

tion.³² A similar statute is needed in Indiana. The right should be available to the landlocked property owner without regard for the conditions under which his land was rendered inaccessible.

XII. Secured Transactions and Creditors' Rights

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The last year has seen some sensational developments in the law of secured transactions and creditors' rights. The vendor under a conditional sales contract is now recognized as holding a security interest in land like that of a mortgagee. The exemptions of a wage earner have been expanded by the Indiana Supreme Court but narrowed by the highest Court of the land. The Indiana courts have also dealt with many technical and policy questions which should be of interest to the legal profession.

A. Real Estate Recording Statutes and Priorities

The Indiana recording statutes are incomplete, inconsistent, and leave much to be desired, especially with respect to reserved interests and transfers not literally or fully covered by recording laws.¹ An example of one problem will illustrate this observation. Suppose that *V* contracts to sell land to *P* on a conditional sales contract. Later, a third party, *P2*, acquires an interest from *V*.

³²An example of such legislation is 10 TENN. CODE ANNO. § 54-1902 (1956) which provides:

Any person owning any lands, ingress or egress to and from which is cut off or obstructed entirely from a public road or highway by the intervening lands of another, or who has no adequate and convenient outlet from said lands to a public road in the state, by reason of the intervening lands of another, is given the right to have an easement or right-of-way condemned and set aside for the benefit of such lands over and across such intervening lands or property.

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¹Indiana has two general statutes governing priorities. One relates to reserved interests. IND. CODE § 32-1-2-17 (Burns 1973). The other applies to conveyances, mortgages and leases. *Id.* § 32-1-2-16. Other statutes provide for recordation of certain types of instruments without including rules of priorities. *E.g.*, *id.* § 32-1-2-32. *Cf. id.* §§ 30-4-4-1, -2 (Burns 1972). None of the statutes states a clear or satisfactory rule for determining priorities, but IND. R. TR. P. 63.1(A), providing for the effect of *lis pendens* notice filing or lack of it, is satisfactory in that area.

Who prevails, and what law governs the rights of the parties?² Prior to the enactment of the modern recording statutes, *P1* was regarded as holding an equitable title. Such title could be cut off by a bona fide purchaser of a legal title from *V* but, as between competing equities, the rule was first in time, first in right.³ The time is ripe for a definitive court decision establishing priority rights among different classes of owners in real estate and, hopefully, the courts will read all the recording statutes as part of an integrated whole and apply uniform rules to both equitable and legal interests in land.⁴ The court of appeals passed up this opportunity in *Rural Acceptance Corp. v. Pierce*,⁵ in which a judgment creditor of the vendor claimed that his judgment lien took precedence over the interest of the vendor's prior purchaser, who was in possession of the land. The judgment creditor argued that his lien gave him a prior right to proceeds realized from insurance carried by the purchaser for himself and the vendor covering the loss of a building.⁶ The purchaser was given priority upon the theory that a judgment lienholder is not a purchaser for value who will cut off prior "equities." Unfortunately, the court failed to examine the valuable but sometimes ignored rule that a purchaser's possession gives him a perfected title as against the claims of subsequent parties.⁷

²The cases on this problem are almost indecipherable. Compare *Bandy v. Myers*, 141 Ind. App. 220, 227 N.E.2d 183 (1967), with *Denham v. Degymas*, 237 Ind. 666, 147 N.E.2d 214 (1958). Neither case considered the recording statutes which apply to land contracts. *Case v. Bumstead*, 24 Ind. 429 (1865); IND. CODE § 32-1-2-32 (Burns 1973).

³Compare *Denham v. Degymas*, 237 Ind. 666, 147 N.E.2d 214 (1958), with *Combs v. Nelson*, 91 Ind. 123 (1883), and *Wright v. Shepherd*, 47 Ind. 176 (1874).

⁴Some past decisions dealing with the Indiana recording laws have gone far toward achieving this result. Thus, defeasible equitable titles which depend upon parol proof are subject to the recording laws which literally apply only to separate written defeasances. *Tuttle v. Churchman*, 74 Ind. 311 (1881). A statute protecting purchasers for value has been judicially rewritten to apply to purchasers giving value without notice. *Wilson v. Wilson*, 86 Ind. 472 (1882). Plat books have been brought within the recording laws without express statutory provision. *Miller v. Indianapolis*, 123 Ind. 196, 24 N.E. 228 (1890).

⁵298 N.E.2d 499 (Ind. Ct. App. 1973).

⁶The court upheld an order granting specific performance to the purchaser and directing that the price first be applied to the vendor's mortgagee. Any excess was to go to the alleged judgment lienholders in the order of what the court assumed to be their judgment liens upon the land. Under the doctrine of equitable conversion, recognized by the court, the vendor had no interest in land but only in personal property. See discussion at text accompanying notes 119-29 *infra*.

⁷A decision to this effect would eliminate for all time the "lazy banker" rule of *Mishawaka, St. Joseph Loan & Trust Co. v. Neu*, 209 Ind. 433,

B. Conditional Sales Contracts

For centuries, the English law and most state statutes have prohibited forfeiture of the rights of a mortgagor. Indiana law contemplates that the mortgagee by contract or otherwise cannot defeat the mortgagor's right of redemption until sale, which sale may not be held until six months after the filing of the foreclosure complaint.⁸ For centuries, crafty lawyers have sought ways to defeat this redemption right, and one device for achieving this end has been the conditional sales contract. It has been the traditional view in Indiana that a conditional vendor of real estate could declare a forfeiture upon the vendee's default when the contract allowed him to do so.⁹ The Indiana Supreme Court declined to approve this practice in the case of *Skendzel v. Marshall*,¹⁰ in which the court required a vendor, who had received over one-half of the purchase price, to foreclose his interest or lien by following the same procedure applicable to mortgagees. The decision was immediately followed by the Indiana Court of Appeals in *Tidd v. Stauffer*.¹¹ Although *Skendzel* indicated that forfeiture would be permitted in situations in which it was equitable to do so, the case is a landmark which brings a much needed humanity and consistency to the law.¹² This need for humanity and consistency was flaunted, but clearly demonstrated, in *Goff v. Graham*.¹³ The

196 N.E. 85, 105 A.L.R. 881 (1935). In that case, the interest of a vendee with three days possession was defeated by a banker who took a mortgage without actual knowledge. Case law overwhelmingly protects the purchaser in possession, who arguably holds a legal title. Cf. *Burt v. Bowles*, 69 Ind. 1 (1879) (equitable title of possessor protected by legal remedy of ejectment).

⁸The Indiana mortgage statute gives a right of redemption and prohibits sales of real estate before the elapse of six months after the filing of the foreclosure complaint. IND. CODE § 32-8-16-1 (Burns 1973) (mortgages executed after July 1, 1957). This requirement was applied to all lien foreclosures by IND. R. TR. P. 69(C). This right of the mortgagor may not be contracted away. *Federal Land Bank v. Schleeter*, 208 Ind. 9, 194 N.E. 628 (1935).

⁹*E.g.*, *J.F. Cantwell Co. v. Harrison*, 95 Ind. App. 293, 180 N.E. 482 (1932).

¹⁰301 N.E.2d 641 (Ind. 1973).

¹¹308 N.E.2d 415 (Ind. Ct. App. 1974) (when \$16,000 had been paid on the purchase price of \$39,000, the court ordered foreclosure rather than forfeiture).

¹²The old law made a distinction between the rights of a conditional seller and a mortgagee of personal property. This inconsistency was one of the emphatic reasons for Article 9 of the Uniform Commercial Code which eliminated any artificial differences and treated the conditional sales contract as an ordinary security interest. UNIFORM COMMERCIAL CODE § 9-201 (37).

¹³306 N.E.2d 758 (Ind. Ct. App. 1974).

court of appeals upheld a lower court decision, after the lower court had exercised apparently unprecedented continuing jurisdiction over the parties to a conditional sales contract in default, and allowed the vendor to claim a forfeiture of moneys paid along with damages which included overdue back payments.¹⁴

One other problem related to the *Skendzel* case should be noted. When the bankers succeeded in bringing about the adoption of the new Trust Code, a means for evading redemption rights may have seeped into the law through a provision which allows an owner of land to convert the land into personal property by a kind of legal "hocus pocus"—a form of dry trust.¹⁵ Thus, an owner may convey his land to a trustee but preserve the right of management in himself as beneficiary, his interest thereby becoming personal property. The idea seems to have come from Illinois, where several recent decisions hold that the beneficiary, who is the real owner of the land for most practical purposes, may give a security interest in his rights as personal property.¹⁶ This security interest may be foreclosed under the Uniform Com-

¹⁴The history of the case in the court below indicated that the defendant was reordered to comply with the contract. This action was followed by appointment of a receiver, dismissal of the receiver, and finally a judgment of cancellation with damages. The opinion in the court of appeals upheld damages for waste and allowed the balance of the award to stand as an award of restitution based upon moneys received by the purchaser as rent. However, no deductions for expenses incurred by the purchaser were mentioned. *See* *Grissom v. Moran*, 292 N.E.2d 627 (1973), *modifying* 290 N.E.2d 119 (Ind. Ct. App. 1972), in which the court held that in a rescission action the burden of proof falls upon the defendant to adjust the equities or damages to achieve the status quo. Two other recent decisions, involving identical fact situations, considered alleged abuses by a conditional seller of real estate and his alleged conspirators in which a form of strict forfeiture apparently was allowed. *Ernst v. Schmal*, 308 N.E.2d 732 (Ind. Ct. App. 1974); *Lake Mortgage Co. v. Federal Nat'l Mortgage Ass'n*, 308 N.E.2d 739 (Ind. Ct. App. 1974). The court in *Ernst* avoided careful examination of the vendee's claims by upholding a lower court decision granting a new trial to the conditional seller and finding insufficient evidence of wrongdoing by a receiver and a prior mortgagee who allegedly participated in the vendee's abuses.

¹⁵IND. CODE § 30-4-2-14 (Burns 1972). This section permits a power of sale in the trustee upon the direction of the beneficiary or other person, thus allowing a lender-trustee to sell the beneficiary's interest on foreclosure. *Id.* § 30-4-2-13 upholds the trust when the beneficiary has the power to manage the real property and excludes the trust from the usual treatment given to a dry trust.

¹⁶*Wambach v. Randall*, 484 F.2d 572 (7th Cir. 1973) (beneficiary's interest under land trust is personal property and security interest therein may be perfected by filing under the Uniform Commercial Code).

mercial Code¹⁷ without judicial sale and without the right of redemption under statutes applicable to mortgages on real estate.¹⁸ It is unlikely that the court which decided *Skendzel* would allow the land trust provision of the Trust Code to repeal the mortgage redemption laws.¹⁹

A vendor improperly evicting a purchaser under a conditional sales contract undoubtedly commits a material breach of contract, thus allowing the purchaser to treat the contract as terminated and to rescind.²⁰ This remedy was clearly recognized by the supreme court in *Smeekens v. Bertrand*,²¹ wherein the breach occurred when the vendor posted bond and improperly recovered possession at the threshold of an ejectment action. Thereupon, the purchaser elected to rescind and sought recovery upon the ejectment bond. The court of appeals²² held that the bond did not cover this element of damages, thus allowing a somewhat shocking abuse of the summary procedures then available in ejectment. Some of the sting of this decision has been removed by the new Indiana ejectment statute,²³ enacted to meet the objections which the United States Supreme Court pronounced in *Fuentes v. Shevin*.²⁴ The

¹⁷IND. CODE §§ 26-1-1-101 to -2-4-1 (IND. ANN. STAT. §§ 19-1-101 to -14-116, Burns 1964) [hereinafter cited as UNIFORM COMMERCIAL CODE; hereinafter referred to as the UCC or Code].

¹⁸Kortenhof v. Messick, 309 N.E.2d 368 (Ill. App. 1974) (holding that mortgage foreclosure act did not apply to beneficiary of trust who assigned his interest as security to a bank).

¹⁹It is extremely doubtful that the land trust provision of the Indiana statute will be held to transform the beneficiaries' interest into personal property for purposes of foreclosure. First, Indiana courts have always taken a dim view of sham transactions to defeat foreclosure laws. *E.g.*, Kerfoot v. Kessner, 227 Ind. 58, 84 N.E.2d 190 (1949); Knapp v. Ellyson Realty Co., 211 Ind. 180, 5 N.E.2d 973 (1937); Davis v. Landis, 114 Ind. App. 665, 53 N.E.2d 544 (1944). Secondly, repeal of the statute by the vague language of the Trust Code is almost unthinkable. Thirdly, the Trust Code specifically provides that the "rules of law contained in this article do not apply to . . . security instruments and creditor arrangements." IND. CODE § 30-4-1-1(c) (Burns 1972).

²⁰Compare Gwynne v. Ramsey, 92 Ind. 414 (1883), with Jennings v. Bond, 14 Ind. App. 282, 42 N.E. 957 (1895). *But cf.* Haas v. Rathburn, 137 Ind. App. 172, 205 N.E.2d 329 (1965) (holding that tenant in ejectment action could not set up eviction in counterclaim).

²¹311 N.E.2d 431 (Ind. 1974).

²²Bertrand v. Smeekens, 298 N.E.2d 25 (Ind. Ct. App. 1973).

²³IND. CODE §§ 32-6-1.5-1 *et seq.* (Burns Supp. 1974). This statute requires notice and hearing before possession is awarded to the plaintiff upon his showing of a "reasonable probability" of recovery in the principal action. *Id.* § 32-6-1.5-5. In case of emergency, possession may be granted without hearing upon affidavits filed with the court. *Id.* § 32-6-1.5-3.

²⁴407 U.S. 67 (1972). This case held unconstitutional statutes which allowed replevin to a plaintiff posting bond but which had no provision

statute provides for a preliminary hearing on the question of the plaintiff's probability of recovery. In any event, the court of appeals decision seems unsound, particularly insofar as the surety bondsman is protected by his right of subrogation which includes the right to the returned property.

C. Motor Vehicles

In Indiana, a security interest in a motor vehicle is created by an ordinary security agreement which must be in writing, must be signed by the debtor, and must describe the collateral. In addition, value must be given and the debtor must have rights in the collateral.²⁵ Suppose that there is no formal security agreement, but that the lien is indicated upon the application for the certificate of title and upon the certificate of title issued by the Bureau of Motor Vehicles. Two formalities required for a security agreement may be missing. One is the lack of the debtor's signature, since he is not required to apply for the certificate,²⁶ and the other is the omission of words of grant or promise.²⁷ In *White v. Household Finance Corp.*,²⁸ the court held that, although the certificate named the secured party as lienholder and included the debtor's surety as a co-owner with the debtor, it did not fulfill the requirements of a security agreement as specified by the Uniform Commercial Code because the signature of the debtor was lacking.²⁹ *White* poses an

for notice and hearing. *Fuentes* has since been modified by *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895 (1974) (allowing ejection when the judge authorizes possession to a plaintiff who furnishes evidence and a bond).

²⁵UNIFORM COMMERCIAL CODE §§ 9-203(1)(b), 9-204(1). To be perfected as against creditors, purchasers and other secured parties claiming through the debtor, the security interest must be indicated upon the certificate of title by a public official. *Id.* § 9-302(3) & (4). However, perfection is not required to create a security interest between the debtor and the secured party.

²⁶*Id.* §§ 9-203(1)(b), 9-204(1). When a certificate of title or of origin is transferred, the assignment upon the certificate is executed and signed by the seller, and not by the transferee who is usually the debtor.

²⁷It is for this reason, *i.e.*, that the financing statement does not contain words of promise or grant, that an official financing statement signed by the debtor does not meet the requirements of a security agreement. *E.g.*, *American Card Co. v. H.H.M.H. Co.*, 97 R.I. 59, 196 A.2d 150 (1963).

²⁸302 N.E.2d 828 (Ind. Ct. App. 1973). This case held that, when the secured party released insurance moneys to permit the debtor to acquire the motor vehicle in question, a release of collateral was effectuated which discharged the surety upon the debtor's obligation.

²⁹Substantial authority was cited in support of this result. *E.g.*, *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. 1973). Other authority to the contrary was also cited. Recently, it has been held that, if a number of documents or instruments are prepared as part of a sale, loan and security transaction, all the papers must be read together as one writing. *In re Penn Housing Corp.*, 367 F. Supp. 661 (W.D. Pa. 1973).

extremely important problem which often arises as a result of common business practice. Often the seller of a motor vehicle delivers possession to the buyer and, to assure payment, the seller retains possession of the certificate of title in his name, without the formality of a security agreement.³⁰ The *White* case indicates the risk involved in this practice and suggests the need for use of at least an informal security agreement when delivery is made before payment is received.

D. After-acquired Collateral and Proceeds

A security agreement may cover after-acquired collateral,³¹ and it may also apply to proceeds or property taken in exchange

³⁰It is not uncommon for a seller of a motor vehicle who receives a check for the price to withhold the certificate of title and his assignment thereon by fastening it to the buyer's check. When the check is paid by the drawee, the certificate with the assignment is made available to the buyer when he receives his cancelled check. But, if the check is not paid, the certificate will be returned to the seller. In this case, the pre-Uniform Commercial Code cases usually held that an unpaid seller could repossess the vehicle even against a bona fide purchaser from the buyer who was not a dealer and who did not get the certificate of title. *E.g.*, *Nelson v. Fisch*, 241 Iowa 1, 39 N.W.2d 594 (1949). *But cf.* *Fryer v. Downard*, 134 Ind. App. 225, 187 N.E.2d 105 (1963) (buyer apparently forged seller's signature to certificate entrusted to buyer; buyer also appeared to be a dealer). Under the Uniform Commercial Code, the seller who receives a bad check for the price of goods delivered to the buyer has a right to reclaim the goods, but the buyer holds a voidable title with a power to cut off the seller's title by sale to a bona fide purchaser. UNIFORM COMMERCIAL CODE § 2-403(1). The seller's right in such a case is a right of rescission and restitution, and is not a security interest. *Compare id.* §§ 2-511(3) (payment by check conditional), 2-702 (seller allowed to reclaim goods when buyer received goods on credit while insolvent), 2-721 (preserving remedies for fraud and extending relief available in case of rescission), *with* *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 519 P.2d 354, 359, 14 UCC REP. SERV. 40, 47 (Colo. 1974) ("the right to reclaim goods sold in a cash sale transaction . . . is not and was not intended to be a security interest"). The better authority under the Code, however, will protect the seller who has received a bad check from the buyer and who retains the certificate of title as against the purchaser of the buyer, if the buyer is not a dealer, upon the theory that the purchaser taking the vehicle without a certificate of title does not purchase in good faith. *Morris Plan Co. v. Moody*, 266 Cal. App. 2d 28, 72 Cal. Rptr. 123, 5 UCC REP. SERV. 1026 (1968); *Mattek v. Malofsky*, 42 Wis. 2d 16, 165 N.W.2d 406, 6 UCC REP. SERV. 277 (1969). *Cf.* *Lane v. Honeycutt*, 14 N.C. App. 436, 188 S.E.2d 604, 10 UCC REP. SERV. 1173 (1972) (purchaser from buyer who gave bad check did not receive certificate of title to boat).

³¹UNIFORM COMMERCIAL CODE § 9-204(3) & (4). A financing statement may be filed prior to the execution of a security agreement and before the debtor acquires any rights in the collateral and, as a general rule, a secured

for the original security.³² Both of these rules were involved in *White v. Household Finance Corp.*,³³ in which the original security agreement on the debtor's motor vehicle included language covering after-acquired household and consumer goods.³⁴ When the motor vehicle was destroyed in an accident, the court recognized the generally accepted rule that insurance covering the debtor against loss of collateral is not proceeds. Such insurance may be claimed as security only when the debtor agrees to insure or when the secured party is named in the policy as an insured.³⁵ The debtor voluntarily had caused the secured party to be named with him as an insured, so that the insurance continued as security after the loss. However, the secured party and the debtor indorsed the insurance check to a dealer for a new motor vehicle without executing a new security agreement covering the second vehicle. The court held that the new vehicle was not covered by the first security agreement, either as proceeds of the insurance moneys³⁶ or as after-acquired collateral's rights date from the time of perfection. Compare *id.* § 9-402(1) with *id.* § 9-312(3) & (5).

³²A security interest continues in identifiable proceeds which include whatever is received when collateral or proceeds are sold, exchanged, collected or otherwise disposed of. See *id.* § 9-306(1) & (2). Perfection as to proceeds is accomplished by indication in the financing statement covering the original collateral; otherwise perfection is required as to the proceeds with a ten day grace period if the original collateral was perfected. *Id.* § 9-306(3).

³³302 N.E.2d 828 (Ind. Ct. App. 1973).

³⁴Although not discussed in the case, descriptions such as "consumer" or "household" goods have been held sufficient. *In re Turnage*, 493 F.2d 505 (5th Cir. 1974); *In re Trumble*, 5 UCC REP. SERV. 543 (W.D. Mich. 1968); *United States v. Antenna Systems, Inc.*, 251 F. Supp. 1013 (D.N.H. 1966). *Contra*, *In re Lehner*, 303 F. Supp. 317, 6 UCC REP. SERV. 1023 (D. Colo. 1969). A general description is almost a necessity in the case of after-acquired collateral. *Barnett Bank v. Fletcher*, 290 So. 2d 533 (Fla. App. 1974). A motor vehicle would seem to be "consumer goods" within the general Code definition of the term if used or bought primarily for personal, family, or household purposes. UNIFORM COMMERCIAL CODE § 9-109(1).

³⁵When insurance is carried by the lien-debtor only, the secured party has no rights to loss payments unless the former agreed to insure the property. *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 13 N.E. 683 (1887). When the debtor procures an insurance policy naming himself and the secured party as insureds, the latter may enforce the policy as a creditor beneficiary and any recovery inures to the benefit of a surety upon the obligation. *Cf.* *Cook v. American States Ins. Co.*, 275 N.E.2d 832 (Ind. Ct. App. 1971). If the policy names both the debtor and secured parties as insureds, the latter receives added protection when a "union" or "standard" clause is used, thereby treating each as separately insured. *Federal Nat'l Mortgage Ass'n v. Great Am. Ins. Co.*, 300 N.E.2d 117 (Ind. Ct. App. 1973) (allowing mortgagee to recover loss after it had purchased the insured property on foreclosure of mortgage).

³⁶The court correctly held that insurance moneys are not "proceeds" of the original collateral—a position supported by the weight of Code and

eral. Section 9-204(4) of the Uniform Commercial Code provides that no security interest attaches under an after-acquired property clause with respect to consumer goods given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value. The court held that this restriction was applicable to the facts in this case and overlooked the fact that the secured party's indorsement and delivery of the check constituted a contemporaneous exchange for the new automobile and, therefore, was value given within the ten day period.³⁷ Furthermore, it appeared that the second vehicle was claimed not as "additional" but as replacement security.³⁸ Upon this point, it seems that the court was in error, and the exchange of the check for the contemporaneous acquisition of the new vehicle should

pre-Code law. *E.g.*, *Universal C.I.T. Credit Corp. v. Prudential Inv. Corp.*, 101 R.I. 287, 222 A.2d 571, 3 UCC REP. SERV. 696 (1966). This was the pre-Code rule in Indiana. *Hoverstock v. Darrow*, 94 Ind. App. 83, 179 N.E. 790 (1932). The proposed revision to the UCC would provide that insurance covering loss of collateral is proceeds. UNIFORM COMMERCIAL CODE § 9-306(1) (1972 version). The main question in *White* was whether the second motor vehicle purchased with the insurance funds was proceeds. Since the right under the insurance policy was properly excluded from the ambit of the UCC, *id.* § 9-104(g), the question of whether the second vehicle took the place of the secured party's rights to the insurance fund was governed by common law principles or the UCC's requirement that a security agreement describing the collateral be signed by the debtor. *Id.* §§ 9-203(1)(b), 9-204(1). The court then held that, in the absence of a written security agreement signed by the debtor, no security interest attached to the new vehicle. In other words, substitution of collateral which is not proceeds must be effectuated by a security agreement meeting UCC requirements. This matter is discussed at text accompanying notes 73-76 *infra*.

³⁷When the secured party indorsed the check payable to him and to the debtor, and the check was used by the debtor to purchase the new vehicle, surrender of the proceeds constituted value. UNIFORM COMMERCIAL CODE § 9-108. This is a form of "new value" and constitutes a well recognized concept of securities law. *See Phelps v. National Acceptance Co. of America*, 7 UCC REP. SERV. 56 (M.D. Ala. 1969).

³⁸The limitation upon after-acquired collateral in the case of consumer goods is restricted to cases in which the security is taken as "additional" security. UNIFORM COMMERCIAL CODE § 9-204(4)(b). Seemingly, this does not apply when collateral is substitutional. Security agreements commonly extend to items taken in replacement of the collateral, and this appears to be the reason for limiting the prohibition as to after-acquired collateral in consumer goods to "additional" security. Section 9-204(4)(b) also excludes accessions from the exception. The reason for requiring the debtor to acquire rights in the goods within ten days after the secured party gives value is to prevent the lender, who takes a security interest in after-acquired consumer goods, from reaping the benefit of such a pot-luck provision without in any way contributing to later acquisitions by the debtor. *Cf. In re Johnson*, 13 UCC REP. SERV. 953 (D. Neb. 1973).

properly have brought the new vehicle within the after-acquired property clause contained in the first agreement.

The Code also restricts after-acquired property provisions in the case of crops by requiring that a security agreement cannot cover future crops unless they become growing within one year of the execution of the security agreement.³⁹ The Court of Appeals for the Seventh Circuit, in *United States v. Gleaners & Farmers Cooperative Elevator Co.*,⁴⁰ upheld a financing arrangement encompassing future crops when the successive security agreements applied to crops which became growing within the year of each security agreement, even though those crops were not growing within one year after the filing of a single financing statement. The court held that the financing statement was still effective for the usual five years.⁴¹ Unfortunately, the court disapproved the one year rule by reference to proposed Uniform Commercial Code amendments which would allow farmers to encumber their crops in perpetuity.⁴² The need to finance the planting, care, and harvest of current crops is a life and death matter, and thus there are sound policy reasons for keeping current crops available as security for current loans. The one year rule is a good one and elimination of it should only be accomplished after careful thought.⁴³

E. Inventory and Accounts Receivable Financing

Probably the most significant pioneering provisions of the Code relate to inventory and accounts receivable financing.⁴⁴ Several recent decisions in this area are of importance to bankers and others involved in this type of financing. The Code adopts the basic

³⁹UNIFORM COMMERCIAL CODE § 9-204(4) (a). This one year restriction does not extend to security interests in crops given in conjunction with a lease, land purchase or land improvement transaction evidenced by a contract, mortgage or deed of trust.

⁴⁰481 F.2d 104 (7th Cir. 1973).

⁴¹A financing statement is effective as constructive notice for five years from the date of filing unless it contains a maturity date within that period, in which case it becomes ineffective sixty days after the maturity date. UNIFORM COMMERCIAL CODE § 9-403(2). The Code fixes no expiration date on the effectiveness of a security agreement except as applied to after-acquired property clauses in the case of consumer goods and crops. *See id.* § 9-204(4).

⁴²*Id.* § 9-204(3) (1972 amendment proposed by the National Conference of Commissioners on Uniform State Laws and the American Law Institute).

⁴³The Code gives a super-priority, to enable production during the growing season, to a security interest taken for new value not more than three months before crops become growing, but only as against prior security interests due more than six months before the crops become growing. *Id.* § 9-312(2).

⁴⁴No longer is it a fraud on creditors for a secured party to take a security interest in inventory and accounts receivable without requiring a strict accounting as to the proceeds. *Id.* § 9-205.

rule that if *D* gives a security interest upon his inventory to *SP*, who perfects, a subsequent buyer in the ordinary course of business will take free of the prior security interest even though he knows of its existence.⁴⁵ The rule was applied in *First National Bank v. Crone*,⁴⁶ in which a dealer in logs had executed a security interest in 147 logs to secure a \$15,000 obligation to his bank, which then "recorded"⁴⁷ a financing statement covering the transaction. Thereafter, the logs were sold to or through a partnership engaged in the business of buying and selling logs. The partnership, in turn, arranged for a sale to an ultimate buyer who paid for the logs by means of a draft deposited with the bank. The bank then withheld the proceeds when the draft was collected. The court held that the partnership was a buyer in the ordinary course of business and took priority as to the draft proceeds less the net amount it owed to the dealer on the price of the logs.

The *Crone* case resolved two interesting questions. First, the court held that a sale of the dealer's entire stock of logs did not constitute a bulk sale, excluded by definition, when the dealer had been engaged in the business of buying and selling logs for over twenty-five years. The burden of proving that the sale was in bulk or out of the ordinary course of business evidently was placed on the inventory financier.⁴⁸ A second question arose when it appeared

⁴⁵*Id.* § 9-307. This substantially restates prior law. *Helms v. American Security Co.*, 216 Ind. 1, 22 N.E.2d 822 (1939).

⁴⁶301 N.E.2d 378 (Ind. Ct. App. 1973).

⁴⁷A distinction of no importance is that financing statements are filed, not recorded. The court assumed that the bank's security interest in the inventory was duly perfected. Had it not been perfected, any buyer, including a buyer in bulk, would have been protected under UNIFORM COMMERCIAL CODE § 9-301(1)(c) had he acquired delivery and given value without knowledge of the prior security interest.

⁴⁸The court held that the absence of evidence showing that the dealer, who sold to the alleged buyer in the ordinary course of business, intended to abscond or repurchase under a sham agreement showed that the sale was in the ordinary course of business. Compare *Everett Nat'l Bank v. Deschuteneer*, 109 N.H. 112, 244 A.2d 196, 5 UCC REP. SERV. 561 (1968). However, proof of an intent to defraud creditors is not required in the case of a bulk sale and, in fact, most bulk sales, when there is compliance with Article 6 of the Uniform Commercial Code, are carried out without fraudulent purposes on the part of either the buyer or seller. Probably the real effect of the *Crone* case is that a sale in the ordinary course of business includes a sale to a broker or wholesaler in the goods. *E.g.*, *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648, 10 UCC REP. SERV. 523 (Del. 1972) (merchant-buyer may be a buyer in the ordinary course of business and the Article 2 definition of good faith as applied to merchants is inapplicable to an Article 9 transaction); *Associates Discount Corp. v. Rattan Chevrolet, Inc.*, 462 S.W.2d 546, 8 UCC REP. SERV. 117 (Tex. 1970). At the least, the case stands for the proposition that a seller regularly engaged in selling raw products, which

that the alleged buyer in the ordinary course of business had advanced \$6,300 on the price before delivery of the goods. The definition of a buyer in the ordinary course of business includes "receiving goods . . . under a pre-existing contract for sale, but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."⁴⁹ Without discussion, it was determined that the receipt of goods in satisfaction of a prior down payment on their price is a receipt "under a pre-existing contract for sale" and not a transfer in "total or partial satisfaction of a money debt." This is a most sensible conclusion.⁵⁰

The Court of Appeals for the Seventh Circuit, in *Fitzpatrick v. Philco Finance Corp.*,⁵¹ dealt with one of the important problems involved in inventory and accounts receivable financing, that is, when cash proceeds are commingled or deposited in a general bank account and the debtor is subjected to bankruptcy. Section 9-306 (4) (d) of the Uniform Commercial Code provides generally that a perfected security interest in cash proceeds intermingled or deposited in a bank account continues to be perfected into the whole of the cash or bank account in the event insolvency proceedings are instituted against the debtor. However, the perfected security interest in the bank account or commingled cash is limited to cash proceeds

require further processing by the buyer, sells in the ordinary course of business when he sells large quantities of his inventory to other merchants or processors.

⁴⁹UNIFORM COMMERCIAL CODE § 1-201(9).

⁵⁰If the seller is indebted to the buyer on a prior debt which is applied to reduce the purchase price of the goods, the buyer is not a buyer in the ordinary course of business. *Sherman v. Roger Kresge, Inc.*, 323 N.Y.S.2d 804, 9 UCC REP. SERV. 858 (Broome County Ct. 1971) (seller delivered used cars—inventory—in exchange for buyer's check which was returned to buyer and applied on prior debt owing by seller to buyer); *Chrysler Credit Corp. v. Malone*, 502 S.W.2d 910, 13 UCC REP. SERV. 964 (Tex. Civ. App. 1973) (seller sold automobile to buyer who purchased by returning a \$5,000 check given earlier on the same day by seller to buyer for a prior obligation owing for insurance premiums). It is interesting to note that, in the *Crone* case, the buyer gave value before receiving possession of the goods. Some decisions have held that a buyer in the ordinary course of business, who makes payment under a valid contract to purchase, qualifies even if he does not receive delivery of the goods. *E.g.*, *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648, 10 UCC REP. SERV. 523 (Del. 1972); *Draper v. Minneapolis-Moline, Inc.*, 100 Ill. App. 2d 324, 241 N.E.2d 342, 5 UCC REP. SERV. 972 (1968); *Chrysler Credit Corp. v. Sharp*, 288 N.Y.S.2d 525, 5 UCC REP. SERV. 226 (Sup. Ct. 1968). *Contra*, *Chrysler Credit Corp. v. Adamatic, Inc.*, 59 Wis. 2d 219, 208 N.W.2d 97, 12 UCC REP. SERV. 849 (1973) (holding that when some goods are returned to the debtor for repair, buyer qualifies as buyer in the ordinary course of business).

⁵¹491 F.2d 1288 (7th Cir. 1974). The case involved the Illinois version of the Uniform Commercial Code which is the same as Indiana's version.

received and commingled or deposited within ten days prior to the institution of the proceedings less cash proceeds received by the debtor and paid over to the secured party during the ten day period.⁵²

In *Fitzpatrick*, an inventory financier with a perfected security interest in inventory and proceeds was paid some \$44,000 from the debtor's general checking account during the ten day period prior to bankruptcy. The court held that, since the security interest in the bank account ceased to be perfected ten days prior to the institution of the bankruptcy proceeding, payments from the account within that period to the secured party depleted the debtor's estate by transferring his property to pay an antecedent debt which was not fully secured. Therefore the transfer was vulnerable as a preference.⁵³ The court also held that the date of payment by check from the account was the date the instrument was paid by the drawee bank, not the date the check was received.⁵⁴ The secured party was allowed to retain \$4,500 of the payment which represented cash proceeds from inventory received by the debtor within the ten day period and deposited in the debtor's general account, even though the court erroneously indicated that such allowance was questionable as a priority provision in conflict with the Bankruptcy Act.⁵⁵

The decision emphasizes the need for the use of special bank accounts for the deposit of cash proceeds and the danger of accept-

⁵²This rule, providing a practical but limited right of tracing cash proceeds upon insolvency, was derived from section 10(b) of the Uniform Trust Receipts Act, ch. 206, § 10(b), [1935] Ind. Acts 1003 (repealed 1964), which was in effect in Indiana until the adoption of the Uniform Commercial Code. It has been held that cash proceeds received and paid to the secured party, which are required to be subtracted from those received and intermingled or deposited, refers to cash proceeds paid from intermingled or deposited funds. *In re Security Aluminum Co.*, 9 UCC REP. SERV. 47 (E.D. Mich. 1971).

⁵³The amounts in the bank account apparently were proceeds or other funds received and deposited in the account prior to bankruptcy. Literally, UNIFORM COMMERCIAL CODE § 9-306(4)(d)(ii) provides that the security interest in the whole of the account is perfected "in the event of insolvency" proceedings but is limited by cash proceeds received within the ten day period and deposited in the account, less pay outs therefrom to the secured party within the same period. It should be noted that, if the secured party claimed unpaid proceeds in the bank account received by the bankrupt prior to the ten day period, as an unperfected security interest, the claim would have been awarded under *id.* § 9-301(1)(b) & (3) and Bankruptcy Act § 70c, 11 U.S.C. § 110(c) (1970).

⁵⁴*Accord*, UNIFORM COMMERCIAL CODE § 3-409 (a draft or check is not an assignment).

⁵⁵11 U.S.C. § 96 (1970). The history of this problem and its correct solution is discussed in Henson, "Proceeds" under the Uniform Commercial Code, 65 COLUM. L. REV. 232 (1965) (reprinted in 2 UCC REP. SERV. 566).

ing payments from the general bank account of the debtor whenever bankruptcy is imminent.⁵⁶ The courts will face an even more difficult problem when a case arises in which payments are received from a general bank account or intermingled cash proceeds prior to the ten day period.⁵⁷ Literally, section 9-306(4)(d) deals only with transactions occurring within the ten day period. Therefore, payments made to a secured party before that time should be protected as payments from cash proceeds subject to the accepted rules for tracing proceeds commingled with other cash funds or in a bank account.⁵⁸

⁵⁶Identifiable cash proceeds which are not commingled continue to be perfected. UNIFORM COMMERCIAL CODE § 9-306(4)(a) to (c). If moneys constituting proceeds are deposited in a special account and are, thus, segregated, perfection continues into the account. *Salzer v. Victor Lynn Corp.*, 315 A.2d 185, 14 UCC REP. SERV. 208 (N.H. 1974).

⁵⁷Payments from intermingled cash proceeds or a general bank account made prior to the ten day period are not specifically dealt with by the Code. It would seem, therefore, that a secured party may claim that such payments are realized from perfected collateral and are nonpreferential to the extent permitted under common law rules of tracing. Indiana follows the lowest intermediate fund theory, *i.e.*, if proceeds are traced to a bank account, the debtor is presumed to make subsequent withdrawals from other funds first so that the secured party may reach the balance not exceeding the lowest amount of the fund after the deposit of his item. *E.g.*, *Rottger v. First Merchants Nat'l Bank*, 98 Ind. App. 139, 184 N.E. 267 (1933). When several secured parties trace proceeds to an intermingled mass or deposit, they share pro-rata subject to the lowest intermediate fund rule. *See Gibbs v. Gerberick*, 1 Ohio App. 2d 93, 96, 203 N.E.2d 851, 855-56 (1964), quoting RESTATEMENT OF RESTITUTION § 213(c) (1937). If cash proceeds are transferred to bona fide purchasers for value, the latter will take priority over perfected security interests. *Merchants Nat'l Bank & Trust Co. v. United States*, 12 UCC REP. SERV. 902 (U.S. Ct. Cl. 1973) (United States, receiving proceeds from checking account in payment of taxes, took priority over secured party). However, a banker's right of set-off to proceeds deposited in a bank account is generally deferred to security interests in proceeds deposited in the account. *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317, 13 UCC REP. SERV. 109 (E.D. Mo. 1973); *Commercial Discount Corp. v. Milwaukee Western Bank*, 61 Wis. 2d 671, 214 N.W.2d 33, 12 UCC REP. SERV. 1202 (1974). *Cf. Peoples State Bank v. Caterpillar Tractor Co.*, 213 Ind. 235, 12 N.E.2d 123 (1938).

⁵⁸If the secured party is able to trace his payment to proceeds in a bank account, there is generally no preference simply because his perfected security interest in the proceeds is used to pay the debtor's indebtedness. If the transfer of the security interest in the original collateral was perfected more than four months prior to bankruptcy, or obtained in exchange for a contemporaneous loan, there will be no preference. Likewise, when a fully secured creditor is paid from any source, there is no preference because the transaction results merely in an exchange or release of the debtor's property and there is no depletion of his estate to the injury of general creditors. In the

The supreme court qualified the holding of the court of appeals in *Ertel v. Radio Corp. of America*,⁵⁹ which recognized that an assignee of accounts takes free of independent defenses and claims accruing to the account debtor after the account debtor has received notification to pay the assignee.⁶⁰ On transfer, the supreme court found that the rights under three contracts between the debtor and the account debtor were assigned, but that the set-off or counterclaim arose out of the debtor's defective performance under the third contract. The court held that the claim or defense was one arising out of that contract and, as required by section 9-318 (1) (a) of the Uniform Commercial Code, the assignee took subject to the claim without regard to the time of notification.⁶¹ The court did not indicate whether the right of set-off was limited to the amount of the claim on the third contract or whether it would be allowed on the other two contracts assigned.

In *First National Bank v. Smoker*,⁶² the court denied a farmer, who sold cattle on credit to a meat processor, the right to reclaim the cattle as against a prior security interest in the buyer's inventory. The reason for denial of the farmer-seller's right to reclaim was that he failed to comply with section 2-702 of the Uniform Commercial Code, which requires a demand within ten days after delivery. This holding was reinforced by the United States Supreme Court in *Mahon v. Stowers*,⁶³ wherein the Court determined that the farmer was not protected under provisions of the Federal Packers and Stockyards Act.⁶⁴

F. Assignments by Lienholder or Lien Debtor

Several decisions dealt with assignments of rights by lienholders. In *Ertel v. Radio Corp. of America*,⁶⁵ the court recognized the general rule that a surety who pays a creditor in full is subro-

Fitzpatrick case, the secured party's claim was not fully secured, so that payment from unperfected funds was vulnerable as a preference.

⁵⁹307 N.E.2d 471 (Ind. 1974).

⁶⁰The case also affirmed the court of appeals opinion, holding that a surety who paid the assignee secured party was subrogated to the assignee's rights to the collateral, *i.e.*, the claim against the account debtor, and that proper notification to the account debtor was received as required by UNIFORM COMMERCIAL CODE § 9-318(3).

⁶¹" . . . the rights of an assignee are subject to (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom . . ." *Id.* § 9-318(1) (a).

⁶²286 N.E.2d 203 (Ind. Ct. App. 1972).

⁶³94 S. Ct. 1626 (1974).

⁶⁴7 U.S.C. §§ 181 *et seq.* (1970).

⁶⁵307 N.E.2d 471 (Ind. 1974). The creditor brought this action against the debtor and guarantors for the amount owing under a loan and security agreement covering accounts receivable and revolving inventory.

gated to all the rights the creditor has in the collateral, including rights against an account debtor upon an account held as security.⁶⁶ The general rule that a lien debtor may not escape liability by assigning his rights and duties to another without the consent of the creditor was recognized in *Chrysler Corp. v. M. Present Co.*,⁶⁷ which involved an assignment of a leasehold interest.⁶⁸

Two recent decisions, *Ernst v. Schmal*⁶⁹ and *Lake Mortgage Co. v. Federal National Mortgage Association*,⁷⁰ dealt with the difficulties encountered by a purchaser of land under a conditional sales contract when the land was sold subject to a prior mortgage. Those cases failed to clarify the issues arising when a purchaser is in default upon the contract and the vendor's subsequent grantee is in default upon the mortgage. Litigation involved an attempt to hold the vendor and others liable for interfering with the purchaser's relationship with the mortgagee.⁷¹

G. Release and Discharge of Surety

The rule that a surety is discharged to the extent of the creditor's release or impairment of collateral is a common law proposition and is also codified in section 3-606 of the Uniform Commercial Code. This principle was recognized and applied in *White v. Household Finance Corp.*,⁷² wherein the court acknowledged the

⁶⁶The surety's right of subrogation to any collateral held by the creditor was recognized in *White v. Household Finance Corp.*, 302 N.E.2d 828 (Ind. Ct. App. 1973), in which an uncle was the surety upon a promissory note of his nephew. The note was secured by a security interest in a motor vehicle. The court held that the surety's right of subrogation extended to other collateral acquired by the creditor, even when the surety released the lien on the motor vehicle after it had been wrecked.

⁶⁷491 F.2d 320 (7th Cir. 1974). This case was a consolidated action brought by the plaintiff to recover damages for loss of property in a warehouse fire.

⁶⁸The court cited *Navin v. New Colonial Hotel*, 228 Ind. 128, 90 N.E.2d 128 (1950), for this well established proposition.

⁶⁹308 N.E.2d 732 (Ind. Ct. App. 1974) (upholding the trial court's right to grant a new trial because the jury was confused as to the complex issues).

⁷⁰308 N.E.2d 739 (Ind. Ct. App. 1974) (purchaser's action, for conspiracy to evict purchaser, brought against vendor's grantee-mortgagee and receiver in foreclosure proceeding; action dismissed as to mortgagee).

⁷¹The problem in both cases seemingly involved a tort claim against the vendor's grantee for bringing about foreclosure of a prior mortgage. The judges at both the appellate and trial levels seemed as confused about the theory of the case as the jury. The purchaser's assertions may have some merit. See *Monarch Buick Co. v. Kennedy*, 138 Ind. App. 1, 209 N.E.2d 922 (1965), in which the assignor of a security agreement was held liable in conversion when he induced the assignee to repossess the collateral.

⁷²302 N.E.2d 828 (Ind. Ct. App. 1973). The case is discussed in connection with the creation and perfection of security interests in motor vehicles at note 66 *supra*. See also text accompanying notes 28-37 *supra*.

rule that a contemporaneous substitution of collateral of equal value does not release a surety.⁷³ However, the court found that the creditor had failed to procure a security interest in property which it had permitted the debtor to acquire with insurance moneys held as security for the loan on which the surety was held discharged.⁷⁴ Prior Indiana law had established that a creditor is under no duty to record or perfect a security interest in collateral received from the principal,⁷⁵ but the court in *White* indicated that the duty imposed by the Uniform Commercial Code—to use reasonable care with respect to collateral in the creditor's possession—would include a duty to perfect.⁷⁶ Outright surrender, to the debtor-principal, of collateral perfected by possession was held to constitute an impairment of collateral which discharged the surety on the obligation.

A lien debtor in default may defeat foreclosure by redeeming, that is, by tendering the full amount owing under the security transaction. The court in *Lake Mortgage Co. v. Federal National Mortgage Association*⁷⁷ recognized and applied the generally accepted rule that a valid tender must include the full amount due.

H. Remedies and Other Rights of Parties to Secured Transactions

Secured parties generally insist on insurance protection, and four recent decisions emphasized the importance of such protection. In *Federal National Mortgage Association v. Great American Insurance Co.*,⁷⁸ a casualty policy covering the debtor, with a pro-

⁷³*Hunter v. Community Loan & Inv. Corp.*, 127 Ga. App. 142, 193 S.E.2d 55 (1972).

⁷⁴In this case, the moneys released by the secured party apparently equaled the unpaid balance of the loan.

⁷⁵*Philbrooks v. McEwen*, 29 Ind. 347 (1868).

⁷⁶"A secured party must use reasonable care in the custody and preservation of collateral in his possession. . . ." UNIFORM COMMERCIAL CODE § 9-207(1). The court cited two recent decisions holding that a surety is discharged when the creditor fails to perfect the security interest and the surety is defeated by other claimants as a consequence. *First Bank & Trust Co. v. Post*, 10 Ill. App. 3d 127, 293 N.E.2d 907, 12 UCC REP. SERV. 512 (1973); *Shaffer v. Davidson*, 445 P.2d 13, 5 UCC REP. SERV. 772 (Wyo. 1968). In the *White* case, the creditor failed to obtain a security interest in the new collateral, but no third party rights were involved.

⁷⁷308 N.E.2d 739 (Ind. Ct. App. 1974). In this case, the conditional purchaser, who was three months in arrears, tendered the installment due for one month and tender was refused. Foreclosure upon debtor's default was therefore held proper.

⁷⁸300 N.E.2d 117, 118 (Ind. Ct. App. 1973). The clause in question stated that insurance "shall not be invalidated by any act or neglect of the mortgagor

vision including the mortgagee under the "union" or "standard" clause was held to cover the mortgagee even after he had purchased the insured property at a mortgage foreclosure sale. The "union" or "standard" clause is especially desirable because it, in effect, is two separate policies, one for the debtor and one for the lienholder, so that the non-performance of conditions, or the breach, or the termination of the relationship by one party will not defeat a recovery of insurance proceeds by the other. In another case, *White v. Household Finance Co.*,⁷⁹ the court held that naming a secured party in an insurance policy voluntarily acquired by the debtor protects the secured party. This is true even though the proceeds of insurance would not otherwise be covered by a security agreement which did not require the debtor to insure. However, a secured party cannot be forced to pay insurance premiums on policies procured by the debtor, which name the secured party as an insured, in the absence of express, implied or apparent authority. In *Kody Engineering Co. v. Fox & Fox Insurance Agency*,⁸⁰ the court of appeals affirmed this rule and held that no recovery could be had on a theory of unjust enrichment, at least in the absence of reimbursement under the policy for a loss. Finally, in *Goff v. Graham*,⁸¹ the failure of a debtor to procure insurance, as required by his agreement, was held to be a material breach which justified the conditional vendor's declaration of a default.

Although a secured party may normally recover a deficiency when repossessed collateral is sold pursuant to the requirements of the Uniform Commercial Code,⁸² the right may be waived. In *Yellow Manufacturing Acceptance Corp. v. Voss*,⁸³ the court held that

or owner of the within described property, nor by any foreclosure." For a further discussion of the virtue of the "union" or "standard" clause, see Comment, *The Effect of the Standard Mortgage Clause in Insurance Policies*, 12 IND. L.J. 50 (1936). *Accord*, *Aetna Ins. Co. v. Robinson*, 213 Ind. 44, 10 N.E.2d 601 (1937) (vendor repossessed under conditional sales contract).

⁷⁹302 N.E.2d 828 (Ind. Ct. App. 1973). See discussion at note 66 and text accompanying notes 28-37 *supra*.

⁸⁰303 N.E.2d 307 (Ind. Ct. App. 1973) (holding that no ratification by the secured party could be found from statements made by the secured party while he was uninformed that he was covered by the insurance policy).

⁸¹306 N.E.2d 758 (Ind. Ct. App. 1974). For a further discussion of this case, see text accompanying notes 14-15 *supra*.

⁸²UNIFORM COMMERCIAL CODE § 9-504. However, the Uniform Consumer Credit Code limits a secured party, in the case of a consumer credit sale of goods or services, to repossession of the collateral or recovery upon the debt, but only when the cash price of the sale is \$1,200 or less. See IND. CODE § 24-4.5-5-103 (Burns 1974).

⁸³303 N.E.2d 281, 283 (Ind. Ct. App. 1973). The decision of the lower court was affirmed upon the debtor's testimony that an agent had told him he "would have no more trouble" after he surrendered the truck.

the secured party's office manager, who had authority to repossess collateral, had apparent authority to accept a return of the property in exchange for the surrender of rights to a deficiency. It is interesting to note that the oral release of deficiency rights was given without consideration. In *Traylor v. Lafayette National Bank*,⁸⁴ the court allowed an action on a note to be joined with foreclosure of stock certificates pledged as security. The court reluctantly admitted parol evidence to show the holder's breach of a joint venture agreement to supply additional capital to the borrower.

The Indiana statute on foreclosure of tax liens contains no provision for giving notice of the sale to mortgagees. The court of appeals, in *Shigley v. Whitlock*,⁸⁵ refused to determine the constitutionality of that statute because the record failed to show that the mortgagee, who challenged the statute, was without actual notice of the sale and therefore prejudiced by the alleged defect in the law.⁸⁶

I. Mechanics' Liens

A subcontractor, laborer or materialman furnishing materials or services to the prime contractor may assert a mechanics' lien either upon the property or upon unpaid funds. Such a lien is measured by the reasonable market value of the materials or services and is not to exceed the full contract price. The lien must be recorded within sixty days and foreclosed within a year of recordation or within thirty days after notice to the lienholder to bring suit.⁸⁷

Is there any other theory upon which the owner may be held? In *Renn v. Davidson's Southport Lumber Co.*,⁸⁸ the lower court

⁸⁴303 N.E.2d 672 (Ind. Ct. App. 1973). In discussing the parol evidence rule, the court did not mention UNIFORM COMMERCIAL CODE § 3-119, which clearly allows a contemporaneous written agreement to vary the terms of a negotiable instrument as between the immediate parties.

⁸⁵310 N.E.2d 93 (Ind. Ct. App. 1974). The statute in question was IND. CODE § 6-1-56-3 (Burns 1972). The court held that, although the burden of proof was upon the purchaser at a tax sale to establish that notice was given to the mortgagee, since the record on appeal did not show that the mortgagee was without actual notice, the decision of the lower court against the mortgagee should be affirmed. It seems that the court placed the burden of proving lack of actual notice upon the mortgagee.

⁸⁶Prior case law holds that notice to the mortgagee is unnecessary. *Cf. Baldwin v. Maroney*, 173 Ind. 574, 91 N.E. 3 (1910). However, this was prior to the now famous case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁸⁷The Indiana mechanics' lien laws are codified at IND. CODE §§ 32-8-3-1 *et seq.* (Burns 1973).

⁸⁸300 N.E.2d 682 (Ind. Ct. App. 1973). The case is one that every lawyer involved with summary judgments should carefully study. It teaches that

granted summary judgment to a subcontractor upon the theory that the prime contractor had been authorized to procure materials from the subcontractor, thereby making the owner liable as a direct contracting party with the subcontractor. The decision was reversed because the contract upon which agency was based was not in the record and because affidavits did not establish that the agency relationship was unrevoked. However, the case raises a red flag to owners who should carefully examine their contracts with prime contractors to make certain that such contractors are not granted agency authority.

In *Saint Joseph's College v. Morrison, Inc.*,⁸⁹ a subcontractor claimed two mechanics' liens, one based upon his contract with the prime contractor and the other based upon a separate contract with the owner for "extras." The court held that recordation of one lien met the notice requirements of the mechanics' lien law as to both liens since both liens arose out of one construction project.⁹⁰ However, the two liens could not be tacked for purposes of computing the sixty day period in which the liens must be recorded, that is, the single notice was effective only as to those contracts upon which work or labor was performed within the sixty day period.⁹¹ The court also explained that it is only when the contractor or subcontractor recovers judgment enforcing a mechanics' lien that he is allowed reasonable attorneys' fees. If he recovers only upon the contract with the owner, attorneys' fees cannot generally be recovered.⁹² In another opinion, *Oxford Development Corp. v. Rausauer*

documents should be carefully put before the court and their foundations established by affidavits. Affidavits must set forth facts based upon the personal knowledge of an affiant, who has been affirmatively shown to be competent to testify, and they must be otherwise admissible as evidence.

⁸⁹302 N.E.2d 865 (Ind. Ct. App. 1973).

⁹⁰Judge Buchanan's opinion on this point was solidly based on the idea that the mechanics' lien, in Indiana, is a consensual lien, that is, it must arise out of contract with the owner or with his assent. Hence, there is no real reason why one lien notice on two separate contracts should not be sufficient so long as the parties are named and the land is identified.

⁹¹On the other hand, the time for recording mechanics' liens may be extended when the owner requests repairs to be made. In this case, the time starts running from the time of the last work. *E.g.*, *Conlee v. Clark*, 14 Ind. App. 205, 42 N.E. 762 (1896) (the time commenced from the time the hot water line was removed by the subcontractor at the request of the new owner). A contractor or subcontractor cannot extend the time by voluntarily making repairs. *Ellis v. Auch*, 124 Ind. App. 454, 118 N.E.2d 809 (1954).

⁹²Although reasonable attorneys' fees are allowed to the plaintiff recovering judgment in the enforcement of a mechanics' lien, an owner cannot be held for attorneys' fees when the "contract consideration for such labor, material or machinery has been paid" by him or the party for whom the improvement has been constructed. IND. CODE § 32-8-3-14 (Burns 1973). This

Builders, Inc.,⁹³ the court recognized that extra work comes within the terms of a written contract expressly providing for "extras"⁹⁴ and upheld an award of \$5,400 attorneys' fees in favor of the prime and subcontractors. The award was upheld even though the contractors had asked for only \$1,500 in their complaint. The court reasoned that, for purposes of appeal, the complaint was deemed to be amended to fit the proof adduced at the trial.

Interpretation of the types of contracts and relationships covered by the Indiana mechanics' lien law will probably never end because the statute applies both to enumerated types of work and to "other structures," thus inviting application of the *ejusdem generis* rule of statutory construction. The court in *Hough v. Zehrner*⁹⁵ rejected the rule, however, and applied the lien law in favor of a materialman who furnished crushed stone for a driveway to be used in conjunction with a commercial garage being constructed.

J. Wage Garnishment Exemptions

Prior to the adoption of the Uniform Consumer Credit Code⁹⁶ in Indiana, it was quite clear that 90% of a debtor's wages were exempt from garnishment in proceedings supplemental.⁹⁷ In the case of a resident householder, \$15 per week plus 90% of his weekly wages above that amount were exempt when the judgment was founded upon contract.⁹⁸ Although there was some question about the constitutionality of these statutes, which granted a much lower initial exemption than in the case of real or personal property,⁹⁹ the figures were widely accepted as governing law. Then, on

seems to mean that, if the owner pays the prime contractor for work completed by the subcontractor, the subcontractor cannot recover attorneys' fees when he forecloses against the property.

⁹³304 N.E.2d 211 (Ind. Ct. App. 1973).

⁹⁴Failure to pay for the extras was held to be a material breach which justified the contractor in his refusal to go forward with performance. For purposes of recording and tacking, a duty to pay under a written contract and for "extras" would therefore seem to be one contract. Compare *Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973), considered at text accompanying notes 88-91 *supra*.

⁹⁵302 N.E.2d 881 (Ind. Ct. App. 1973).

⁹⁶IND. CODE §§ 24-4.5-1-101 to -6-203 ((Burns 1974) [hereinafter referred to as UCCC]).

⁹⁷*Id.* § 34-1-44-7 (Burns 1973).

⁹⁸*Id.* § 34-2-28-1(d). This provision is included in the general exemption statute.

⁹⁹In *Martin v. Loula*, 208 Ind. 346, 194 N.E. 178 (1935), the court held that a statute allowing 90% of intangibles to be exempt while other property, up to \$1,000, could be claimed as fully exempt denied equal protection to debtors owning intangibles. If this result is followed to its logical conclusion, the present exemption laws are all unconstitutional.

October 1, 1971, the Uniform Consumer Credit Code, which gave additional benefits to judgment debtors by a prohibition against discharge for garnishment of wages,¹⁰⁰ provided that 25% of a judgment debtor's weekly disposable earnings above 30 times minimum hourly wages "shall be subject to garnishment . . . notwithstanding any exemption or other law."¹⁰¹ The Indiana Supreme Court, in *Mims v. Commercial Credit Corp.*,¹⁰² applied "Alice in Wonderland" reasoning to hold that the law did not mean what it said. The court allowed the judgment debtor to take the highest exemption allowed under either the UCCC or the prior law. Based upon present minimum wage laws of \$2 per hour for employees covered by the Fair Labor Standards Act¹⁰³ prior to February 1, 1967, the opinion directs that the exemption available to a resident householder with respect to judgments founded upon contract will be \$15 plus 90% of weekly disposable earnings above \$15, if weekly disposable earnings are greater than \$90. However, if weekly disposable earnings are less than \$90, the exemption is computed at 30 times minimum hourly wages, now 30 times \$2, plus 75% of weekly disposable earnings above that amount (\$60) as provided by the UCCC.¹⁰⁴ If the debtor is not entitled to the \$15 weekly exemption, his exemption will be computed at 90% of total weekly disposable earnings if the weekly disposable earnings are greater than \$100; but, if weekly disposable earnings are less than \$100, the exemption is 30 times hourly minimum wages, now 30 times \$2, plus 75% of weekly disposable earnings above that amount (\$60) as provided by the UCCC.¹⁰⁵

¹⁰⁰IND. CODE § 24-4.5-5-106 (Burns 1974).

¹⁰¹*Id.* § 24-4.5-5-105. The law excludes and thus makes exempt amounts required by law to be withheld from earnings.

¹⁰²307 N.E.2d 867 (Ind. 1974).

¹⁰³29 U.S.C. §§ 201-09 (1970).

¹⁰⁴The point at which the old formula *with* the \$15 householder exemption grants a larger exemption than that permitted by the UCCC is determined by the following equation (X being the point at which each formula produces the same exemption and the minimum hourly wage being \$2): $.10(X - \$15) = .25(X - \$60)$; $X = \$90$. Thus, if weekly disposable earnings are \$90, then either formula will produce the maximum exemption. If weekly disposable earnings are less than \$90, then the old formula will produce the maximum exemption. If weekly disposable earnings are greater than \$90, then the UCCC formula will produce the maximum exemption.

¹⁰⁵The point at which the old formula *without* the \$15 householder exemption grants a larger exemption than that permitted by the UCCC is determined by the following equation (X being the point at which each formula produces the same exemption and the minimum hourly wage being \$2): $.10X = .25(X - \$60)$; $X = \$100$. Thus, if weekly disposable earnings are \$100, then either formula will produce the maximum exemption. If weekly disposable earnings are less than \$100, then the old formula will

Three unfortunate results flow from the *Mims* decision. The first concerns the many hundreds of outstanding garnishment orders based upon the UCCC computation. What happens to those judgments or decrees? They may be reopened under Trial Rule 60(B)¹⁰⁶ but, until this is done, the finality of such judgments cannot be challenged. The second unfortunate result flows from the unusual affirmative burden placed upon the court to determine the debtor's exemption when he is not represented by counsel, a burden which seemingly will be applied to all exemptions in the case of proceedings supplemental. However, since the Federal Truth in Lending Act¹⁰⁷ fixes a somewhat similar but smaller exemption, language in that law seems to deny jurisdictional power to any court to award less than the exemption allowed by the federal law.¹⁰⁸

produce the maximum exemption. If weekly disposable earnings are greater than \$100, then the UCCC formula will produce the maximum exemption.

¹⁰⁶It sometimes is believed that a continuing decree or injunction cannot be later modified except as provided by statute, on appeal or by other recognized post-judgment remedies. This, however, is untrue as applied to courts of equity who have continuing jurisdiction to modify a continuing decree or order which becomes oppressive due to changed conditions. *E.g.*, *United States v. Swift & Co.*, 286 U.S. 106 (1932); *cf.* *Union Trust Co. v. Curtis*, 182 Ind. 61, 105 N.E. 562 (1914); *Crumpacker v. Howes*, 140 Ind. App. 37, 222 N.E.2d 296 (1966). Recent Indiana decisions make it clear that the open-end provisions of IND. R. TR. P. 60(B)(7) & (8) will be liberally construed to permit modification of a continuing order or decree when enforcement becomes inequitable. *E.g.*, *Soft Water Util., Inc. v. LeFevre*, 301 N.E.2d 745 (Ind. 1973) (the court amended the date of a ruling to conform to the misinformation supplied by the court's clerk); *School City v. Continental Elec. Co.*, 301 N.E.2d 803 (Ind. Ct. App. 1973) (a decree of specific performance was set aside in favor of the party obtaining it when performance became impossible). *But cf.* *Public Serv. Comm'n v. Schaller*, 299 N.E.2d 625 (Ind. Ct. App. 1973) (the court unnecessarily equated relief under IND. R. TR. P. 60(B)(8) with the inherent power of the court to modify an equitable decree and limited the corrective action to changed conditions which were not foreseeable).

¹⁰⁷15 U.S.C. §§ 1672, 1673 (1970). The Truth in Lending Act provides that the maximum amount of the aggregate disposable earnings subject to garnishment may not exceed the lesser of 25% of the judgment debtor's disposable earnings for that week, or the amount by which the judgment debtor's disposable earnings exceed 30 times minimum hourly wages. In short, this means that the judgment debtor is allowed an exemption of \$60 (at the present minimum hourly wage of \$2) with respect to weekly wages up to \$90. When his wages exceed \$90 a week, he is entitled to an exemption measured by 25% of weekly wages. In computing weekly wages, withholdings required to be made by law are excluded and thus made exempt.

¹⁰⁸The Act provides that "[n]o court of the United States or any State may make, execute, or enforce any order or process in violation of this section." *Id.* § 1673(c). A similar provision will be found in section 5-105(3) of the UCCC. IND. CODE § 24-4.5-5-105(3) (Burns 1974). These provisions were not mentioned in the *Mims* case.

A third consequence of the holding in the *Mims* case is that it not only complicates the computation of exemptions, but fixes them at such low rates that the effect may be to dry up credit to the very poor, a result at war with the underpinnings of the UCCC. The case demonstrates the need for an overhaul of Indiana's many exemption laws¹⁰⁹ and forthrightly mandates a humane approach to the whole problem.

In a recent decision, the United States Supreme Court dealt with the interesting question of whether a debtor's right to a refund of income taxes withheld from wages is subject to creditor process. In *Kokoszka v. Belford*,¹¹⁰ the bankrupt defended a turnover order directing him to deliver his refund check to the trustee. The bankrupt claimed that the refund was exempt under the Federal Truth in Lending Act, which exempts from garnishment the lesser of 25% of a debtor's disposable weekly earnings or 30 times minimum wage. Chief Justice Burger limited the exemption to "garnishment" of periodic payments and did not extend the exemption to include the trustee's rights to reach proceeds of weekly payments

¹⁰⁹The general exemption statute, IND. CODE § 34-2-28-1 (Burns 1973), is limited to debtors who are resident householders and to judgments founded upon contract. Many other statutes exempt such items as specified pensions and insurance but are not restricted to resident householders and to judgments founded upon contract. The garnishment statute, *id.* § 34-1-44-7, allows only 10% of the debtor's income or profits to be subjected to garnishment in proceedings supplemental. The 90% exemption thus allowed is not limited to resident householders or to judgments founded upon contract. Under the garnishment statute, it has been held that enforcement of an alimony or support decree by garnishment is limited to 10% of the judgment debtor's income. *Clay v. Hamilton*, 116 Ind. App. 214, 63 N.E.2d 207 (1945) (the court disallowed the \$15 exemption since the judgment was not founded upon contract). Hence, although the UCCC allows garnishment of wages and income in excess of the exemption provided therein, the more liberal provisions allowing 90% of earnings and income to be exempt under the garnishment law would seem to prevail under the ruling of the *Mims* decision. Compare IND. CODE § 24-4.4-5-106(2) (Burns 1974) with *id.* § 34-1-44-7 (Burns 1973). It appears, however, that the court may award alimony or support payments in excess of that prescribed by exemption laws. *Cf. Dorman v. Dorman*, 251 Ind. 272, 241 N.E.2d 50 (1968) (court ordered payment of \$40 a week support to be made from the husband's pay of \$75 a week). But, in view of *Wellington v. Wellington*, 304 N.E.2d 347 (Ind. Ct. App. 1973), holding that alimony decrees for the payment of money are no longer enforceable by contempt, collection of such decrees from income and wages must occur under garnishment laws in proceedings supplemental, resulting in the right of the judgment defendant to assert that 90% of his income or wages is exempt.

¹¹⁰94 S. Ct. 2431 (1974). The decision did not flatter the many judges in the lower federal courts who had written extensive opinions on the same subject. None of their opinions were cited.

once they have been made.¹¹¹ In view of the more humane attitude of the Indiana Supreme Court toward exemptions,¹¹² and because the Indiana definition of "garnishment" is much broader than the federal law's definition and includes proceedings requiring the debtor to withhold earnings,¹¹³ it is not unlikely that tax refunds from wage withholdings will be held exempt under the Indiana Uniform Consumer Credit Code. Therefore, such tax refunds should also be held exempt in Indiana bankruptcy proceedings.¹¹⁴

K. Property Subject to Creditor Process

Not all the debtor's interests in property are subject to creditor process. Indiana law recognizes that a creditor cannot reach a future interest in property "incapable of being appraised or sold with fairness to both the debtor and the creditor."¹¹⁵ A substantial extension of this doctrine occurred in *Loeb v. Loeb*,¹¹⁶ wherein the supreme court held that, in an award of alimony, the court could not consider the husband's interest in a trust established by his mother which was to be paid to him upon his mother's death, subject to the condition that he survive her. The decision is to be applauded in the expectation that it will help remove all speculative future interests from court sponsored market places. In a somewhat similar vein, the court of appeals, in *Irwin Union Bank & Trust Co. v. Long*,¹¹⁷ held that a wife with a judgment for alimony

¹¹¹The Court first determined that the tax refund for the tax year 1971 was "property" of the debtor at the time he filed his petition on January 5, 1972. The Court did not determine what the answer would have been had the petition been filed in 1971. Chief Justice Burger accepted the idea that a "tax refund is not the weekly or other periodic income required by a wage earner for his basic support." *Id.* at 2435. He did not take judicial notice of inflation nor of the well known fact that millions of families depend upon their tax refunds for support.

¹¹²See *Mims v. Commercial Credit Corp.*, 307 N.E.2d 867 (Ind. 1974). See text accompanying notes 102-109 *supra*.

¹¹³The Federal Truth in Lending Act defines "garnishment" as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. § 1672(c) (1970). The Indiana law defines "garnishment" as

any legal or equitable proceedings through which the earnings of an individual are required to be withheld by a garnishee, by the individual debtor, or by any other person for the payment of a judgment.

IND. CODE § 24-4.5-5-105(1)(b) (Burns 1974).

¹¹⁴Not only are exemptions provided by federal law allowed to a bankrupt, but the bankrupt can also take advantage of the exemptions allowed under state law. Bankruptcy Act § 6, 11 U.S.C. § 24 (1970).

¹¹⁵*Gushwa v. Gushwa*, 93 Ind. App. 68, 75, 177 N.E. 366, 368 (1931).

¹¹⁶301 N.E.2d 349 (Ind. 1973).

¹¹⁷312 N.E.2d 908 (Ind. Ct. App. 1974).

could not force the judgment debtor to exercise his right to withdraw up to four per cent of the principal of a trust of which he was beneficiary, when the trust instrument provided that none of his creditors could reach the trust corpus.¹¹⁸

L. Judgment Liens and Lien Creditors

A creditor with a judgment may obtain a lien upon the judgment debtor's real estate by causing the judgment to be entered and indexed in the judgment docket in the county where the land is located.¹¹⁹ Although this lien will protect the judgment lienholder against persons who subsequently acquire an interest in the property from the judgment debtor,¹²⁰ the judgment lienholder is not a purchaser for value who may claim the rights of a bona fide purchaser as against prior unperfected interests in the land. This rule was applied in *Rural Acceptance Corp. v. Pierce*.¹²¹ On the other hand, a creditor who obtains a lien on personal property by means of judicial proceedings will take priority over prior unperfected security interests, if the lien creditor becomes such without knowledge.¹²² The *Pierce* court ignored an interesting problem generated by its unusual facts. *V* gave a mortgage to *E1* upon which a balance was owing. *V* then contracted to sell the land to *P2* who went into possession owing a balance to *V* in excess of the mortgage. *C3* then obtained a judgment against *V* and he apparently claimed a judgment lien upon the land. *C4* thereafter obtained a

¹¹⁸In reaching this result, the court emphasized that it would attempt to give effect to the intention of the settlor and, in so doing, considered the federal estate tax law and the obvious efforts of the settlor to provide for his grandchildren. Prior case law indicated that a beneficiary's interest in a spendthrift trust could be reached for purposes of paying alimony or support to the beneficiary's wife or children. *Cf. Clay v. Hamilton*, 116 Ind. App. 214, 63 N.E.2d 207 (1945) (allowing a wife holding an alimony judgment to reach the husband's interest in the trust for support). The judgment debtor in *Long* was not the settlor. Had he been the settlor, IND. CODE § 30-1-9-14 (Burns 1972) would have had some relevancy. It provides that a "grantor of lands reserving an absolute power of revocation, shall be deemed an absolute owner, as regards creditors and purchasers."

¹¹⁹IND. CODE §§ 34-1-43-1, -45-2 (Burns 1973).

¹²⁰*E.g.*, *Armstrong v. McLaughlin*, 49 Ind. 370 (1875).

¹²¹298 N.E.2d 499 (Ind. Ct. App. 1973). A judgment creditor who purchases at his own sale is a purchaser for value and qualifies as a bona fide purchaser who will cut off prior unperfected interests. *Pugh v. Highley*, 152 Ind. 252, 53 N.E. 171 (1899). Likewise, an assignee of the judgment lienholder qualifies as a purchaser for value with similar rights. *Tuttle v. Churchman*, 74 Ind. 311 (1881).

¹²²UNIFORM COMMERCIAL CODE § 9-301(1)(b) & (3). A subsequent judgment lienholder on realty who is without knowledge will take priority over a prior unperfected security interest in fixtures. *Id.* § 9-313(3)(c).

judgment against *V*, also apparently claiming a judgment lien upon the land, but he obtained a proceedings supplemental order against *V*, and *P2* as garnishee, directing that amounts owing by *P2* in excess of those owing *E1* who was to be paid first, be paid to *C4*.¹²³ In a subsequent suit by *P2* for specific performance, the lower court ordered payment of the unpaid purchase price to first be applied to *E1*'s mortgage, then to *C3*'s judgment, and finally, if any amounts remained, to *C4*'s judgment. If the payment was insufficient to satisfy either of the judgment creditors, determined by the court to be judgment lienholders, they were to have no further claim. This order was affirmed on the theory that *P2*'s equity was superior to the interest of a subsequent "judgment lienholder."

The astonishing fact is that the judgment debtor, *V*, had no interest in the land. Under the doctrine of equitable conversion, which was recognized by the court, he merely owned *P2*'s obligation to pay him. This obligation was secured by an interest in the land, but was, at most, possibly a contract right or a general intangible.¹²⁴ Since a judgment lien is recognized only in land, it can be argued that neither *C3* nor *C4* obtained a judgment lien upon *V*'s property.¹²⁵ Therefore, when *C4* obtained a garnishment order

¹²³The garnishment order directed the purchaser to make payments directly to *E1* until *E1*'s mortgage was satisfied and then to make the balance of his payments to *C4*. The *res judicata* effect of this order was not discussed or considered. *But cf.* *Bostwick v. Bryant*, 113 Ind. 448, 16 N.E. 378 (1888). Of course, the order was not binding upon *C3* who apparently was not a party to that proceeding.

¹²⁴*Compare* UNIFORM COMMERCIAL CODE § 9-105(g) *with id.* § 9-106. Although the Uniform Commercial Code does not apply to liens upon real estate, *id.* § 9-104(j), its provisions do govern obligations secured by interests in land. *In re Bristol Associates, Inc.*, 13 UCC REP. SERV. 1150 (E.D. Pa. 1973) (the security taken in a leasehold and rents thereunder was required to be perfected under the provisions of the Uniform Commercial Code); UNIFORM COMMERCIAL CODE § 9-102.

¹²⁵Several very old decisions indicate that a judgment lien may be obtained upon the vendor's interest. *Garr v. Lockridge*, 9 Ind. 92 (1857). On the other hand, the interest of the vendee was not subject to a judgment lien and could be reached only by proceedings supplemental. *Figg v. Snook*, 9 Ind. 202 (1857); *Jeffries v. Sherburn*, 21 Ind. 112 (1863). *But cf.* *Hamilton v. Byram*, 122 Ind. 283, 23 N.E. 795 (1890) (equitable interest of mortgagor under absolute deed subject to execution as interest in land). With the development of the doctrine of equitable conversion, these cases seem unsound. *Jackson v. Snell*, 34 Ind. 241 (1870) (holding that the assignee of promissory notes held by the vendor prevailed over the judgment creditor who claimed a lien upon vendor's interest); *Davis v. Landis*, 114 Ind. App. 665, 53 N.E.2d 544 (1944) (holding the transfer of purchaser's interest in a land contract as security to be a mortgage); *Butcher v. Kagey Lumber Co.*, 164 Ohio 85, 128 N.E.2d 54 (1955) (holding that assignee for value of vendor in an unrecorded executory land contract took priority over a subsequent judgment creditor of the vendor).

against *V*, and *P2* as garnishee, he obtained an equitable lien¹²⁶ prior in time to that of *C3*, who may never have obtained an interest in the property until the lower court issued the order from which *C4* appealed.¹²⁷ In summary, the vendor's interest ought to be treated the same as that of a mortgagee,¹²⁸ and if creditors are to reach it, they must do so by proceedings supplemental.¹²⁹ This, at least, is a logical result which naturally flows from the decision of the Indiana Supreme Court in *Skendzel v. Marshall*.¹³⁰

The Federal Tax Lien Act of 1966 subordinates the federal lien for taxes to "security interests" existing before recordation of the federal lien.¹³¹ By definition, a "security interest" is a security in property which would be given protection against "judgment liens" under state law.¹³² In interpreting this provision, the United States District Court for the Northern District of Indiana, in *Fred Fraus & Sons, Inc. v. United States*,¹³³ gave priority to a properly recorded federal tax lien over a prior unperfected security interest in personal property of the taxpayer, even though the government had been notified of the security interest before its lien arose or was recorded. Under state law, an unperfected security interest is valid against a subsequent lien creditor with knowledge,¹³⁴ but the court held that the federal statute referred to perfection as against all judgment creditors, meaning lien creditors, including those with or without notice.¹³⁵

¹²⁶*Cf.* *Graydon v. Barlow*, 15 Ind. 197 (1860); *Union Bank & Trust Co. v. Vandervoort*, 122 Ind. App. 258, 101 N.E.2d 724 (1951).

¹²⁷*C4* argued, in effect, that he held a perfected security interest in the vendor's real estate because of a filed financing statement. The court dismissed the argument upon the theory that perfection of security interests applies only to personal property other than fixtures. It may have been that *C4* claimed *lis pendens* notice of his lien against *V*'s rights in the contract with *P*, perfection of which is permitted by the filing of a financing statement under IND. R. TR. P. 63.1(A)(2) & (C). The decision does not make this clear.

¹²⁸*Compare, e.g., Walner v. Capron*, 224 Ind. 267, 66 N.E.2d 64 (1946), with *Knapp v. Ellyson Realty Co.*, 211 Ind. 180, 5 N.E.2d 973 (1937).

¹²⁹Choses in action owned by an obligee, as a general rule, cannot be sold on execution against him unless the chose is surrendered by the obligee, *i.e.*, the judgment debtor. *Beckman Supply Co. v. Newell*, 68 Ind. App. 679, 118 N.E. 962 (1918); IND. CODE § 34-1-36-2 (Burns 1973).

¹³⁰301 N.E.2d 641 (Ind. 1973), discussed at text accompanying notes 11-19 *supra*.

¹³¹26 U.S.C. § 6323(a) (1970).

¹³²*Id.* § 6323(h).

¹³³369 F. Supp. 1089, 14 UCC REP. SERV. 828 (N.D. Ind. 1974).

¹³⁴UNIFORM COMMERCIAL CODE § 9-301(1)(b)(3).

¹³⁵The court assumed that the term "judgment lien" is co-extensive with the term "lien creditor" as used in the Uniform Commercial Code. Similar problems will emerge when a state lien for taxes arises and is perfected after the creation of a security interest but before the security interest is

M. Proceedings Supplemental to Execution

In Indiana, "actions" upon judgments for the payment of money are barred after ten years,¹³⁶ judgment liens expire within the same period,¹³⁷ execution may issue after ten years from entry of judgment only after notice and hearing,¹³⁸ and judgments of courts of record are "deemed satisfied" after twenty years.¹³⁹ The question presented to the court of appeals in *Myers v. Hoover*¹⁴⁰ was whether proceedings supplemental could be initiated to reach or garnish the debtor's property after ten years had expired from entry of the judgment. The court held that, inasmuch as proceedings supplemental to execution are continued by motion in the original action, the remedy now allowed by Trial Rule 69(E) is not an "action" upon a judgment and therefore is not barred by the ten year statute of limitations. The result finds doubtful support in case law¹⁴¹ and is an unfortunate restriction on statutes of limitations which are usually sufficiently generous to judgment creditors who sleep on their rights. Moreover, the case may mean that orders in proceedings supplemental will not extend the statutes of limitations in favor of judgment creditors.¹⁴² Basically, proceed-

perfected. In this connection, see *Gevyn Constr. Corp. v. Affiliated Eng'rs, Inc.*, 375 F. Supp 207 (W.D. Pa. 1974) (the state lien took priority under the terms of a statute creating a lien for unemployment taxes).

¹³⁶IND. CODE § 34-1-2-2(b) (Burns 1973).

¹³⁷*Id.* § 34-1-45-2.

¹³⁸*Id.* § 34-1-34-2.

¹³⁹*Id.* § 34-1-2-14. This provision has been held to create only a rebuttable presumption of payment. *Pensinger v. Jarecki Mfg. Co.*, 78 Ind. App. 569, 136 N.E. 641 (1922).

¹⁴⁰300 N.E.2d 110 (Ind. Ct. App. 1973).

¹⁴¹*White v. White*, 98 Ind. App. 587, 186 N.E. 349 (1933), held to the contrary at a time when the statute of limitations barring actions upon judgments was twenty years. It is now ten years. See note 136 *supra*. While that case did not involve proceedings supplemental, it did deal with a motion for execution as provided by IND. CODE § 34-1-34-2 (Burns 1973). In support of its decision, the court in *Myers* cited *Hinds v. McNair*, 235 Ind. 34, 129 N.E.2d 553 (1955), in which proceedings supplemental were commenced prior to the end of the ten year period barring a judgment lien and in which the court allowed the proceedings to continue after the ten year period had expired. In quoting from *Hinds*, the court misquoted the effect of that decision which more accurately is stated in the *Hinds* opinion as follows:

We hold, therefore, that the expiration of the judgment lien or the lien of the execution pending the proceedings supplemental does not terminate such proceedings and make them ineffectual.

Id. at 40, 129 N.E.2d at 558.

¹⁴²*But cf.* *Hinds v. McNair*, 235 Ind. 34, 129 N.E.2d 553 (1955). A recent decision has indicated that proceedings supplemental are civil actions subject to the change of venue laws. *McCarthy v. McCarthy*, 297 N.E.2d 441 (Ind.

ings supplemental as provided by statute are equitable in nature.¹⁴³ Hence, judgment creditors pursuing such remedies should be subject to the doctrine of laches, especially since equity usually adopts the outermost limits of the statute of limitations applicable to the underlying legal remedy.¹⁴⁴

N. Bulk Sales—Sale of Business

Suppose that *S* operates a business under the trade name "Rose City Sheet Metal Works" and from time to time purchases supplies from *C*. Later, *S* sells his business, along with the trade name, to *B* who operates thereunder and continues to purchase supplies from *C*. If *B* defaults on his obligations to *C*, may *C* hold *S* upon a theory of estoppel? In *Meggs v. Central Supply Co., Inc.*,¹⁴⁵ the court held that *S* was liable for sales made by *C* to *B* when *C* relied upon *S*'s continued ownership. Sellers of a business must take warning from this unique, but sound, decision and either notify former suppliers or limit the use of the seller's business name in the continuation of the business. The Bulk Sales Article of the Uniform Commercial Code affords a complementary type of protection by allowing creditors of the seller to reach the property passing to the buyer.¹⁴⁶

Ct. App. 1973), discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1973 Survey of Indiana Law, 7 IND. L. REV. 226, 241-42 (1973).

¹⁴³*Cf.* Figg v. Snook, 9 Ind. 202 (1857) (holding that proceedings supplemental were a substitute for an equity suit denominated as a creditor's bill).

¹⁴⁴As a general rule, equity will follow the law and, if a claim is barred by the statute of limitations at law, it will be barred in equity. *Cf.* McKinney v. Springer, 3 Ind. 59 (1851) (equity followed the law as to the statute of limitations, including provisions extending time). Laches may bar a claim within a time shorter than the statute of limitations. Compare Hegarty v. Curtis, 121 Ind. App. 74, 95 N.E.2d 706 (1950), with Ryason v. Dunten, 164 Ind. 85, 73 N.E. 74 (1905).

¹⁴⁵307 N.E.2d 288 (Ind. Ct. App. 1974).

¹⁴⁶A bulk sale is defined as the sale of a "major part" of the seller's inventory or a "substantial part" of his equipment if sold in connection with a bulk transfer of inventory. UNIFORM COMMERCIAL CODE § 6-102. The sale may be avoided by the seller's creditors who become such prior to the sale or prior to receiving notice as required by the Code. The sale will not be avoided if a schedule of assets and creditors is furnished by the seller and notice of the sale is given to the creditors. *Id.* §§ 6-104 to 6-108. See First Nat'l Bank v. Crone, 301 N.E.2d 378 (Ind. Ct. App. 1973). This case is discussed at text accompanying notes 46-50 *supra*.