XIV. Secured Transactions and Creditors' Rights

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That the economy is in hard times was demonstrated during the last year by over forty-five decisions concerned with secured transactions and creditors' rights, fifteen cases involving enforcement of support and property division orders, and at least twelve published local opinions in bankruptcy. Without detracting from the importance of this body of case law, it is fair to say that only a few cases have demonstrated outstanding legal craftsmanship. Excellent decisions include opinions clarifying the means by which unrecorded interests in real estate may be perfected;[1] recognizing the commercial obligations of indorsees to perfect security interests when provided by the terms of the indorsement;[2] giving sensible meaning to mortgage provisions regarding the acceleration and the application of proceeds when loss of the collateral gives rise to insurance funds;[3] allowing the assessment of punitive damages against lenders who short-credit paying mortgagors by overcharging on interest[4] or by refusing to release liens;[5] recognizing that owners of property interests do not fall within the class of creditors who must file claims with the debtor's estate;[6] and including in the duty to pay "reasonable" attorney fees those fees incurred in defending an appeal.[7] The Indiana Court of Appeals deserves no commendation for opinions allowing bankers to cheat by misrepresenting the effect of the one-side forms;[8] allowing creditors to "terrorize" the family members of debtors;[9] applying rigidly the rules of proof to determine the existence of a resulting trust in an

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[1]Curry v. Orwig, 429 N.E.2d 268 (Ind. Ct. App. 1981). *See infra* text accompanying note 21.

[2]White Truck Sales v. Shelby Nat'l Bank, 420 N.E.2d 1266 (Ind. Ct. App. 1981). *See infra* text accompanying note 32.

[3]Hoosier Plastics v. Westfield Sav. & Loan Ass'n, 433 N.E.2d 24 (Ind. Ct. App. 1982). *See infra* text accompanying note 52.

[4]Shelby Fed. Sav. & Loan Ass'n v. Doss, 431 N.E.2d 493 (Ind. Ct. App. 1982). *See infra* text accompanying note 56.

[5]Southwest Forest Indus. v. Firth, 435 N.E.2d 295 (Ind. Ct. App. 1982). *See infra* note 58.

[6]Williams v. Williams, 427 N.E.2d 727 (Ind. Ct. App. 1981), *reh'g granted*, 432 N.E.2d 417 (Ind. Ct. App. 1982). *See infra* text accompanying note 153.

[7]Templeton v. Sam Klain & Son, Inc., 425 N.E.2d 89 (Ind. 1981). *See infra* text accompanying notes 96 & 187.

[8]American Fletcher Nat'l Bank v. Pavilion, Inc., 434 N.E.2d 896 (Ind. Ct. App. 1982). *See infra* text accompanying note 178.

[9]Elza v. Liberty Loan Corp., 422 N.E.2d 760 (Ind. Ct. App. 1981), *transfer denied*, 426 N.E.2d 1302 (Ind. 1981). *See infra* text accompanying note 194.

area where the rules of proof have always been applied generously to allow the establishment of an equitable mortgage;[10] failing to deal adequately with the problem of "due on sale" clauses and with the effects of acceleration under such clauses;[11] resurrecting pleading rules in foreclosure matters[12] and proceedings supplemental,[13] which belong in the last century, and putting exemptions out of the reach of debtors by a similar judicial technique;[14] and giving mechanic's lien laws[15] and statutes barring claims against decedents' estates[16] interpretations which would shock most persons of common sense. Lawyers concerned with bankruptcy matters and with the enforcement of divorce decrees are advised to review the many current decisions which both clarify and obfuscate the law in these areas of practice.[17]

A. Secured Transactions

1. Real Estate Transactions.—a. Formalities.—Suppose that a contract, note, deed, or mortgage purports to bind three co-owners, but only two sign the instrument. Is the instrument binding upon those who signed it? The answer seems to be yes, but parol evidence is admissible to show that those who signed did so upon the condition that the third party also would sign. If the instrument on its face shows that all are to sign, none presumptively are bound until all sign, according to *Ellis v. George Ryan Co.*,[18] where a covenant purporting to bind "all parties hereto" was not signed by all the parties to the

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[10]Workman v. Douglas, 419 N.E.2d 1340 (Ind. Ct. App. 1981). *See infra* text accompanying note 23.

[11]Downing v. Dial, 426 N.E.2d 416 (Ind. Ct. App. 1981). *See infra* text accompanying note 43. *Cf.* Colonial Discount Corp. v. Bowman, 425 N.E.2d 266 (Ind. Ct. App. 1981) (vendor under a conditional sales contract repossessed the property after refusing to consent to a transfer by the vendee).

[12]Colonial Discount Corp. v. Bowman, 425 N.E.2d 266 (Ind. Ct. App. 1981). *See infra* text accompanying note 64.

[13]American Underwriters, Inc. v. Curtis, 427 N.E.2d 438 (Ind. 1981) (requiring defenses of garnishee in proceedings supplemental to be affirmatively pleaded). *See infra* text accompanying note 113.

[14]Schuler v. Langdon, 433 N.E.2d 841 (Ind. Ct. App. 1982). *See infra* text accompanying note 102.

[15]Bayes v. Isenberg, 429 N.E.2d 654 (Ind. Ct. App. 1981) (notice to both entireties owners required). *See infra* text accompanying note 79; Cato v. David Excavating Co., 435 N.E.2d 597 (Ind. Ct. App. 1982). *See infra* text accompanying note 87.

[16]Pasley v. American Underwriters, Inc., 433 N.E.2d 838 (Ind. Ct. App. 1982). *See infra* text accompanying note 147.

[17]Recent bankruptcy decisions are discussed in the text, *see infra* notes 161-77 and accompanying text; current decisions relating to enforcement of property division and support orders are considered in the text, *see infra* notes 118-41 and accompanying text.

[18]424 N.E.2d 125 (Ind. Ct. App. 1981) (conduct of parties buttressed intent that all parties were to sign).

transaction. The covenant restricting the use of property was held ineffective.[19]

b. Perfection of unrecordable or unrecorded interests in land.—It is not uncommon for an owner to acquire an interest in land, which arises from an unrecordable transaction. How can the owner perfect that interest? The answer is simple and clear. The purported owner may file an in rem action to establish his title and file lis pendens notice.[20] Thereafter, a purchaser is put on constructive notice of the claim which will ultimately be established by a judgment. This point was graphically made in *Curry v. Orwig*,[21] in which property owners with an easement filed a declaratory judgment suit to establish the ending point of a roadway which ran through their property and filed lis pendens notice of their claim. When the owners of the fee were unable to sell land through which the roadway was projected, suit was brought against the property owners who had filed lis pendens notice for slander of title. The court held that the easement owners, alleging a violation of their easement rights, were privileged in filing the suit based upon probable cause; therefore, no slander of title action was proper.[22] The court did not decide the merits of the action upon which the declaratory judgment was based.

c. Outright deed as a mortgage.—In need of a home, husband and wife persuaded a friend to purchase a home. The friend made a $3,000 cash down payment on the home and secured a mortgage for $12,000. Husband and wife moved in and made payments to the friend in the amount of the monthly mortgage payments. Parol evidence was admitted to prove that the husband and wife were to pay the friend the price. Under these circumstances, the court in *Workman v. Douglas*[23] held that no resulting trust in favor of the husband and wife was established and no contract to sell to the husband and wife was proven.[24] The case was decided by applying the traditional rules of

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[19]*Id.* at 127. *Cf.* Parrish v. Terre Haute Sav. Bank, 431 N.E.2d 132 (Ind. Ct. App. 1982) (signatories to a note, also naming the principal and two sureties on a note who did not sign, were bound in absence of parol evidence of a condition showing that they were not to be bound unless all signed); Curtis v. Hannah, 414 N.E.2d 962 (Ind. Ct. App. 1981) (summary judgment in favor of two vendors denied simply because the third named vendor did not execute the contract).

[20]IND. CODE § 34-1-4-2 (1982). The Indiana Rules of Trial Procedure also allow unperfected interests in personal property to be perfected by a lis pendens suit and filing under the Uniform Commercial Code filing system. IND. R. TR. P. 63.1(C).

[21]429 N.E.2d 268 (Ind. Ct. App. 1981). For further discussion of this case see Krieger, *Property, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 283, 312 (1983).

[22]429 N.E.2d at 274. The suit was not based upon a theory of malicious civil prosecution since the lis pendens suit was still pending—for over twelve years.

[23]419 N.E.2d 1340 (Ind. Ct. App. 1981). For further discussion of this case see Krieger, *supra* note 21, at 310.

[24]419 N.E.2d at 1345-46.

resulting trust law which require that the cestui que trust furnish the consideration at the time of the conveyance, and by applying the specific performance doctrine that equity will not enforce contracts where the terms are indefinite. The decision in *Workman v. Douglas* is flawed inasmuch as parol evidence of the sort offered in this case has long been admissible to prove that a conveyance to a grantee who furnished the consideration was in fact a loan with an ensuing equitable mortgage.[25]

d. Lease: option to purchase real estate.—Strict compliance with the acceptance terms of a lease option agreement was excused in *Rowland v. Amoco Oil Co.*[26] The general rule is that the terms of an option agreement must be strictly followed if the exercise of an option is to be effective.[27] In *Rowland*, the lessee-buyer's promised acceptance was deficient by $6,000; however, prompt tender of the correct amount was held sufficient, even though it was made apparently after expiration of the time for acceptance.[28] The decision in *Rowland* stands for the equitable proposition that strict compliance will not be required if the optionee made an honest mistake in tender.[29]

2. Security Interests in Personal Property.—a. Perfection.—The secured party took a security interest in the inventory and accounts of the debtor, Lintz West Side Lumber, Inc. However, the financing statement named as debtors "Lintz, John Richard" and "Lintz, Mayella." In *In re Lintz West Side Lumber, Inc.*,[30] the Court of Appeals for the Seventh Circuit held that because the financing statement did not include the name of the debtor corporation, the financing statement was insufficient notice of the security interest to the debtor corporation's creditors, and therefore was invalid against the debtor's trustee in bankruptcy.[31] A thoughtful argument that the Lintzs and their corporation were considered one and the same in the local community fell on deaf ears.

A truck dealer who accepted and endorsed a check issued by the bank for the purchase of a truck was held liable because the dealer

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[25]*See* Moore v. Linville, 170 Ind. App. 429, 352 N.E.2d 846 (1976). *See generally* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW 38-39 (1979).

[26]432 N.E.2d 414 (Ind. Ct. App. 1982).

[27]*Id.* at 416.

[28]*Id.* at 417.

[29]*Accord* Thomas v. Heddon, 186 Ind. 48, 114 N.E. 218 (1916) (failure of lessees to exercise their option to purchase within specified period of time did not prevent lessees from obtaining specific performance where administrator of lessor's estate refused tender of purchase price, where ability of residuary devisee to pass good title was in question, and where lessees brought suit for specific performance within five days of expiration of the option).

[30]655 F.2d 786 (7th Cir. 1981).

[31]*Id.* at 791.

failed to comply with the statement on the back of the check that required the payee to perfect a lien on the certificate of title to the vehicle in favor of the bank. In *White Truck Sales v. Shelby National Bank*,[32] the court held that an enforceable contract was created between the bank and truck dealer when the dealer endorsed and negotiated the check.[33] Thus, when the purchaser later disposed of the collateral to a bona fide purchaser, who procured a clear certificate of title, the truck dealer was held liable for the loan extended by the bank. The case is most important insofar as the court intimated that the truck dealer may not only be liable for the original loan made to the purchaser by the bank, but also for further advances under a refinancing agreement later made between the bank and the purchaser.[34] However, in this case the bank only claimed damages for less than the amount of the first loan.[35]

b. Motor vehicle.—A security interest in personal property, including motor vehicles, must be in a writing that is signed by the debtor, describes the collateral,[36] and contains words of promise or grant.[37] An exception arises when the secured party is in possession of the collateral.[38] Suppose a lender takes possession of the borrower's certificate of title to his motor vehicle without a written security agreement. Does this meet the requirement of "possession of the collateral?"[39] The answer seems to be "yes" in view of *Och v. State*,[40] in which a bail bondsman took possession of the debtor's certificate of title. The bondsman was charged for issuing a bond without collecting the full premium.[41] On the supposition that the title was taken to secure the premium and was a "thing of value," the court reversed the conviction of the bondsman. The court noted that because the space for liens could be filled in and submitted for perfection to the Bureau of Motor Vehicles, a valuable interest, apparently a security interest, was conferred on the possessor of the certificate.

3. Transfers by Lien Debtor—Effect of Required Consent of Lienholder to Avoid Acceleration.—Several recent decisions involved security devices providing for acceleration of installment indebtedness

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[32]420 N.E.2d 1266 (Ind. Ct. App. 1981).

[33]*Id.* at 1269.

[34]*Id.*

[35]*Id.* at 1268.

[36]IND. CODE § 26-1-9-203(1)(b) (1982).

[37]*See* Shelton v. Erwin, 472 F.2d 1118 (8th Cir. 1973); Mitchell v. Shepherd Mall State Bank, 458 F.2d 700 (10th Cir. 1972).

[38]IND. CODE § 26-1-9-203(1)(a) (1982).

[39]For a case holding that notation of a lien on the certificate of title does not meet Code requirements, see White v. Household Fin. Corp., 158 Ind. App. 394, 302 N.E.2d 828 (1973).

[40]431 N.E.2d 127 (Ind. Ct. App. 1982).

[41]*Id.* at 128. *See* IND. CODE § 35-4-5-40 (1982).

upon transfers by the debtor without the consent of the lienholder. The established rule that the lienholder's consent does not release the original debtor who remains liable as a surety[42] was reaffirmed in *Downing v. Dial.*[43] In *Downing*, the seller of a restaurant business who retained a security interest on the equipment in order to secure the selling price consented to a sale by the original debtor. Later the second purchaser sold to a third purchaser who also assumed the indebtedness. Upon default, the first debtor was held liable on the theory that the second consent was not intended as a novation.[44]

The court in *Downing* did not consider the possibility that the original debtor was released by a binding alteration of the contract because the secured party has insisted upon a substantial prepayment as a condition to his consent to a second transfer. This, in effect, may have amounted to an agreement that altered performance and squeezed transferees into a cash-flow problem by threatening acceleration, thus discharging the debtor-surety.[45] This point, however, was not discussed. Alternatively, suppose the secured party had required the second assignee to pay an increased interest rate. Under these circumstances, the debtor-surety surely would have been released.[46] Thus, it is difficult to distinguish a situation where the secured party asked for and obtained a prepayment of interest as was done in *Downing*. Lienholders are well advised to obtain the permission of primary parties when their consent to a transfer results in an alteration of the underlying agreement. Without that permission, the position of the original debtor as a surety more than likely becomes impaired.

A unique consequence of the so-called "due on sale" clauses commonly included in mortgages, conditional sales contracts, and security agreements was also considered in *Downing v. Dial.*[47] In *Downing*, Downing, who was obligated under a real estate mortgage with a due on sale clause, contracted to sell the land to a purchaser. The sales contract included a provision requiring Downing to execute a conveyance to the purchaser when installments on the sales price were reduced to an amount equal to the balance due on Downing's mortgage. The purchaser was then to assume Downing's mortgage at a favorable rate of interest. However, upon proper tender by the pur-

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[42]*See* Boswell v. Lyon, 401 N.E.2d 735 (Ind. Ct. App. 1980), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 494-95 (1981).

[43]426 N.E.2d 416 (Ind. Ct. App. 1981).

[44]*Id.* at 421.

[45]*See generally* L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 339-42 (1950).

[46]*See* First Fed. Sav. & Loan Ass'n v. Arena, 406 N.E.2d 1279 (Ind. Ct. App. 1980), *discussed in* Townsend, *Secured Transactions and Creditors' Rights, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 367, 381-82 (1982).

[47]426 N.E.2d 416 (Ind. Ct. App. 1981).

chaser, Downing was unable to comply with the sales contract because the mortgagee would not consent to the assumption of the mortgage. Thereupon, the purchaser was forced to find new financing, which was at a higher interest rate than the original mortgage. The trial court held that because the purchaser paid off the contract with the new financing, he was entitled to damages measured by the present value of the increased finance charge payable over the same period as the original mortgage.[48] Unfortunately, the court relied upon the testimony of an "expert" banker as to the damages without disclosing the formula upon which the calculation was made. The vendor submitted no alternative proof, and the court held that in view of its own "primitive calculations," no gross error was made by the trial court.[49]

Downing assumed the answer to another interesting and important issue. Was the mortgagee bank justified in refusing consent under its due on sale clause? Probably the bank refused consent because it could then increase the interest rates. This motivation raises the serious question of the bank's good faith in exercising this strange but common mortgage restraint on alienation. Some decisions elsewhere have outlawed due on sale provisions when these provisions are exercised as a device to increase interest without regard to risks.[50]

4. Acceleration.—The general rule that a creditor, lienholder, or secured party cannot accelerate unilateral installment obligations upon default without a provision permitting acceleration was recognized in *Griese—Traylor Corp. v. Lemmons*.[51] If the right of acceleration is con-

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[48]*Id.* at 421.

[49]*Id.* The original mortgage carried interest at 6.5% with installments to run for 87 months at time of default. The new financing obtained by the purchaser was at 8% with installments running for 60 months. Installments were increased from $2,100 monthly to $3,041.49 monthly. Damages of $12,006.12 were upheld. *Id.* This record as reported makes absolutely no basis upon which this award could be sustained mathematically. This reliance upon primitive mathematics strengthens this writer's opinion that the Indiana courts are easily "hoodwinked" by the mathematics of computing interest or finance charges. Much assistance is available, although not requested, from fine mathematics departments in Indiana's state universities. *See* Townsend, *Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252-53 (1975); Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226-28 (1974).

[50]*See* Brown v. Avemco Inv. Corp., 603 F.2d 136 (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* Townsend, *supra* note 46, at 384 n.108 (1982). The United States Supreme Court recently upheld due on sale clauses executed after 1976 by federal savings and loan banks. *See* Fidelity Federal Savings and Loan Ass'n v. Cuesta, 50 U.S.L.W. 4916 (U.S. June 28, 1982) (No. 81-750).

[51]424 N.E.2d 173 (Ind. Ct. App. 1981) (rule applied to stock purchase agreement under which purchaser was bound by unilateral obligation to make adjusted weekly payments for stock which had been transferred). For further discussion of this case see Townsend, *supra* note 46, at 387-88.

ditional, the conditions must be met before the acceleration is permitted. This principle was applied in *Hoosier Plastics v. Westfield Savings & Loan Association*[52] where a mortgage provided that "insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security . . . is not thereby impaired."[53] When the mortgagee refused to apply insurance proceeds towards the cost of restoration of the building destroyed by fire, the mortgagor brought suit for damages. Although the trial court dismissed the mortgagor's suit because it found no proof that the conditions had been met, the court of appeals reversed.[54] The two foregoing decisions put in jeopardy the holding of *Pearson v. First National Bank*,[55] which was a questionable decision last year. In *Pearson*, the mortgagee was allowed to accelerate and apply insurance proceeds towards the indebtedness under a similar insurance clause that provided payment to the mortgagor and mortgagee as their interests appear, but without an express provision in the mortgage for acceleration.

A mortgagee refusing to correctly credit principal payments by overcharging the interest on a mortgage loan was held liable not only for the ensuing deficiency but also for punitive damages in *Shelby Federal Savings & Loan Association v. Doss*.[56] Proof established abusive efforts by the lender to claim an increased finance charge. The decision is refreshing in that it allows a remedy to a debtor for the creditor's refusal to credit an account upon which a balance remains owing.[57] It thus becomes clear that bookkeeping entries which are intentionally incorrect become actionable although pecuniary loss may depend on future enforcement procedures.[58]

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[52]433 N.E.2d 24 (Ind. Ct. App. 1982).

[53]*Id.* at 27.

[54]*Id.* at 28-29.

[55]408 N.E.2d 166 (Ind. Ct. App. 1980) (allowing acceleration by mortgagee absent proof of bad faith in refusing to allow insurance proceeds to be applied towards rehabilitation of the collateral).

[56]431 N.E.2d 493 (Ind. Ct. App. 1982).

[57]*Id.* at 498-500. The court did not give a precise description of the theory of its remedy which seems to be in the nature of an action for disparagement of title. *Cf.* Harper v. Goodin, 409 N.E.2d 1129 (Ind. Ct. App. 1980) (recordation of false mechanic's lien and refusal to release actionable).

[58]In a recent decision, Southwest Forest Indus. v. Firth, 435 N.E.2d 295 (Ind. Ct. App. 1982), a mechanic's lienholder who had been paid in full was bound by the ten dollars a day penalty specially applicable to mechanic's liens. *See* IND. CODE § 32-8-6-1 (1982) (part of mechanic's lien statute imposing penalty fifteen days after "demand" until release or expiration of lien). The terms of a general statute that imposed a penalty for refusal to release liens, that required a written demand and that imposed a cap

5. Foreclosure Procedures.—a. Effect of private sale by conditional vendor and mortgagee.—Indiana statutes mandate judicial foreclosure of real estate mortgages,[59] and under the rule of *Skendzel v. Marshall*,[60] the same applies to conditional sales contracts where more than a minimal amount has been paid on the contract. Suppose, however, that a mortgagee or conditional seller by self help regains possession and resells the property. May the lienholder recover a deficiency? It seems quite clear that a deficiency is barred if the property has been resold[61] without authority from the debtor. Other aspects of this problem were dealt with by two recent decisions. A mortgagor cannot avoid liability on the indebtedness by deeding the collateral to the mortgagee with a provision that the transfer would release the debtor in the face of proof that the mortgagee refused to accept the deed.[62] If the terms of the deed are rejected, *Ellsworth v. Homemakers Finance Service, Inc.*[63] holds that the mortgagee must foreclose by judicial sale, and that the ineffective deed gives no power of private sale. In *Colonial Discount Corp. v. Bowman*,[64] the seller had regained possession and resold one of three lots that were sold on conditional sales contracts, after over fifteen percent had been paid on the price.[65] A suit by the purchaser to recover damages in the county court was dismissed by the court of appeals on the ground that the county court lacked equitable jurisdiction.[66] The court of appeals obviously decided the case on a technicality to avoid a substantive question of real importance and, in doing so, erroneously[67] held that a suit in rescission for recovery of money cannot be determined at law.[68] The case, forc-

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on recovery were held inapplicable. 435 N.E.2d at 296-97. *See* IND. CODE § 32-8-1-2 (1982) (requiring demand by registered or certified mail with a cap of $500).

[59]IND. CODE § 32-8-16-1 (1982).

[60]261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974).

[61]Powers v. Ford, 415 N.E.2d 734 (Ind. Ct. App. 1981) (conditional seller who accepted repossession and resold the property denied deficiency and deemed to have accepted a surrender).

[62]Homemaker Fin. Serv., Inc. v. Ellsworth, 380 N.E.2d 1285 (Ind. Ct. App. 1978).

[63]424 N.E.2d 166 (Ind. Ct. App. 1981). A decree on retrial awarded judgment on the mortgage indebtedness and directed the mortgagee to sell the property and apply it towards the indebtedness. *Id.* at 167. The court on second appeal ordered the property to be sold at judicial sale. *Id.* at 169.

[64]425 N.E.2d 266 (Ind. Ct. App. 1981). The vendors in this case frustrated the efforts of the purchaser to resell the property by refusing to consent under a due on sale clause.

[65]*Id.* One lot had been resold by the vendor for $600 in excess of the price under the conditional sales contract. *Id.*

[66]*Id.* at 268. The opinion states that the purchasers sought to enforce what amounted to an equitable lien, although this does not seem to have been asserted in the purchaser's complaint.

[67]*See* Ferrell v. Hunt, 189 Ind. 45, 124 N.E. 745 (1919).

[68]425 N.E.2d at 268.

ing the plaintiff to comply with a strict theory of pleading, should have been written 100 years ago.

b. Notice to junior lienholders of foreclosure proceedings; tax and execution sales.—It is established practice in Indiana to give known and perfected junior lienholders and owners notice of actions to foreclose mortgages and liens.[69] Failure to make such persons parties and to give them proper notice makes the sale ineffective as to their interests.[70] However, notice need not be given to junior interests in all instances. Two of these exceptions were recognized by two recent court of appeals' decisions. In *Mennonite Board of Missions, Inc. v. Adams*[71] the court of appeals reiterated the rule that actual notice of a tax sale is not required to be given to mortgagees of record.[72] In *Hines v. Behrens*,[73] the court held that the purchaser at an execution sale will take free of the interest of a junior mortgagee of record, even though the junior mortgagee was not made a party to the foreclosure or execution proceedings, or given formal notice of the sale.[74] The court also noted that the junior mortgagee in *Hines* had had actual notice of the sale, and thus should be bound.[75]

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[69]IND. CODE § 32-8-18-1 (1982).

[70]*See* Catterlin v. Armstrong, 101 Ind. 258 (1884); Oldham v. Noble, 117 Ind. App. 68, 66 N.E.2d 614 (1946).

[71]427 N.E.2d 686 (Ind. Ct. App. 1981).

[72]*Id.* at 688. The mortgagee in *Mennonite* argued that the notice requirements under the tax sale statutes, IND. CODE §§ 6-1.1-24-1, -2 (1982), do not meet due process standards. The court rejected this argument relying upon First Sav. and Loan Ass'n v. Furnish, 174 Ind. App. 265, 367 N.E.2d 596 (1977).

[73]421 N.E.2d 1155 (Ind. Ct. App. 1981).

[74]*Id.* at 1159.

[75]*Id. Hines* is an incomplete decision and will cause trouble to real estate and title lawyers for several reasons. First, the judgment debtor had executed and recorded a mortgage to the mortgagee bank before the judgment was procured by the judgment creditor. However, before the sale under the judgment, the mortgagee bank released its original mortgage and recorded this release. The mortgagee bank then took a new note and mortgage from the judgment debtor and his wife. This new mortgage was recorded at the same time as the release. Substantial authority supports the proposition that the new note and mortgage constituted a renewal and did not release the old mortgage. *See* Farmers and First Nat'l Bank v. Citizens State Bank, 211 Ind. 389, 5 N.E.2d 506 (1937). It is unclear whether the purchaser at the judgment sale should be protected as a bona fide purchaser because the sale was entered after the first mortgage had been released and the new mortgage contemporaneously executed. A purchaser, practically, may not be wise to rely upon such a release and apparent renewal as advancing a junior interest. *See id.* at 393-94, 5 N.E.2d at 508. A second point leaving uncertainty in the case is whether the judgment creditor acquired a judgment lien which predated the refinanced mortgage. If the judgment had not been properly docketed and indexed, the judgment creditor did not hold a valid judgment lien. The judgment was entered in a divorce proceeding and may not have been a lien upon the property. *Cf.* Kuhn v. Kuhn, 402 N.E.2d 989 (Ind. 1980) (order for periodic payments of child support not considered a final judgment so as to become a statutory lien upon property of obligor). If not, an execution lien procured with the issuance of a writ

c. Foreclosure in equity.—Recognizing that mortgage and lien foreclosures are essentially equitable, one recent decision[76] holds that the vendee's liens cannot be foreclosed in county courts without equity jurisdiction. Another indicates that legal issues under an independent counterclaim to a foreclosure action may be separately tried.[77]

B. Creditors' Rights

1. Mechanic's Liens.—a. Notice to entireties owners.—Written notice of intent to claim a mechanic's lien must be given to the occupying resident owner or future occupying owner of a single or double family dwelling within thirty days from the commencement of performance for alterations and repairs and within sixty days from commencement of performance for new construction.[78] A notice naming both entireties owners that was delivered to the husband within the statutory period, but that was not delivered to the wife within that time, was held to be insufficent notice in *Bayes v. Isenberg.*[79] The case seems to hold that, absent evidence of agency, provable personal service on both entireties owners is required.[80] The *Bayes* court refused to follow a recent fourth district court of appeals' opinion, *Beneficial Finance Co. v. Wegmiller Bender Lumber Co.*,[81] which held that a recorded notice naming only one entireties owner met the record requirements for notice.[82] Although *Bayes* and *Beneficial* involve different statutes,[83] the rationale for holding notice to one entireties owner to

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of execution had expired before the refinanced transaction. *See* IND. CODE §§ 34-1-45-2, 34-1-37-10 (1982). Thereafter, the sale was held under a new writ of execution long after the refinanced mortgage was of record, and the execution lien under which the sale was held would have been junior to the refinanced mortgage. The court in a footnote merely held that because the court found the mortgage to be junior and because it was supported by evidence in the stipulations, which certainly did not appear in the opinion, the purchaser at the sale took priority. The case stands only for the point that parties junior to the judgment or execution lien upon which property is sold at an execution sale are not entitled to notice of the sale. Otherwise the case is a disaster, probably because the judge felt that the facts did not deserve careful restatement.

[76]Colonial Discount Corp. v. Bowman, 425 N.E.2d 266 (Ind. Ct. App. 1981); *see supra* note 64 and accompanying text.

[77]Associates Fin. Servs. Co. v. Knapp, 422 N.E.2d 1261 (Ind. Ct. App. 1981). This case allowed counterclaim issues to be tried after a summary judgment on the foreclosure issues. That independent issues may be separately tried by jury, see Hartlep v. Murphy, 197 Ind. 222, 150 N.E. 312 (1926). In the *Knapp* case, the parties consented to a nonjury trial on the counterclaim.

[78]IND. CODE § 32-8-3-1 (1982).

[79]429 N.E.2d 654 (Ind. Ct. App. 1981).

[80]*Id.* at 659.

[81]402 N.E.2d 41 (Ind. Ct. App. 1980).

[82]402 N.E.2d at 46.

[83]The statute considered in *Bayes* was IND. CODE § 32-8-3-1 (Supp. 1981). The statute under consideration in *Beneficial* was IND. CODE § 32-8-3-3 (1976). These statutes retain the same section numbers in the 1982 Indiana Code.

be sufficient would be similar in both. This is especially true in view of the fact that the wife probably authorized or assented to the construction. Thus, notice to one of several members of a joint venture should be adequate.[84]

b. Recordation of notice within sixty days of completion.—Each mechanic claiming a lien must record notice within sixty days after completion, in accordance with the mechanic's lien statute.[85] Recordation within sixty days after corrective repairs performed at the request of the owner was held sufficient in *Smith v. Bruning Enterprises.*[86] However, *Cato v. David Excavating Co.*[87] ridiculously held that a recorded notice "upon the buildings" located on properly described real estate was insufficient when the lien was claimed only for roadwork on the property. The opinion of the court of appeals strained credibility because the court interpreted the statutory provision requiring the filing of a notice of lien to require additionally a description of the improvement. Unless reversed by opinion or legislation, the case will never serve as a model for legislative interpretation.

c. No-lien contract.—A "no-lien" contract in proper form is valid if recorded not more than five days after the execution of the contract.[88] In *Torres v. Meyer Paving Co.*,[89] a no-lien contract that was executed at the same time but separate from the original construction contract, and that was filed within five days of the original contract was upheld as valid. The court of appeals construed the two instruments as one and found consideration for the no-lien agreement.[90] For some reason, the court omitted reference to Trial Rule 9.1(C),[91] which places upon the promisee the burden of proof for lack of consideration in the written contract. Proof of the no-lien agreement was allowed despite an integration clause in the original construction contract.

d. Limitation upon foreclosure.—Actions to foreclose mechanic's liens are barred unless suit is commenced within one year of recordation of the lien, or the due date of record.[92] In *Geiger & Peters, Inc.*

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[84]*Cf.* Sondheim v. Gilbert, 117 Ind. 71, 18 N.E. 687 (1888) (*note:* the section discussing this theory was deleted in the unofficial reporter); O'Hara v. Architects Hartung & Ass'n, 163 Ind. App. 661, 665, 326 N.E.2d 283, 286 (1975) (co-venturers are liable to third parties for acts of their joint venturers within the scope of the enterprise).

[85]IND. CODE § 32-8-3-3 (1982).

[86]424 N.E.2d 1035 (Ind. Ct. App. 1981).

[87]435 N.E.2d 597 (Ind. Ct. App. 1982).

[88]IND. CODE § 32-8-3-1 (1982).

[89]423 N.E.2d 692 (Ind. Ct. App. 1981).

[90]*Id.* at 695.

[91]IND. R. TR. P. 9.1(C).

[92]IND. CODE § 32-8-7-1 (1982).

v. American Fletcher National Bank & Trust Co.,[93] the filing of a cross-complaint to foreclose a lien within the one year period was held sufficient, although service was made upon party owners after the time had expired. This case recognized that suit is commenced at the time of the filing of the complaint, not at the time of service; nonetheless, the case was remanded for a hearing on the motion to dismiss because of failure to prosecute diligently the cross-complaint.

e. Attorney fees.—A mechanic's lienholder is entitled to reasonable attorney fees as part of his lien.[94] One exception exists in the case of a subcontractor claiming against an owner who has paid the consideration for the performance.[95] *Templeton v. Sam Klain & Son, Inc.*[96] held that if, on appeal, the mechanic lienholder successfully defends the judgment ordering foreclosure of his lien, then he is entitled to an additional fee for the reasonable services rendered on appeal. In *Templeton,* the supreme court found that the mechanic lienholder defending the challenge to the foreclosure may petition the lower court for an allowance to pay attorney fees for the appeal, but the lower court should hold its determination in abeyance until the conclusion of the appeal process.[97]

The supreme court also adopted the holding of the lower court[98] decision in *Templeton* to the effect that a subcontractor is not required to apply undesignated payments received from the prime contractor to indebtedness incurred upon that project, unless the subcontractor has actual knowledge of the source of the funds;[99] there is proof of delivery of materials to the construction site which creates a presumption of incorporation into the project;[100] and there is a lien that may be claimed upon funds owing by the owner to the prime contractor after written notice by the subcontractor to hold the owner personally liable.[101]

2. Exemptions and Execution.—A most incredible decision, *Schuler*

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[93]428 N.E.2d 1279 (Ind. Ct. App. 1981).

[94]IND. CODE § 32-8-3-14 (1982).

[95]*Id.*

[96]425 N.E.2d 89 (Ind. 1981). *Cf.* O.S. v. J.M., 436 N.E.2d 871 (Ind. Ct. App. 1982) (attorney fees incurred on appeal in defending paternity award).

[97]425 N.E.2d at 95. In *Templeton* an additional award of $2500 was upheld because the appellant owner failed to raise the amount as an error on appeal.

[98]400 N.E.2d 1198 (Ind. Ct. App. 1980), *discussed in* Townsend, *supra* note 42, at 500, 508.

[99]425 N.E.2d at 93. A recent decision also holds that absent some agreement or assumed responsibility, a mortgagee advancing funds under a construction loan to the debtor-mortgagor has no duty to ascertain that subcontractors are paid and without liens. Spurlock v. Fayette Fed. Sav. & Loan Ass'n, 436 N.E.2d 811 (Ind. Ct. App. 1982).

[100]425 N.E.2d at 94.

[101]*Id.*

v. Langdon,[102] in effect upheld a lower court eviction judgment that allowed the landlord, without a lien or security interest, to satisfy the judgment by executing on the personal property the tenant left behind. In addition to the eviction, the court awarded damages to the landlord for back rent and for holding over expenses. On appeal, the court considered whether any of the tenant's personal property was exempt from the landlord's judgment. The court found that the amount of damages apportioned for back rent were damages in "contract,"[103] and thus qualified under the Indiana General Exemption Law.[104] That portion of the damages for holding over expenses was found to be "in tort" and not subject to the statutory exemption.[105] The tenant, who defaulted, was denied the personal property exemption for the apportioned contract damages because he did not file a schedule of his personal property with the sheriff who was ordered to execute the judgment.[106] The court's decision which ignored proper procedures for execution and sale by the sheriff, service of the writ of execution, and basic due process,[107] makes Judge Roy Bean appear as a "boy scout." This kind of decision denying the exemption for a questionable technicality is truly incredible.[108]

3. Proceedings Supplemental.—The broad equitable power of a court to reach concealed assets of a debtor was illustrated in *Coak v. Rebber*,[109] which was a case involving the enforcement of a judgment that had awarded support arrearages. In a proceedings supplemental, the wife had sought certain assets to satisfy the judgment. The wife had established in those proceedings that the husband's transfer of his stock, one-half ownership in a corporation, to his new wife was without a fair consideration and was thus a fraudulent con-

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[102]433 N.E.2d 841 (Ind. Ct. App. 1982).

[103]*Id.* at 844.

[104]IND. CODE § 34-2-28-1 (1982). In *Schuler*, the lower court specified the different amounts for back rent and holding over damages in the judgment so that the mathematics of separating the tort and contract parts of the judgment appeared in the record.

[105]433 N.E.2d at 844.

[106]*Id.*

[107]*See* IND. CODE § 34-1-36-1 (1982); *see also* 433 N.E.2d at 844-47 (Staton, J., dissenting); *cf.* Mims v. Commercial Credit Corp., 261 Ind. 591, 307 N.E.2d 867 (1974) (which indicates that where the debtor is not represented by counsel, the court must affirmatively fix the debtor's exemption).

[108]Judge Staton's opinion revealed that the landlord retained possession of household goods worth over $13,000 and that bits and pieces were sold by him without accounting. 433 N.E.2d at 846. It seems that the tenant may have a separate action in conversion against the landlord. In the seemingly disoriented opinion of the majority, it appears that the court approved execution by the sheriff on the remaining assets in the landlord's possession for the undetermined, unpaid part of the judgment. A reference to the law of abandonment (in this case, $13,000 worth of property) is mystifying.

[109]425 N.E.2d 197 (Ind. Ct. App. 1981).

veyance. The lower court thereupon directed that an obligor, who had purchased the corporation, be named as garnishee to pay one half of the contract installments of the conditional sales contract to the former wife. The court of appeals affirmed the trial court's finding that the monthly installment payments were subject to execution, although the pleadings in proceedings supplemental seeking to discover the assets did not indicate that the stock transfer was sought, and despite the fact that the corporation's obligor was not named as a party.[110] Strict rules of pleading do not apply to proceedings supplemental and failure of the judgment debtor in the instant case to bring in the corporation under Trial Rule 19(A)[111] at the hearing was fatal to his defense. Evidence established that the entire assets of the corporation had been sold to its obligor, but neither the findings nor the evidence appeared to show that the debtor-corporation was insolvent, a usual requirement for avoiding a fraudulent conveyance which does not apply when intent to defraud is present.[112]

According to *American Underwriters, Inc. v. Curtis*,[113] defenses of a liability insurer must be affirmatively pleaded in an action to enforce a judgment against the insured, particularly where the defense was not raised at the hearing or in an answer permissively filed in the proceedings.

Answers to interrogatories in proceedings supplemental, and probably other actions as well, must be formally offered into evidence. Hence, the court in *In re Marriage of Hudak*[114] found that the answers to interrogatories of the garnishee defendant, which were attached to a motion for proceedings supplemental, did not support a garnishment order against the defendant's employer because the probative value of the answers could not be considered until they were offered into evidence.[115]

In other cases relating to proceedings supplemental a search of an arrestee's wallet pursuant to a lawful arrest was permitted,[116] and a vague new standard of probable cause for inspecting premises[117] of

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[110]*Id.* at 200.

[111]IND. R. TR. P. 19(A).

[112]*Cf.* UNIFORM FRAUDULENT CONVEYANCE ACT §§ 4, 7, 7A U.L.A. 205, 242 (1978); 11 U.S.C. § 548(a)(1) and (2) (1979 & Supp. 1982).

[113]427 N.E.2d 438 (Ind. 1981) (adopting opinion in 392 N.E.2d 516 (1979)). For a discussion of this case, see Townsend *supra* note 42, at 512. The effect of this decision is to make defenses and claims of garnishees in proceedings supplemental subject to the basic rules of civil procedure. Informal procedures generally followed in proceedings supplemental do not apply to the unadjudicated rights of third parties.

[114]428 N.E.2d 1333 (Ind. Ct. App. 1981).

[115]*Id.* at 1336-37.

[116]Chambers v. State, 422 N.E.2d 1198 (Ind. 1981).

[117]State v. Kokomo Tube Co., 426 N.E.2d 1338 (Ind. Ct. App. 1981) ("legislative standards" may serve as basis for occupational safety warrant).

a business establishment may aid in defining permissible perimeters for judicial orders in proceedings supplemental, with respect to the search of a debtor's person and his property.

4. Enforcement of Support and Property Division Orders.—Several recent decisions concern the status of pension rights and whether pensions constitute marital property for purposes of property division. Two decisions held that pension income that was being received by a husband but was dependent upon continued survivorship may not be divided, but may be considered in the division of other property on the theory that the asset is not vested.[118] An award may not eat into contingent pension funds and will be held improper if it exceeds present marital property.[119] A third decision applied the same rules to a pension payable in the future and dependent upon survivorship.[120] The Supreme Court of the United States has held that military pensions, under the admonitions of the language of federal statutes, cannot be considered as marital property.[121] A divorce court making a property division may cancel a debt of the husband's solely owned corporation to his wife.[122]

With respect to support, other decisions ordered payment of support or maintenance from unemployment compensation payments[123] and social security,[124] which otherwise are exempt from the creditor process.[125]

The rule of *Kuhn v. Kuhn*,[126] that an installment support order may not be enforced by way of execution and supplementary remedies without a judicial determination of the amounts overdue and owing, was recognized in *Statzell v. Gordon*.[127] The court properly held,

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[118]*See In re* Marriage of Delgado, 429 N.E.2d 1124 (Ind. Ct. App. 1982); Sadler v. Sadler, 428 N.E.2d 1305 (Ind. Ct. App. 1981).

[119]428 N.E.2d 1305 (Ind. Ct. App. 1981) (army pension).

[120]*In re* Marriage of Sharp, 427 N.E.2d 690 (Ind. Ct. App. 1981), *reh'g granted*, 430 N.E.2d 417 (Ind. Ct. App. 1982) (on issue of trial court relinquishing jurisdiction).

[121]McCarty v. McCarty, 453 U.S. 210 (1981) (pension found not subject to community property by divided court). The decision was recognized by Sadler v. Sadler, 428 N.E.2d 1305 (Ind. Ct. App. 1981).

[122]White v. White, 425 N.E.2d 726 (Ind. Ct. App. 1981) (corporation not made a party by either husband or wife).

[123]*In re* Marriage of Church, 424 N.E.2d 1078 (Ind. Ct. App. 1981). For further discussion of this case, see Buck, *Domestic Relations, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 171, 185 (1983).

[124]Paxton v. Paxton, 420 N.E.2d 1346 (Ind. Ct. App. 1981).

[125]*Cf.* 42 U.S.C.§ 659(a) (Supp. IV 1980) (United States subject to legal process in like manner and to same extent as a private person if action brought for enforcement of legal obligations to provide child support or make alimony payments); IND. CODE § 22-4-33-3 (1982) (assignment or pledge of any rights to benefits void and such rights to benefits exempt from levy or execution until benefits actually received).

[126]402 N.E.2d 989 (Ind. 1980).

[127]427 N.E.2d 732 (Ind. Ct. App. 1981). For further discussion of this case, see Buck, *supra* note 123, at 180.

however, that a separate suit for this purpose was not necessary; a petition under the original cause number by motion to establish unpaid and overdue support payments was proper. Seemingly, joinder of a prayer for this relief in connection with a motion for proceedings supplemental or contempt is proper. Once a definite judgment is entered for arrearages in support, several recent decisions allowed the enforcement by proceedings supplemental.[128] The limitation period for enforcing overdue support payments is now ten years.[129] Difficulty with successive suits to establish the amount of overdue support is illustrated in *White v. Davis*,[130] in which rules of res judicata were twisted to give the wife the benefit of the doubt by holding that failure of prior proceedings to fix arrearages did not constitute a negative judgment.[131]

Decisions in this area also reiterate established rules to the effect that maintenance and support orders cannot later be modified with respect to past or overdue payments.[132] In one recent case, the court acknowledged that an exception to these rules may exist where the obligor has assumed custody and payment of all expenses of the child; however, the court did not apply this exception to the instant case.[133] Support and maintenance orders may be altered prospectively.[134] If the amount payable may be reduced because of the emancipation of some but not all of the children, a court order must be obtained and it is effective prospectively.[135] An overpayment of support, made by agreement of the parties but without court approval, cannot be recovered or recouped.[136] While credit for support payments made directly to children will not be allowed if not required by the support order,[137] it was recently held that a husband should not be found in contempt for making support payments directly to the wife contrary to a decree requiring payments to the clerk.[138]

Property division orders are not ordinarily modifiable, either pro-

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[128]*See, e.g.*, Coak v. Rebber, 425 N.E.2d 197 (Ind. Ct. App. 1981) (court set aside fraudulent conveyance of stock and allowed decree against obligor of corporation to extent of husband's one-half interest in the corporation). *Cf. In re* Marriage of Hudak, 428 N.E.2d 1333 (Ind. Ct. App. 1981) (garnishment order denied because garnishee liability was not established through failure to introduce interrogatories into evidence).

[129]IND. CODE § 34-1-2-3 (1982).

[130]428 N.E.2d 803 (Ind. Ct. App. 1981).

[131]*Id.* at 805-06.

[132]*See* Isler v. Isler, 422 N.E.2d 416 (Ind. Ct. App. 1981), *discussed in* Buck, *supra* note 123, at 178; Breedlove v. Breedlove, 421 N.E.2d 739 (Ind. Ct. App. 1981).

[133]425 N.E.2d 667 (Ind. Ct. App. 1981).

[134]*In re* Marriage of Sharp, 427 N.E.2d 690 (Ind. Ct. App. 1981).

[135]Reffeitt v. Reffeitt, 419 N.E.2d 999 (Ind. Ct. App. 1981).

[136]*In re* Marriage of Bradach, 422 N.E.2d 342 (Ind. Ct. App. 1981).

[137]Breedlove v. Breedlove, 421 N.E.2d 739 (Ind. Ct. App. 1981).

[138]Castro v. Castro, 436 N.E.2d 366 (Ind. Ct. App. 1982).

spectively or retrospectively,[139] but interpretation of a nonmodifiable property division or support order may be procured to avoid uncertainties.[140] Vagueness or uncertainty of a property division order is a cause for remand in a direct appeal.[141]

5. Receiverships.—By statute, a receiver may be appointed at the request of the Indiana Securities Commissioner to oversee the assets of a person who violates Indiana securities laws.[142] Where a receiver was appointed at the request of the Commissioner, *State ex rel Higbie v. Porter Circuit Court*[143] held that judgment creditors could not enforce their rights against the receivership debtors by execution but the judgment creditors must work out their claims through the receiver.[144]

6. Decedents' Estates.—Ordinarily a claim against a person who dies must be filed with the estate within five months of the first published notice to creditors, and the estate must have been opened within one year of death.[145] Several qualifications to this nonclaim statute were involved in recent decisions. A special statutory rule[146] allowing tort claims covered by liability insurance to be presented within the non-estate time limitation was construed in *Pasley v. American Underwriters, Inc.*[147] The court of appeals in *Pasley* held that a direct suit by the tort claimant against the heirs or devisees of a decedent was not properly filed because the plaintiff failed to have the estate opened and an administrator appointed, within the non-estate time limitation.[148] Since the statute of limitations on the tort claim expired one day after the suit was filed, but before an opening of the estate, the claim was barred. In *Pasley*, form won over

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[139]*In re* Marriage of Bradach, 422 N.E.2d 342 (Ind. Ct. App. 1981) (order may be reopened under IND. R. TR. P. 60).

[140]TeWalt v. TeWalt, 421 N.E.2d 415 (Ind. Ct. App. 1981) (husband, under writ of assistance, procured court commissioner to hold disputed funds).

[141]*In re* Marriage of Owens, 425 N.E.2d 222 (Ind. Ct. App. 1981) (spouses made co-owners with uncertain accounting responsibilities).

[142]IND. CODE § 23-2-1-17.1 (1982).

[143]428 N.E.2d 782 (Ind. 1981) (court denied writ of prohibition sought by judgment creditors who were enjoined by lower court from enforcing judgments by way of execution). For further discussion of this case, see Galanti, *Business Associations, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 32 (1983).

[144]428 N.E.2d at 783-84. For an interesting decision involving the power of an Indiana insurance receiver to adjudicate rights to a deposit fund held by another state, see Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n, 102 S. Ct. 1357 (1982).

[145]IND. CODE § 29-1-14-1(a), (b), (d) (1982).

[146]IND. CODE § 29-1-14-1(f) (1982).

[147]433 N.E.2d 838 (Ind. Ct. App. 1982) (noting that the statute provides for suit by the tort claimant against the "estate" which may be opened up within the tort "limitations" period).

[148]*Id.* at 840.

substance,[149] again justifying lay suspicions that administration of decedents' estates is not in good hands. However, faith in the system will be found in *First National Bank & Trust Co. v. Coling*,[150] which allowed a claim that had been erroneously filed. In *Coling*, the court clerk had filed the claim under the same cause number as a will contest petition in the same action.

An owner of property that is in the possession of a decedent's estate or his successor is not a creditor in the sense that he must file a claim within time limits or be forever barred.[151] Although he must file to recover from the representative within five months from the first published notice to creditors,[152] he may establish his property rights against heirs and devisees outside the statutory time limit for claims against the estate. This rule was recognized and applied in *Williams v. Williams*,[153] in which the decedent had agreed to sell his one-half ownership in a corporation to the surviving shareholders. Although the surviving shareholders failed to file their action against the personal representative within the five month period,[154] on the basis of equitable conversion the shareholders were able to enforce specific performance against the heirs and devisees.[155]

While an unpaid award of property division to a spouse will survive the death of the obligor,[156] *Hicks v. Fielman*[157] holds that if the decree is based upon a settlement which indicates that installments are made as alimony and conditional upon events indicating that the payments are intended as maintenance,[158] the claim dies with the

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[149]Because the tort statute of limitations is not a bar statute, the case clearly fell within IND. R. TR. P. 15(c) if an amendment named a representative with prior knowledge of the suit—particularly the insurer. That the insurer is the real party in interest, see Jenkins v. Nachand, 154 Ind. App. 672, 290 N.E.2d 763 (1972) (dead man's statute did not bar testimony of tort claimant whose claim was covered by insurance).

[150]419 N.E.2d 1326 (Ind. Ct. App. 1981) (error corrected by Trial Rule 60(B) motion).

[151]Beach v. Bell, 139 Ind. 167, 38 N.E. 819 (1894); Paidle v. Hestad, 169 Ind. App. 370, 348 N.E.2d 678 (1976).

[152]IND. CODE § 29-1-14-21 (1982); Estate of Williams, 398 N.E.2d 1368 (Ind. Ct. App. 1980).

[153]427 N.E.2d 727 (Ind. Ct. App. 1981), *reh'g granted*, 432 N.E.2d 417 (Ind. Ct. App. 1982). For further discussion of this case, see Falender, *Trusts and Decedents' Estates, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 415, 419 (1983).

[154]The shareholders in this case were denied a right to litigate their claim by proceedings against the estate in Estate of Williams, 398 N.E.2d 1368 (Ind. Ct. App. 1980). Dismissal was on the apparent basis that the probate court lacked jurisdiction, and therefore did not go to the merits.

[155]427 N.E.2d at 731. *See* Townsend, *supra* note 42, at 519-20.

[156]*See* White v. White, 167 Ind. App. 459, 338 N.E.2d 749 (1975); *cf.* Miller v. Clark, 23 Ind. 370 (1864) (arrears of alimony may be collected by administrator after death).

[157]421 N.E.2d 716 (Ind. Ct. App. 1981).

[158]*Id.* at 722. Under present Indiana law, alimony or maintenance seemingly is allowed to a spouse only for physical or mental incapacity or when it is included in the

obligor. In *Hicks*, the payments were made dependent on the non-death and non-remarriage of the obligee, and reducible on the retirement of the husband-obligor. This follows the established rule that contingent support obligations which are not overdue do not survive,[159] an outmoded principle which is now rejected by statute with respect to the judicially ordered duty of parents to support children.[160]

7. Bankruptcy.—With the new Bankruptcy Code in full operation and with the overwhelming number of bankruptcy court opinions, a number of cases deserve the brief attention of Indiana lawyers. The Indiana law allowing revocation of a nonpaying judgment debtor's driver's license[161] conflicts with the bankruptcy law to the extent that the statute is enforceable after the debtor has been discharged in bankruptcy.[162] A claim for money was held nondischargeable because the bankrupt had misrepresented the purpose for which he had obtained the money and thus the creditor was induced by false pretenses to make the loan.[163] A decree approving a property settlement in which the husband was to pay installments on a mobile home was held dischargeable in *In re Frey*.[164] However, attorney fees assessed to the wife in contempt proceedings to enforce the decree were held to be for maintenance and nondischargeable in *Frey*.[165] The court in *In re Maitlen*,[166] on the other hand, held nondischargeable the husband's obligation to pay the mortgage on the home to be occupied by the wife and child. In *Maitlen*, the obligation arose from a settlement agreement approved by the court. This obligation was contained in a paragraph immediately following a paragraph which provided for support to a child. The agreement also included a provision terminating the mortgage payment obligation on death or remarriage of the wife. The Court of Appeals for the Seventh Circuit concluded that these factors indicated the obligation was in the nature of support rather than property division and was thus nondischargeable.[167]

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parties' property settlement agreement which is approved by the court. IND. CODE §§ 31-1-11.5-9(c), -10(b) (1982). The court is without power to award maintenance absent these conditions. Whaley v. Whaley, 436 N.E.2d 816 (Ind. Ct. App. 1982) (holding illegal a provision that made property division payments dependent upon survivorship).

[159]McKamey v. Watkins, 257 Ind. 195, 273 N.E.2d 542 (1971).

[160]Support orders survive the death of the obligor, subject, however, to modification. IND. CODE § 31-1-11.5-17(b) (1982).

[161]IND. CODE § 9-2-1-6 (1982).

[162]Perkinson v. Woody, 419 N.E.2d 1306 (Ind. 1981) (declaring IND. CODE § 39-2-1-11(c) unconstitutional in violation of supremacy clause).

[163]*In re* Pappas, 661 F.2d 82 (7th Cir. 1981) (applying 11 U.S.C. § 35(a)(2) (1976) which was repealed in 1978; current version at 11 U.S.C. § 523(a)(2) (Supp. IV 1980)).

[164]13 Bankr. 12 (S.D. Ind. 1981).

[165]*Id.* at 14.

[166]658 F.2d 466 (7th Cir. 1981).

[167]*Id.* at 467.

Unperfected security agreements were invalidated under the strong arm provision of the Bankruptcy Code in *In re Lintz West Side Lumber, Inc.*[168] because the debtor was incorrectly named, and in the questionable case of *In re Rex Printing, Inc.*[169] because the security agreement of a corporation was signed by officers without indicating the capacity in which they signed. To the extent that it operated retrospectively, section 522 of the Bankruptcy Code that allows a debtor to claim as exempt certain nonpurchase money, nonpossessory security interests in household goods was held unconstitutional by a bold local bankruptcy judge.[170] This problem is now before the United States Supreme Court.[171] Future rights to army retirement payments were found exempt in *In re Harte.*[172] In deciding this case, the court applied a nonbankruptcy federal law.[173] The loan value of a debtor's life insurance policies, which are payable to the wife, children and creditors, is also exempt under Indiana law.[174] The court in *In re Johnson*[175] held that a Chapter 13 plan to avoid nondischargeability of a student loan, the debtor's only debt, was not proposed in good faith. The court in *In re Miller*[176] disapproved a Chapter 13 cramdown plan which contemplated installment payments toward a motor vehicle loan for its value, but which failed to include a lien thereon, interest, a cushion for depreciation, and a showing of need for the asset as transportation for the debtor.

The plight of a tort creditor of the bankrupt when his claim is covered by liability insurance was clarified in *In re Holtkamp.*[177] The court lifted the automatic stay and allowed the creditor to litigate his action in state court in view of the fact that estate assets were not jeopardized. However, it seems that the bankruptcy court should retain jurisdiction to assure fair distribution among competing tort claimants when the insurance fund is inadequate.

8. Suretyship.—The folly of signing suretyship agreements makes its appearance in hard times when special rules of suretyship law

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[168]655 F.2d 786 (7th Cir. 1981).

[169]14 Bankr. 403 (N.D. Ind. 1981).

[170]Henderson v. Beneficial Fin. Co., 10 Bankr. 19 (N.D. Ind. 1980). A retrospective law requiring a specified debtor in reorganization to pay employees displacement allowances was held unconstitutional as not meeting the uniformity requirement of the constitutional provision granting Congress power to adopt bankruptcy laws. Ry. Labor Executives Ass'n v. Gibbons, 102 S. Ct. 1169 (1982).

[171]Rodrock v. Sec. Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *prob. juris. noted sub nom.* United States v. Sec. Indus. Bank, 50 U.S.L.W. 3486 (Dec. 14, 1981) (No. 81-184).

[172]10 Bankr. 11 (N.D. Ind. 1981).

[173]*See* 10 U.S.C. § 1315 (1976).

[174]*In re* Tennant, 15 Bankr. 502 (N.D. Ind. 1981).

[175]17 Bankr. 78 (S.D. Ind. 1981).

[176]13 Bankr. 110 (S.D. Ind. 1981).

[177]669 F.2d 505 (7th Cir. 1982).

recognizing that foolishness often come into play. Three recent decisions deal with these depression-oriented problems. However, the court in *American Fletcher National Bank & Trust Co. v. Pavilion, Inc.*,[178] refused to allow sureties to escape responsibility when the creditor lied to them with respect to the contents of the surety contract.[179] Parol evidence that a construction loan was not to be included in an all-encompassing contract of continuing guaranty was excluded after the court delivered a misguided lecture to the effect that businessmen should read and understand what they sign.[180] The case writes into law the lowest possible common denominator of business ethics under the guise of the parol evidence rule.[181]

Sureties signing a note were bound although two of the sureties named in the note did not sign in *Parrish v. Terre Haute Savings Bank*.[182] No evidence was introduced showing that their signatures were conditional upon all parties signing. The court in *Zack v. Smith*[183] held that a wife is not liable upon a loan procured by the husband alone, although the proceeds were used in a partnership or joint business venture. One recent decision[184] held that the husband is not liable for the wife's medical expenses[185] and another indicated to the contrary,[186] but the former recognized that marital assets are secondarily responsible—a refreshing new idea recognizing a type of common law community ownership.

C. Miscellaneous

Many troubles have been experienced with the law governing the assessment of reasonable attorney fees provided by agreement or statute. The Indiana Supreme Court has made it clear that a right

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[178]434 N.E.2d 896 (Ind. Ct. App. 1982).

[179]*Id.* at 906.

[180]*Id.* at 905-07.

[181]The decision excluded an admission by the lender that the construction loan was not included within the broad language of the guarantee. *Id.* at 905. For a decision to the contrary, compare Hancock County Bank v. American Fletcher Nat'l Bank & Trust Co., 150 Ind. App. 513, 276 N.E.2d 580 (1972) (open-end pledge agreement). The court in *Pavilion* overlooked the fact that the type of continuing guaranty contract here involved required a two-hour law school course of study to understand its many ramifications—one of which is the probability that the surety promise remained revocable by the sureties until credit was extended. Hence, a parol agreement that it would not apply to a specified later loan was not inconsistent with the writing.

[182]431 N.E.2d 132 (Ind. Ct. App. 1982).

[183]429 N.E.2d 983 (Ind. Ct. App. 1982).

[184]Memorial Hosp. v. Hahaj, 430 N.E.2d 412 (Ind. Ct. App. 1982).

[185]*See id.* at 416.

[186]Collection Bureau of Warrick County, Inc. v. Sweeny, 434 N.E.2d 143 (Ind. Ct. App. 1982) (the court appeared equally persuaded by the parental obligation of the husband to pay for the expenses attendant upon the birth of his child).

to reasonable attorney fees includes those incurred in defending an appeal;[187] it remains to be settled whether the right to attorney fees would include expenses in successfully prosecuting an appeal. The right to post-judgment attorney fees and interest obligations may be ascertained by motion or proceedings in the nature of proceedings supplemental, and if incurred upon appeal, are to be assessed by the trial court after the appeal is determined.[188] Numerous decisions remind lawyers that claims for reasonable attorney fees should be accompanied by competent proof.[189]

Consumer legislation received some attention in the last year. On rehearing, the court in *Noel v. General Finance Corp.*[190] determined that a consumer loan note covering after-acquired consumer goods was improper because the security interest was not limited to collateral acquired within ten days of the giving of value. The United States Supreme Court interpreting the Truth in Lending Act held that consumer credit sale assignees who made final approval of the credit transaction were "creditors" within the meaning of the law.[191] A finance company was allowed to sell household insurance to borrowers on a voluntary basis, although householders were also covered by homeowner's policies in *Department of Financial Institutions v. Beneficial Finance Co.*[192] The practice was challenged by a provision of the Uniform Consumer Credit Code[193] prohibiting charges for insurance unless it covers a substantial risk of loss in consumer transactions. The court correctly noted that the insurance paid off at

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[187]Templeton v. Sam Klain & Son, Inc., 425 N.E.2d 89 (Ind. 1981) (mechanic's lien). For further discussion, see *supra* note 96 and accompanying text.

[188]*Id.* at 94-95. *See also* Indiana State Dep't of Revenue v. Davies, 421 N.E.2d 688 (Ind. Ct. App. 1981) (action by taxpayer to collect interest on prior money judgment against the Department of Revenue).

[189]*E.g.*, Leibowitz v. Moore, 436 N.E.2d 899 (Ind. Ct. App. 1982) ($580 per hour unreasonable); Henry B. Gilpin Co. v. Moxley, 434 N.E.2d 914 (Ind. Ct. App. 1982) (layman creditor's affidavit insufficient to support summary judgment of $8500 for attorney fees); Parrish v. Terre Haute Sav. Bank, 431 N.E.2d 132 (Ind. Ct. App. 1982) (testimony of bank officer as to what fee attorney would charge to enforce note of bank held insufficient to establish $5000 attorney fee). *Cf. In re* Marriage of McBride, 427 N.E.2d 1148 (Ind. Ct. App. 1981) (meager proof established $75 an hour for chief attorney and $50 for associate and no proof of customary fees in locality where suit filed); *In re* Marriage of Gray, 422 N.E.2d 696 (Ind. Ct. App. 1981) (judicial notice of attorney fees in excess of expert testimony is not abuse of discretion).

[190]421 N.E.2d 25, *reh'g* 419 N.E.2d (Ind. Ct. App. 1981).

[191]Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981) (statement on contract notifying debtor of assignment sufficient disclosure of assignee's creditor status). In another decision, the Supreme Court held that assignment of unearned property damage insurance premiums was not a separate "security interest" required to be disclosed. Anderson Bros. Ford v. Valencia, 425 U.S. 205 (1981) (four justices justifiably dissenting).

[192]426 N.E.2d 711 (Ind. Ct. App. 1981).

[193]IND. CODE § 24-4.5-4-301 (1982).

replacement cost whereas most homeowner policies are limited to cash value thus justifying the practice of making the insurance available.

Finally, during the survey period, creditors, either directly or inferentially, were awarded by the courts some favorable rulings allowing them to intimidate debtors. A bill collector, for example, may enter a debtor's home, terrorize the debtor's wife and children by subjecting the husband and father to a beating all without incurring liability for any mental distress suffered by the debtor's family.[194]

[194]Elza v. Liberty Loan Corp., 422 N.E.2d 760 (Ind. Ct. App. 1981), *transfer denied*, 426 N.E.2d 1302 (Ind. 1981) (Hunter, J., dissenting). The decision was based upon the questionable Indiana rule requiring physical impact for emotional injuries of this type.