior Court*, 399 N.E.2d 356 (Ind. 1980).

²⁰⁷*Id.* at 358-59. The court held, also, that the Marion County Superior Court was given concurrent jurisdiction with the circuit court. *Id.* at 359 (citing IND. CODE § 33-5-35.1-4 (Supp. 1980)).

²⁰⁸395 N.E.2d 418 (Ind. Ct. App. 1979) (opinion by Judge Robertson).

²⁰⁹The creditor-insurer in this case had entered into a contractual arrangement whereby its credit life and disability policies would be sold in states where the reinsurer (now in insolvency proceedings) was not authorized to do business. The reinsurer then reaped the profits, if any, paid the insurer a straight commission, and took the risk on the policies. The creditor insurer, however, remained secondarily liable as between the parties recognized in the case as a "quasi-suretyship" arrangement. *Id.* at 422-23.

²¹⁰See IND. CODE § 27-1-4-15 (1976). The liquidation and priorities law has been changed and is now codified at IND. CODE § 27-9-3-40(3) (Supp. 1980). However, law of this case remains important under the new statute.

²¹¹395 N.E.2d at 425.

²¹²The court also held that the creditor-insurer or surety in this case was not a guaranty association entitled to third priority under the express terms of the law.

14. *Creditors' Rights in Decedents' Estates.*—As a general rule a creditor may not share in the assets of a decedent unless an estate is opened within one year and his claim is filed within five months of the first published notice to creditors.²¹³ In *Anson v. Estate of Anson*,²¹⁴ a creditor who also was a disinherited heir was barred by failure to file his claim within the statutory limits from the time of the first newspaper publication to heirs. By statute, newspaper notice to creditors is authorized, but notice to heirs and devisees must be sent by mail.²¹⁵ The creditor argued that because his claim was filed within five months of the mailed notice to him as an heir his claim should have been allowed. The mailing had been delayed because of the representative's omission and amendment. The court held that the purpose of the notice provision of the probate code applicable to creditors was validly different from the notice provision required to be given heirs and devisees and that newspaper notice to a creditor who was an heir was all that was required to fix time limits for filing his claim as a creditor.²¹⁶ Had the court been completely honest it would have pointed out that the statute is illogical in that there is in fact a greater need to give known creditors mail notice of administration than heirs and devisees.²¹⁷ Another decision, *Rising Sun State Bank v. Fessler*,²¹⁸ denied relief to a physician who sued the personal representative instead of filing a claim with the probate court within the time limits. In the interests of justice, the court should have ordered the case transferred to the proper court²¹⁹ or bound the personal representative on principles of estoppel (which the court held inapplicable under the non-claim statute).

It is a general rule that a person claiming an interest in property

²¹³IND. CODE § 29-1-14-1 (Supp. 1980). Unless administration is commenced within five months of death, real estate may not be sold to pay claims. *Id.* § 29-1-7-15.1 (1976).

²¹⁴399 N.E.2d 432 (Ind. Ct. App. 1980). See also, Falender, *Decedents' Estates and Trusts, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 291 (1981).

²¹⁵IND. CODE § 29-1-7-7 (1976). Fairly interpreted, the statute could be construed as requiring mailed notice to creditors as well as heirs and devisees, but because the requirement of mailing follows a sentence prescribing notice to the latter, it was construed as not requiring notice to creditors. 399 N.E.2d at 434-35.

²¹⁶399 N.E.2d at 435.

²¹⁷Because heirs and devisees are closer to the decedent, they are more likely to know of his death than are creditors. It can be argued that notice by publication to known creditors denies them due process of law. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The court, however, relied upon cases indicating that the legislature could make the non-claim statute commence from a time other than upon notice.

²¹⁸400 N.E.2d 1164 (Ind. Ct. App. 1980).

²¹⁹*Cf.*, IND. R. TR. P. 75(B) applied in *State ex rel. Indiana Life & Health Ins. Guar. Ass'n v. Superior Court of Marion Co.*, 399 N.E.2d 356 (Ind. 1980) to receivership administration.

held by the decedent is not required to file a "claim" with the estate and the interest therein will continue against distributees and successors from the estate.²²⁰ The rule was recognized in *Deetz v. McGowan*²²¹ where a lien upon the debtor's interest in an escrowed fund was obtained by a creditor in proceedings supplemental before the debtor's death. The court held that the proceedings could be continued without the necessity of filing a claim with the estate.²²² The lien thus took precedence over priority claims of other unsecured creditors. Another interesting question of the rights of property claimants to assets of the debtor was posed in *Estate of Williams*.²²³ There, the decedent owned stock in what appeared to be a closely held corporation under an agreement not to sell to others and to sell to the petitioner upon his death. The petitioner filed an action in the estate to enforce this agreement more than five months after the first published notice to creditors. The court determined that the suit did not involve a "claim" within the non-claim statute.²²⁴ However, the court applied another provision of the Indiana Code allowing persons with "any interest in any property in the possession of the personal representative adverse to the estate . . . [to] file, prior to the expiration of five (5) months after the date of the first published notice to creditors, a petition" with the probate court to establish his title.²²⁵ By construing "may" as "must" the court denied relief on the basis that the statute fixed a cut-off date for establishing property rights in probate proceedings. The court was careful to point out that the statute was a bar to proceedings in probate, leaving the inference that rights to the property after the five month period may be pursued in other courts against distrib-

²²⁰*Beach v. Bell*, 139 Ind. 167, 38 N.E. 819 (1894). Heirs and devisees are not required to file claims with the estate. *Rush v. Kelley*, 34 Ind. App. 449, 73 N.E. 130 (1905) (claim of widow for statutory allowance). The probate code expressly provides that proceedings to enforce liens are not subject to the non-claim statute. IND. CODE § 29-1-14-1(e) (Supp. 1980); see *Paidle v. Hestad*, 348 N.E.2d 678 (Ind. Ct. App. 1976).

²²¹403 N.E.2d 1160 (Ind. Ct. App. 1980), see also text accompanying notes 154-55 *supra*.

²²²403 N.E.2d at 1165.

²²³398 N.E.2d 1368 (Ind. Ct. App. 1980).

²²⁴*Id.* at 1369-70. The petitioner in this case apparently was seeking specific performance of the contract to sell the stock. For some unexplained reason, the court indicated that the doctrine of equitable conversion would not apply to such property. On this point, it is clear that specific performance of an agreement to sell or not to sell close corporate stock is generally granted and the doctrine of equitable conversion applies. *E.g.*, *Legro v. Kelley*, 311 Mass. 674, 42 N.E.2d 836 (1942). When a purchaser sought specific performance in such a case, the court properly held that his action was not a "claim" within the non-claim statute. See, *New England Trust Co. v. Spaulding*, 310 Mass. 424, 38 N.E.2d 672 (1941).

²²⁵398 N.E.2d at 1370-71 (applying IND. CODE § 29-1-14-21 (1976)).

utees and successors in administration. In short, the statute frees the probate court from late suits involving title, such as ejectment, replevin, specific performance, rescission and restitution and the like, but without necessarily barring later property remedies against successors and possibly the representative in other courts.²²⁶ Any other interpretation of the case would create chaos with respect to property titles.

In another significant opinion,²²⁷ the supreme court held that a sale of estate property to a personal representative is void unless approved by all interested parties or specifically authorized by will.²²⁸ This decision has an important bearing upon all types of judicial, foreclosure and fiduciary sales, and teaches that purchase of trust property by a fiduciary is improper.

15. *Bankruptcy*.—Worthless assets of a bankrupt may be abandoned by court order after a hearing.²²⁹ Under the Bankruptcy Code of 1978²³⁰ and prior Bankruptcy Rules,²³¹ assets which are scheduled but not administered are deemed abandoned when the estate is closed. This latter principle was overlooked by *Zeigler Building Materials, Inc. v. Parkinson*²³² in which the title of the bankrupt was denied because no order of abandonment had been made.²³³ In *De Later v. Hudak*,²³⁴ the court of appeals apparently was in contempt of the bankruptcy court by enforcing a property division decree based upon a prior, discharged obligation of the wife.²³⁵ Both under the

²²⁶A person claiming an interest in property coming into the possession of the personal representative may recover the property by filing a reclamation petition—at least if it is filed within the five month period. *Isbell v. Heiny*, 218 Ind. 579, 33 N.E.2d 106 (1941). The probate code expressly forbids foreclosure of liens on real estate until after five months from the death of the decedent unless the representative is diligently prosecuting proceedings to sell the property. IND. CODE § 29-1-14-16 (1976).

²²⁷*In re Garwood*, 400 N.E.2d 758 (Ind. 1980).

²²⁸*Id.* at 767.

²²⁹11 U.S.C. § 554(a) (Supp. III 1979).

²³⁰11 U.S.C. § 554(c) (Supp. II 1978).

²³¹Bankruptcy Rule 608 (1973).

²³²398 N.E.2d 1330 (Ind. Ct. App. 1980) (relying on AM. JUR.).

²³³*Id.* at 1332-33. In this case a bankrupt contractor asserted a cause of action by counterclaim against an owner for whom a home was built. A materialman to whom the contractor owed money intervened and claimed any excess fund owing to the contract under IND. CODE § 32-8-3-9 (1976). Before judgment, the contractor took bankruptcy and was discharged. Among its reasons for disallowing the intervening materialman a right to any surplus retainage owing by the owner was the fact that this surplus, if any, belonged to the trustee in bankruptcy unless there was an order from the bankruptcy court abandoning the property. For further discussion of the case see text accompanying note 127 *supra*.

²³⁴399 N.E.2d 832 (Ind. Ct. App. 1980).

²³⁵Prior to the divorce, the wife received a discharge in bankruptcy on a claim which she was later ordered to pay in a divorce decree; no appeal was taken. The

Code²³⁶ and pre-Code²³⁷ law, enforcement of discharged claims is stayed, and the new bankruptcy law makes it clear that a judgment procured by a creditor on a discharged claim is void.

16. *Suretyship*.—Several established suretyship principles were applied in *Gemmer v. Anthony Wayne Bank*.²³⁸ *Gemmer* held that a surety bound upon a negotiable instrument as an indorser under words guaranteeing payment is not entitled to demand or presentment and notice as a condition to liability;²³⁹ the creditor is not required first to bring suit against the principal, absent a condition to this effect in the suretyship contract;²⁴⁰ consideration is not required in the case of a surety on a negotiable promissory note securing a prior obligation of a third party;²⁴¹ and proof that a surety was not to be bound on the instrument must be raised by an affirmative defense.²⁴² *Whipple v. Dickey*²⁴³ recognized that a paying surety may recover reimbursement from his principal.²⁴⁴ As previously noted, other recent cases recognized the rule that a debtor selling lien property usually remains liable as a surety,²⁴⁵ and that action of the lienholder in consenting to the arrangement with the assignee is not such a modification of the contract as to release the surety.²⁴⁶ Consistent with the general rule that a surety's promise is limited to the terms of his bargain, the guarantor of a tenant's obligations to a landlord under a lease was held not liable on a subsequent note and mortgage on the leased premises given to pay for the construction of a building on the mortgaged property.²⁴⁷ The construction of the building was permitted but not required by the lease. Erosion of the old rule making keepers of public funds and their sureties insurers

court held that in proceedings supplemental by the husband to enforce the order, she could not raise the issue of discharge which had been adjudicated by the divorce decree.

²³⁶11 U.S.C. § 524(a)(1) and (2) (Supp. II 1978).

²³⁷Bankruptcy Rule 401 (1973).

²³⁸391 N.E.2d 1185 (Ind. Ct. App. 1979).

²³⁹*Id.* at 1187 (citing IND. CODE § 26-1-3-416(5) (1976) (rule of the Uniform Commercial Code)).

²⁴⁰This is the usual suretyship principle. *Barnes v. Mowry*, 129 Ind. 568, 28 N.E. 535 (1891).

²⁴¹IND. CODE § 26-1-3-408 (1976) (rule of the Commercial Code).

²⁴²As between the immediate parties, parol evidence may be admitted to prove that the surety was not to be bound. *E.g.*, *Hunter v. First Nat'l Bank*, 172 Ind. 62, 87 N.E. 734 (1909); IND. CODE § 26-1-3-306(c) (1976).

²⁴³401 N.E.2d 787 (Ind. Ct. App. 1980).

²⁴⁴The court also held that the creditor was not required to have raised a compulsory counterclaim in a prior proceeding where the obligation did not mature until after the action had commenced.

²⁴⁵See text accompanying note 42 *supra*.

²⁴⁶*Boswell v. Lyon*, 401 N.E.2d 735 (Ind. Ct. App. 1980).

²⁴⁷*Orange Co. v. Brown*, 393 N.E.2d 192 (Ind. Ct. App. 1979).

when the funds are lost or misapplied²⁴⁸ was indicated in a recent case holding a financial officer liable only for bad faith in paying out unauthorized funds.²⁴⁹

17. *Miscellaneous.*—Lobbying activity of financial institutions was reflected in 1980 legislation authorizing variable rate (VRM) and rollover (ROM) mortgages or loans by banks, industrial loan and investment companies, savings banks and credit unions.²⁵⁰ Building and loan associations who were granted VRM authority in 1979 were authorized to make rollover mortgages and loans.²⁵¹ The United States Supreme Court in *Ford Motor Credit Co. v. Milhollin*²⁵² construed the federal truth-in-lending act as not requiring acceleration provisions to be disclosed on the face of a consumer credit sale agreement as a “default, delinquency, or similar charg[e].”²⁵³ In another case,²⁵⁴ the Indiana Court of Appeals found that a “subject to financing” clause in a real estate contract “impose[s] upon the buyers an implied obligation to make a reasonable and good faith effort to satisfy the condition.”²⁵⁵

²⁴⁸The root Indiana decision to this effect is *Halbert v. State ex rel. Bd. of Comm’rs*, 22 Ind. 125 (1864). The case has not been overturned except by statute in some instances.

²⁴⁹*State v. Newbern*, 398 N.E.2d 683 (Ind. Ct. App. 1979).

²⁵⁰Act of Mar. 3, 1980, Pub. L. No. 176, § 1980 Ind. Acts 1544, reflected in IND. CODE §§ 28-1-13.5-1 to -5 (Supp. 1980) (banks); *id.* §§ 28-1-21.5-1, -2, -5 to -7 (building and loan associations); *id.* § 28-6-1-19 (savings banks); *id.* § 28-7-1-17 (credit unions). The law regulates the number and amount of loan changes and requires disclosures to be made to the debtor.

²⁵¹*See* note 1 *supra*.

²⁵²100 S. Ct. 790 (1980) (settling split of authority recognized in *Townsend, 1979 Survey*, *supra* note 132, at 371 and relying upon administrative interpretations by the Federal Reserve Board).

²⁵³100 S. Ct. at 794.

²⁵⁴*Billman v. Hensel*, 391 N.E.2d 671 (Ind. Ct. App. 1979) (purchasers denied recovery of \$1000 deposit where a contract was conditioned on procurement of a conventional mortgage of \$35,000 on a purchase price of \$54,000—purchaser failed to procure the loan mainly because he did not have a sufficient down payment to make up the difference).

²⁵⁵*Id.* at 673.