XI. Secured Transactions and Creditors' Rights

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The last ten years have seen some important changes in the law governing those who furnish credit and those who obtain it, particularly when security is involved. Indiana has suffered through the enactment of both the Uniform Commercial Code[1] and the Uniform Consumer Credit Code[2] and has felt the impact of the Federal Truth in Lending Act.[3] Cases have just begun to deal with these new laws. Some important legislative changes lie just over the horizon, particularly in transactions involving real estate.[4] A brief review of recent Indiana case law in the field of secured transactions and creditors' rights reflects changes that have taken place and indicates judicial recognition of innovations in store for those who practice in this area of the law.

A. Disclosure Requirements

Attention must be called to the recent decision of the United States Supreme Court upholding the constitutionality of the Truth in Lending Act as applied to consumer credit, defined by regulations to include transactions in which either a credit charge is or may be imposed or which are payable in more than four install-

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[1]Ind. Code §§ 26-1-1-101 to -2-4-1 (1971) [hereinafter cited as UCC]. This Act became effective in Indiana on July 1, 1964.

[2]*Id.* §§ 24-4.5-1-101 to -6-203 [hereinafter cited as UCCC]. This Act became effective on October 1, 1971, but the provision for maximum charges applicable to revolving loan and charge accounts became effective upon passage, March 5, 1971.

[3]15 U.S.C. §§ 1601-13, 1631-41, 1661-65, 1671-77 (1970) (also referred to as the Consumer Credit Protection Act). The statute went into effect on July 1, 1969, and the provisions regulating garnishment became effective July 1, 1970. The basic rules relating to the Truth in Lending Act are included in Regulation Z issued by the Board of Governors of the Federal Reserve System. There have been a large number of subsequent interpretations.

[4]The National Conference of Commissioners on Uniform State Laws is drafting a Uniform Land Transactions Act which will cover matters involving most aspects of security transactions concerning real estate. A second Tentative Draft of this legislation was considered by the National Conference at its 1973 meeting. The Uniform Residential Landlord and Tenant Act has been considered by the 1973 Indiana General Assembly, but it did not come out of committee.

ments.[5] *Mourning v. Family Publications Service, Inc.*[6] held that the vendor of magazine subscriptions for five years payable in thirty installments violated the Act by failing to make required disclosures. The case pointed up the all-encompassing nature of the law and the tremendous responsibility incurred by those who grant consumer credit. Both country and city lawyers need copies of the Federal Reserve Regulations which implement the Truth in Lending Act,[7] and practically all persons who are engaged in the business of extending consumer cerdit are in constant need of legal assistance.

B. Usury

Prior to the adoption of the UCCC, except as provided by special statutes, it was generally believed that a charge in excess of eight percent per annum was usurious because the general statute so provided.[8] Cunning lawyers, however, had long ago hoodwinked the courts of other states and Indiana into neutralizing the language of the statute by various devices. One of these was the "time price differential" theory which allowed a seller of goods, services, or land to impose any charge for the credit—his time price—which he wished.[9] The Indiana Court of Appeals recently fell victim to one of the best hoodwinking jobs in *Standard Oil Co. v. Williams*[10] in which the court was induced to apply the doctrine in favor of the issuer of a credit card who was not a seller and apparently when no "time price" by a seller was involved.[11] Thankfully, the mathematical and intellectual impurity

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[5]Fed. Res. Bd. Reg. Z, 12 C.F.R. 226.2(k) (1973).

[6]411 U.S. 356 (1973).

[7]The regulation and interpretations along with appropriate tables may be obtained from the Federal Reserve Bank or the Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

[8]Ch. 24, § 4, [1879] Ind. Acts 43, *as amended* ch. 220, § 3, [1929] Ind. Acts 804 (repealed by Pub. L. No. 366, § 10(1), [1971] Ind. Acts 1675).

[9]The Indiana Supreme Court was hoodwinked into this construction in Borum v. Fouts, 15 Ind. 50 (1860), which recognized that a seller could have a cash price and a time price.

[10]288 N.E.2d 170 (Ind. Ct. App. 1972).

[11]The case involved the finance charge imposed by Standard Oil Company upon purchases from dealers (who apparently were not necessarily connected with Standard except as independent contractors) under credit cards issued by Standard to its customers. There was no showing that the dealers extended the credit.

of the time price differential theory and its extension to lender credit card transactions have been neutralized by the Truth in Lending Act[12] for disclosure purposes and by the UCCC[13] which limits the finance charge (now to one and one-half percent and more in some cases) on a consumer loan or on the cash price if a consumer credit sale is involved.

C. Vendor's Lien

When a vendor conveys real estate in exchange for a consideration to be performed by the purchaser, the vendor retains a law-created lien on the realty to secure the purchaser's executory obligation.[14] This lien does not exist in favor of the seller of goods, and a recent decision denies the lien to a transferor of securities—in this case, stock certificates.[15] Article 2 of the UCC gives the seller of goods a possessory lien,[16] and in certain cases he

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[12]Regulation Z requires disclosure of the "annual percentage rate," computed on the basis of the finance charge which must include "[i]nterest, *time price differential*, and any amount payable under a discount or other system of additional charges." Fed. Res. Bd. Reg. Z § 226.4(a)(1), 12 C.F.R. § 226.4(a)(1) (1973) (emphasis added).

[13]In the case of a consumer credit sale or consumer related sale, the seller is allowed to impose variously fixed maximum "credit service charges" which include any "time price differential" and range from 18% to 36%. IND. CODE § 24-4.5-2-109 (1971). Maximum "loan finance charges" upon consumer loans, regulated loans and supervised loans are fixed by provisions relating to loans, as distinguished from consumer credit sales or consumer related sales, and range from 10% to 36%. *See id.* § 24-4.5-3-109.

[14]*E.g.*, Old First Nat'l Bank & Trust Co. v. Scheuman, 214 Ind. 652, 13 N.E.2d 551 (1938). As a law-created lien, the security is fragile and subject to many special rules. *E.g.*, Cassidy v. Ward, 70 Ind. App. 550, 123 N.E. 724 (1919) (taking of a mortgage or other security waived lien without relation back). Unless the obligation of the purchaser is included within the deed, a bona fide purchaser from a vendee will cut off the rights of the vendor. *Compare* Hawes v. Chaillee, 129 Ind. 435, 28 N.E. 848 (1891), *with* Case v. Bumstead, 24 Ind. 429 (1863). The vendor may perfect his lien by filing suit to do so and filing notice of his claim in the lis pendens docket. Wilson v. Burgett, 131 Ind. 245, 27 N.E. 749 (1891).

[15]Johnson v. Jackson, 284 N.E.2d 530 (Ind. Ct. App. 1972). In this case the vendor sold stock to the purchaser and his wife with the husband only agreeing to pay the price. When the corporation was subjected to a receivership proceeding the court originally allowed the vendor what amounted to a set-off from proceeds of the receivership, but the court reversed its order upon the petition of the wife and allowed her to receive her undivided one-half of the proceeds. This decision was sustained upon appeal.

[16]*Cf.* UCC §§ 2-703(a), (b), -705 (relating to seller's right of stoppage in transit).

may avoid a sale when the buyer has obtained delivery.[17] Parallel provisions in Article 8 allow the seller to regain possession of securities obtained by wrongdoing, but nothing in the nature of a vendor's lien is created.[18]

D. The Deed in Consideration of Support

A significant geriatrics problem arises when older persons convey land to a relative upon the understanding that the grantee will furnish support or a home to the grantor in consideration for the conveyance. Many Indiana cases deal with deeds of this sort and find that the conveyance creates in the grantor either a right to enter for conditions broken in the event that support is not forthcoming or a lien upon the property to secure the performance promised by the grantee.[19] This kind of arrangement was presented to the court of appeals in *Brunner v. Terman*[20] in which the deed provided that "as part of the consideration for this Deed, Grantees do agree to take care of and assist . . . grantors in case they do need any aid during their respective lifetimes."[21] The court held this to be a covenant, not a condition subsequent in favor of the grantors. However, the court seemingly held that a mortgage of the grantees in the deed took priority over the interest of the grantors in support. If this was the holding of the court, the case appears to be in error. A covenant of support in the deed creates a lien which will take priority over any subsequent mortgage of the grantees.[22] However, Judge Lowdermilk's opinion also

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[17]Subject to the rights of bona fide purchasers, the seller may avoid a sale when the buyer obtains a voidable title. *Id.* § 2-403(1). *See also id.* §§ 2-702, -722.

[18]Subject to the rights of a bona fide purchaser, the seller may reclaim a security wrongfully obtained. UCCC § 8-315.

[19]A promise of support by the grantee is sufficient to create a vendor's lien in favor of the grantor to secure the consideration—*i.e.*, the duty of support. *E.g.*, Huffmond v. Bence, 128 Ind. 131, 27 N.E. 347 (1890). Language may create a condition subsequent in favor of the grantor who may elect to enforce his rights as a lien upon the property. Lowman v. Lowman, 105 Ind. App. 102, 12 N.E.2d 961 (1955).

[20]275 N.E.2d 553 (Ind. Ct. App. 1972).

[21]*Id.* at 555-56.

[22]Federal Land Bank v. Luckenbill, 213 Ind. 616, 621, 13 N.E.2d 531, 534 (1938) ("A conveyance in consideration of support of the grantor from the land conveyed is held to create a lien paramount to the rights of creditors of the grantee . . . ."); Glendening v. Federal Land Bank, 112 Ind. App. 162, 44 N.E.2d 251 (1942).

determined that the provision for support was inserted in the deed without authorization from the grantors and was of no effect for that reason.[23] The decision re-emphasizes the need for careful draftsmanship in the case of support conveyances.

E. Real Estate Recording Statutes

The aged Indiana recording statutes amazingly spawn little litigation.[24] One recent decision makes it clear that the State has no special rights under a conveyance or dedication which is not properly recorded. Bona fide purchasers take free of the State's claim except as to that portion of the highway which is in current use.[25] This imposes upon the State the burden of entering its real estate acquisitions on the record books—a concept which is not new in Indiana.[26]

F. Conditional Sales Contracts—Forfeiture

The rule for generations has been that the mortgagor's equity

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[23]*See* 275 N.E.2d 553, 565 (Ind. Ct. App. 1972). Improper insertion of the support provision should have been raised by a claim for reformation, but a formal pleading to this effect was not required under Indiana Rule of Trial Procedure 64(C). The court could have found the language of the support provision precatory or vague. *But cf.* Garard v. Yeager, 154 Ind. 253, 56 N.E. 237 (1900). In any event, the rights of the parties to support deeds remain subject to special equitable principles. *Cf.* Tibbetts v. Krall, 128 Ind. App. 215, 145 N.E.2d 577 (1957).

[24]*Cf.* IND. CODE §§ 32-1-2-16, -1-2-17, -1-2-31, -7-2-1 (1971). By and large these and other recording statutes have received a most sensible construction by Indiana courts which have been able to hear much better than they see. *E.g.*, Tuttle v. Churchman, 74 Ind. 311 (1881). *But cf.* Mishawaka St. Joseph Loan & Trust Co. v. Neu, 209 Ind. 433, 196 N.E. 85 (1935) (originating the "lazy banker" rule—holding that a purchaser's three day possession did not put a mortgagee banker on notice of the purchaser's rights).

[25]State v. Cinko, 292 N.E.2d 847 (Ind. Ct. App. 1973) (buyer protected although his deed provided "subject to rights of public in existing highways").

[26]The state claiming by eminent domain proceeding must start over again against a bona fide purchaser unless it first records its proceeding in the lis pendens records, takes control of the land, or records the conveying instrument. *Compare* State v. Anderson, 241 Ind. 184, 170 N.E.2d 812 (1960), *with* Cleveland, Cin., Chi. & St. L. Ry. v. Beck, 84 Ind. App. 380, 139 N.E. 705 (1923) (eminent domain by railway).

It is recognized that a general, unrecorded scheme restricting the use of land may be proved by parol and that purchaser of tracts within the scheme may take subject to the plan. Elliot v. Kelly, 121 Ind. App. 529, 98 N.E.2d 374 (1951) (en banc). A recent decision makes it clear that a purchaser without notice thereof takes free of the restrictions. Newell v. Standard Land Corp., 297 N.E.2d 842 (Ind. Ct. App. 1973) (constructive notice not inferred from facts as presented on motion for summary judgment).

of redemption may not be clogged—contracted away.[27] The same rule does not apply to the vendee in possession under a land contract even though the transaction is essentially a security device. Quite a number of Indiana decisions have allowed strict forfeiture under standard conditional sales contracts which permit the vendor to retake possession and treat prior payments as rent when the purchaser defaults.[28] The rule again has been recognized by a recent court of appeals decision.[29] One might foresee a quick end to the rule allowing strict forfeiture in land contract cases and even a reversal of this case, when it is heard on transfer to the supreme court, for several reasons. One stems from the analogy in personal property transactions in which the UCC eliminated distinctions between the chattel mortgage and the conditional sales contract.[30] Another lies in the Indiana rule denying the vendor forfeiture rights when the evidence establishes that he has accepted late payments. The right to forfeiture is denied until the purchaser is given notice to bring himself current and is allowed a reasonable time to do so,[31] and this rule has been recently applied in favor of a defaulting tenant.[32] By this means, the harsh consequences of forfeiture usually have been avoided by Indiana appellate decisions. Finally, forfeiture has always been a hideous thing in equity, which granted relief from law actions,[33] but in recent times unconscionability, which usually entails some kind of forfeiture provision, has

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[27]*E.g.*, Federal Land Bank v. Schleeter, 208 Ind. 9, 194 N.E. 628 (1934) (invalidating a mortgage provision giving up the statutory right of redemption as then, and now in different form, allowed by Indiana law).

[28]*E.g.*, J.F. Cantwell Co. v. Harrison, 95 Ind. App. 293, 180 N.E. 482 (1932). *But cf.* Gilbreth v. Grewell, 13 Ind. 484 (1859) (upon forfeiture, vendor required to account for payments above his damages).

[29]Skendzel v. Marshall, 289 N.E.2d 768 (Ind. Ct. App. 1972). In this case the purchaser had paid $21,000 on a $36,000 contract, and the court upheld a strict forfeiture. The case probably sets some kind of record for strict forfeiture. Another recent decision permitted forfeiture plus damages. Lacy v. White, 288 N.E.2d 178 (Ind. Ct. App. 1972).

[30]UCC § 9-102(2). Conditional sales of goods were separately dealt with by the Uniform Conditional Sales Act (repealed by the UCC) which allowed limited forfeiture. Law prior thereto allowed strict forfeiture against a defaulting conditional buyer. *Cf.* International Harvester Co. v. Lockwood, 205 Ind. 36, 185 N.E. 637 (1933).

[31]*E.g.*, Carr v. Troutmen, 125 Ind. App. 151, 123 N.E.2d 243 (1954) (en banc).

[32]Rembold v. Bonfield, 293 N.E.2d 210 (Ind. Ct. App. 1973).

[33]*E.g.*, Walter v. Bement, 50 Ind. App. 645, 94 N.E. 339 (1912).

become an accepted means for eliminating unreasonable provisions in "pig" contracts of all sorts.[34]

G. Assignment of Mortgagor's Interest; Merger

Because much property is mortgaged or impressed with a security interest, many difficulties may be encountered when the mortgagor or lien debtor conveys his interest in the property. The sale may be subject to the mortgage;[35] the transferee may assume the mortgage;[36] the lienholder may accept the buyer's obligation by way of novation;[37] or the purchaser may refinance and pay off the lien. One aspect of this problem was recently presented to the court of appeals in *Cook v. American States Insurance Co.*[38] under a fact situation that stretches the imagination of even a law professor. In that case, M executed a mortgage on improved real estate and a note to E loan association for about $6,000. Later M sold the property to M2 who assumed the mortgage and insured it with I insurance company. Subsequently the building on the property burned, I paid off E and took an assignment of the mortgage from E; I then took a deed from M2 and, apparently, released M2 from his obligation.[39] The court correctly held that when M2 assumed the mortgage he became a surety and M became a principal on the obligation. Hence a binding release or agreement between M2 (the surety) and I (the creditor or mortgagee) discharged M who was the primary party under established principles of suretyship law.

One interesting sidelight to the case was considered—whether

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[34]*E.g.*, Weaver v. American Oil Co., 276 N.E.2d 144 (Ind. 1971).

[35]Mutual Benefit Life Ins. Co. v. Lindley, 97 Ind. App. 575, 183 N.E. 127 (1933) (holding that the property is primarily liable for the debt, the transferor remaining primarily liable for any deficiency and taking the position of a surety to the extent of the value of the property).

[36]Usually this form of transaction is evidenced in the terms of the deed which binds the grantee through his acceptance. However, parol evidence is admissible to show that the transferee assumed the obligation. Thus the mortgagee will recover on a theory of third party creditor beneficiary contract. Hays v. Peck, 107 Ind. 389, 8 N.E. 274 (1886).

[37]The mortgagor and his transferee cannot bind the lienholder, who must be a contracting party to the arrangement. Navin v. New Colonial Hotel, 228 Ind. 128, 90 N.E.2d 128 (1950).

[38]275 N.E.2d 832 (Ind. Ct. App. 1971).

[39]The facts of the case are specially strange since the assignment to the insurer redounded to the disadvantage of the insured. One might guess that the insurer suspected arson or some wrongdoing. Certainly the insurance company had no rights arising by way of subrogation.

or not the acquisition of the mortgagor's interest by the mortgagee resulted in a merger extinguishing both the debt and the mortgage. Ordinarily merger results in such a case, but equity will prevent merger when it operates against the intent of the parties or when it would unfairly prejudice the rights of the transferee.[40] Assuming that merger took place in this case, the effect would be to discharge the mortgage. But merger is a property concept and does not necessarily dissolve the debt.[41] Hence the surety would have been discharged under principles of suretyship law only to the extent of the value of the property securing the debt (which was of diminished value because of the fire), but not necessarily upon the whole debt.[42] The case seemingly did not reach this point because the court found a binding agreement between the creditor and principal releasing M2, the principal, upon his debt.

H. Assignment of Vendor's Interest under Land Contract

An interesting problem arises when V contracts to sell land to P and before consummation of the transaction V wishes to assign his interest to V2. How should this be done? One thing is very clear. V should not attempt to transfer his interest by means of deed. If he does so, he may commit anticipatory repudiation and allow P to escape his liabilities under the contract.[43] One further difficulty was highlighted by a recent decision of the court of appeals.[44] There the vendor, V, who had given an option to purchase to P1, subsequently deeded the property to V2. The court held that a subsequent quitclaim conveyance by V to P was ineffective to transfer title, since V no longer had any interest to convey, or, at least under the facts of the case as presented on appeal, P failed to show that the transfer was made in fulfillment of the option.

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[40]*See* Coburn v. Stephens, 137 Ind. 683, 36 N.E. 132 (1893). *Accord,* United States v. Joe Murray's Point Lookout, 342 F. Supp. 92 (S.D.N.Y. 1972).

[41]Thus a mortgagee may release the mortgage without releasing the debt, and it is doubtful that a release of the mortgage standing alone will establish that the debt has been paid. *Cf.* Holland v. Johnson, 51 Ind. 346 (1875) (oral release upheld by dissenting judge who wrote for the majority).

[42]A creditor's releasing collateral of the principal will discharge a non-assenting surety only to the extent of the value of the collateral. Sterne v. Bank of Vincennes, 79 Ind. 549 (1881). *Accord,* UCC § 3-606(1)(b).

[43]Sabaugh v. Schrieber, 87 Ind. App. 588, 162 N.E. 248 (1928).

[44]Coons v. Baird, 265 N.E.2d 727 (Ind. Ct. App. 1970).

Upon this point the case was clearly wrong[45] inasmuch as V2 was informed of and took subject to P's rights, with only a claim to payment of any sums owing under the contract as of the time P was informed of V2's interest. Instead the court awarded title to V2 and left P to pursue his rights against V, a nonparty.

I. Open-Ended Credit Transactions

A lender may take security and provide that the security interest will cover future advances. Such arrangements are valid and recognized by the UCC. In *Hancock County Bank v. American Fletcher National Bank & Trust Co.*,[46] the debtor pledged coins as security for a loan. The pledge agreement included an open-end provision to the effect that the pledge should cover all present and future obligations owing to the secured party bank. Two additional loans were subsequently made when the debtor died. The court upheld the validity of the arrangement under UCC section 9-204(5),[47] but sustained the decision of the lower court holding the bank to be unsecured as to the two subsequent loans made after the execution of the pledge agreement. An officer of the secured party had stated, in response to an inquiry, that the two notes representing the subsequent loans "are on an unsecured basis."[48] This was held to constitute an admission sufficient to show that the later loans were not intended to be secured. A good guess is that the bank officer was unfamiliar with the open-end provision commonly included in pledge agreements, a point of interest to lawyers who have occasion to advise bankers.

It should be pointed out that future advances made on personal property security under the UCC probably take a higher, or safer, priority over intervening secured parties than in the case

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[45]Railroadmen's Bldg. & Sav. Ass'n v. Rifner, 88 Ind. App. 580, 163 N.E. 236 (1929); *cf.* UCC § 9-318(3); IND. CODE § 37-7-1-9 (1971). A recent decision dealt with the obligation of an account debtor to make payment to an assignee of an account. It held that the account debtor must pay the assignee who complies with UCC § 9-318(3) and that payment to the assignor is at the account debtor's risk. Ertel v. Radio Corp. of America, 297 N.E.2d 446 (Ind. Ct. App. 1973).

[46]276 N.E.2d 580 (Ind. Ct. App. 1972).

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> Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment.

Id. at 581.

[48]*Id.*

of real property security. Under the UCC, priorities basically are determined by the order of perfection.[49] In real estate transactions, an open-end advance will be deferred to an intervening mortgage unless the advance is mandatory under an agreement with the mortgagor or unless it is made without actual, as distinguished from constructive, notice of the intervening interest.[50]

J. Security Interest in Inventory

Probably the most significant innovation of the UCC was the validation of security interests upon inventory, accounts, contract rights, and other types of personal property assets representing the revolving assets of a business. Three recent decisions have given integrity to that policy and upheld security interests in inventory against competing interests. In *National Bank & Trust Co. v. Moody Ford, Inc.*,[51] a bank, floor planning an automobile dealer, had perfected its security interest by filing a financing statement with the Secretary of State. The security agreement covered all inventory and equipment then owned or acquired thereafter. The court granted the bank priority as to after-acquired new automobiles as against a shareholder-creditor of the dealer who had caused his purchase money security interest to be noted upon the certificates of origin of three new cars. The court pointed out that the only way in which the perfected security interest in inventory, whether consisting of motor vehicles or other property, may be defeated is for the holder of purchase money security in inventory to both perfect and notify the prior secured party of the purchase money security interest and his acquisition of a purchase money security interest in the debtor's inventory described

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[49]UCC § 9-312(5). This means that if SP1 claims under an open-end security agreement and SP1 first perfects, and SP2 claims a later perfected advance, SP1 ordinarily will take priority even though SP1 knew of SP2's security interest upon the same property, and still later SP1 makes a future interest at the time of the advance. *Cf.* James Talcott, Inc. v. Franklin Nat'l Bank, 292 Minn. 277, 194 N.W.2d 775 (1972) (recognizing that SP1 protected under a filed financing statement as to future advances even though security agreement executed after SP2's interest claimed or perfected unless SP2 entitled to a super-priority under other provisions of the Code). *But cf. In re* Hagler, 10 UCC Rep. Serv. 1285 (E.D. Tenn. 1972) (when SP1 underfiled financing statement and security agreement paid in full, subsequent security agreement taken after SP2 had taken security agreement on same property deferred to SP2).

[50]*See generally In re* Woodruff, 272 F.2d 696 (7th Cir. 1959) (discussing Indiana law on the subject).

[51]273 N.E.2d 757 (Ind. Ct. App. 1971).

by item or type before the debtor acquires possession.[52] In this case, the evidence failed to show that the purchase money secured party had either perfected or given the proper notice prior to the time the debtor acquired possession.[53] It should be noted that had he complied with the statute, the purchase money secured party would have been allowed a super-type of priority under the express provisions of the UCC.

In a much more difficult case, the court of appeals in *First National Bank v. Smoker*[54] upheld the security interest of a banker in the inventory of the debtor who was a meat processor. The security agreement covered after-acquired inventory and was properly filed with the Secretary of State. A farmer delivered $17,500 worth of cattle to the processor and expected payment when the beef was graded on the following day. When the banker repossessed the debtor's inventory which included the farmer's cattle, the farmer was not paid. In an action for conversion, the farmer claimed in essence a sale conditioned upon cash payment, a claim based upon custom and usage. The court correctly held that the farmer had two principal avenues open to him. He could claim that title had not passed, but, if this were done, he was required to show a security interest meeting the requirements of Article 9.[55] The farmer's claim was based upon custom and usage and did not meet the requirement of a security agreement,[56] and even if it did, he did not qualify for the super-priority accorded a purchase money security interest as in the *Moody* case discussed above. The farmer in any event could have reclaimed the goods from the processor under UCC section 2-702 because of the processor's insolvency—provided that he made demand for their

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[52]The court quoted UCC § 9-312(3).

[53]Although a security interest in motor vehicles ordinarily is perfected upon the certificate of title by a public official, this method of perfection is not recognized as to motor vehicles which are inventory held for sale. *Id.* §§ 9-302(3), (4). Note that if the inventory is held for lease, notation upon the certificate is a proper method of perfection and filing is not.

[54]286 N.E.2d 203 (Ind. Ct. App. 1972).

[55]The language of the Code is:

> Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. . . .

UCC § 2-401(1). *See also id.* §§ 1-201(37), 9-113.

[56]A written security agreement signed by the debtor describing the collateral is required when the secured party does not retain possession of the goods. *Id.* §§ 9-113, -203. There was no such agreement in this case.

return within ten days after their receipt.[57] Compliance with this provision was not shown, but had the farmer made proper demand he might have been defeated by the bank which, under the present status of the law, could qualify as a good faith purchaser for value and defeat the claim.[58] This case makes it seemingly tough on farmers, but a contrary result would undo a lot of certainty that the Code brings to inventory financing—certainty which in the long run will redound to the farmer's advantage. The case leaves no practical solution for the farmer to protect himself when the buyer does not concurrently pay in cash or its equivalent.[59] The farmer thus is faced with insisting upon prepayment or cash, taking the risk of inventory financing, and in all events keeping informed as to his rights.

One other problem has recently been resolved concerning the financing of accounts. The Code allows a debtor to assign his accounts, and, although the assignee's rights may be perfected by filing, the account debtor may safely pay the debtor until he receives notification from the assignee or secured party.[60] The Code also allows the latter to notify the account debtor to pay him

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> Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery, the ten days limitation does not apply. Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

Id. § 2-702(2).

[58]A good faith purchaser for value will defeat the seller's right of reclamation under section 2-702. *Id.* §§ 2-403(1), 2-702(3). Case law holds that a secured party holding under a security agreement covering after-acquired property becomes a purchaser for value as to the after-acquired property and the secured party will be protected if he qualifies as a good faith purchaser. *E.g.*, *In re* Hayward Woolen Co., 3 UCC REP. SERV. 1107 (D. Mass. 1967); Stumbo v. Paul B. Hult Lumber Co., 251 Ore. 20, 444 P.2d 564 (1968). The prior indebtedness for which the collateral is taken as security is value. UCC § 1-201(44)(b).

[59]Legislation requires livestock dealers to be licensed and furnish a bond to protect sellers. Meat processors are included. IND. CODE §§ 15-2-12-4(f), -9 (1971). One argument that might have been plausible in this case is that the buyer (the meat processor) did not obtain delivery or possession but merely a custody of the goods. *See* UCC §§ 2-501(1), -511(1).

[60]UCC § 9-318(3).

and therefore collect directly.[61] In a recent decision,[62] the assignee notified the account debtor of the assignment, required that payment be made to the assignee, and identified the rights assigned. When the account debtor ignored the notice and paid the debtor (assignor) who defaulted upon his obligation to the assignee, the assignee was allowed to recover from the assignor. This decision emphasizes the responsibility of account debtors to honor the claims of assignees, but only upon proper receipt of notification. It also serves as a reminder to an assignee that if he wishes payment to be made directly to him, he must comply strictly with Code provisions as was done in this case.[63]

K. Creditor and Debtor Rights—Collection Devices

It is a fair supposition that a creditor cannot "beat up" the debtor as a collection tactic, and by the same token, a debtor is not allowed to use such means to discourage the creditor from collecting.[64] Several Indiana decisions have dealt with some lesser evils. To discourage an employee from claiming workmen's compensation, the employer threatened discharge and, when the claim was made, fired the employee. In a landmark case, *Frampton v. Central Indiana Gas Co.*,[65] the Indiana Supreme Court found this to be a tort for which the employee could recover actual and punitive damages. Hopefully, the decision will also set a new standard of decency for judging the conduct of debtors and creditors in the use of extra-legal efforts to collect or defend.[66] The appellate court, however,

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[61]Only when so agreed or upon default by the debt. *Id.* § 9-502(1).

[62]Ertel v. Radio Corp. of America, 297 N.E.2d 446 (Ind. Ct. App. 1973). In this case a surety of the debtor paid the assignee and the court also held that the surety was subrogated to all the assignee's rights.

[63]Similar statutory provisions protect debtors in consumer credit transactions as against assignees. UCCC §§ 2-412, 3-406. These provisions are IND. CODE §§ 24-4.5-2-412, -3-406 (1971).

[64]This was substantiated by Kelsbeck v. State, 272 N.E.2d 607 (Ind. 1971) which upheld the conviction of the representative of a finance company for malicious trespass when the agent removed a mobile home upon which it held a security interest without the consent of the landlord who had a claim for rent against the debtor.

[65]297 N.E.2d 425 (Ind. 1973), *rev'g* 287 N.E.2d 902 (Ind. Ct. App. 1972). The wrong here was labelled as "retaliatory discharge" and parallels cases allowing relief against tenants the subject of "retaliatory eviction" when they complained to authorities of housing violations. *See* decisions cited *id.* at 428 n.4.

[66]Hopefully, the case may furnish a basis for overruling Patton v. Jacobs, 118 Ind. App. 338, 78 N.E.2d 789 (1948), which allowed the collecting creditor to interfere with the debtor's employment.

has held that the wrongful refusal of an insurance company to pay a claim is not the basis for recovering damages for emotional suffering.[67]

L. Mechanics' Liens

Claims of contractors, subcontractors, materialmen, and laborers to liens under the Indiana mechanics' lien statute continue to be litigated upon the appellate level. It has been determined that failure of a contractor to obtain a building permit required by law when it would have been granted had the application been pursued is not grounds for denying a contractor recovery upon his contract and the right to a mechanics' lien.[68] Although the lien claimant must file a sworn statement of a notice of intent to hold a mechanics' lien,[69] omission of his name from the jurat attached to the notice of lien which named and was signed by the claimant did not defeat the notice of lien.[70] Most of the current litigation involves the resolution of disputed facts including questions of the timeliness of the filing of the lien,[71] the substantial performance of the lien claimant,[72] and the cost of extras.[73] A lien may be

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[67]Meridian Mutual Ins. Co. v. McMullen, 282 N.E.2d 558 (Ind. Ct. App. 1972). The court was careful to point out that there was no evidence of a malicious failure to pay the claim, and so the insurance company was not liable for punitive damages. A number of jurisdictions, including Indiana, recognize liability for malicious refusal to pay a claim. *See generally* Annot., 47 A.L.R.3d 314, 318 (1973). *See also* Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972) (allowing compensatory damages for malicious refusal to pay). A creditor may be held for malicious prosecution of civil litigation. Why should not the same rule be applied to a debtor submitting a malicious defense? *See* Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084 (1932) (allowing recovery for malicious counterclaim filed without probable cause).

[68]Drost v. Professional Bldg. Serv. Corp., 286 N.E.2d 846 (Ind. Ct. App. 1972). A nonregistered architect cannot claim a lien for plans furnished to the owner. Kolan v. Culveyhouse, 144 Ind. App. 249, 245 N.E.2d 683 (1969).

[69]IND. CODE § 32-8-3-3 (1971) (requiring "sworn statement" in duplicate to be filed within 60 days after performance).

[70]Whitfield v. Greater South Bend Housing Corp., 276 N.E.2d 188 (Ind. Ct. App. 1972) (distinguishing case in which jurat was not signed by notary).

[71]Walker v. Statzer, 284 N.E.2d 127 (Ind. Ct. App. 1972).

[72]*Id.* In this case the court allowed the contractor to testify as to the value of his work, but held that photographs showing inferior work were not conclusive.

[73]Drost v. Professional Bldg. Serv. Corp., 286 N.E.2d 846 (Ind. Ct. App. 1972) (holding also that the fact of the owner's occupancy after completion shows substantial performance).

asserted against funds remaining in the owners' hands,[74] and it has been held that a second subcontractor of a first subcontractor may assert the lien although the first subcontractor has been paid by the contractor.[75]

Owners of single and double dwellings occupied (or to be occupied in the case of new construction) as a home receive special protection under the Indiana mechanics' lien statute. Unless a subcontractor gives such an "owner" written notice of his intent to hold a lien within five days (fourteen days in the case of new construction) after the first work is commenced or the first materials delivered, no lien can be claimed by him.[76] Suppose that an owner deeds his property to the contractor with an agreement that the contractor will reconvey it to him upon completion of a new home. Must a subcontractor give notice of his intent to claim a lien as required by the statute? Is the contractor the "owner"? *William F. Steck Co. v. Springfield*[77] held that under the arrangement the owner remained as "owner" of a dwelling to be occupied as a home and within the statute requiring notice. The court ingeniously determined that the transaction constituted an equitable mortgage under established principles allowing the grantor under an absolute deed to show that the transaction was a mortgage.[78] It should be noted that the deed to the contractor had not been executed until after work had been commenced by the subcontractor claiming the lien, but had it been recorded prior to that time some additional difficulty would have been encountered because of lack of notice.[79]

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[74]The lien granted here is upon funds held by the owner before payment to the claimant's "employer" as distinguished from the lien upon the land. *See* IND. CODE § 32-8-3-9 (1971).

[75]This was an important point settled by Indianapolis Power & Light Co. v. Southeastern Supply Co., 146 Ind. App. 554, 257 N.E.2d 722 (1970), and worth mentioning here.

[76]IND. CODE § 32-8-3-1 (1971).

[77]281 N.E.2d 530 (Ind. Ct. App. 1972).

[78]It has long been established that an outright deed may be a mortgage when the grantee agrees to reconvey or other circumstances indicate that the transaction is a security device. *E.g.*, Burcham v. Singer, 277 N.E.2d 814 (Ind. Ct. App. 1972).

[79]Either upon a theory of estoppel or upon the theory that the holder of a mechanics' lien may qualify as a bona fide purchaser subject to protection under the recording laws, it can be argued that an "owner" claiming under an unperfected title has no rights to the notice provided by statute. IND. CODE § 32-8-3-1 (1971). *Cf.* Metropolitan Cas. Ins. Co. v. S.J. Peabody Lumber Co., 99 Ind. App. 307, 192 N.E. 323 (1934).

A properly perfected mechanics' lien is barred unless foreclosure is commenced within one year after notice of the lien was filed or from the time credit given to the claimant expired.[80] It has been held that a suit to foreclose a lien was not commenced until the filing of the complaint and summons was issued to the sheriff.[81] Under Trial Rule 3, however, the action is commenced simply by filing of the complaint, and summons in all probability need not issue.[82] This severe time restriction for bringing foreclosure of mechanics' liens has another important consequence reiterated in *Mitchels Plumbing & Heating Co. v. Whitcomb & Keller Mortgage Co.*[83] There suit was brought within the proper time, but a junior lienholder of record was not made a party. The court held that because of the failure to make him a party within the year, priority was lost and the junior lienholder held a first right to proceeds on foreclosure sale.[84]

M. Creditors' Remedies—Proceedings Supplemental to Execution

Some very important issues relating to the enforcement of judgments in proceedings supplemental to execution have been resolved. Facing a number of issues raised by a reluctant and stubborn ex-husband in regard to alimony payments, the court of appeals in *McCarthy v. McCarthy*[85] held that as the principal judgment defendant, he was not entitled to a jury trial in proceedings supplemental to execution,[86] that the court rendering judgment in the original action had venue in enforcement of the judgment despite the general venue statutes or the venue provisions of the

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[80]IND. CODE §§ 32-8-3-6, -7-1, -7-2, -7-4 (1971).

[81]Valley View Dev. Corp. v. Cheugh & Schlegal, Inc., 280 N.E.2d 319 (Ind. Ct. App. 1972). The court held that the Indiana Rules of Trial Procedure, effective on January 1, 1970, were not applicable.

[82]Trial Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court . . . ."

[83]289 N.E.2d 138 (Ind. Ct. App. 1972). It seems that the court also deferred the mechanics' lienholder to a judgment lien acquired after foreclosure proceedings were commenced. This appears to have been upon the ground that the court in the foreclosure action did not enter a judgment of foreclosure and sale, but only gave judgment upon the indebtedness.

[84]Had a sale been held the purchaser thereat would have taken title subject to the rights of the junior lienholder which would then have a first priority. Stoermer v. People's Sav. Bank, 152 Ind. 104, 52 N.E. 606 (1899).

[85]297 N.E.2d 441 (Ind. Ct. App. 1973).

[86]The court recognized, however, that a garnishee named as party in proceedings supplemental may claim a jury trial upon legal issues applicable to him alone. McMahan v. Works, 72 Ind. 19 (1880).

proceedings supplemental statutes,[87] and that the fixing of a hearing in proceedings supplemental less than twenty days after service, as required by Trial Rule 69(D), was corrected by postponement of the hearing to a proper time. The court tacitly recognized that the change of venue provisions applied to proceedings supplemental to execution and, most significantly, indicated that a new practice which allows proceedings to be initiated by motion in the court where judgment was rendered does not deny the judgment plaintiff the right to initiate the proceedings as a separate action in other courts.[88] This is consistent with the idea that the remedy granted through proceedings supplemental is an equitable concept which allows the judgment creditor broad scope in pursuing assets of the debtor—the person usually who is at serious fault in not paying the judgment or making his assets readily available for that purpose. Accordingly, *Tipton v. Flack*[89] recognized that the judgment creditor could bring successive supplemental proceedings until his judgment was satisfied and that a former order requiring the defendant to pay into court a percentage of his wages did not bar a later proceeding naming the debtor's employer or garnishee. The court refused to hold that the first order was res judicata since there was no showing that the same wages were involved or that the employer was a party to the first proceeding. There is no reason that an in personam order directing the judgment debtor to turn over assets should bar a later proceeding against him and a garnishee to reach the same property if he fails to comply with the first order, and the case properly indicated that, although appealable,[90] an order in garnishment is part of a continuing process designed to assure enforcement of the judgment.[91]

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[87]The proceedings supplemental statutes contain specific venue provisions. *See* IND. CODE §§ 34-1-44-1, -2 (1971) (fixing venue at the judgment debtor's residence). The venue requirement of the new rules greatly expands the venue opportunities in such cases. IND. R. TR. P. 75.

[88]If an independent action is initiated (as the court indicated would be allowed) the plaintiff's choice of venue is governed by Trial Rule 75.

[89]271 N.E.2d 185 (Ind. Ct. App. 1971).

[90]The court held the order in proceedings supplemental to be appealable as a final judgment.

[91]

> Where the first order is not closed or abandoned, it may be consolidated with proceedings under a new order for examination of the judgment-debtor.

271 N.E.2d at 190.

One very important substantive issue related to the proceedings supplemental remedy was posed by a case in which a liability insurer tortiously refused to accept settlement of a claim within policy limits. Later a judgment was rendered against the insured in excess of those limits. It was recognized that the insured had a good claim against the insurer in tort or for breach of the insurer's contract to defend.[92] Does the judgment creditor have any means of reaching this asset of the insured? The answer seems to be very clear that this is an asset subject to garnishment in proceedings supplemental.[93] However, in *Bennett v. Slater*,[94] the court of appeals held that the judgment plaintiff had no standing to bring a direct action against the liability insurer in which the judgment debtor was named a party defendant. Clearly this should have been construed to be a supplemental proceeding initiated by separate action as allowed by *McCarthy v. McCarthy*,[95] even without labels identifying the suit as a proceeding supplemental to execution.[96] The decision is one of many which make a strong case for some type of no-fault program although it also furnishes little reason to anticipate that the insurance industry will apply itself generously and responsibly to the administration of no-fault insurance.[97]

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[92]The insured has a claim against the insurer if he can establish fault on the part of the insured. Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965), *cited with approval in* Bennett v. Slater, 289 N.E.2d 144 (Ind. Ct. App. 1972).

[93]It is clear that almost everywhere such a claim of the insured is assignable and is subject to creditor process. *E.g.*, Whitehead v. Leuven, 347 F. Supp. 505 (D. Idaho 1972). The asset will pass to the insured's estate, even though it is insolvent. Maguire v. Allstate Ins. Co., 341 F. Supp. 866 (D. Del. 1972). The claim will pass to the insured's trustee in bankruptcy. Young v. American Cas. Co., 416 F.2d 906 (2d Cir. 1969), *petition for cert. dismissed*, 396 U.S. 997 (1970) (recognizing a different rule when insured insolvent before liability incurred since no damage would have been sustained); Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965) (applying Indiana law). A claim for negligent injury to the debtor's property is assignable and is available to his creditors. *E.g.*, Annot., 66 A.L.R.2d 1217, 1221 (1959).

[94]Bennett v. Slater, 289 N.E.2d 144 (Ind. Ct. App. 1972).

[95]297 N.E.2d 441 (Ind. Ct. App. 1973).

[96]*Cf.* Rowe v. United States Fidelity & Guar. Co., 421 F.2d 937 (4th Cir. 1970) (the court allowed an amendment to the judgment creditor's complaint showing an assignment of the insured's claim to him).

[97]It seems that the only effect of the case is delay. The judgment creditor may still bring proceedings supplemental and name the insurer as garnishee. *Compare* IND. CODE § 34-1-2-8 (1971) *with* Allstate Ins. Co. v. Mor-

A problem causing some difficulty in the trial courts concerns the amount of wages subject to garnishment. It is made clear by section 5-105 of the UCCC that the maximum amount of weekly wages subject to garnishment under that law, *i.e.*, twenty-five percent of disposable earnings above thirty times the minimum wage, shall be subject to garnishment notwithstanding any exemption or other law.[98] A recent decision[99] avoided settling the matter by finding that a debtor claiming ninety percent of amounts above thirty times the minimum wage as exempt failed to assert his exemption in the proceedings below, although this is not required either by the UCCC or the proceedings supplemental statute.[100]

N. Attachment

When a debtor is a nonresident or fraudulently conceals himself or similarly conceals or disposes of his property, a creditor may cause his property to be attached or, if it is held or owed by a third person, include the latter by attachment and garnishment.[101] In this way he may obtain a lien upon the debtor's property by filing an affidavit and bond, without the necessity for any hearing.

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rison, 146 Ind. App. 497, 256 N.E.2d 918 (1970) (liability insurer subject to garnishment in proceedings supplemental).

[98]IND. CODE § 24-4.5-5-105(2) (1971) provides in part:

> Notwithstanding any exemption or other law, the maximum part of the aggregate disposable earnings of an individual subject to garnishment under this section shall be subject to garnishment except this provision shall not apply to any order of any court for the support of any person. . . .

[99]Mimms v. Commercial Credit Corp., 297 N.E.2d 892 (Ind. Ct. App. 1973).

[100]Behind the problem of exemptions is the Consumer Protection Credit Act, still applicable to Indiana, which provides that not more of the debtor's aggregate weekly wage than the lesser of either (1) 25% of his disposable weekly earnings or (2) 30 times the minimum wage may be subject to garnishment. The Act further 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." 15 U.S.C. § 1673(c) (1970). It is possible that this imposes a jurisdictional limitation upon the power of a court to exceed this authorization. A similar provision is included in UCCC § 5-105. IND. CODE § 24-4.5-5-105(c) (1971). The proceedings supplemental statute expressly provides that only 10% of income and profits are subject to the lien of proceedings supplemental and this provision is not a part of the general exemption laws. *See id.* § 34-1-44-7. This statute was not considered by the court.

[101]The grounds for attachment will be found in IND. CODE § 34-1-11-1 (1971) and Indiana Trial Rule 64(B), which greatly expands the types of assets subject to attachment.

Because of the lack of provision for hearing before attachment of the property, there may be some question as to whether the statute is constitutional, under the recent United States Supreme Court decision of *Fuentes v. Shevin*,[102] which struck down statutes permitting replevin before hearing. However, it is a fair bet that the Indiana statute meets the constitutional requirements of that case.[103] An excellent lecture on the use of attachment or attachment and garnishment against Indiana property of nonresidents will be found in *Transcontinental Credit Corp. v. Simkin*,[104] in which the court upheld a personal judgment to the extent of property attached at the threshold of the lawsuit against a nonresident defendant.[105] Service in that case was procured by publication, but creditors should be advised that under the doctrine of *Mullane v. Central Hanover Bank & Trust Co.*,[106] service calculated to give the defendant actual notice is required unless it is not reasonably possible.

O. Fraudulent Conveyances

A debtor may not give his property away and defeat his creditors. It generally is taught in law school that such a transfer may be avoided by an existing creditor if it involved property subject to creditor process, was made without a fair consideration, and left the debtor insolvent. Neither the Uniform Fraudulent Conveyance Act[107] nor the Bankruptcy Act[108] requires an intent to defraud creditors, but the established Indiana rule which allows a fraudulent conveyance to be avoided only when made with intent to defraud creditors[109] was again reaffirmed in *Kourlias v. Haw-*

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[102]407 U.S. 67 (1972). This case held unconstitutional replevin statutes in Florida and Pennsylvania similar to the then-existing statute in Indiana.

[103]Grounds for attachment required by the Indiana law seemingly meet the requirements of the extraordinary situations justifying the delay in granting a hearing. *See id.* at 90-91.

[104]277 N.E.2d 374 (Ind. Ct. App. 1972).

[105]Wages, even those of a nonresident, are not subject to attachment garnishment—*i.e.*, before judgment. *See* IND. R. TR. P. 64(B)(2).

[106]339 U.S. 306 (1950). In the *Simkin* case the defendant appeared in the case and challenged only the jurisdiction over the subject matter.

[107]UNIFORM FRAUDULENT CONVEYANCE ACT § 3.

[108]Bankruptcy Act § 67d, 11 U.S.C. § 107 (1970). This provision of the Act applies to transfers made within one year of the filing of the petition.

[109]Statute makes intent a requirement and a question of fact. IND. CODE §§ 32-2-1-14, -15 (1971). Intent is presumed in the case of a resulting trust situation. *Id.* § 30-1-9-7.

kins.[110] There the debtor remarried his former wife, and, pursuant to an antenuptial agreement binding both parties, conveyed his real estate to himself and his wife as tenants by the entireties and thus took it out of the reach of his individual creditors.[111] The court affirmed a judgment upholding the transfer on the somewhat incredible ground that the evidence showed the conveyance to have been made for the purpose of restoring marital harmony and thus imputed a pure state of mind to the debtor-husband who escaped the plaintiff-creditor with a judgment of $13,000. A little more research would have found sounder and more convincing grounds—Indiana case law holding that marriage is a fair consideration.[112]

The subject of fraudulent conveyances should not be left without a brief mention of a not-so-recent, but well reasoned casebook-type case allowing the creditor to obtain a preliminary injunction against a not yet consummated, but threatened, fraudulent transfer.[113]

P. Receiverships

The receivership as a means of enforcing creditors' rights continues to be regarded as an extraordinary remedy hedged with strict limitations. A complaint seeking the appointment of a receiver without notice must strictly show the need for equitable relief and be buttressed with affidavits establishing the facts.[114]

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[110]287 N.E.2d 764 (Ind. Ct. App. 1972).

[111]*See generally* Sharpe v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911) (recognizing that entireties assets could be reached by creditors holding a joint obligation of husband and wife). Transfer of individual property to the spouses as tenants by the entireties is a fraudulent conveyance as against the transferor's creditors—providing that the elements of a fraudulent transaction are established. Lewis v. Stanley, 148 Ind. 351, 45 N.E. 693 (1897). But a transfer of entireties property to one of the spouses is not a fraudulent conveyance on the part of the other because the property is not subject to creditor process; for that reason a transfer to a third party also is not vulnerable. *E.g.*, C.I.T. Corp. v. Flint, 333 Pa. 350, 5 A.2d 126 (1939); *cf.*, Stamper v. Stamper, 227 Ind. 15, 83 N.E.2d 184 (1949) (transfer of exempt property).

[112]Marmon v. White, 151 Ind. 445, 51 N.E. 930 (1898); McKnight v. Kingsley, 48 Ind. App. 372, 92 N.E. 743 (1911). However, a transfer made after marriage based upon an antenuptial oral promise (unenforceable under the Statute of Frauds) has been treated as without consideration. Gagnon v. Baden-Lick Sulphur Springs Co., 56 Ind. App. 407, 105 N.E. 512 (1914).

[113]McKain v. Rigsby, 250 Ind. 438, 237 N.E.2d 99 (1968).

[114]Inter-City Contractors Serv., Inc. v. Jolley, 277 N.E.2d 158 (Ind. 1972). It seems that the need for a prompt hearing may be controlled by Trial Rule

Obliquely the Indiana Supreme Court has reaffirmed the doctrine that the receiver and the receivership court control the right to press derivative actions,[115] and the statute giving the Insurance Department somewhat exclusive rights to seek a receivership and similar remedies against an insurance company has been construed to deny the granting of derivative relief against third parties.[116] In the liquidation of a local insurance company, the court of appeals[117] correctly denied a Florida ancillary liquidator any claim to assets in Indiana (rights under a re-insurance agreement) and left Florida creditors the alternative of pursuing their claims in the Indiana liquidation or on property of the debtor in Florida, if any. An order of distribution fixing rights and priorities to funds in the receivership was allowed to be modified upon petition of an adversely affected creditor or shareholder within thirty days after the filing of the receiver's final report.[118] This casts some serious doubts upon the appealability and finality of orders during the course of the receivership.

65(B) which applies to temporary restraining orders. This question was not considered in the case. *Cf.* Indianapolis Mach. Co. v. Curd, 247 Ind. 657, 221 N.E.2d 340 (1966).

[115]Sacks v. American Fletcher Nat'l Bank & Trust Co., 279 N.E.2d 807 (Ind. 1972). *Compare* Mooresville Bldg., Sav. & Loan Ass'n v. Thompson, 212 Ind. 306, 9 N.E.2d 101 (1937), *with* Siegel v. Archer, 212 Ind. 599, 10 N.E.2d 626 (1937). The case correctly held that shareholders could pursue parties dealing with the corporation to the extent that claims against them were not derivative. *Cf.* INDIANA CIVIL CODE STUDY COMM'N, IND. R. TR. P. 231, Comment (Proposed Final Draft 1968).

[116]State *ex rel.* Great Fidelity Life Ins. Co., v. Circuit Court, 288 N.E.2d 143 (Ind. 1972). The court applied IND. CODE § 27-1-20-23 (1971). The statute allows a judgment creditor to initiate such proceedings. In this case the court also denied a shareholder in a proxy fight the right of access to stockholder lists and relegated the shareholder to the Department of Insurance. The dissent correctly regarded this as the abandonment of a clear judicial function and responsibility.

[117]A very interesting decision revealing the almost unmitigated gall of the Florida receiver who demanded the share of Florida creditors in rights under a re-insurance agreement which gave no direct rights to policyholders. Florida *ex rel.* O'Malley v. Department of Ins., 291 N.E.2d 907 (Ind. Ct. App. 1973).

[118]Johnson v. Jackson, 284 N.E.2d 530 (Ind. Ct. App. 1972). The court applied IND. CODE § 34-2-7-1 (1971), allowing any creditor or shareholder or other interested party to file objections within 30 days from the filing of the receiver's final account. *Cf.* Trial Rule 52(B) (allowing reopening of judgments); IND. CODE §§ 33-1-6-3, -4 (1971); Holiday Park Realty Corp. v. Gateway Corp., 289 N.E.2d 292 (Ind. 1972) (court could reopen judgment within time for filing motion to correct errors).

Q. Rights of Creditors in Decedents' Estates

Some very interesting cases involving the rights of creditors with respect to deceased persons have been resolved by current litigation of special interest to lawyers. It is generally recognized that the claims and property rights of a deceased person against others may be pursued by heirs without administration, provided that they make a showing that it is not necessary.[119] In a somewhat parallel situation it was held that neither heirs nor devisees could pursue rights to undistributed assets without reopening the estate and procuring the appointment of an administrator de bonis non.[120] This result certainly lacks the virtue of cutting red tape in the administration of decedents' estates.

The strict statutory scheme for the allowance of claims against dead people spawns litigation, old and new. A ridiculously technical decision concerned the rights of a tort claimant against a nonresident motorist who was involved in an Indiana accident and who died before suit was commenced. Although the Indiana nonresident motorist statute allows service upon a representative through the Secretary of State, the court of appeals held that death terminated the authority of the Secretary to receive service of process when no representative had been appointed at the time of service.[121] The court apparently became cognizant of the absurdity of its holding which was softened in rehearing by noting that the statute of limitations would be tolled under the Journey's Account Statute.[122] This of course does not subtract from the delay, but will save the plaintiff if and when a personal representative is appointed sometime, somewhere.[123] In *In re Estate of Gerth,*[124] the plaintiff filed

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[119]Jester v. Gustin, 158 Ind. 287, 63 N.E. 471 (1902); Magel v. Milligan, 150 Ind. 582, 50 N.E. 564 (1898); Finnegan v. Finnegan, 125 Ind. 262, 25 N.E. 341 (1890).

[120]McGahan v. National Bank, 281 N.E.2d 522 (Ind. Ct. App. 1972). *But cf.* W.Q. O'Neall Co. v. O'Neall, 108 Ind. App. 116, 25 N.E.2d 656 (1940).

[121]Morris v. Harris, 293 N.E.2d 202 (Ind. Ct. App. 1973). The nonresident motorist statute is IND. CODE § 9-3-2-1 (1971). Among other things the statute provides: "[s]uch appointment of the secretary of state shall be irrevocable and binding upon his executor or administrator."

[122]Morris v. Harris, 295 N.E.2d 159 (Ind. Ct. App. 1973) (denying rehearing). The Journey's Account Statute extends the statute of limitations when an action "abates" for a cause except negligence in the prosecution.

[123]This is not made clear by the case, but it seems that if a representative is appointed over the deceased nonresident motorist in the state of his residence, service may be obtained by serving the Secretary of State who will then be agent of the representative. A judgment in such case probably would

his claim within the six-month period, but it was unverified. When the plaintiff submitted an amended claim in proper verified form before trial, the court held that the claim was properly filed and should have been allowed. Trial Rule 15(C), which makes the amendment relate back, was applied—a result which may make inept probate lawyers squirm. Not all rights of creditors must be pursued under the general claims provisions of the Probate Code. *Menniear v. Estate of Metcalf*[125] implicitly recognized that a principal may reclaim property from the estate of a decedent agent, subject to set-off for amounts owed by the reclaimant.[126] Although a general boilerplate provision in a will providing for the payment of creditors does not dispense with the necessity for creditors to properly file their claims,[127] a recent case reopens the matter by recognizing that a bequest made to discharge a duty or obligation to a debtor who predeceases the decedent will not lapse although the Probate Code does not deal with the situation.[128]

On the substantive side a very unfortunate decision of the supreme court held that the disinherited wife and children, bene-

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be binding upon the foreign representative and would be entitled to full faith and credit against him. *E.g.*, Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969) (overwhelming weight of authority); Brooks v. National Bank, 251 F.2d 37 (8th Cir. 1958) (holding that statute of limitations where suit commenced controlled and not the nonclaim provision of the state of administration); Hayden v. Wheeler, 33 Ill. 2d 110, 210 N.E.2d 495 (1965); Toczko v. Armentano, 341 Mass. 474, 170 N.E.2d 703 (1960); *cf.* Leighton v. Roper, 300 N.Y. 434, 91 N.E.2d 876 (1950) (did not decide whether Indiana would be required to give full faith to New York judgment against an Indiana representative); 36 CHI.-KENT L. REV. 157 (1959). Had the action been commenced before the nonresident died it should have been continued by substituting the representative if and when he was appointed. *Compare* Kibbey v. Mercer, 11 Ohio App. 2d 51, 228 N.E.2d 337 (1967), *with* IND. R. TR. P. 25(E) *and* INDIANA CIVIL CODE STUDY COMM'N, IND. R. TR. P. 25(E), Comment (Proposed Final Draft 1968).

[124]283 N.E.2d 578 (Ind. Ct. App. 1972).

[125]286 N.E.2d 700 (Ind. Ct. App. 1972).

[126]A person claiming personal property in the possession of a decedent does not bring replevin, but must file a petition to reclaim in the probate court. *Compare* Isbell v. Heiny, 218 Ind. 579, 33 N.E.2d 106 (1941), *with In re* Collinson's Estate, 231 Ind. 605, 106 N.E.2d 225 (1952).

[127]Lewis v. Smith's Estate, 130 Ind. App. 390, 162 N.E.2d 457 (1959). Heirs and devisees are not required to file claims. Rush v. Kelley, 34 Ind. App. 449, 73 N.E. 130 (1905).

[128]*See* Farmers & Merchants State Bank v. Feltis, 276 N.E.2d 204 (Ind. Ct. App. 1971). A bequest to "Roy Lytle in return for the assistance and aid that he has extended to me over the past many years" was held to lapse as it did not purport to be made to pay a debt or obligation.

ficiaries of a support order entered in a divorce case, have no claim against the estate of the father on the theory that the duty is personal and dies with the obligor.[129] The supreme court reached far in the past to resurrect this rule and in doing so it created further cause for lay suspicions that probate principles are in need of reform at the judicial level as well as in the legislature.

The dead man's statute often impairs claims of creditors.[130] Two current decisions weaken its effect and unseal the lips of those otherwise in a position to testify. One held that a lawyer who counselled the deceased at the negotiations leading to an alleged account stated was not "an agent in the making or continuing of a contract" since he did not negotiate it.[131] In another the guest of the decedent when involved in a motor vehicle accident was allowed to testify when it was established that his claim was covered by the decedent's liability insurance.[132] The result was reasoned on the theory that testimony with respect to a transaction with a deceased person should not be excluded when its effect will not deplete his estate, which was the case when the witness's claim was payable by an insurer.

R. Miscellaneous

Several miscellaneous new decisions are worthy of mention to those interested in the rights and obligations of debtors and creditors. The United States Supreme Court has indicated that the states may be subject to their own exemption laws.[133] The rule that the courts will not take judicial notice of reasonable attorney's fees and that formal proof of their value is not required has been reaffirmed,[134] but apparently repudiated when it involved al-

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[129]McKamey v. Watkins, 273 N.E.2d 542 (Ind. 1971). The court followed an 1859 case for this result and rejected a 1946 opinion from Ohio to the contrary.

[130]IND. CODE §§ 34-1-14-6, -11 (1971).

[131]Hoopingarner v. Bowser, 287 N.E.2d 570 (Ind. Ct. App. 1972).

[132]Jenkins v. Nachand, 290 N.E.2d 763 (Ind. Ct. App. 1972).

[133]James v. Strange, 407 U.S. 128 (1972) (statute imposing liability upon indigent criminal defendant who was furnished counsel held unconstitutional to the extent that debtor was denied exemptions).

[134]Marshall v. Russell R. Ewin, Inc., 282 N.E.2d 841 (Ind. Ct. App. 1972). The case was interesting in that the note secured by a mortgage provided for attorney's fees but the mortgage did not. Since the amount allowed was based upon services in connection with recovery upon the note (not in the foreclosure of the mortgage), the award was affirmed.

lowing extra attorney's fees for appeal work.[135] A good example of a real estate mortgage foreclosure decree is found in *Marshall v. Russell R. Ewin, Inc.*[136] The right to recover security deposits held by a landlord was recognized as the basis for a class suit.[137] Failure to furnish a nonmilitary affidavit, as required by the federal Soldiers' and Sailors' Relief Act, does not furnish grounds for avoiding a default judgment against a defendant or persons not in the military service.[138] The text-book rule that a binding agreement between principal and creditor altering the former's duty of performance will discharge the surety was applied to a case in which the creditor reduced the payments to be made on the balance on a loan.[139] A surety discharging the obligation of his principal was subrogated to security held by the creditor and his rights to collect accounts receivable directly from account debtors.[140] A creditor indorsing a check carrying a notation that it is in full settlement of all claims was allowed to show to the contrary upon a motion for summary judgment by the drawer—even when payment was not raised by an affirmative defense.[141] The result here unnecessarily subjects to litigation a commercial transaction which should be undone only by solid evidence.[142] And slavery may be back—for divorced husbands who refuse to work and pay support. At least *Slagle v. Slagle*[143] seems to say that a man who is able to work cannot escape a civil contempt order by living with his mother and refusing to work.

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[135]Willsey v. Hartman, 276 N.E.2d 577 (Ind. Ct. App. 1971).

[136]282 N.E.2d 841 (Ind. Ct. App. 1972).

[137]Boehne v. Camelot Village Apts., 288 N.E.2d 771 (Ind. Ct. App. 1972). In reversing the lower court, the court of appeals held that former tenants should be allowed to establish a community of interest in support of the class action, although the court recognized that each member of the class might be required to establish his own damages.

[138]Duncan v. Binford, 278 N.E.2d 591 (Ind. Ct. App. 1972).

[139]Indiana Telco Fed. Credit Union v. Young, 297 N.E.2d 434 (Ind. Ct. App. 1973).

[140]Ertel v. Radio Corp. of America, 297 N.E.2d 446 (Ind. Ct. App. 1973).

[141]Linden Packing Co., Inc. v. Heinhold Hog Mkt., Inc., 294 N.E.2d 848 (Ind. Ct. App. 1973).

[142]*But cf.* Fidelity & Deposit Co. v. Standard Oil Co., 101 Ind. App. 301, 199 N.E. 169 (1936) (without discussing the evidence, the court found it conflicting, although a check received by the creditor carried the notation, "In full gas and oil project N. 163").

[143]292 N.E.2d 624 (Ind. Ct. App. 1973).