

XV. Secured Transactions and Creditors' Rights

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Over sixty cases dealing with problems in secured transactions and creditors' rights were handed down in this last year, and in the process the court of appeals has credibly resolved many difficult and complex problems but generously has left some matters for good faith criticism and discussion. Commercial opinions by the supreme court tend to be regarded as carved in stone. Forceful justification for the tendency of that court to shy away from appeals in this area is to be found in *Van Bibber v. Norris*.¹ This decision gave effect to non-waiver clauses in consumer credit transactions which this writer and surely others will agree is an offensive "pig" type agreement seldom approved elsewhere.

Special attention is reserved for decisions recognizing that an entireties owner may be barred by laches from asserting that a conveyance or mortgage by the other, alone, is of no effect;² involving the rule of *Skendzel v. Marshall*,³ especially when the debtor's equity was enhanced or diminished by improvements on one side and waste or other misconduct on the other;⁴ dealing with description of and priorities between security interests in livestock when it becomes commingled;⁵ categorizing leases with option to purchase as secured transactions;⁶ involving transfers by the debtor of property "subject to" a lien on the property;⁷ concerning the right of a debtor to insist that insurance proceeds be applied towards repair or rebuilding of the collateral;⁸ procedure in the sale of goods by artisan lienholders;⁹

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¹419 N.E.2d 115 (Ind. 1981), *discussed in text* accompanying notes 81-82 & 105-120 *infra*.

²Wienke v. Lynch, 407 N.E.2d 280 (Ind. Ct. App. 1980), *discussed in text* accompanying note 14 *infra*.

³261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *petition for writ of mandate denied*, 263 Ind. 337, 330 N.E.2d 747, *aff'd*, 264 Ind. 77, 339 N.E.2d 57 (1975).

⁴See text accompanying notes 27-38 *infra*.

⁵Cargill, Inc. v. Perlich, 418 N.E.2d 274 (Ind. Ct. App. 1981), *discussed in text* accompanying notes 55-59 *infra*. This case involves complex issues of after-acquired collateral and description under the Uniform Commercial Code.

⁶Bolen v. Mid-Continent Refrigerator Co., 411 N.E.2d 1255 (Ind. Ct. App. 1980), *discussed in text* accompanying notes 60-63 *infra*.

⁷First Federal Sav. and Loan Ass'n v. Arena, 406 N.E.2d 1279 (Ind. Ct. App. 1980), *discussed in text* accompanying notes 90-95 *infra*.

⁸Pearson v. First Nat'l Bank of Martinsville, 408 N.E.2d 166 (Ind. Ct. App. 1980), *discussed in text* accompanying notes 121-29 *infra*.

⁹Robertson v. Mattingly, 413 N.E.2d 647 (Ind. Ct. App. 1980), *discussed in text*

the resolution of many important issues under the mechanic's lien statute;¹⁰ the res judicata effect of the allowance of a creditor's claim in bankruptcy in a later suit against the bankrupt's creditor;¹¹ and many more decisions of importance in enforcing security interests, judgments, support orders, and rights in decedent's estates.¹² The 1981 legislature was busy mainly catering to the special interests of the lending industry.¹³

A. Secured Transactions

1. *Land Title and Priority Problems.*—Several decisions relating to title and priorities which may affect secured transactions involving real estate were decided, some very important. A conveyance of entireties property by one spouse was effective to bind the other non-joining party on a theory of laches after the grantee and its successor paid taxes and made improvements for nearly five years in *Wienke v. Lynch*.¹⁴ Constructive knowledge of the entireties ownership appearing from the records showing that one entireties owner had failed to sign the deed did not defeat the right of a purchaser to assert laches against him.¹⁵ According to *Baker v.*

accompanying notes 136-38 *infra*. This case teaches that if a sale is bad, hold it over again.

¹⁰Eight current decisions are discussed in the text commencing at note 139. For a complete review and summary of Indiana law on mechanics' liens, lawyers are advised to consult the 1981 manual on the subject published by the Indiana Continuing Legal Education Forum.

¹¹*Indiana Univ. v. Indiana Bonding & Surety Co.*, 416 N.E.2d 1275 (Ind. Ct. App. 1981), *discussed in* text accompanying notes 229-35 & 243-51 *infra*. The case involves important suretyship issues.

¹²In particular, note *Siskind v. Siskind*, 415 N.E.2d 771 (Ind. Ct. App. 1981), *discussed in* text accompanying notes 191-94 *infra*. This case considers exemption limits on garnishment of wages for support.

¹³Legislation dealing with title problems, conditional sales contracts, statutes of limitations, exemptions, enforcement of support orders and usury and lending authority will be briefly considered in the material which follows.

¹⁴407 N.E.2d 280 (Ind. Ct. App. 1980). The court recognized the rule that husband and wife have no separate interests in entireties property which during their lives may be conveyed by one without the other. A purchaser claiming through entireties ownership shown in the records must take notice of a conveyance by one of the spouses in the event the transfer has been authorized by the non-joining spouse. *Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41 (Ind. Ct. App. 1980) (holding valid a mechanic's lien recorded in name of one spouse), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 489, 503 (1981).

¹⁵The wife conveyed the entireties property without his signature and with the apparent knowledge of the husband. After a later divorce some five years after the conveyance, the husband brought a quiet title action against a purchaser of the grantee who acquired his interest ten months after the original deed. The court held that the time span for measuring laches related to the time the plaintiff learned of his

Chambers,¹⁶ a conveyance to unmarried joint owners without further definitive language presumptively creates equal ownership in common among the grantees upon which a good faith purchaser from one may rely.¹⁷ The case held that a conveyance to "A and B, husband and wife" does not create a survivorship title and that as between the parties, parol evidence is admissible to show unequal ownership and, in this case, that A who paid for the property did not intend to make a gift of any interest to B. Whether the interest is categorized as an easement or as an irrevocable license, the municipal owner of a water main buried deep in the ground pursuant to an unrecorded agreement with the owner was determined in *Industrial Disposal Corp. v. City of East Chicago*¹⁸ to hold an unperfected interest in land which could be cut off by a bona fide purchaser. Unless recorded or discoverable by reasonable observation, the right to use the main constituted an unperfected interest in land. The court of appeals in *Kuchler v. Mark II Homeowners Association*,¹⁹ determined that a "declaration of Covenants and Restrictions" containing restrictive covenants on all property then owned by the developer-declarer and recorded in the miscellaneous records did not bind land previously and later platted where neither the plats nor the conveyances of lots thereunder referred to or incorporated the "declaration." Although the precise basis of the decision is not clear, the case seems to stand for the proposition that restrictions not included by express provision or reference in plats requiring approval of zoning officials will not be binding upon prior or subsequent purchasers of lots without knowledge of the plan.²⁰ An Indiana

claim and when he asserted it—not the time of reliance by the plaintiff. The court also determined that neither the defendant's constructive or actual knowledge of the plaintiff's claim would defeat the defense of laches which depended upon a discretionary balancing by the trial court of an assortment of equities. Finally, it should be noted that the equitable defense of laches was permitted against an action to quiet title which in Indiana is a legal cause of action.

¹⁶398 N.E.2d 1350 (Ind. Ct. App. 1980).

¹⁷The decision is supported by *Brown v. Budd*, 2 Ind. 442 (1850) which was not cited by the court.

¹⁸407 N.E.2d 1203 (Ind. Ct. App. 1980). The case holds in effect that an irrevocable license is an interest in land and is subject to the recording statutes. *Cf. Residents of Green Spring Valley Subdivision v. Town of Newburg*, 168 Ind. App. 621, 344 N.E.2d 312 (1976) (contract to provide sewer services in exchange for landowner's waiver of right to remonstrate against annexation subject to recording statute).

¹⁹412 N.E.2d 298 (Ind. Ct. App. 1980). The restriction at issue in this case provided for a homeowners' association which could levy assessments and a lien upon the various lots.

²⁰*Id.* Two approved plats from which sales were made by the developer contained no reference to the involved restrictions which were recorded in the form of a "declaration" in the miscellaneous records. Hence the restrictions were not a part of

statute²¹ barring unused mineral interests after twenty years unless a claim extending the interest is recorded within two years after the effective date of the act or before the expiration period was upheld as constitutional and effective.²² The decision is important to mortgagees and vendor's lienholders whose claims are similarly barred by a non-claim statute.²³

Priorities between contract purchasers from the same vendor became an oblique issue in *North v. Newlin*,²⁴ where the vendor contracted to sell the same land to successive purchasers. In a suit for specific performance by the first purchaser, the vendor argued that the remedy was improper because he could not convey title already committed by contract to another. The court denied the defense because the second purchaser was not a party, and his superior title was not affirmatively pleaded or proved. Thus an interesting priority question was avoided by a combination of poor pleading and an evasive opinion on the priority issue.²⁵ The court granted specific

the plats approved by zoning officials. Indiana law seems to require plat restrictions to be included in the plat which in turn must be approved by zoning officials. *E.g.*, IND. CODE § 18-7-5-52 (1976) (not cited in opinion). Since purchasers of lots under a plat acquired title limited only by those restrictions incorporated in the approved plat, the case seems to hold that they were not bound by the prior declaration which was not the subject of official approval. However, the court held that lot purchasers under a third plat which incorporated by reference the "declaration" were bound by the restrictions included thereunder.

There also is some question under Indiana law whether a covenant restricting use of an interest in land constitutes a recordable interest unless it relates to a conveyance, reservation, or known development plan. *Compare* *Starz v. Kirsch*, 78 Ind. App. 431, 136 N.E. 36 (1922) (covenant by adjoining owner to limit use of land held personal and not recordable) *with* *Elliot v. Keely*, 121 Ind. App. 529, 98 N.E.2d 374 (1951) (lot purchasers with knowledge bound by general unwritten and unrecorded development plan). In *Kuchler*, the court did not determine whether a developer selling lots with restrictions under a plat could increase the restrictions with respect to later sales through the "declaration" recorded after eleven lots had been sold. The court determined that the later unapproved "declaration" was not enforceable. 412 N.E.2d at 300.

²¹IND. CODE §§ 32-5-11-1 to -8 (1976).

²²*Short v. Texaco, Inc.*, 406 N.E.2d 625 (Ind. 1980), *prob. juris. noted*, 101 S. Ct. 1693 (1981).

²³*E.g.*, *compare* IND. CODE § 32-8-4-1 (1976) *with* IND. R. TR. P. 63.1(A) protecting bona fide purchasers of property after statute of limitations has barred claim unless an extension because of tolling has been recorded. New bar and limitation statutes adopted in 1981 are discussed in the text accompanying notes 130-34 *infra*.

²⁴416 N.E.2d 144 (Ind. Ct. App. 1981).

²⁵In this case, apparently neither purchaser took possession or recorded his contract. The question then arose as to which purchaser should take priority. It is this writer's opinion that the rule "first in time, first in right" should have been applied. If the second purchaser had perfected by possession or recordation in good faith, he should have prevailed and specific performance denied to the first purchaser. *See* Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 234-35 (1974) (discussing Indiana

performance in favor of the first purchaser.²⁶

2. *Conditional Sales Contracts—Real Estate.*—Conditional sales contracts as a device for financing real estate transactions continue to spawn appellate litigation in Indiana. The rule of *Skendzel v. Marshall*²⁷ to the effect that a conditional seller cannot forfeit the conditional buyer who has paid a substantial part of the price (more than a minimal amount) was involved in three cases, one allowing forfeiture, the others requiring the seller to bring judicial foreclosure proceedings as in the case of mortgage foreclosure. In *Ebersold v. Wise*,²⁸ the purchaser had paid over \$9,000 principal on a \$21,000 contract with improvements of \$3,000. Although the purchasers had failed to pay taxes because of misconduct by the seller, the court required judicial foreclosure. Strict forfeiture also was denied in *U. S. Aircraft Financing, Inc. v. Jankovich*²⁹ where the purchasers of a leasehold and buildings had long been in default but had paid \$188,000 on a \$300,000 obligation increased by \$60,000 in waste and \$82,000 in back taxes (forty-two percent of the price thus having been paid). The sale included buildings at an airport which were determined by the court to be personal property. Inasmuch as the seller had sought a remedy against both the buildings and leasehold, the court held that judicial foreclosure of the whole as real estate was permitted under the remedies provisions of Article 9 of the Uniform Commercial Code.³⁰ This law allows a secured party holding security in real and personal property to pursue remedies under the Code with respect to the personal property, or proceed with rights and remedies against both as if real estate. Strict forfeiture against the owner of a shell home was permitted in *Miles Homes of Indiana, Inc. v. Harrah Plumbing and Heating Service Co.*³¹ There the seller of a shell home had taken a mortgage securing the price and, after later defaults, the mortgagor reconveyed to the mortgagee who resold it to the mortgagor on conditional sales contract for \$8,300. The conditional buyer had paid approximately \$1,200 in installments

authorities). In *North*, no evidence was offered establishing the second purchaser as a bona fide purchaser. 416 N.E.2d at 150.

²⁶Since the decree of specific performance would have been worthless if in a later suit the second purchaser established priority, the court in the exercise of sound appellate practice could have returned the case for a new trial.

²⁷261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974), *petition for writ of mandate denied*, 263 Ind. 337, 330 N.E.2d 747, *aff'd*, 264 Ind. 77, 339 N.E.2d 57 (1975).

²⁸412 N.E.2d 802 (Ind. Ct. App. 1980).

²⁹407 N.E.2d 287 (Ind. Ct. App. 1980).

³⁰IND. CODE § 26-1-9-501(4) (1976).

³¹408 N.E.2d 597 (Ind. Ct. App. 1980). This case involved priorities between a conditional seller and the mechanic's lienholder, *discussed in text* accompanying notes 165-73 *infra*.

and made improvements of \$3,600 for which a plumbing contract claimed a mechanic's lien. A decision of the lower court allowing foreclosure of the lien and denying forfeiture to the conditional seller was reversed. The court held that the buyer had forfeited his rights and that the lien of the mechanic rose no higher than the buyer's title.³² The court failed to weigh into the amount paid the value of the improvements which would have given the debtor an equity of about fifty percent.

A unique aspect of the conditional seller's remedies was presented in *Powers v. Ford*³³ where the conditional buyer of a newspaper, including real estate and personal property, fell in default after paying over \$53,000 on a \$60,000 contract. The purchaser surrendered the property to the conditional seller who resold it at a private sale. The vendor then brought suit against the vendee for the difference between the unpaid purchase price and what was realized on the sale—in effect, an action for damages. The court held that since the contract allowed the vendor to retake the property and keep the payments made as liquidated damages, the repossessing vendor was barred from seeking damages or foreclosure because of an election of remedies.³⁴ Since under the rule of *Skendzel v. Marshall* an absconding vendee may be held to the forfeiture provision, in this case the provision which otherwise would not have been enforceable became controlling.³⁵ However, the rule works a hardship in that a defaulting vendee may abandon or turn possession over to the seller and escape a deficiency judgment. The conditional seller in such a case is put to a choice of taking possession and losing all other rights or allowing the property to remain vacant and seeking judicial foreclosure³⁶—a position not unlike that of a lessor who may be bound by an election of remedies when he accepts surrender of the premises from a defaulting tenant.³⁷ Conditional vendors will be quick to avoid this problem by inserting a contractual provision allowing them alternative remedies upon the buyer's default including recovery on the debt by acceleration or as installments become due, judicial foreclosure, specific performance, or the usual forfeiture provisions all without regard to whether or not possession has been abandoned or surrendered to the vendor.³⁸ On the other hand,

³²408 N.E.2d at 600-01.

³³415 N.E.2d 734 (Ind. Ct. App. 1981).

³⁴*Id.* at 736.

³⁵*See id.* at 737 (concurring opinion).

³⁶A similar choice had to be made by a conditional seller of personal property under old common law. *See Igleheart Bros., Inc. v. John Deere Plow Co.*, 114 Ind. App. 182, 51 N.E.2d 498 (1943); *Crute v. LaPorte Discount Corp.*, 89 Ind. App. 573, 167 N.E. 542 (1929).

³⁷*See Grueninger Travel Serv. v. Lake County Trust Co.*, 413 N.E.2d 1034 (Ind. Ct. App. 1980).

³⁸*Cf. id.* (lease allowed repossessing landlord to relet and recover damages).

the supreme court could avoid much worry by treating all conditional sales as mortgages with the usual remedies available to mortgagees.

In other decisions, specific performance of an oral contract was granted to a purchaser who went into possession.³⁹ Parol evidence offered by a conditional seller showing that only a portion of the "\$1,000.00 cash in hand upon the execution of this agreement, the receipt whereof by the Seller is hereby acknowledged," was excluded under the parol evidence rule in *Ebersold v. Wise*⁴⁰ despite a strong dissent.⁴¹

Legislation enacted in 1981 requires conditional buyers of real estate to record the contract or a memorandum thereof with the recorder if a property tax deduction is claimed. A copy must be furnished to the auditor who will assign a separate description and identification number to the parcel being sold under the contract.⁴²

3. *Secured Transactions in Personal Property—Description; After-Acquired Collateral.*—The Uniform Commercial Code permits a security agreement to cover after-acquired collateral if the agreement so provides,⁴³ but after-acquired property so described need not be included in the financing statement.⁴⁴ Unless excluded by its terms, a security agreement automatically covers proceeds which can be traced from the collateral,⁴⁵ but coverage of proceeds in order to be perfected after ten days must be indicated in the financing statement.⁴⁶ The security agreement must describe the collateral,⁴⁷ but the financing statement need only indicate the types of collateral to be covered.⁴⁸ A financing statement may be filed before the

³⁹*Claise v. Bernardi*, 413 N.E.2d 609 (Ind. Ct. App. 1980). A counterclaim by the vendor claiming breach of contract was held drawn into the equitable action and was not triable by jury. *Id.* at 613.

⁴⁰412 N.E.2d 802 (Ind. Ct. App. 1980). *Cf.* *First Fed. Sav. & Loan Ass'n v. Arena*, 406 N.E.2d 1279 (Ind. Ct. App. 1980) (similar misapplication of the parol evidence rule), *discussed in* text accompanying notes 90-95 *infra*.

⁴¹412 N.E.2d at 807 (Garrard, P.J., dissenting).

⁴²IND. CODE §§ 6-1.1-12-1 to -2 (Supp. 1981).

⁴³IND. CODE § 26-1-9-204(3) (1976). The provision does not generally apply to crops becoming growing after one year from the time the security agreement is executed and to consumer goods acquired more than 10 days after value is given. *Id.* § 26-1-9-204(4).

⁴⁴The leading case on the point is *National Cash Register Co. v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963). *Accord*, *American Nat'l Bank & Trust Co. v. National Cash Register Co.*, 473 P.2d 234 (Okla. 1970).

⁴⁵IND. CODE § 26-1-9-306(3) (1976).

⁴⁶*Id.*

⁴⁷*Id.* §§ 26-1-9-203(1)(b), -110.

⁴⁸A description in the financing statement is sufficient if it "contains a statement indicating the types, or describing the terms, [*sic*] of collateral." *Id.* § 26-1-9-402(1) ("items" in engrossed bill).

debtor executes a security agreement upon his collateral⁴⁹ and priorities against subsequent or other secured parties (other than purchase money security interests) who perfect by filing are determined in the order of filing.⁵⁰ Thus, suppose that *SP1* files a financing statement covering *D*'s "livestock" and proceeds. Later, *D* acquires the livestock and gives a non-purchase money security agreement covering the described livestock to *SP2*, who files a financing statement covering proceeds and livestock. Still later, *D* executes a security agreement covering the described livestock to *SP1*. *SP1* will take priority.⁵¹ Reason: *SP1* was the first to file.

However, when a secured party claims a security interest in collateral acquired under but after execution of the security agreement, priorities will depend upon whether the security agreement covers after-acquired property or whether the collateral is proceeds of assets covered by the security agreement. Thus, in the above example, suppose that livestock covered by the original security agreement of *SP1* was sold by *D* and then *D* acquired additional livestock within the description of the security agreement. If *SP1*'s security agreement covers after-acquired collateral of the same description, *SP1* will prevail over *SP2* who does not claim a purchase money security interest.⁵² Likewise, *SP1* will take priority if he can trace proceeds from the original livestock to the new livestock.⁵³ However, if *SP1*'s security agreement does not cover after-acquired livestock and if he is unable to trace proceeds into the new, *SP2* will take the collateral free of any claim of *SP1* providing *SP2*'s security agree-

⁴⁹"A financing statement may be filed before a security agreement is made or a security interest otherwise attaches." *Id.*

⁵⁰*Id.* § 26-1-9-312(5)(a).

⁵¹*E.g.*, *Allis-Chalmers Credit Corp. v. Cheney Inv., Inc.*, 227 Kan. 4, 605 P.2d 525 (1980).

⁵²Since *SP1*'s security agreement covers after-acquired livestock, *SP1* being first to perfect by filing would take priority over *SP2* who does not claim a purchase money security interest therein. *National Cash Register Co. v. Firestone & Co.*, 346 Mass. 255, 191 N.E.2d 471 (1963); *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 200 N.W.2d 1 (1972); *cf.* *First Nat'l Bank of Elkhart County v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203 (1972) (security interest of bank on after-acquired inventory upheld against seller). If *SP2* had taken a purchase money security interest in the after-acquired livestock and perfected within ten days after the debtor acquired possession, *SP2* would take priority. IND. CODE § 26-1-9-312(4) (1976). Livestock, if farm products, is not inventory. *Id.* § 26-1-9-109(3).

⁵³Even if the security agreement of *SP1* does not cover after-acquired property, *SP1* will take priority if the later-acquired livestock was purchased with proceeds from the livestock covered by the security agreement. *Jordan v. Butler*, 182 Neb. 626, 156 N.W.2d 778 (1968) (security interest in cattle traced to cash proceeds and then to cattle purchased with cash and then to cash proceeds); *Baker Production Credit Ass'n v. Long Creek Meat Co.*, 266 Ore. 643, 513 P.2d 1129 (1973) (secured party traced checks received by debtor in sale of cattle). Further compare *Citizens Nat'l Bank v. Mid States Dev. Co.*, 380 N.E.2d 1243 (Ind. Ct. App. 1978) (security interest in inventory and accounts receivable traced to bank setoff).

ment covers the after-acquired livestock.⁵⁴ This very fact situation was presented in *Cargill, Inc. v. Perlich*⁵⁵ with an added twist. The court gave priority to *SP1* on the basis of the evidence which did not clearly establish whether the livestock subsequently disposed of by *SP2* was made up of original (covered by *SP1*'s security agreement) or of subsequently acquired livestock—in this case, hogs. *SP2* had replevined and resold the disputed hogs, but inasmuch as no records were kept, the pigs could not be identified as being those covered by *SP1*'s security agreement or those later acquired. The burden of going forward with the evidence shifted to *SP2* who was best able to identify the hogs seized under his temporary writ of replevin.⁵⁶ The court buttressed its opinion by applying section 9-108 of the Uniform Commercial Code which creates a presumption that after-acquired collateral is deemed to be taken for new value.⁵⁷ This provision, however, was not literally applicable because it applies only in favor of a secured party for new value whose security agreement covers after-acquired collateral.⁵⁸ But the decision does imply

⁵⁴*Tri-County Livestock Auction Co. v. Bank of Madison*, 228 Ga. 325, 185 S.E.2d 393 (1971); *cf. White v. Household Fin. Corp.*, 158 Ind. App. 394, 302 N.E.2d 828 (1973) (different rule for consumer goods).

⁵⁵418 N.E.2d 274 (Ind. Ct. App. 1981).

⁵⁶This rule requiring a converter to go forward with the evidence when proof establishes that he was the last possessor and in the best position to identify the goods or their quality was recognized and applied in *Bottema v. Producers Livestock Ass'n*, 366 N.E.2d 1189 (Ind. Ct. App. 1977). There the court applied a presumption that livestock converted was of the best or highest condition and value. In the *Cargill* case, *SP2* had procured possession of 237 animals under a preliminary replevin proceeding and sold the hogs before the replevin case ultimately decided that *SP1* had priority. Since the collateral was disposed of by a secured party—*SP2*—the burden of proving compliance with sales procedures under the Uniform Commercial Code was placed upon *SP2*. Whether proof established compliance did not appear in the decision, but damages were awarded on the basis of the price received by *SP2* at the sale.

⁵⁷IND. CODE § 26-1-9-108 (1976) which provides:

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

This provision, aimed at protecting inventory and accounts receivable financiers in bankruptcy, has been superceded by a new Bankruptcy Rule allowing the trustee to reach after-acquired collateral as a preference if the secured party's position is enhanced within the ninety day or other preference period. 11 U.S.C. § 547(c)(5) (Supp. III 1979) (applicable to inventory, receivable or proceeds thereof without definition).

⁵⁸*SP1*'s security agreements covered certain hogs as collateral including the "young, products and produce of the collateral," and proceeds. 418 N.E.2d at 277. Its prior financing statement covered "a purchase money interest in all livestock" on *SP2*'s farms and proceeds. *Id.* *SP2*'s security agreements covered certain types of hogs

that in the case of inventory and livestock financing, there is a presumption that replacement inventory or livestock constitutes proceeds when the original financing is for value. If so, the horrid burden of tracing collateral under this kind of financing is assisted by what amounts to a very sensible rule. The court held that *SP1*'s security agreement describing the collateral as a "purchase money security interest in all livestock" was reasonably construed as including livestock securing non-purchase money loans, although it was not broad enough to include after-acquired property.⁵⁹

a. Lease with option to purchase; goods left with seller.—A lease of refrigeration equipment was held to constitute a security agreement upon parol proof that the lessee could buy the equipment for \$1.00 and sales taxes upon the completion of rental payments. The court in *Bolen v. Mid-Continent Refrigerator Co.*⁶⁰ applied the Uniform Commercial Code definition of a security agreement as including a lease when the lessee has an option to become the owner for "no additional consideration or for a nominal consideration."⁶¹ *Bolen* is important because the option agreement was proved by parol—in this case by testimony of the lessor's sales representative and a shipping order.⁶² As a security agreement, the transaction was subject to Article 9 remedies, and the lessor was permitted to recover a deficiency after repossession and resale under its provisions.⁶³

and "all additions, substitutions, replacements, progeny and proceeds" under a prior financing statement covering "all swine now owned or hereafter acquired including any progeny, additions thereto or replacements thereof." *Id.* Thus, although *SP1*'s security agreement and financing statement included proceeds, it is not fair to say that after-acquired hogs were covered either by the security agreement or financing statement. *SP2*'s security agreement and financing statement were sufficiently broad to include both proceeds and after-acquired hogs. *Cf.* *Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026 (1976) (McFadden, C.J., concurring) (agreement giving security interest in cattle and "replacements therefor" created security interest in after-acquired cattle). *SP2* in this case furnished feed for the cattle. Even if *SP2* had retained a security interest in the feed, the fattened cattle would not have been "proceeds." *First Nat'l Bank of Brush v. Bostron*, 564 P.2d 964, 967 (Colo. Ct. App. 1977). The cattle may arguably have been a "product." *See* IND. CODE § 26-1-1-9-315 (1976).

⁵⁹418 N.E.2d at 280.

⁶⁰411 N.E.2d 1255 (Ind. Ct. App. 1980).

⁶¹*Id.* at 1258. The court held that the lessor's inclusion of the lease within its pleading eliminated the necessity of proof of execution absent denial under Indiana Trial Rule 9.2. *Id.* at 1257-58.

⁶²*Id.* at 1258. While cases are divided on the allowance of parol proof of an agreement allowing the lessee to purchase for a nominal or reduced consideration, parol proof to show that a lease was intended as a security interest usually is considered. *Compare In re Walter W. Willis, Inc.*, 313 F.Supp. 1274 (N.D. Ohio 1970), *aff'd*, 440 F.2d 995 (6th Cir. 1971) with *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 626 F.2d 401 (5th Cir. 1980) (oral option permitted absent integration clause in lease).

⁶³411 N.E.2d at 1260.

An interesting problem of the rights of a buyer of goods that are being processed or manufactured by the seller in possession, and what such a buyer must do to protect itself, was presented in *Masson Cheese Corp. v. Valley Lea Dairies, Inc.*⁶⁴ where a manufacturer and seller of cheese had promised to sell its output to a buyer. In this situation the buyer runs several risks, particularly if he has paid for the goods or advanced funds before delivery. By allowing a seller to remain in possession, the transaction is presumptively fraudulent as against the seller's creditors and purchasers under the statute on fraudulent conveyances.⁶⁵ By permitting the seller who is a merchant who deals in goods of that kind to remain in possession, he empowers the seller to dispose of the goods to a buyer in ordinary course of business.⁶⁶ If the transaction is a sale or a contract to sell, the buyer cannot replevin the goods unless he can show grounds for specific performance or is unable to procure cover.⁶⁷ Should the transaction be construed as a security device, unless the buyer takes a security agreement and perfects he will be deferred to lien creditors, buyers, and secured parties under the rules of the Uniform Commercial Code.⁶⁸ In the *Masson Cheese Corp.* decision, the court of appeals found that the buyer had entrusted possession to a merchant and was defeated when the cheese was sold in ordinary course to a second buyer to pay a prior debt.⁶⁹ On this point, the court erred for the reason that the Code specifies that a buyer for an antecedent debt is not a buyer in ordinary course of business.⁷⁰ The concurring opinion chose to treat the transaction as a secured transaction.⁷¹ Since the buyer did not perfect, the subse-

⁶⁴411 N.E.2d 716 (Ind. Ct. App. 1980).

⁶⁵IND. CODE §§ 32-2-1-7 to -8 (1976). Possession by a merchant seller in good faith and for a commercially reasonable time after sale or identification is not fraudulent. *Id.* § 26-1-2-402(2).

⁶⁶*Id.* § 26-1-2-403(2).

⁶⁷Under the Uniform Commercial Code, a buyer who does not get possession usually cannot get possession of the goods unless they are unique or he is unable to procure cover. *See* IND. CODE § 26-1-2-716 (1976). He has a limited right to repossess upon the seller's insolvency. *Id.* §§ 26-1-2-502, -402(1).

⁶⁸*See id.* § 26-1-9-301. If the buyer takes a security interest in the goods to secure delivery, the price, or both, he has all the rights and disabilities of a secured party under Article 9. *See id.* §§ 26-1-2-402(1), (3) (1976). A buyer allowing the seller to remain in possession fits the pattern of the old chattel mortgage arrangement under which the mortgagee allowed the mortgagor-seller to remain in possession. *Seavey v. Walker*, 108 Ind. 78, 9 N.E. 347 (1886). Unless the mortgage was recorded, the transaction was a fraud on creditors. If the buyer holds a security interest, he can recover possession from the seller on default. IND. CODE § 26-1-9-503 (1976).

⁶⁹411 N.E.2d at 719-20.

⁷⁰IND. CODE § 26-1-1-201(9) (1976) providing that a purchase in ordinary course "does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."

⁷¹411 N.E.2d at 720.

quent purchaser was entitled to priority because any purchaser taking possession and giving value (which includes a prior indebtedness) without knowledge will defeat an unperfected security interest.⁷² The court did not consider the alternative that the transaction was presumptively a fraudulent conveyance. The case teaches one important lesson. A buyer allowing the seller to remain in possession for repair, processing or other reasons is wise to take a security agreement from the seller and perfect. As a secured party, he can recover possession on default⁷³ and if he perfects, he will be protected against creditors, secured parties and purchasers who do not qualify as buyers in ordinary course of business and will retain rights to proceeds and after-acquired collateral under the rules of Article 9.⁷⁴

b. Remedies.— A repossessing secured party may resell the collateral at a public or private sale, and if he complies with the requirements of notice and conducts the sale in a commercially reasonable manner, he may recover a deficiency.⁷⁵ A recent decision illustrates proper sale procedure by the secured party where a deficiency was claimed. In *Bolen v. Mid-Continent Refrigerator Co.*,⁷⁶ evidence established a public sale justifying purchase by the lessor-secured party. A valid public sale was shown by publication of the sale in two local newspapers advertising public bidding with notice of the sale to the debtor's attorney who had appeared in the action prior to repossession.⁷⁷ Another decision recognized that a security agreement covering both real and personal property may be foreclosed against the whole as real estate.⁷⁸

In the event that a secured party who has properly repossessed

⁷²IND. CODE § 26-1-9-301(1)(c) (1976).

⁷³See *id.* § 26-1-9-503.

⁷⁴On this problem further compare *In re Double H. Products Corp.*, 462 F.2d 52 (3d Cir. 1972) (United States allowed to recover goods being manufactured for it from seller's trustee in bankruptcy and given priority over secured lender—held United States not required to perfect under federal law applied to dispute).

⁷⁵Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. Ct. App. 1977).

⁷⁶411 N.E.2d 1255 (Ind. Ct. App. 1980), *discussed in text* accompanying notes 60-63 *supra*.

⁷⁷In this case, it was determined that the lessor held a security interest. If this had not been a secured transaction, the reselling lessor apparently would not be allowed to recover a deficiency for future rent—at least in the absence of a lease provision for resale. *Cf. Loudermilk v. Feld Truck Leasing Co.*, 171 Ind. App. 498, 358 N.E.2d 160 (1976) (where lease of trucks provided for repossession without termination of lease and lessor repossessed trucks, holding them available for use by lessee, lessor entitled to rent after repossession), *discussed in Townsend, Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252, 268-69 (1978).

⁷⁸U.S. Aircraft Financing Inc. v. Jankovich, 407 N.E.2d 287 (Ind. Ct. App. 1980), *discussed in text* accompanying note 29 *supra*.

collateral fails to dispose of it in compliance with Code provisions, he may still be allowed to recover a deficiency if he can show that the property was worth less than the amount of the indebtedness.⁷⁹ This rule, however, is qualified in the case of consumer goods. The Code allows the debtor whose assets have been improperly sold to recover not less than the amount of the finance charges plus ten percent of the price or original loan.⁸⁰ This rule was pointed out by the supreme court in *Van Bibber v. Norris*⁸¹ where the court determined that the assignor of a security agreement was a party to what the court on appeal determined to be a proper repossession. However, the court allowed a retrial⁸² for what seemed to be two reasons. One was that the house trailer which was the subject of the sale was not sold within ninety days after repossession as required by the Code where over sixty percent of the purchase price on consumer goods has been paid.⁸³ For this violation and any other disposal requirements of the Code the assignee-secured party was held potentially responsible for the penalty.⁸⁴ Apparently, too, liability would be allowed for a second reason—that the secured party had insolently converted personal, non-secured assets of the debtor in the trailer which was repossessed.⁸⁵ The court did not decide

⁷⁹Hall v. Owen County State Bank, 370 N.E.2d at 928 (secured party in non-consumer transaction failed to give one of debtors notice of sale).

⁸⁰IND. CODE § 26-1-9-507(1) (1976).

⁸¹419 N.E.2d 115 (Ind. 1981).

⁸²The lower court had awarded separate damages against the assignor and assignee of the security agreement on the grounds of an improper repossession which the appellate court found to be proper. This problem is discussed in the text commencing at note 102. After repossession, the assignor-surety had paid off the assignee bank and thereafter disposed of the collateral in a manner which did not appear in the record. The court allowed a retrial of the damages against the assignor since it could not determine the extent to which they were based upon what the court below incorrectly found to be an improper repossession as opposed to an improper disposal of the collateral and other non-security assets of the debtor.

⁸³IND. CODE § 26-1-9-505(1) (1976).

⁸⁴The supreme court seemed to recognize the failure to give notice of the sale to the debtor would be a proper ground for damages. 419 N.E.2d at 127. The court observed that "notice of the resale" had been sent to the debtor by the assignee. *Id.* However, the statement of the facts in the case showed only that a notice of "repossession" had been sent by the assignee, and this to a known incorrect address. The notice could have been found inadequate for the latter reason alone. *See Day v. Schenectady Discount Corp.*, 125 Ariz. 564, 611 P.2d 569 (Ariz. Ct. App. 1980). A general notice of sale is inadequate. *E.g.*, *GEMC Fed. Credit Union v. Shoemaker*, 151 Ga. App. 705, 261 S.E.2d 443 (1979).

⁸⁵Some of the contents had been destroyed in a fire for which it appeared that the assignor may or may not have been responsible. *Cf.* IND. CODE § 26-1-9-207 (1976) (secured party obligated to exercise reasonable care toward collateral in his possession). But others had been given by the assignor to relatives, and the proof established ill feelings of the assignor and the debtor.

whether the debtor could recover punitive damages in addition to the penalty provisions of the Code for improper resale procedures,⁸⁶ or for the independent conversion of debtor's personal assets which were not subject to Code procedures.⁸⁷ Nor did the court determine whether a deficiency judgment could be awarded to a secured party who improperly disposes of consumer goods—an issue which was not provoked by the facts. The court implicitly determined, however, that an assignee-secured party may escape responsibility to the debtor by transferring the function of resale to a paying, assignor-surety.⁸⁸ Whether this responsibility can be delegated to a non-paying surety or independent contractor remains unresolved, but in any event it seems unlikely that the assignee can escape his responsibilities in this way.

4. *Transfers by Mortgagor or Lien Debtor.*—A transferee of property on which there is a mortgage or other lien may promise to pay the indebtedness. In this case the lienholder may enforce his lien, and, as a third-party creditor, the beneficiary may enforce a deficiency against the transferee. The transferring debtor becomes a surety of the transferee who is the primary party. In Indiana, if the

⁸⁶The Code specifically gives the debtor an "option" to recover in conversion or the penalty where the collateral is not disposed of within ninety days of repossession. IND. CODE § 26-1-9-505(1) (1976).

⁸⁷Article 9 provisions of the Uniform Commercial Code come into play with respect to disposal of collateral after default. IND. CODE § 26-1-9-501(1) (1976). When non-security assets are involved, and probably when the secured party converts collateral prior to default, the debtor may proceed with his common law and statutory remedies which are not dealt with by the Code. See Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 319 n.50 (1976).

⁸⁸*Accord*, Community Management Ass'n v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973). *But cf.* Maas v. Allred, 577 P.2d 127 (Utah 1978) (bank responsible for acts of junior lien or title holder to whom possession returned); Western Nat'l Bank v. Harrison, 577 P.2d 635 (Wyo. 1978) (outright transfer to surety held a conversion). It seems that the assignee of the security interest would be responsible for wrongful acts of the non-paying assignor-surety for wrongfully repossessing or reselling the collateral with the assignee's assent. *In re Webb*, 17 U.C.C. Rep. 627 (Bankr. S.D. Ohio 1975); Farmers State Bank v. Otten, 87 S.D. 161, 204 N.W.2d 178 (1973). Some decisions recognize that pursuant to practice, a transfer to the surety-assignor may constitute a sale under the Code, and if there is no compliance with notice and other Code requirements, the debtor may hold both parties for wrongful acts with respect to that sale. *Reeves v. Associates Fin. Serv. Co.*, 197 Neb. 107, 247 N.W.2d 434 (1976). *Cf. In re Ford Motor Co.*, 27 U.C.C. Rep. 1118 (F.T.C. 1979) (involving practice of reselling to assignor as purchaser at a private sale). In *Van Bibber*, had a proper resale with notice to the debtor been made by the assignee to the assignor-surety, the assignee's subsequent disposal of the collateral would have been irrelevant. *Shields v. Bobby Murray Chevrolet, Inc.*, 44 N.C. App. 427, 261 S.E.2d 238, *aff'd*, 300 N.C. 366, 266 S.E.2d 658 (1980). The *Van Bibber* court held that the re-transfer to the assignor-surety was not a sale or disposal, applying IND. CODE § 26-1-9-504(5) (1976).

transferee does not assume the indebtedness, he takes subject to the mortgage or lien, meaning that he assumes no liability on the indebtedness, but the secured property becomes the primary source of payment. In effect then the transferring debtor becomes a surety to the extent of the value of the collateral, but as to any deficiency he remains primarily liable. The transferee may lose the property to the secured party, but he cannot be held for a deficiency absent some breach of duty.⁸⁹ These principles were again recognized in *First Federal Savings and Loan Association v. Arena*,⁹⁰ where the mortgagor contracted to sell mortgaged land to a purchaser who in the contract promised to assume the mortgage. However, when the land was conveyed pursuant to the contract, the deed recited that the conveyance was "subject to" the mortgage. The case decided three important issues. First, it was held that the recital "subject to" in the deed merged the prior contract of the parties and excluded parol evidence as shown by the written contract that the transferee was to assume the mortgage.⁹¹ Second, immediately after the transfer, the mortgagee extended time of payment to the transferee along with the transferee's agreement to pay increased interest.⁹² This, the court held, released the original mortgagor as surety to the extent of the value of the collateral at the time of the release which was presumed to be the amount of the unpaid indebtedness.⁹³

⁸⁹These principles, along with the rule that the transferring lienholder does not escape his liability by transferring the collateral to an assuming buyer without a novation, were carefully considered in *Boswell v. Lyon*, 401 N.E.2d 735 (Ind. Ct. App. 1980), discussed in *Townsend, 1980 Survey, supra* note 14, at 494-95.

⁹⁰406 N.E.2d 1279 (Ind. Ct. App. 1980).

⁹¹*Id.* at 1281-82 & n.1. The decision followed *Wayne Int'l Bldg. & Loan Ass'n v. Beckner*, 191 Ind. 664, 134 N.E. 273 (1922). The weight of authority is to the contrary on this issue since the "subject to" language is a recital and not promissory in character, and proof establishes the consideration for the deed which is usually not integrated in a deed poll. *McDill v. Gunn*, 43 Ind. 315 (1873); *McRae v. Pope*, 311 Mass. 500, 42 N.E.2d 261 (1942); G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* § 256 (2d ed. 1970). On this point, the case probably is wrong.

⁹²406 N.E.2d at 1282. This follows the general rule that a binding agreement altering performances between principal and creditor without the assent of the surety will discharge the latter. For refinements of this rule, see *American States Ins. Co. v. Floyd I. Staub, Inc.*, 370 N.E.2d 989 (Ind. Ct. App. 1977), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 318-19 (1979).

⁹³The court followed *Mutual Benefit Life Ins. Co. v. Lindley*, 97 Ind. App. 575, 183 N.E. 127 (1932), which, in the case of a "subject to mortgage" transfer, held that the transferring mortgagor was a surety to the extent of the value of the collateral, but primarily liable as to any deficiency. If the value of the collateral at the time of the modification of the contract between the mortgages and the transferee is not proved, it is presumed to be the amount of the unpaid debt secured. *Id.* at 585, 183 N.E. at 130. In *Arena*, the issue of the value of the collateral was not raised in the appeal, which affirmed the decision below completely discharging the surety-transferring mortgagor.

Third, the original mortgage included a provision anticipating transfers by the mortgagor to the effect that the mortgagee "may, without notice to the Mortgagor, deal with . . . successors . . . in the same manner as with the Mortgagor, and may . . . extend time for payment . . . without discharging . . . the debt"⁹⁴ This waiver of suretyship defenses was interpreted as applicable only to extensions of time. Inasmuch as the mortgagee and the transferee had increased the interest rate on unpaid principal, the waiver was ineffective.⁹⁵ The binding agreement modifying the transferee's duty to pay interest discharged the obligation of the mortgagor to the extent that he was a surety.

Suppose that a mortgagor contracts to sell the mortgaged land to a purchaser on conditional sales contract. The purchaser agrees to make the installment payments under the mortgage, but fails to do so. Does the mortgagor-seller have a remedy against the purchaser? In *Claise v. Bernardi*,⁹⁶ the court held that the mortgagor-seller's remedy was limited to his contract damages. He could not recover in tort on a theory that the purchaser interfered with his contractual relation with the mortgagee, thereby injuring his credit.⁹⁷

5. *Acceleration Provisions.*—Acceleration provisions in lien and loan agreements giving creditors the option of accelerating the remaining payments when a default occurs are tempered by principles of equity barring acceleration when the creditor accepts late payments or performances under the contract after a default. The creditor is estopped or deemed to have waived his right to enforce acceleration for the original and like defaults until he notifies the debtor of his intent to reinstate his option and gives the debtor a reasonable time in which to bring himself current.⁹⁸ The rule was

⁹⁴406 N.E.2d at 1283.

⁹⁵*Id.* For other decisions construing advance waiver of surety defenses, see *Holmes v. Rushville Prod. Credit Ass'n*, 170 Ind. App. 509, 353 N.E.2d 509, *modified on other grounds*, 170 Ind. App. 518, 357 N.E.2d 734 (1976), *transfer denied*, 267 Ind. 454, 371 N.E.2d 379 (1978) (advance consent to "any partial release of collateral" applied to proceeds of collateral); *White v. Household Fin. Corp.*, 158 Ind. App. 394, 302 N.E.2d 828 (1973) (consent to release of collateral did not apply to release of insurance proceeds).

⁹⁶413 N.E.2d 609 (Ind. Ct. App. 1980).

⁹⁷The case raises interesting questions of the surety-transferor's remedies against an assuming transferee who fails to pay lien installments. If the transferor pays installments, he may recover reimbursement. If he pays in full, he may claim subrogation and accelerate the payments. He may not request the mortgagee to accelerate and foreclose under IND. CODE §§ 34-1-55-1, -2 (1976) (so-called rule of *Paine v. Packard*). *Fensler v. Prather*, 43 Ind. 119 (1873) (holding surety must have been such at inception of the contract). However, he may be wise to retain a separate lien or sell on conditional sale so that he may fully protect himself on default as in this case.

⁹⁸In general, see cases discussed in *Townsend, 1980 Survey, supra* note 14, at 497; *Townsend, 1977 Survey, supra* note 77, at 261; *Townsend, 1976 Survey, supra* note 87 at 315; *Townsend, Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 231 (1973).

again recognized in *U.S. Aircraft Financing, Inc. v. Jankovich*⁹⁹ involving a defaulting buyer under a conditional sales contract. Acceptance of late payments, however, was held not to deny the conditional seller the right of acceleration for other and different defaults.¹⁰⁰

Many "pig" type contracts and security agreements contain provisions to the effect that acceptance of late payments shall not estop the creditor from accelerating the indebtedness. Generally, the Indiana cases have recognized in effect that these types of contractual provisions negate the right of the parties to be governed by rules of fair play in the future and therefore are ineffective.¹⁰¹ However, the Indiana Supreme Court in *Van Bibber v. Norris*¹⁰² in overruling a careful decision by the court of appeals¹⁰³ and the court below held that contractual provisions of this sort may be rammed down the consumer's throat—even in a case where late payments were accepted fifty-seven times by a creditor from a debtor who had paid seventy percent of the purchase price. The court also held in effect that even supposing that late payments were waived by the creditor's conduct, other grounds for default were not.¹⁰⁴ One of these was the right reserved in the security agreement to declare a default under an insecurity clause.¹⁰⁵ In applying this provision, the court reweighed the evidence on appeal¹⁰⁶ and found that the acceleration was exercised in good faith despite evidence to the contrary. Another ground for default was a provision allowing optional acceleration in the case of transfer or an encumbrance—found in this

⁹⁹407 N.E.2d 287 (Ind. Ct. App. 1980).

¹⁰⁰*Id.* The court determined that while a waiver of late payments may have survived a letter addressed to the wrong debtor, acceleration for failure to pay taxes and insure the property provided alternative grounds for acceleration. The case did not indicate whether or not these breaches occurred before or after the acceptance of late payments. *Id.* at 292.

¹⁰¹See authorities cited at note 117 *infra*.

¹⁰²419 N.E.2d 115 (Ind. 1981).

¹⁰³404 N.E.2d 1365 (Ind. Ct. App.), *on rehearing*, 408 N.E.2d 1302 (Ind. Ct. App. 1980), *rev'd in part*, 419 N.E.2d 115 (Ind. 1981). This case was discussed in Townsend, 1980 *Survey*, *supra* note 14, at 496-98.

¹⁰⁴419 N.E.2d at 125. *Cf.* *U.S. Aircraft Financing, Inc. v. Jankovich*, 407 N.E.2d 287 (Ind. Ct. App. 1980) holding in effect that waiver of acceleration by acceptance of late payments did not constitute waiver of other grounds for acceleration.

¹⁰⁵Under this provision, the secured party had the option to accelerate "for any reason deeming itself insecure." This provision must be exercised in good faith, and the burden of proving bad faith is upon the debtor. IND. CODE § 26-1-1-208 (1976).

¹⁰⁶The court reweighed the evidence upon appeal and refused to consider all the circumstances against which the assignee bank's faith was to be determined, including the fact that no effort was made to contact the debtor in jail before the repossession. The court indulged in the presumption that if a debtor is in jail, the debt is impaired, leading to the untenable position that the bank had no duty to make further inquiry as to the whole circumstances. In this respect, the court erred. *See Mineika v. Union Nat'l Bank*, 30 Ill. App. 3d 277, 332 N.E.2d 504 (1975).

case from the fact that a mobile home park held a lien on the trailer for failure of the debtor to pay overdue rent.¹⁰⁷ The court failed to examine the many problems raised by "due on sale" clauses which have an abusive effect on debtors who need to sell or further encumber the property.¹⁰⁸

Van Bibber v. Norris, in upholding the anti-waiver clause, is most unfortunate for several important reasons. First, the judge in effect overruled his own opinion in an earlier case without citing or considering it.¹⁰⁹ Second, the court failed fully to consider the oppressive character of anti-waiver or anti-estoppel clauses in contracts. These are seldom, if ever, fairly bargained, and are included as boiler plate in agreements prepared or drafted by the lending industry.¹¹⁰ Third, the decision affects a whole line of cases which have ignored or invalidated such provisions in other contractual contexts.¹¹¹ Thinking men everywhere know that if *A* and *B* contract with each other they cannot agree not to bargain in the future—nor should they be able to fix a new statute of frauds or parol evidence rule for later, non-contemporaneous agreements and dealings. Fourth,

¹⁰⁷"Sale or encumbrance" of the collateral was made a ground for declaring acceleration. The court failed to consider whether or not this provision, drafted by the lender, applied only when the sale or encumbrance is made with fraudulent purpose or intent to deprive the lender of its property.

¹⁰⁸The Uniform Commercial Code permits voluntary or involuntary transfers of the debtor's interest notwithstanding a provision prohibiting transfer or making the transfer a default. Some scant authority has held that optional acceleration on transfer is permitted. *Production Credit Ass'n v. Nowatzki*, 90 Wis. 2d 344, 280 N.W.2d 118 (1979). Other decisions require the so-called "due on sale" clauses to be exercised in good faith and not for purposes of obtaining a greater rate of interest. *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979); *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978); *Continental Fed. Sav. & Loan Ass'n v. Fetter*, 564 P.2d 1013 (Okla. 1977). See generally 47 MISS. L. J. 331 (1976).

¹⁰⁹*Lafayette Car Wash, Inc. v. Boes*, 258 Ind. 498, 502, 282 N.E.2d 837, 840 (1972) (under lease with anti-waiver clause, court stated that the acceptance of a late payment of rent would have waived the right to terminate the lease, and "if lessors' past acceptance of late rent payments had induced the vendees to neglect to pay the rent . . . when otherwise they would not have neglected to do so, lessors would be estopped from terminating the lease without notice on the grounds of late payment").

¹¹⁰This is a point of which the court should take judicial notice. See, e.g., ICLEF & IND. STATE B. ASS'N, UNIFORM COMMERCIAL CODE FORMS, Forms 1-1 & 1-2 (1974).

¹¹¹E.g., *Oxford Dev. Corp. v. Rausauer Builders, Inc.*, 158 Ind. App. 622, 304 N.E.2d 211 (1973) (contract prohibiting charge for "extras" unless agreed to in writing held waived by subsequent conduct); *Foltz v. Evans*, 113 Ind. App. 596, 49 N.E.2d 358 (1943) (contract stipulating that any modification must be in writing held to be modified verbally). Anti-waiver clauses have been held ineffective in conditional sales contracts of real estate. E.g., *Nelson v. Butcher*, 170 Ind. App. 101, 352 N.E.2d 106 (1976); *Pierce v. Yochum*, 164 Ind. App. 443, 330 N.E.2d 102 (1975). Likewise, such clauses have been held ineffective in the case of leases. *Rembold Motors, Inc. v. Bonfield*, 155 Ind. App. 422, 293 N.E.2d 210 (1973).

such clauses are brutal to the home owner who has given a security interest in a trailer or mobile home—which was the fact in this case. Since under the Commercial Code this type of home owner can be dispossessed and foreclosed in a matter of a few days, the result is almost unthinkable in a humanitarian society.¹¹² Fifth, there is some question whether or not the repossession of a trailer-home, planned and executed while the owner is known to be in jail, is carried out without a “breach of the peace.”¹¹³ Had the owner been handcuffed by a third party while the home was repossessed by the lender, it stretches technicality to say that the repossession was peaceable—certainly not in good faith. Sixth, anti-waiver clauses will enable unscrupulous lenders to trick and coerce unsuspecting consumers to refinance at higher rates of interest—especially given the current situation in which interest rates are out of control. This has been the effect of “due on sale” clauses where the buyer is forced to refinance at higher rates.¹¹⁴ Seventh, it stretches the imagination to suggest that a legitimate financial institution after continually accepting late payments fifty-seven times after seventy percent of the price had been paid, would in good faith accelerate and in a sneaky manner repossess the jailed debtor’s home without giving him notice and an opportunity to bring himself current as under the precise circumstances of the case. All transactions under the Code are governed by a standard of good faith.¹¹⁵ The bad faith in

¹¹²Foreclosure sale under a mortgage on real estate is prohibited until three months after the complaint is filed. IND. CODE § 32-8-16-1 (1976). No time limitations upon resale of goods or fixtures is fixed by the Uniform Commercial Code, except that the time must be commercially reasonable. IND. CODE § 26-1-9-504(3) (1976). However, the 1980 legislature accorded trailer homes the same exemption from execution as home owners. *Id.* § 34-2-28-1(a) (Supp. 1981).

¹¹³Repossession by self-help is permitted if completed “without a breach of the peace.” *Id.* § 26-1-9-503 (1976). The fact that the debtor is in jail has been held insufficient to show a breach of the peace. *Helfinstine v. Martin*, 561 P.2d 951 (Okla. 1977). The duty of the secured party when the debtor is known to be incarcerated may, however, be increased. *Cf.* IND. CODE § 26-1-9-504(3) (1976) (“every aspect of the disposition . . . must be commercially reasonable”).

¹¹⁴*See* note 108 *supra*.

¹¹⁵IND. CODE § 26-1-1-102(3) (1976) (obligation of good faith may not be disclaimed by agreement); *id.* § 26-1-1-203 (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”) The requirement of good faith applies to all accelerations. *See Brown v. Avemco Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979). The court in *Van Bibber* determined that an assignee-banker is not a “merchant” within the meaning of Article 2 of the Code, which it held inapplicable to an assignee of the seller. Under Article 2, a merchant’s standard of good faith includes the “observance of reasonable commercial standards of fair dealing in the trade” in addition to honesty in fact. *See* IND. CODE § 26-1-2-103(b) (1976). Why a banker should be held to a lesser standard than a merchant on financial matters growing out of a sale was left a mystery by the court.

this case was sufficiently shown to support the lower court award of actual and probably punitive damages.¹¹⁶ Eighth, the decision will encourage lenders and other contracting parties to view the decision as opening the door to anti-waiver clauses and other provisions eliminating defenses arising out of subsequent conduct. This will put the ethical lawyer in a serious dilemma—to protect his client on one side and to draft a fair bargain on the other. Ninth, although the decision recognized a split of authority under the Commercial Code,¹¹⁷ it failed to deal with the import of the Uniform Consumer Credit Code which recognizes a special rule of unconscionability to be applied in consumer transactions.¹¹⁸ In fact, *Van Bibber* is supported by only one decision under the Commercial Code applying the anti-waiver clause against consumers, and that decision has been severely criticized by dissenting and disagreeing judges there.¹¹⁹ Finally, if the court had outlawed the anti-waiver clause, no serious injury would flow to lenders. Balanced against the relative hurt to borrowers who find that they suddenly lose their property and credit standing because of an unsuspected repossession, the case makes no sense. Creditors may easily protect themselves by accepting late payments with a warning or by giving the debtor notice and a reasonable opportunity to bring himself current.¹²⁰

¹¹⁶See *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 164 Ind. App. 598, 330 N.E.2d 785 (1975), discussed in *Townsend, 1976 Survey, supra* note 87, at 321; *Nevada Nat'l Bank v. Huff*, 582 P.2d 364 (Nev. 1978). However, punitive damages were properly denied where the fact-finder had found that the creditor was guilty of only a mistake in the law. *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232 (Minn. 1980).

¹¹⁷Several decisions have denied effect to anti-waiver clauses in consumer transactions. *Ford Motor Credit Co. v. Waters*, 273 So.2d 96 (Fla. 1973) (creditor estopped from asserting default); *Vines v. Citizens Trust Bank*, 146 Ga. App. 845, 247 S.E.2d 528 (1978) (separate notification to bring debtor current waived); *Fontaine v. Industrial Nat'l Bank*, 111 R.I. 6, 298 A.2d 521 (1973) (unconscionable). Only one decision was found upholding the anti-waiver provision in a consumer transaction. This was *McAllister v. Langford Investigators, Inc.*, 380 So.2d 299, 300 (Ala. Civ. App. 1980) (disapproving *Hale v. Ford Motor Credit Co.*, 374 So.2d 849 (Ala. 1979) (three judges dissenting)). Anti-waiver clauses have been upheld in the case of commercial loans in Illinois and Kentucky, neither of which involved self-help repossession. *General Grocer Co. v. Bachar*, 51 Ill. App. 3d 907, 365 N.E.2d 1106 (1977); *Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc.*, 424 S.W.2d 409 (Ky. 1968).

¹¹⁸IND. CODE § 24-4.5-5-108 (1976). Under this provision, official comments make it clear that the standard of conscionability is to be determined by conduct acceptable between a businessman and a consumer—not between merchants. UNIFORM CONSUMER CREDIT CODE § 5.108, Comment 1.

¹¹⁹See *Hale v. Ford Motor Credit Co.*, 374 So.2d 849 (Ala. 1979).

¹²⁰See *Wade v. Ford Motor Credit Co.*, 455 F. Supp. 147, 24 U.C.C. Rep. 1040 (E.D. Mo. 1978) where the creditor gave continual reminders to the debtor to pay up. The anti-waiver clause was not needed to support a finding of no waiver or estoppel.

As noted below, the court of appeals has indicated that destruction of the collateral may have the effect of accelerating the indebtedness when insurance proceeds covering the loss and payable to them as their interests appear are received. *Pearson v. First National Bank*¹²¹ held that the mortgagee could keep and apply the proceeds to the indebtedness as it became due unless the debtor could show bad faith by the lienholder or some equitable basis entitling the debtor to rebuild or refurbish the property with the proceeds.¹²²

6. *Right of Lien Debtor to Apply Insurance Funds Towards Repair of the Collateral.*—Suppose that a lien debtor under a mortgage or security agreement procures property insurance covering both the debtor and the lienholder when neither the policy nor the lien contract specify how the proceeds are to be applied. Upon damage or destruction of the collateral, may the debtor insist that the proceeds be used to repair or replace the collateral? May the lienholder insist upon a refinancing at a higher rate of interest? In *Pearson v. First National Bank*¹²³ the court construed a mortgage provision requiring insurance payable in favor of the mortgagees “as their interest may appear” as allowing the bank to apply the insurance proceeds to the indebtedness as it becomes due.¹²⁴ After a careful review of the few decisions on the point in other states, the court denied relief to the mortgagor because of failure to prove lack of good faith¹²⁵ on the part of the mortgagee or other grounds requiring application of the funds towards rehabilitation of the property. The case indicated that relevant proof would have included evidence of whether the debtor was current upon the indebtedness;¹²⁶ facts showing estoppel by the bank when reconstruction was com-

¹²¹408 N.E.2d 166 (Ind. Ct. App. 1980).

¹²²*Id.* at 170-71.

¹²³*Id.* at 166.

¹²⁴*Id.* at 170. Prior Indiana law was to the effect that if the indebtedness is overdue or accelerated, the lienholder may insist that insurance proceeds be applied first towards the indebtedness. *Commercial Union Fire Ins. Co. v. Wade*, 103 Ind. App. 461, 8 N.E.2d 1009 (1937).

¹²⁵408 N.E.2d at 171. The court cited *Schoolcraft v. Ross*, 81 Cal. App. 3d 75, 146 Cal. Rptr. 57 (1978) holding that an express provision giving the lienholder the option of applying the proceeds to the balance of the debt or for reconstruction carried an implied condition that the option be exercised in good faith. This seemed to be construed to mean that if the lienholder's security remained unimpaired either before or after the reconstruction, refusal to allow the proceeds to be used for this purpose would be in bad faith. In the *Pearson* case no evidence was introduced on the value of the collateral either before or after the projected construction. 408 N.E.2d at 171.

¹²⁶408 N.E.2d at 170. *Accord*, *Cottman Co. v. Continental Trust Co.*, 169 Md. 595, 182 A. 551 (1936).

menced after the fire; and the amount of insurance proceeds paid or credited to the debtor, and how or if the mortgage was retired.¹²⁷ If the debtor was in effect seeking specific performance of an implied obligation to allow application of the proceeds toward rehabilitation of the collateral, the court was correct in requiring proof of damages or that damages would not have afforded an adequate remedy.¹²⁸ The case thus does not subscribe to the unreasonable view that a mortgage or security agreement silent upon the subject will allow the lienholder to accelerate and apply insurance proceeds payable to both parties toward the debt. It indicates that the lien debtor may obtain relief if he is not in default and can show damages or a need for specific equitable relief. Most policy provisions give the insured the option to repair or pay damages, and terms of mortgages or security agreements carefully drafted by lienholders give the latter the option of accelerating and application towards the total debt.¹²⁹

7. *Mortgage Foreclosure—Statute of Limitations.*—New statutes of limitations and bars or non-claim provisions with respect to real estate mortgages were enacted in 1981. Title lawyers are advised that mortgages and vendors' liens created on September 1, 1982 and thereafter shall expire ten years after the maturity date of the last installment as shown of record (prior thereto, twenty years).¹³⁰ The statute of limitations on mortgages continues to be ten years,

¹²⁷408 N.E.2d at 170-71.

¹²⁸*Id.* at 170. The court seemed to assume that if the debtor could have refinanced reconstruction at a lower rate of interest elsewhere, the debtor suffered no damages from the mortgagee's refusal to make the funds available for repair. But if he was forced to pay an increased rate of interest, it seems that he would be entitled to damages. See *Doddridge v. American Trust Sav. Bank*, 98 Ind. App. 334, 189 N.E. 165 (1934). While equity will not generally grant specific performance of promises to lend money, it will do so where the plaintiff can show that money is not available or that he would suffer undue hardship. See *Standard Land Corp. v. Bogardus*, 154 Ind. App. 283, 289 N.E.2d 803 (1972). The court thus seems to leave the door open to damages or equitable relief depending upon the circumstances. It would be unfair to require the lienholder to suffer repairs if his security will be or continue to be impaired by the improvement. Thus if repairs would leave his indebtedness in a less secured state than before the loss, allowing the repairs would be in the nature of waste. *Cf. Finley v. Chain*, 374 N.E.2d 67 (Ind. Ct. App. 1978) (waste measured by extent of impairment of security below amount of debt). On the other hand, if the debtor finds it difficult to obtain financing for needed repairs so that he will be unable to have a home or to continue a business, equities predominate in his favor.

¹²⁹*Cf. Savings Soc'y Commercial Bank v. Michigan Mut. Liab. Co.*, 118 Ohio App. 297, 194 N.E.2d 435 (1963) (election by insurer—notice to debtor sufficient).

¹³⁰IND. CODE § 32-8-4-1 (Supp. 1981). This statute is a bar to recovery and will protect good faith purchasers relying upon the record after the time period has expired despite any tolling which is not shown of record. See *Citizens Bank v. Mergenthaler Linotype Co.*, 216 Ind. 573, 586, 25 N.E.2d 444, 450 (1940).

presumably from the time each installment becomes due,¹³¹ but the limitation for suing upon the written money debt is changed from ten to six years after August 31, 1982.¹³² The effect will be to restore the old Indiana rule recognizing two causes of action for limitations purposes: one on the debt and another on the security.¹³³ The catch-all limitation period has also been reduced by the same legislation from fifteen to ten years commencing on September 1, 1982.¹³⁴

B. Creditors' Rights

1. *Artisans' Liens.*—An artisan with a possessory lien for labor, materials, and a storage lien upon a motor vehicle may sell the property under statutory provisions allowing the sale at public auction after thirty days, the insertion of two weekly advertisements in a newspaper, and the sending of a registered mail notice to the owner at his last known address indicating that the property will be sold at public sale within fifteen days of mailing.¹³⁵ In *Robertson v. Mattingly*¹³⁶ an artisan who had furnished repairs and storage for over two years sold the vehicle to a purchaser without compliance with the statute. So that a certificate of title could be obtained,¹³⁷ the artisan later resold it to the original buyer, this time after compliance with statutory procedures. The buyer then procured a new certificate of title and the car was ultimately sold to a successive seventh purchaser from whom the original owner sought recovery. The sale was upheld upon proof of compliance with the statute and that notice to the owner was timely sent (though not necessarily received).¹³⁸ The case mainly teaches that strict compli-

¹³¹IND. CODE § 34-1-2-2(6) (Supp. 1981).

¹³²*Id.* § 34-1-3-2(5). A special rule applies to written contracts to pay money between September 19, 1981 and September 1, 1982 where the limitation is fixed at ten years, and contracts executed before September 19, 1981 are enforceable only under the limitations period in effect at the time of execution.

¹³³*Yarlott v. Brown*, 192 Ind. 648, 138 N.E. 17 (1923).

¹³⁴IND. CODE § 34-1-2-3 (Supp. 1981). No provision applies to security interests in personal property, but "chattel mortgages" are excluded from real estate mortgage provisions of the new law. *Id.* § 34-1-2-2(b). This exclusion indicates that the statute does not apply to liens on fixtures and personal property.

¹³⁵IND. CODE § 9-9-5-6 (1976). Another statute also recognizes the artisans' liens and provides for judicial foreclosure one year from the time of recordation of notice of the lien. *Id.* § 32-8-31-5.

¹³⁶413 N.E.2d 647 (Ind. Ct. App. 1980).

¹³⁷IND. CODE § 9-9-5-6 (1976) (providing for the issuance of a new certificate of title on the artisan's "certificate" showing compliance with the sales provision of the statute).

¹³⁸The court also emphasized that an agent of the owner was notified of the sale, and showed concern for his long delay in asserting his rights. The court did not decide an issue of the statute of limitations.

ance with sales procedures will pay off to the artisan who forecloses, and that if a bad sale is made, it can be corrected by a complying resale.

2. *Mechanics' Liens—General Duties of Parties; Punitive Damages.*—Parties to a construction contract are expected to perform their obligations. If they do not, an intentional breach of contract or duty may result in punitive damages, as reflected in recent decisions. An owner, however, has no duty to pay a subcontractor without a mechanic's lien. In this connection, *Harper v. Goodin*¹³⁹ held that a sub filing a mechanic's lien after the sixty day required period for asserting the lien and then refusing to release it could be held liable in a common law action for disparagement of title.¹⁴⁰ Damages included the cost of attorney's fees in clearing title and punitive damages as well.¹⁴¹ An owner or contractor who wrongfully withholds retainages intentionally causing injuries to the obligee's credit may be held liable for punitive damages under a ruling in *Southern, School Buildings, Inc. v. Loew Electric, Inc.*¹⁴² This kind of liability was also extended to a contractor intentionally breaching his contract.¹⁴³

a. *Notice to occupying owner by subcontractors.*—Current provisions of the mechanic's lien statute require subcontractors claiming a lien against an occupying owner of a single or double dwelling to give him written notice of intent to claim the lien within thirty days after performance commences (sixty days in the case of new construction).¹⁴⁴ In *Henderlong Lumber Co. v. Zinn*,¹⁴⁵ a supplier gave the notice a few months after the time had expired. The supplier claimed a lien for only those materials furnished after the

¹³⁹409 N.E.2d 1129 (Ind. Ct. App. 1980).

¹⁴⁰The court recognized that the mechanic wrongfully refusing to release the lien could be held liable for a statutory penalty as provided by statute. IND. CODE §§ 32-8-1-1 to -2 (1976). The statutory remedy was not exclusive.

¹⁴¹The mechanic defended on the ground that his refusal to release the lien was based on advice of counsel, but the defense was held not to be established by proof that the disparagement was made with knowledge that the lien was ineffective. 409 N.E.2d at 1132, 1134-35.

¹⁴²407 N.E.2d 240 (Ind. Ct. App. 1980) (refusal to submit instruction on punitive damages prejudicial error justifying new trial).

¹⁴³*F.D. Borkholder Co., Inc. v. Sandock*, 413 N.E.2d 567 (Ind. 1980) (building constructed in latent deviation from plans); see *Harper v. Goodin*, 409 N.E.2d 1129 (Ind. Ct. App. 1980); cf. *Orto v. Jackson*, 413 N.E.2d 273 (Ind. Ct. App. 1980) (owner allowed damages for aggravation and inconvenience in counterclaim to foreclosure action and this was not barred by owner's settlement with subcontractor for the same defect).

¹⁴⁴IND. CODE § 32-8-3-1 (Supp. 1981). Prior to its amendment, the statute required the notice to be sent within five and fourteen days, respectively. See Act of March 16, 1963, ch. 376, § 1, 1963 Ind. Acts 963.

¹⁴⁵406 N.E.2d 310 (Ind. Ct. App. 1980).

notice had been given. The court held that since the notice had not been given *within* the statutory time from *commencement*, the supplier could not meet the condition of the lien statute.¹⁴⁶ An attempt to argue that deliveries were made under separate contracts occurring after the notice had been given was rejected as being raised for the first time on appeal. Had the argument been supported by proof and timely made, it would have found support in a dubious line of cases refusing to tack successive performances under separate contracts on the same construction project.¹⁴⁷

b. *Recordation of notice.*—A mechanic claiming a lien upon real estate must record notice of his intent to claim the lien within sixty days after the last performance.¹⁴⁸ The lien then relates back to the time the work first commenced.¹⁴⁹ If the notice is not recorded within the prescribed time, the lien and the accompanying right to recover attorney's fees¹⁵⁰ are lost.¹⁵¹ Two decisions rejected liens for failure of the recorded notice to meet statutory requirements. In *Froberg v. Northern Indiana Construction, Inc.*,¹⁵² the court denied attorney's fees to a prime contractor whose notice described a tract of land other than that on which the work was performed.¹⁵³ *Suburban Electric Co. v. Lake County Trust Co.*¹⁵⁴ held that designation of a general partner by name as owner-contractor in the notice recorded by a materialman was inadequate to bind real estate held of record in the name of the partnership.¹⁵⁵ This technical result was justified on the theory that the notice provision was designed to inform the owner and subsequent purchasers.¹⁵⁶ A notice which would not in fact give accurate notice to subsequent purchasers did not meet the requirements of the statute—even though the record in the case did

¹⁴⁶*Id.* at 312.

¹⁴⁷Thus, if a prime contractor or subcontractor renders performances under separate contracts upon a single construction project, it has been held that the notice of the lien must be recorded within sixty days of the last performance for each contract. Tacking is not permitted. *See Saint Joseph's College v. Morrison, Inc.*, 158 Ind. App. 272, 302 N.E.2d 865 (1973), *discussed in Townsend, 1974 Survey, supra* note 25, at 253 (1974). Logically, this highly questionable interpretation of the law would require notices by subcontractors to the owner within the thirty or sixty day period from the commencement of performances under each separate contract.

¹⁴⁸IND. CODE § 32-8-3-3 (1976).

¹⁴⁹*Id.* § 32-8-3-5.

¹⁵⁰*See id.* § 32-8-3-14.

¹⁵¹*See id.* § 32-8-3-3.

¹⁵²416 N.E.2d 451 (Ind. Ct. App. 1980). The prime contractor, however, recovered upon his contract with the owner.

¹⁵³*Id.* at 454.

¹⁵⁴412 N.E.2d 295 (Ind. Ct. App. 1980).

¹⁵⁵*Id.* at 297.

¹⁵⁶*Id.*

not show prejudice to a third party who acquired title a short time after the defective notice was recorded.¹⁵⁷

c. *Priorities*.—A lien or property interest properly perfected will, as a general rule, take priority over a mechanic who later commences construction work on the property.¹⁵⁸ An exception to this rule is recognized when proof establishes that the prior lienholder has actively consented to the construction improvement.¹⁵⁹ Active consent has been found on the part of a joint owner making part payment to the contractor,¹⁶⁰ an unenforceable promise by an owner to convey land to a person furnishing materials and work on the property,¹⁶¹ and where the prior owner or lienholder participates in the construction project.¹⁶² A landlord's agreeing to improvements was also deemed evidence of active consent.¹⁶³ If a mortgage or lien is taken on property with a view that the proceeds of the loan will be used for an improvement on the property, the law is not clear whether giving the construction loan constitutes active consent.¹⁶⁴ Leaning in the direction that it does not is *Miles Homes of Indiana, Inc. v. Harrah Plumbing and Heating Service Co.*¹⁶⁵ where a seller furnished a shell house to the owner of land who gave a mortgage on the land to secure the price. To make the property livable as expected by the lender, the owner-debtor contracted with a mechanic

¹⁵⁷The lien in this case was claimed by a subcontractor who dealt with a prime contractor represented by a general partner of the owning partnership. The partnership-owner conveyed the property to a trust while the work was in progress, but the deed was not recorded until one hour and forty minutes after notice of the lien was recorded. The court made an assumption which in view of the record was completely unjustified: i.e., that the trust changed its position because the record failed to show the lien. In this case, the notice of the lien was accompanied by a document (deed) showing the partnership as owner, but the court held that the attachment did not cure the defect in name.

¹⁵⁸*E.g.*, *Woods v. Deckelbaum*, 244 Ind. 260, 191 N.E.2d 101 (1963).

¹⁵⁹*E.g.*, *Rader v. A.J. Barrett Co.*, 59 Ind. App. 27, 108 N.E. 883 (1915).

¹⁶⁰*O'Hara v. Architects Hartung & Assocs.*, 163 Ind. App. 661, 326 N.E.2d 283 (1975).

¹⁶¹*Martin v. Martin*, 122 Ind. App. 241, 103 N.E.2d 905 (1952) (wife orally agreed to convey land to entireties ownership in exchange for improvements by husband who claimed a lien upon property).

¹⁶²*Better Homes Co. v. Hildebrand Hardware Co.*, 202 Ind. 6, 171 N.E. 321 (1930).

¹⁶³*Dallas Co. v. William Tobias Studio, Inc.*, 162 Ind. App. 213, 318 N.E.2d 568 (1974) (reversing summary judgment for landlord).

¹⁶⁴It has been held that a construction lien may be deferred to later mechanics' liens. *See Farmers Loan & Trust Co. v. Canada & St. L. Ry.*, 127 Ind. 250, 26 N.E. 784 (1890); *Building & Loan Ass'n v. Coburn*, 150 Ind. 684, 50 N.E. 885 (1898). A construction loan made after mechanics have commenced work will be deferred to mechanics liens. *Beneficial Fin. Co. v. Wegmiller Bender Lumber Co.*, 402 N.E.2d 41, 403 N.E.2d 1150 (Ind. Ct. App. 1980), *discussed in Townsend, 1980 Survey, supra* note 14, at 504-06 (1981).

¹⁶⁵408 N.E.2d 597 (Ind. Ct. App. 1980).

for installation of plumbing, and this mechanic duly asserted a lien against the property. In reversing the lower court which allowed the lienholder to foreclose with priority, the court held that the interest of the seller of the shell home should prevail.¹⁶⁶ Why active consent to make a shell home livable could not be inferred is unfathomable.

Another exception to the rule giving prior liens and interests superiority over subsequent mechanics' liens is a statutory provision allowing removal of "buildings erected by the lienholder" as against lessors and mortgagees.¹⁶⁷ *Miles Homes* found that this statutory exception was inapplicable for two reasons. One was that the building was not erected by the mechanic claiming the lien,¹⁶⁸ a dubious interpretation which will not work when several persons contribute to the construction of a building. The other reason was that the seller of the shell building had become a conditional seller of the land, and, since conditional sellers were not excepted by the statute, the exception did not apply.¹⁶⁹ Evidence showed that originally the owner-debtor had given the seller of the house a mortgage on the land for the price, and upon later defaults, the property was conveyed to the seller who then resold it to the owner on conditional sales contract. Although the decision below could clearly be sustained on the theory of a fake sale amounting to a mortgage,¹⁷⁰ the court determined that the seller had the rights of a conditional seller of the land. The court stretched the law a little further by allowing the so-called conditional seller strict foreclosure because nothing had been paid on principal.¹⁷¹ The court failed to consider the value of improvements made by the owner and the mechanic amounting to nearly one-half of the original purchase price.¹⁷² As a consequence the mechanic was foreclosed without an opportunity to assert even a

¹⁶⁶*Id.* at 600-01.

¹⁶⁷IND. CODE § 32-8-3-2 (1976).

¹⁶⁸408 N.E.2d at 601.

¹⁶⁹*Id.* at 600. This accords with *Davis v. Elliott*, 7 Ind. App. 246, 34 N.E. 591 (1893), holding that the exception did not include vendors.

¹⁷⁰*See Kerfoot v. Kessener*, 227 Ind. 58, 84 N.E.2d 190 (1949) (applying well established rule that outright deed may be proved as an equitable mortgage, especially when the property is resold on security to the debtor). *See generally Townsend, 1974 Survey, supra* note 25, at 311-12 (1974).

¹⁷¹408 N.E.2d at 600. The court held that the case fell within an exception to *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), which requires judicial foreclosure of conditional sales contracts of real estate when a substantial equity exists in the debtor. *Id.*

¹⁷²Counting payments which had been made and the value of improvements established in the record, the debtor and the mechanic had added over one-half of the value of the indebtedness in payments and value added to the land. *Id.* at 598-99. *See generally* text accompanying notes 31 & 32 *supra*.

secondary lien on the property since he stood in the shoes of the owner-debtor. The case is a complex manipulation of difficult security concepts aided by a reweighing of the evidence on appeal.¹⁷³

d. Waiver of lien.—That a contractor may waive its rights to a mechanic's lien was established in *King Pin Motor Lodge, Inc. v. D. J. Construction Co.*¹⁷⁴ There the agreement to waive the lien was executed in favor of the bank which apparently furnished financing on the strength of the waiver. The court held that the waiver bound the contractor with respect to the owner as well, so that when recovery for extras was allowed, the contractor was denied attorney's fees.¹⁷⁵

e. Foreclosure of mechanic's lien; notice to bring suit.—By statute, time limits for foreclosure of mechanics' liens are severely prescribed. Suit must be brought within one year¹⁷⁶ and the owner may expedite this time period by giving the lienholder written notice to commence suit.¹⁷⁷ If the lienholder fails to bring suit within thirty days after receiving this notice, the lien (not liability on contract) is "null and void."¹⁷⁸ In *Lafayette Tennis Club, Inc. v. C.W. Ellison Builders, Inc.*,¹⁷⁹ a subcontractor who properly recorded notice of its lien was served with an unregistered and uncertified letter from the owner complaining that an itemized account had not been furnished with the following directions: "Please file suit on your Mechanic's Lien which you filed in order that the matter may be brought to a head."¹⁸⁰ No response was made to the letter and suit to foreclose the lien was commenced more than thirty days after receipt of the notice. In an unusually harsh holding, the court focused upon the second paragraph of the statute stating that an owner who has given such notice by "registered or certified mail to the holder of the lien at the address given in the notice of lien recorded *may* file an affidavit" to this effect and that the thirty day period had elapsed.¹⁸¹ Ignoring that this provision was added by legislative amendment obviously to expedite and secure the clearance of titles when mechanics' lienholders have undetermined claims, the court

¹⁷³This conclusion is supported by the dissent of Judge Young. 408 N.E.2d 597 at 601 (Young, J., dissenting).

¹⁷⁴416 N.E.2d 1317 (Ind. Ct. App. 1981).

¹⁷⁵*Id.* at 1319.

¹⁷⁶Suit must be brought within one year of the time the notice of lien is recorded or within one year of the time that credit is given and written terms thereof are executed by the lienholder and all owners of record. IND. CODE § 32-8-3-6 (1976).

¹⁷⁷IND. CODE § 32-8-3-10 (1976).

¹⁷⁸*Id.*

¹⁷⁹406 N.E.2d 1211 (Ind. Ct. App. 1980).

¹⁸⁰*Id.* at 1212.

¹⁸¹*Id.* at 1213-14, quoting IND. CODE § 32-8-3-10 (1976) (emphasis added). This second paragraph was added in 1963. Act of March 16, 1963, ch. 376, § 4, 1963 Ind. Acts 963.

seemed to hold that the notice must be sent by certified or registered letter, that an affidavit of service must be recorded, and that the written notice must prominently explain to the sendee that his foreclosure action will be barred if suit is not commenced within thirty days.¹⁸² The notice and the manner of its service were held insufficient to require foreclosure within thirty days of its receipt. The case has a virtue—it is accompanied by a dissent.¹⁸³

3. *Exemptions.*—By statute, it is now clear that the exemption provision of the Uniform Consumer Credit Code allowing creditors to reach twenty-five percent of disposable weekly earnings above thirty times minimum hourly wages with an exemption of the balance is valid.¹⁸⁴ Doubt arising from the fact that the proceedings supplemental statute allowed a continuing lien upon only ten percent of earnings and income¹⁸⁵ was eliminated by an amendment to that statute permitting non-exempt property to be applied to the judgment debt with a lien upon income and profits to the extent permitted by the Code.¹⁸⁶ This new statute also provides that the judgment debtor must be “notified” of a hearing before the court can order property, income or profits applied towards the judgment in proceedings supplemental,¹⁸⁷ overruling *Citizens National Bank v. Harvey*¹⁸⁸ on this point. The exemption of life insurance was extended to protect a beneficiary or an assignee spouse against a creditor of the spouse as well as the insured, and loan values as well as cash surrender values were made exempt.¹⁸⁹

4. *Enforcement of Property Division and Support Orders.*—The statute limiting garnishment of weekly wages to twenty-five percent of disposable earnings allows more to be reached in the case of “alimony” or “support” if the decree specifies a higher percentage.¹⁹⁰ This provision of the law seemingly was repealed by *Siskind*

¹⁸²406 N.E.2d at 1214-15.

¹⁸³*Id.* at 1215. Similar to the statute involved in this case is a rule of suretyship to be found in IND. CODE §§ 34-1-55-1 to -2 (1976) which allows a surety to demand in writing that a creditor bring suit against the principal. If suit is not prosecuted promptly and with diligence, the surety is discharged. See text accompanying notes 247-48 *infra*. For a case in which a notice by the surety similar to that used in *Lafayette Tennis Club* was upheld, compare *Reiman v. Terre Haute Sav. Bank*, 96 Ind. App. 652, 180 N.E. 490 (1932).

¹⁸⁴IND. CODE § 34-1-44-7 (Supp. 1981) (validating *id.* § 24-4-4.5-5-105 (1976))

¹⁸⁵Doubt became serious when an opinion of the Attorney General resurrected *Mims v. Commercial Credit Corp.*, 261 Ind. 591, 307 N.E.2d 867 (1974) holding that a debtor was entitled to the most liberal exemption provided by different statutes.

¹⁸⁶IND. CODE § 34-1-44-7 (Supp. 1981).

¹⁸⁷*Id.*

¹⁸⁸167 Ind. App. 582, 339 N.E.2d 604 (1976), criticized in *Townsend*, 1976 *Survey*, *supra* note 87, at 330-33.

¹⁸⁹IND. CODE § 27-1-12-14(c) to (d) (Supp. 1981).

¹⁹⁰IND. CODE § 24-4.5-5-105 (Supp. 1981).

v. Siskind,¹⁹¹ which held that the twenty-five percent limitation upon disposable earnings does not apply to an alimony or support decree even if the decree fails to specify that more may be garnished. Under this interpretation, the effect seems to be that one hundred percent of a defaulting spouse's wages could be garnished to satisfy a back property division or for support payments when the decree is silent as to the amount of disposable earnings to be reached.¹⁹² Fortunately, this hideous result is tempered by federal law which limits garnishment of wages for "support" to 50, 55, 60 and 65% of disposable earnings, depending upon the support and delinquency status of the debtor.¹⁹³ To the extent that the decree involved property division, it may have been in violation of federal law permitting garnishment of not more than twenty-five percent of weekly disposable earnings towards payment of non-support judgments.¹⁹⁴ In *Budnick v. Budnick*,¹⁹⁵ it was made clear that a divorce award of attorney's fees to the attorneys could be enforced by them in proceedings supplemental to execution.¹⁹⁶ *Rohn v. Thuma*¹⁹⁷ decided that a husband could not be punished in contempt for failure to pay uncertain undefined college expenses awarded by a support decree—at least until the court determined whether the decree should be construed to include college expenses at institutions more costly than a state university.¹⁹⁸

¹⁹¹415 N.E.2d 771 (Ind. Ct. App. 1981).

¹⁹²In this case the court allowed garnishment of 55% of the husband's wages (disposable earnings) to satisfy a variable rate alimony decree in arrears. *Id.* at 772.

¹⁹³15 U.S.C. § 1673(b)(2) (Supp. III 1979).

¹⁹⁴The federal law exempts the lesser of 25% of weekly disposable earnings or the amount by which weekly disposable earnings exceed 30 times minimum wages with the further provision allowing only 50, 55, 60 or 65 per cent of weekly disposable earnings to be reached for "support." 15 U.S.C. § 1673 (1976). Hence, under federal law it appears that not more than 25% may be reached for property division which is determined not to be "support" under Indiana law. See generally Townsend, *Creditor Problems Growing out of Alimony, Support, and Property Settlement Decrees*, in [ICLEF] *Rights and Remedies of an Indiana Creditor in 1980*, V-3, V-19 to V-23 (1980). Therefore, the award in *Siskind* of 55% was illegal under federal law if the order was for property division and if it is so regarded under the federal law. The court called it "alimony." 415 N.E.2d at 772. Actually, the decree involved a property settlement providing for both support and property division in lump sum payments every month. Hence the decree may have been in compliance with federal law—at least to the extent that the payment was for "support" if that portion of the amount owing was included in the 55% ordered to be paid. This opinion lays the groundwork for future trouble.

¹⁹⁵413 N.E.2d 1023 (Ind. Ct. App. 1980).

¹⁹⁶Fees may be awarded directly to attorneys in divorce proceedings. See IND. CODE § 31-1-11.5-16 (1976). In this case, the court determined that the appeal from proceedings supplemental was in bad faith, justifying a penalty of ten percent.

¹⁹⁷408 N.E.2d 578 (Ind. Ct. App. 1980).

¹⁹⁸Contempt for failure to pay uncontested dental bills was allowed. Another recent decision holds that contempt for failure to pay support is proper even though

The power of the court to include pension rights as marital property in divorce awards appeared again in several decisions. *Wilson v. Wilson*¹⁹⁹ concerned a pension payable absolutely but only when the husband reached a certain age. After reviewing the array of conflicting Indiana decisions on the problem, the court determined that the pension was not vested and therefore not distributable as a marital asset.²⁰⁰ Another decision recognized that gift transfers by a spouse with intent to defeat marital assets may be considered in reducing the donor's share of the assets on property division.²⁰¹

New law was made, or at least an old problem of enforcement was clarified, in *Clark v. Clark*,²⁰² holding that a spouse allegedly in contempt of a court order could be arrested on a body attachment without prior notice and hearing on the contempt charge.²⁰³ Legislation in 1981 provides that the court may, on application, order interest to be paid at one percent per month on delinquent child support payments.²⁰⁴

5. *Proceedings Supplemental to Execution.*—Two recent decisions, both involving issues of res judicata, illustrate that a judgment creditor may enforce his judgment against a liability insurer by means of garnishment of the insurer in proceedings supplemen-

some but not all the children for which support has been ordered are emancipated. *Reffeitt v. Reffeitt*, 419 N.E.2d 999 (Ind. Ct. App. 1981) (holding also that agreement between husband and wife reducing payments ineffective until approved by court for prospective operation).

¹⁹⁹409 N.E.2d 1169 (Ind. Ct. App. 1980).

²⁰⁰*Compare* *Morgan v. Cooper*, 415 N.E.2d 729 (Ind. Ct. App. 1981) (excluding pension rights from marital assets as "future income" and not vested) *with* *Irwin v. Irwin*, 406 N.E.2d 317 (Ind. Ct. App. 1980) (unvested pension could be considered but not divided). The present divorce law defines property as "including a present right to withdraw pension for retirement benefits." IND. CODE § 31-1-11.5-2(d) (Supp. 1981). Pension rights payable in the future and contingent upon survival are not a part of the estate in bankruptcy. *In re Harter*, 10 Bankr. 272 (Bankr. N.D. Ind. 1981), *discussed at* note 236 *infra*.

²⁰¹*Melnik v. Melnik*, 413 N.E.2d 969, 973 (Ind. Ct. App. 1980).

²⁰²404 N.E.2d 23 (Ind. Ct. App. 1980).

²⁰³*Id.* at 37-38. It seems that old case law held that before the defendant charged with civil contempt could be subjected to a body attachment, he must have been served with notice and given an opportunity to appear at the hearing and found in contempt. *Denny v. State*, 203 Ind. 682, 695-96, 182 N.E. 313, 317-18 (1932). Legislation adopted in 1947 seems to make it clear that the court in contempt proceedings may direct body attachment either before or after the hearing on contempt. *See* IND. CODE §§ 34-4-9-1 to -3 (1976) (applying to both civil and criminal contempt proceedings). A body attachment to procure witnesses who refuse to honor a properly served subpoena is proper. *See* IND. R. TR. P. 45(F) & (G). However, before a body attachment may issue, it seems that it must be based upon affidavit or proof establishing probable cause for the charge. *See* IND. CODE § 34-1-10-10 (1976); *Thomas v. Woollen*, 255 Ind. 612, 266 N.E.2d 20 (1971); *Carey v. Carey*, 132 Ind. App. 30, 171 N.E.2d 487 (1961). Whether or not this was the case in *Clark v. Clark* is unclear.

²⁰⁴IND. CODE § 31-6-6.1-15.5 (Supp. 1981).

tal. In *Snodgrass v. Baize*,²⁰⁵ a judgment based on negligence against the insured from which the defending insurer withdrew because of a conflict of interest was held not binding upon the insurer who defended on the ground that the policy did not cover the judgment creditor's claim.²⁰⁶ The garnishee insurer was allowed to prove as a defense that the claim was based on an intentional tort which was not covered by the policy. The insurer successfully argued that if it had defended the position, it would be taking positions both for and against the client. The effect is that in any case where the liability insurer denies liability on the policy, it can not properly represent the insured as to issues at war with its undertaking. The insurer's defense thus must be litigated separately, and this may be done in proceedings supplemental if the defense is preserved. In this case the insurer paid for the insured's defense by another lawyer who represented the insured. In *United Farm Bureau Mutual Insurance Co. v. Wampler*²⁰⁷ the court found that a declaratory judgment in favor of the insurer determining that it was not liable on the policy before judgment was not binding upon the judgment creditor who was not a party to the proceeding.²⁰⁸ Both cases indicate that the liability insurer who denies liability on its policy to the insured may and possibly should make its defense in proceedings in which the insured beneficiary is named as a party.²⁰⁹ If proper steps are taken to avoid waiver or estoppel as in these cases, the insurer is entitled to raise the defense in proceedings supplemental.²¹⁰

As noted above, an attorney awarded fees in divorce or support

²⁰⁵405 N.E.2d 48 (Ind. Ct. App. 1980).

²⁰⁶*Id.* at 55.

²⁰⁷406 N.E.2d 1195 (Ind. Ct. App. 1980).

²⁰⁸*Id.* at 1197. The insured had filed a third party complaint against the insurer to determine that the insurer was liable, and the insurer was granted a severance of the trial on that issue. Thereafter the insured was defaulted on the negligence action and the declaratory judgment action was dismissed. *Id.* at 1196-97.

²⁰⁹See 406 N.E.2d at 1197; 405 N.E.2d at 55. Defenses may not be raised after the hearing in proceedings supplemental. *American Underwriters, Inc. v. Curtis*, 392 N.E.2d 516 (Ind. Ct. App. 1979). Defenses of a garnishee probably should be pleaded. *Travelers Ins. Co. v. Madison Superior Court*, 265 Ind. 287, 354 N.E.2d 188 (1976). The insurer must affirmatively raise defenses on the policy in proceedings supplemental, and in an appropriate case is entitled to jury trial. 406 N.E.2d at 1197-98. In the rehearing of *Snodgrass v. Baize*, 409 N.E.2d 645 (Ind. Ct. App. 1980), the court held that the insurance beneficiary carried the burden of proving liability on the policy, but once the policy was offered in evidence, the insurer carried the burden of going forward with the evidence showing non-coverage. The court apparently applied Indiana Trial Rule 9(C). For another decision where liability of the insurer was determined in a declaratory judgment suit, see *Indiana Lumbermens Mut. Ins. Co. v. Brandum*, 419 N.E.2d 246 (Ind. Ct. App. 1981) (insured intended to injure *A* and injured *B*—act not "intentional" as to *B*).

²¹⁰In both cases the prompt action of the insurer denying liability appeared to negate waiver or estoppel.

proceedings may enforce the judgment by proceedings supplemental to execution.²¹¹

6. *Receiverships—Life Insurance Liquidation.*—The Indiana insurance law giving priority in insurance company liquidations to policyholders was interpreted as excluding “reinsurers” by *Foremost Life Insurance Co. v. Department of Insurance*.²¹² The Indiana Supreme Court denied subrogation to the rights of policyholders paid by it to an insurer under whose name the insolvent issued policies so that it could do business in other states, although under the agreement between them the entire risk was born by the insolvent company. The decision construed the arrangement between the insurance companies as one of “reinsurance” and overruled in part a careful decision by the court of appeals²¹³ which attempted to remove some of the mystique surrounding the concept of “reinsurance.” The mystique remains.

7. *Creditors' Rights in Decedents' Estates.*—The dead man's statute²¹⁴ does not apply to make a vendee, seeking specific performance of a contract to purchase entireties property, incompetent to testify as to transactions with the deceased spouse.²¹⁵ The survivor against whom the action was brought was determined not to be an “heir” in *Summerlot v. Summerlot*.²¹⁶ A claim filed against a decedent in his name before the running of the statute of limitations but amended by naming a special representative of the decedent thereafter was upheld in *Eberbach v. McNabney*²¹⁷ as a procedural matter governed by Trial Rule 15(C).²¹⁸ This rule relates the amendment back to when the correct party was informed of the action within the limitation period. On the other hand, the same judges in *General Motors Corp. v. Arnett*,²¹⁹ where the wife filed a wrongful death action within the two year period allowed for wrongful death actions, held that her appointment as special representative after the time had expired did not relate back under the Rule. The latter holding represents the absurd struggle in which form sometimes prevails over substance, and pays no compliment to the law or its profession.²²⁰

²¹¹See notes 195-96 *supra* and accompanying text.

²¹²409 N.E.2d 1092 (Ind. 1980).

²¹³395 N.E.2d 418 (Ind. Ct. App. 1979), *discussed in Townsend, 1980 Survey, supra* note 14, at 517 (1981).

²¹⁴IND. CODE § 34-1-14-6 (1976).

²¹⁵*Id.*

²¹⁶408 N.E.2d 820 (Ind. Ct. App. 1980).

²¹⁷413 N.E.2d 958 (Ind. Ct. App. 1980). Suit was apparently filed against the representative as permitted under IND. CODE § 29-1-14-1(f) (1976).

²¹⁸413 N.E.2d at 962.

²¹⁹418 N.E.2d 546 (Ind. Ct. App. 1981).

²²⁰The court failed to apply Trial Rule 17(A) to this case through the rule was clearly applicable. The case also overlooked *Holmes v. Pennsylvania N.Y. Cent. Transp. Co.*, 48 F.R.D. 449 (N.D. Ind. 1969) (reaching a contrary result). The court also failed to

Two recent decisions, *Key v. Sneed*²²¹ and *In re Kingseed*,²²² hold that income from specifically devised assets of a decedent passes to the personal representative as a general asset of the estate to be used in paying administration expenses or even swelling the rights of other beneficiaries at the expense of the specific devisees. *Kingseed* also holds that a devisee in possession of specifically devised property is accountable for the rental value of the property until distribution, but wisely allows the personal representative to make early distribution of this and other property without a court order.²²³ These decisions taking away income from specifically devised property before distribution raise an unanswered problem when the specifically devised asset is subject to a mortgage or lien. Must income from such property be applied towards the payment of liens upon the property? The problem is complicated by the fact that specifically devised property upon which there is a lien passes subject to the encumbrance unless the testator indicates otherwise.²²⁴ While the probate code allows the representative to pay all or part of the lien upon estate property with prior court approval,²²⁵ case law indicates that the lienholder may insist on application of income from the encumbered property toward his lien if the lien instrument so provides.²²⁶ The position of the representative is further complicated by the fact that *Kingseed* indicates that he is under a duty to keep installment payments current in order to avoid acceleration or default of lien property,²²⁷ but makes it clear that he may avoid ongoing responsibility for current payments by making prompt distribution of the lien property to the specific devisee—preferably

recognize that the widow and beneficiaries are the real party in interest in a wrongful death action despite the technical requirement that suit be brought by the decedent's representative. See *Pettibone v. Moore*, 223 Ind. 232, 59 N.E.2d 114 (1945). The decision was based in part on the outmoded notion that actions for wrongful death are not a part of the common law. *But cf.* *Carlson v. Green*, 100 S. Ct. 1468 (1980) (federal common law allows survival of constitutional civil rights actions in Indiana).

²²¹408 N.E.2d 1305 (Ind. Ct. App. 1980).

²²²413 N.E.2d 917 (Ind. Ct. App. 1980).

²²³413 N.E.2d at 924 (upholding retroactive approval of early distribution). The court held that for occupancy or possession prior to the time the distribution is made, the devisee is responsible and may be held to pay rent for the use of the property. *Id.* at 926-27.

²²⁴IND. CODE § 29-1-17-9 (1976).

²²⁵*Id.* § 29-1-14-20.

²²⁶In receivership proceedings, the lienholder is entitled to income from mortgaged property when the mortgage so provides. *Hemstock v. Wood*, 113 Ind. App. 112, 44 N.E.2d 1016 (1943).

²²⁷*Kingseed* held the representative accountable for failure to lease assets and collect rent. It seems to follow that if he defaults on a mortgage, allowing the mortgagee to insist on higher interest, he may incur liability for the loss. *Cf.* IND. CODE § 29-1-14-3 (1976) (claims due at future date payable at present value or to be secured by funds or bond of distributee); *Id.* § 29-1-14-16 (foreclosure of lien on land stayed for five months after death).

after obtaining a court order.²²⁸

8. *Bankruptcy*.—A surety who directed its creditor to file a claim in the principal's bankruptcy was not bound on principles of res judicata or issue preclusion for contesting the amount of the claim allowed in bankruptcy in a later suit by the creditor in state court. The surety in *Indiana University v. Indiana Bonding & Surety Co.*²²⁹ was permitted to prove that the creditor sustained loss of only \$19,000 although the creditor's claim for the same loss was allowed for nearly \$30,000 in the principal's bankruptcy.²³⁰ Since the claim was uncontested in bankruptcy, the allowance of the claim there was not even treated as evidence of the amount owing by the principal to the creditor, although the court recognized that a contested judgment by the creditor against the principal ordinarily would be admitted as prima facie evidence against the surety who was not a party.²³¹ The court also determined that the surety's act of directing enforcement of the creditor's claim in the principal's bankruptcy did not estop the surety from challenging the amount allowed, mainly because the surety had no opportunity to defend or participate in the bankruptcy proceedings.²³² Under the Bankruptcy Code²³³ it is

²²⁸The representative may and probably should make timely payments of current installments on lien property. He is protected if he first obtains a court order or if he later obtains court approval. *Baker v. Happ*, 114 Ind. App. 591, 54 N.E.2d 123 (1944). After a court order, he may abandon encumbered property. IND. CODE § 29-1-13-8 (1976).

²²⁹416 N.E.2d 1275 (Ind. Ct. App. 1981).

²³⁰The creditor in the case was Indiana University which was protected by a bond governing the faithful performance of the principal which supplied food to the Indianapolis campus through vending machines. The case demonstrated that the University had no satisfactory means of ensuring accurate accounting of sales by the vendor.

²³¹416 N.E.2d at 1285. The judgment for the creditor is allowed as rebuttable evidence in a later suit against the surety unless it was obtained by default or by confession. RESTATEMENT OF SECURITY § 139 (1941). However, the surety on judicial bonds usually is concluded by a judgment rendered against the principal in the judicial proceeding. *See Ross v. Felter*, 71 Ind. App. 58, 123 N.E. 20 (1919). Liability of the surety on judicial bonds may be enforced on motion. *See IND. R. TR. P. 65.1*. It seems that a judgment in favor of the creditor against the surety will not bind the principal who is not a party unless he is given an opportunity to defend. *Cf. IND. CODE § 34-1-55-7* (1976) (default judgment by surety forbidden if he knows of defense and principal defends after furnishing indemnity); *Michener v. Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N.E. 679 (1895) (judgment by a creditor against a surety was reopened after the principal successfully defended the claim against the same creditor).

²³²The decision involved a 1971 bankruptcy which is not covered by the Bankruptcy Code effective October 1, 1979. The court cited authority under pre-Code law which narrowly restricted the persons who could object to claims. One argument for denying res judicata effect in bankruptcy proceedings to the allowance or denial of a claim by the principal is that this will deny the creditor or surety a right to trial by jury on the issue resolved. For a holding to the contrary, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (determination for SEC in equity suit binding party in later civil suit did not deny right to trial by jury); *Katchen v. Landy*, 382 U.S. 323 (1966).

²³³As to jurisdiction of the bankruptcy court over civil proceedings arising in "or

now clear that the bankruptcy court has jurisdiction to litigate collateral issues relating to the bankruptcy, and determination of a surety's rights with respect to the creditor filing a claim are drawn into the authority of the bankruptcy court.²³⁴ Hence, under the Code it seems logical that a surety who urges the creditor to file the obligation secured in bankruptcy should be bound by the allowed claim on principles of agency or estopped from claiming that the award is too large when the surety has an opportunity to challenge the claim, and to be made a third party by intervention or as a defendant.²³⁵ Hence, a creditor whose claim is secured by a surety should join the surety as a third party defendant if he wishes to avoid double litigation and run the risk of inconsistent judicial determinations. Under the Code, the courts probably will no longer protect a surety who advises his creditor to sue or file a claim and then seeks to mitigate the damage award. In all events, the creditor may avoid the problem by making the surety a party.

In other decisions, the bankruptcy court in the northern Indiana district has determined that pension rights payable in the future and contingent upon survivorship do not pass as "property" to the bankrupt's estate, but like future wages and earnings remain with the bankrupt.²³⁶ Another important case in the southern Indiana district dealt with the right of a bankrupt to avoid non-possessory, non-purchase money liens on household goods, jewelry, tools of the trade and health aids.²³⁷ A lender consolidating or refinancing loans was disallowed the right to claim that all or some of the debts were purchase money loans unless his security agreement provided that payments on consumer credit sales would be applied in the order prescribed by the Uniform Consumer Credit Code.²³⁸ Decisions coming

related to cases under" the Code, see 28 U.S.C. § 1471 (Supp. III 1979). Further compare *In re Lucasa Int'l Ltd.*, 6 Bankr. 717 (S.D.N.Y. 1980) (third party suit against guarantor proper).

²³⁴11 U.S.C. § 502 (Supp. II 1978) (allowing party in interest, including creditor of a partner, to object to allowance of claims).

²³⁵Compare RESTATEMENT OF JUDGMENTS § 85 & 93, comment e (1942) with Bankr. R. 306(c) (allowing objection to allowance of a claim) and Bankr. R. 714 (allowing third party practice) and Bankr. R. 724 (allowing intervention).

²³⁶In two decisions, the court held that army and naval retirement benefits payable in the future and contingent upon survival are not "property." See *In re Harter*, 10 Bankr. 272 (Bankr. N.D. Ind. 1981); *In re Haynes*, 9 Bankr. 418 (Bankr. N.D. Ind. 1981). In the first cited case, the court pointed out that while Congress exempted benefits of the Veteran's Administration, Medal of Honor winners, railroad retirement benefits, social security payments, military pay annuities and others, no exemption is given army retirement pensions. The second case noted that since pensions are not marital property, pensions are not "property" in the bankruptcy sense.

²³⁷*Mulcahy v. Indianapolis Morris Plan Corp.*, 3 Bankr. 454 (Bankr. S.D. Ind. 1980).

²³⁸IND. CODE § 24-4.5-2-409 (1976).

down hard on the very poor were followed by Judge Rodibaugh in denying approval of a Chapter 13 plan to a plasterer with a monthly salary of \$600 and a gross income of \$3,300 who proposed to pay nothing under the plan.²³⁹ The court determined, in effect, that a poor person cannot propose a plan in good faith.

9. *Suretyship*. The promise of a surety as general rule must be supported by consideration, and when signed with the principal, the consideration moving to the principal or from the creditor will support his promise. *Davis v. B.C.L. Enterprises, Inc.*²⁴⁰ held that a surety's promise made after the contract between the principal and creditor (in this case a tenant and his landlord) will not be binding absent other consideration. The case recognized that such a promise would be enforceable if the original agreement was signed on the understanding that the guaranty would be forthcoming, but the decision did not take the forward step of recognizing that the requirement of consideration in such cases is a formality which should be eliminated.²⁴¹ The case also failed to note that lack of consideration is an affirmative defense under the Indiana trial rules,²⁴² and was in error if its decision upholding the lower court was based simply on the fact that the suretyship agreement was dated after the original contract was signed.

*Indiana University v. Indiana Bonding & Surety Co.*²⁴³ and *First Federal Savings and Loan Association v. Arena*²⁴⁴ recognized and applied the rule that a binding agreement between principal and creditor altering the principal's duty of performance under the contract will discharge a non-assenting surety.

Both of these cases involved provisions waiving suretyship defenses. In *Indiana University*, the surety bond provided that no modifications of the guaranteed contract shall affect the obligation of the surety.²⁴⁵ An extension and modification of the contract between the principal vending company and the creditor-university did not release the surety. In *First Federal Savings & Loan*, a provision

²³⁹*In re Hurd*, 6 Bankr. 329 (Bankr. N.D. Ind. 1980).

²⁴⁰406 N.E.2d 1204 (Ind. Ct. App. 1980).

²⁴¹A negotiable instrument given for the prior debt of any person is enforceable under the Uniform Commercial Code which also defines such a debt as value. Compare IND. CODE § 26-1-3-408 (1976) with *id.* § 26-1-1-201(44).

²⁴²IND. R. TR. P. 9.1(C) provides: "When an action or defense is founded upon a written contract or release, lack of consideration for the promise or release is an affirmative defense, and the party asserting lack of it carries the burden of proof."

²⁴³416 N.E.2d 1275 (Ind. Ct. App. 1981).

²⁴⁴406 N.E.2d 1279 (Ind. Ct. App. 1980), discussed in text accompanying notes 90-95 *supra*.

²⁴⁵416 N.E.2d at 1282. A companion bond covering the vending company's operation in Bloomington did not contain the waiver provision.

authorizing the mortgagee to extend time to successors of the mortgagor was construed as inapplicable to alterations of the rate of interest.²⁴⁶

Indiana University also dealt with the rights of a creditor who complies with the written request of a surety to bring suit against the principal under the statutory rule of *Pain v. Packard*.²⁴⁷ Under this rule as adopted in Indiana, the surety is discharged unless the creditor, having received notice to sue the principal, sues the principal and prosecutes the case through execution with dispatch. The rule is a beneficial device to rid the surety of a contingent liability against a defaulting debtor and a dilatory creditor.²⁴⁸ As noted previously,²⁴⁹ the court held that the surety was not bound by the amount of the claim allowed the creditor against the principal in bankruptcy proceedings, mainly because the amount was not litigated in bankruptcy and because the court determined that the surety could not become a party to defend its interest in bankruptcy. However, in most cases involving attempts to comply with *Pain v. Packard*, the surety may be and usually is named as a party defendant.²⁵⁰ If he is not made a party, he should not be allowed to relitigate the issues which he has invoked by pressing for judicial proceedings in which he is represented and may intervene.²⁵¹

While the promise of a surety ordinarily falls within the Statute of Frauds,²⁵² *Shane Quadri v. Goodyear Service Stores*²⁵³ recognized that a third party beneficiary promise in which the promisor purports to pay his own obligation for the beneficiary is not within the statute. There an insurer orally directed a car-leasing company to furnish an automobile to an insured and also to pay for repairs on the rented car. The undertaking was found not to be a promise to pay the debts of another within the Statute of Frauds.

²⁴⁶406 N.E.2d at 1283.

²⁴⁷The Indiana statute codifying the rule is IND. CODE §§ 34-1-55-1 to -2 (1976). Unlike the original case of *Pain v. Packard*, 13 Johns. 174 (N.Y. 1816) which discharged the surety only to the extent of damage resulting from the failure to prosecute the principal, the Indiana statute absolutely discharges the surety if the creditor fails to sue and prosecute through collection with diligence.

²⁴⁸It avoids the technical problems of exoneration, the only remedy by which the surety can resolve his troubled position without paying the creditor. See *Hunter v. First Nat'l Bank*, 172 Ind. 62, 87 N.E. 734 (1909); *Barnes v. Sammons*, 128 Ind. 596, 27 N.E. 247 (1891).

²⁴⁹See text accompanying notes 229-35 *supra*.

²⁵⁰L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 179 (1950).

²⁵¹RESTATEMENT OF JUDGMENTS § 85 (1942) (person represented in litigation bound by rules of *res judicata*). The surety by requesting suit parallels the position of one vouched into litigation. See *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571 (Ind. Ct. App. 1978).

²⁵²IND. CODE § 32-2-1-1 (1976).

²⁵³412 N.E.2d 315 (Ind. Ct. App. 1980).

C. Miscellaneous Cases and Legislation

Inability of the landlord to obtain financing did not excuse him from a covenant requiring him to rebuild a leased building completely destroyed by fire,²⁵⁴ a result at war with inflation and probably reason.²⁵⁵ The responsibility under a sour mortgage participation agreement was construed and resolved in favor of a supervising mortgagee releasing a mortgage during the course of construction.²⁵⁶ Release of the lien for inheritance taxes by the five year limitations period after death was construed not to bar the personal liability of the personal representative and distributees under a former statute,²⁵⁷ and the rule of the case has been codified in the succeeding law.²⁵⁸ Two cases involved violations of and the disclosure requirements of the Truth in Lending Act and the Uniform Commercial Code. In one, a consumer loan taken on all the debtor's after-acquired household goods without qualification was determined to be in violation of applicable law²⁵⁹ because under the Uniform Commercial Code, a security interest on after-acquired consumer goods is forbidden unless value is given within ten days after acquisition.²⁶⁰ The consumer was allowed damages only to the extent of setoff as permitted under the Indiana law since her claim for affirmative relief was barred under the one year statute of limitations.²⁶¹ In the other case, an improper disclosure was incorrectly found from the failure of a consumer credit sale to disclose the amount of credit life and disability coverage,²⁶² and damages were allowed as a setoff

²⁵⁴Marcovich Land Corp. v. J.J. Newberry Co., 413 N.E.2d 935 (Ind. Ct. App. 1980).

²⁵⁵Cf. Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (aluminum seller faced with inflation given relief under long term sales contract).

²⁵⁶American Fletcher Mortgage Co. v. Cousins Mortgage & Equity Investments, 623 F.2d 1228 (7th Cir. 1980).

²⁵⁷State, Ind. Dep't of State Revenue v. Lees, 418 N.E.2d 226 (Ind. Ct. App. 1980). The former statute was Act of March 6, 1931, ch. 175, § 30, 1931 Ind. Acts 192 (amended 1937, 1951) as amended by Act of March 12, 1957, ch. 204, § 1, 1957 Ind. Acts 424 (repealed 1976).

²⁵⁸IND. CODE § 6-4.1-8-1 (1976) (no limitation on personal liability).

²⁵⁹Corbin v. Town Fin., Inc., 417 N.E.2d 1172 (Ind. Ct. App. 1981). Both the federal truth-in-lending law and the Uniform Consumer Credit Code require a description of the security interest and a "clear identification of the property to which the security interest relates." 15 U.S.C. § 1639(a)(8) (1976); IND. CODE § 24-4.5-3-306(2)(k) (1976). Federal Reserve Regulation Z, 12 C.F.R. § 226.8(b)(5) (1981), specifically requires after-acquired property to be "clearly" set forth in conjunction with a description of the type of security interest.

²⁶⁰IND. CODE § 26-1-9-204(4)(b) (1976).

²⁶¹See Streets v. M.G.I.C. Mortgage Corp., 378 N.E.2d 915 (Ind. Ct. App. 1978), discussed in Townsend, *Secured Transactions and Creditors' Rights, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 369, 371-72 (1980).

²⁶²Means v. Indiana Financial Corp., 416 N.E.2d 896 (Ind. Ct. App. 1981). The case applied IND. CODE § 24-4.5-2-306(2)(g) (1976). However, the case was in error. While the

against an assignee who did not show that it was a good faith purchaser who had given notice of the assignment as required by the Uniform Consumer Credit Code.²⁶³ *Crestwood Park, Inc. v. Apostol*²⁶⁴ indicated that officers of a corporation transferring its assets to a trust for the purpose of avoiding corporate debts could be held liable to its creditors.

Several decisions involved the award of attorney's fees where provided for by agreement or statute.²⁶⁵ While several cases upheld awards of attorney's fees without proof on the theory that the judge below is an expert who may judicially note what is a reasonable fee,²⁶⁶ the court of appeals has sounded a warning against the practice and held that fees should be carefully established by time records in accordance with the Code of Professional Responsibility—at least where the case is unusual or involved.²⁶⁷

Bankers and lenders had a field day in the 1981 legislature. Obligations secured by first mortgages and liens on land were taken out of most of the regulatory provisions of the Uniform Consumer Credit Code except for disclosures, remedies, and powers of the administrator.²⁶⁸ Thus, there seems to be no limit on interest rates chargeable upon consumer credit sales and loans on real estate

cited Indiana Uniform Consumer Credit Code provision requires the amount of insurance to be stated, the Federal Truth in Lending Act does not. Indiana law, however, specifies that if disclosures meet the requirements of the federal law, requirements of Indiana law are met. IND. CODE § 24-4.5-2-301(2) (1976). Hence, both Indiana and federal law disclosure requirements did not require the amount to be stated.

In another decision the court of appeals initially refused to review a truth in lending violation because the security agreement was not included in the record on appeal; however, the court granted a rehearing after finding that the promissory note, which was in the record, contained violations. *Noel v. General Fin. Corp.*, 419 N.E.2d 200 (Ind. Ct. App.), *rehearing granted*, 421 N.E.2d 25 (Ind. Ct. App. 1981).

²⁶³IND. CODE § 24-4.5-2-404 (1976). The court held that the assignee had notice as shown by the face of the sales agreement.

²⁶⁴413 N.E.2d 654 (Ind. Ct. App. 1980). The issue was not decided since the case was reversed on other grounds.

²⁶⁵*E.g.*, *Donahue v. Watson*, 413 N.E.2d 974 (Ind. Ct. App. 1980) (attorney's fee to trustee from trust estate allowed at an hourly rate of \$50 to a lawyer with one and one half years of experience and at \$60 to one with 25 years of experience—note how experience pays off).

²⁶⁶*State v. Kuespert*, 411 N.E.2d 435 (Ind. Ct. App. 1980) (attorney's fees of \$1,381.34 which were awarded as sanction for failure to respond to discovery fixed by judge's judicial knowledge).

²⁶⁷*U.S. Aircraft Financing, Inc. v. Jankovich*, 407 N.E.2d 287 (Ind. Ct. App. 1980) (fees of \$30,000 for foreclosing conditional sales contract rejected and sent back for retrial on basis of court's knowledge derived from pleadings, documents, and time lawyer spent in court).

²⁶⁸"Mortgage transactions" defined as consumer first mortgages on or consumer credit sales of real estate were taken out of the Code provisions with the exceptions noted above. IND. CODE §§ 24-4.5-1-301(15)(a), -2-104(2)(b), -3-105 (Supp. 1981).

(unless they qualify as consumer related sales or loans). Incredibly, this is the first time in 100 years that the lid on interest rates on home and other mortgages in Indiana has been completely lifted.²⁶⁹ Other legislation extended interest rates to twenty-one percent on overall consumer credit sales and supervised loans; and to twenty-one percent on consumer related sales and loans.²⁷⁰ The permissible scope of VRM and ROM loans for banks was expanded to accord with federal tolerances,²⁷¹ and banks were permitted to make second mortgages subject to valuation requirements.²⁷² Interest rates on judgments were raised from eight to twelve percent.²⁷³ This provision becomes effective after December 31, 1982. Budget service agencies were allowed to charge an initial fee, but were required to post a higher bond and forbidden to take accounts unless a budget analysis shows that the debtor can reasonably meet required payments.²⁷⁴

²⁶⁹This is justified by some bankers from the fact that on March 31, 1980, Congress took the lid off interest rates on first mortgage home loans with respect to loans by lenders under the National Housing Act and under laws insuring deposits of banking institutions. States may reinstate maximum limits by vote before April 1, 1983. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132, 161-63 (to be codified in 12 U.S.C. § 1735f-7).

²⁷⁰IND. CODE §§ 24-4.5-2-201(2)(b), -602(2), -3-508(2)(b), -602(2.5) (Supp. 1981).

²⁷¹*Id.* §§ 28-1-13.5-2 to -3.

²⁷²*Id.* § 28-1-13-7(b).

²⁷³*Id.* § 24-4.6-1-101.

²⁷⁴*Id.* §§ 28-1-29-6, -8, -12.

