Summer 1961

Mechanics Liens in Indiana-The Extent of the Property and Property Interests Subject to the Lien

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an anticipatory assignment of income.\textsuperscript{93} The courts, however, should never go so far as to use the "substitution" theory of the \textit{Lake} case to deny an effective gift or capital gains treatment to the conveyance of the entire or vertical slice of a royalty interest.\textsuperscript{94} In fact, a strong argument can be made that the application of the \textit{Lake} case should not be extended into the area of lease bonus conveyances. It would appear to be somewhat of an anomaly if the Commissioner and the courts maintain their present position that conveyance of the entire or vertical-slice of a royalty with a retained lease bonus is not a carve-out, but a capital transaction; and still tax the conveyance of the entire or a proportionate interest in a lease bonus, with or without a retained royalty, as an anticipatory assignment of income, under the authority of the \textit{Lake} case. In either instance, the result is the conversion into capital gain of what would be received as ordinary income at a future time; in both instances, a separate depletable interest, a property, not a carve-out, is conveyed.

\section*{Mechanics Liens in Indiana—The Extent of the Property and Property Interests Subject to the Lien}

The mechanic's lien is a security device to insure the mechanic or materialman the debt owed for work performed or materials furnished for the erection, improvement, or repair of buildings or other structures on real property. The right of the mechanic or materialman to such a lien was a remedy unknown to the common law, and exists today only by virtue of statute.\textsuperscript{1}

These statutes first appeared in the United States at the beginning of the 19th century.\textsuperscript{2} Their origin is traced by some to the need for a simple and effective debt remedy in a growing nation which emphasized mechanical and industrial pursuits.\textsuperscript{3} For the first one hundred years of this new remedy's existence a great amount of attention was given it by both legal writers and state legislatures. Since the turn of this century, however, very little has been written on mechanic's liens. This note is

\textsuperscript{94} See Galvin, The "Ought" and "Is" of Oil and Gas Taxation, 73 HARV. L. REV. 1441, 1505-06 (1960).
\textsuperscript{1} See, e.g., National Brick Co. v. Russel, 99 Ind. App. 53, 190 N.E. 614 (1934).
\textsuperscript{2} PHILIPS, MECCHANICS' LIENS § 1-12 (3d ed. 1893).
\textsuperscript{3} Id. § 6.
an attempt to discuss and evaluate portions of the Indiana mechanic’s lien statute.

The current Indiana statute was enacted in 1909, and the portions with which this note is concerned are sections 43-701 and 43-702.\textsuperscript{4} Section 43-701 states:

Persons entitled to lien—Contractors and laborers—Posting of notice.—Contractors, subcontractors, mechanics, journeymen, laborers and all persons performing labor or furnishing materials or machinery for the erection, altering, repairing or removing any house, mill, manufactory, or other building; bridge, reservoir, system of water-works, or other structures, or for construction, altering, repairing, or removing any walk or sidewalk, whether such walk or sidewalk be on the land or bordering thereon, stile, well, drain, drainage ditch, sewer or cistern may have a lien separately or jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, drainage ditch, sewer or cistern which they may have erected, altered, repaired or removed or for which they may have furnished materials or machinery of any description, and, on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, material furnished or either; and all claims for wages for mechanics and laborers employed in or about any shop, mill, wareroom, storeroom, manufacture or structure, bridge, reservoir, system of water works or other structure, sidewalk, walk, stile, well, drain, drainage ditch or cistern shall be a lien on all the machinery, tools, stock of material, work finished or unfinished, located in or about such shop, mill, wareroom, storeroom, manufactory or other building, bridge, reservoir, system of water-works, or other structure, sidewalks, walk, stile, wall, drain, drainage ditch, sewer, or cistern or used in the business thereof; and should the person, firm, or corporation be in failing circumstances the above-mentioned claims shall be preferred debts whether claims or notice of lien has been filed or not. . . .\textsuperscript{5}

Section 43-702 states:

Extent of lien—The entire land upon which any such build-


\textsuperscript{5} \textit{Ind. Ann. Stat.} § 43-701 (Burns 1952).
ing, erection or other improvement is situated, including that portion not covered therewith, shall be subject to lien to the extent of all the right, title, and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or material furnished; and where the owner has only a leasehold interest, or the land is encumbered by mortgage, the lien, so far as concerns the buildings erected by said lien-holder, is not impaired by forfeiture of the lease for rent or foreclosure of mortgage; but the same may be sold to satisfy the lien and be removed within ninety (90) days after the sale by the purchaser.

To interpret these sections properly, attention must also be given to the earlier statute of 1883, and its predecessor enacted in 1953. The

7. Ind. Laws 1883, ch. CXV, §§ 1-2 at 140, as amended, Ind. Laws 1889, ch. CXXIII, §§ 1-2 at 257:

Mechanic’s Liens—1. That contractors, sub-contractors, mechanics, journeymen, laborers and all other persons performing labor or furnishing materials or machinery for the erection, altering, repairing or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water works or other structure, or for constructing, altering or repairing or removing of any sidewalk, walk, stile, well, drain, sewer or cistern may have a lien separately or jointly upon the house, mill, manufactory or other building, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected to the extent of the value of any labor done, material furnished, or either; and all claims for wages for mechanics and laborers employed in or about any shop, mill, ware-room, storeroom, manufactory, or structure, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern, shall be a first lien on all machinery, tools, stock of material, work finished or unfinished located in or about such shop, mill, ware-room, storeroom, manufactory or other building, bridge, reservoir, system of waterworks or other structure, sidewalk, walk, stile, well, drain, sewer or cistern or used in the business thereof; and should the person, firm or corporation be in failing circumstances the above mentioned claim shall be preferred debts, whether claim or notice of lien has been filed or not.

Extent of Lien—2. The entire land upon which any such building, erection or improvement is situated, including that portion not covered therewith shall be subject to lien to the extent of all the right, title, and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or material furnished; and where the owner has only a leasehold interest or the land is encumbered by mortgage, the lien, so far as concerns the buildings erected by said lien-holder, is not impaired by forfeiture of the lease for rent or foreclosure of the mortgage; but the same shall be sold to satisfy the lien and be removed within ninety (90) days after the sale by the purchaser.

8. Ind. Rev. Stat. 1852, part second, ch. 1 §§ 647-48 at 181:

Mechanic’s Liens on buildings: Mechanics, and all persons performing labor or repair of any building, or who may have furnished any engine or other machinery for any mill, distillery, or other manufactory, may have a lien separ-
current statute and the 1883 statute are very similar in nature (especially the sections with which this note is concerned), and generally, judicial decisions rendered under the 1883 statute are valid law today. This is not so true of the 1853 statute which differs greatly from both the 1883 and 1909 statutes. In many instances, however, emphasis is given to the judicial construction of this century-old statute so it cannot be properly omitted from a discussion of mechanic's liens.

Although Indiana has had mechanic's lien statutes for over one hundred years, there remain problem areas which have not been adequately settled, and where an error by the prospective lienor could easily cost him the benefits of this simple and inexpensive remedy. Only two of these areas will be discussed here. Part I is concerned with the property interest to which a mechanic's lien may attach. Part II is a discussion of the extent of real estate which may be attached by a mechanic's lien.

I

THE PROPERTY INTEREST TO WHICH A MECHANIC'S LIEN MAY ATTACH

Under the standard mechanic's lien fact pattern, few problems arise. Labor or materials are furnished for the erection, improvement, or repair of a structure, a mechanic's lien is filed, the debt is not paid, and the lienor brings an action to foreclose the lien and have the land sold to satisfy the debt. A more difficult situation may arise, however, when the person who contracts for the labor or materials is not the fee simple owner of the land. This person may be on the land as a lessee, by virtue of a life estate, or he may be one of several co-tenants, or even a mere vendee in possession. The question is one of ascertaining whose property interest may be attached as security for the debt owed to the mechanic or materialman. The choices and problems may be as varied as the possible divisions of interest in real property.

The Indiana mechanic's lien statute does not mention any particular property interest to which a mechanic's lien must attach. Under Section

ately or jointly upon the building which they may have constructed or repaired or upon any buildings, mill, distillery, or other manufactory for which they may have furnished materials of any description, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both.

Extent of Lien: The provisions of this Act shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any buildings for repairs, or to the engine or other machinery furnished for any mill, distillery, or other manufactory unless furnished to the owner of the land on which the same may be situated; and not to any contract made with the tenant, except only to the extent of his interest.
43-701 the lien may attach to "... the interest of the owner of the lot or parcel of land ... ", and under Section 43-702 it may attach "... to the extent of all the right, title, and interest owned therein by the owner thereof. ... ". The word "owner" as used in these sections includes any person who holds an estate or interest in the land. It is used as a correlative of contractor or laborer. The prospective lienor, then, must look at the property interests involved, and at the judicial interpretation of the statute to find what "interest" of which "owner" he may attach with a mechanic's lien.

There must be some property interest in the land to which the mechanic's lien can attach. If materials are furnished or labor performed under contract with a trespasser or person on the land by mistake, no lien may attach which will prejudice the rights of the true owner.

**Fee Simple, Life Estate, Term of Years.** All estates in land, whether legal or equitable, appear to be subject to attachment by mechanic's liens. There is no distinction made by the statute between the various estates—the only requirement is that the "owner" have some interest or estate in the land which may be attached and sold. As regards a fee simple, the estate would clearly be subject to a mechanic's lien for the owner's whole interest. The same would hold true of the life estate or the leasehold—these interests could be attached and sold. In estates or interests which are less than a leasehold, such as those of the tenant at will, a practical problem may exist as these lesser interests might not have a sufficient sale value to cover the amount of the debt. This would not seem, under the statute, to prevent their attachment by lien, but it should be noted that no Indiana cases were found where such a lien was attempted.

Where a mechanic's lien is filed against less than a fee simple estate, an important question for the lienor is whether he may attach only the life estate or leasehold or may also attach the reversionary interest. If the lienor may attach both interests he has, of course, more security for his debt.

The general rule regarding the liability of the owner of a reversionary interest for mechanic's liens was stated in *American Islam Society, Inc. v. Bob Ulrich Decorating*, where the court said:

In order that a lien may attach to real estate for material used

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12. See 10 Thompson, Real Property, § 5192 (repl. 1957).
in a building erected thereon, it is necessary that such material should be furnished by the authority and direction of the owner, and something more than mere inactive consent on the part of the owner is necessary in order that a lien may be acquired against it.\textsuperscript{16}

The court goes on to note that, when a lease is involved, if the lease contemplates improvements by the lessee, the lessor's interest may be subject to a mechanic's lien. This is especially applicable where the provision in the lease authorizing the improvements states: that the lessee may deduct from the rent for improvements, that part of the consideration for the lease is making improvements, or that the improvements made by the lessee will revert to the lessor.\textsuperscript{18}

Therefore, if the lienor wishes to attach the reversionary interest, he must show either: (1) that the materials were furnished by the authority and direction of the owner of the reversionary interest, and something more than mere inactive consent on the part of this owner, or (2) that the lease contemplated improvements by the lessee. This latter requirement is not necessarily separate and distinct from the former for if the lease contemplated improvements in one of the ways mentioned above this would appear to show both authority and direction and more than mere inactive consent. Thus the lease could be considered as evidence of the reversioner's authorization and direction and his consent.

The application of these rules or tests has not been uniform in Indiana. A lease in Abrams v. Silver contained a clause which said, "the tenant is hereby granted the right, and agrees, to change the front of the premises herein mentioned. . . ."\textsuperscript{17} After the building was remodeled, the lessee assigned his lease to the lienor as security for the improvements made, and the lessor consented to the assignment. When the lienor brought his action on a mechanic's lien filed against the lessor's interest, the Indiana Appellate Court held that the lien failed since it did not meet the test of authority and direction, and more than mere inactive consent by the lessor. No mention was made of the provision in the lease which stipulated that the front of the premises were to be changed (other than quoting it in the statement of facts), or of any effect it would have had on the outcome. Eleven years earlier the Indiana Appellate Court in another case where the lease required improvements,\textsuperscript{18} upheld the lien

\textsuperscript{15} Id. at 270, 132 N.E.2d at 622; see e.g., Snelling v. Wortman, Receiver, 107 Ind. App. 442, 24 N.E. 791 (1940); Abrams v. Silver, 102 Ind. App. 97, 1 N.E.2d 286 (1936).
\textsuperscript{17} 102 Ind. App. 97, 98, 1 N.E.2d 286 (1936).
\textsuperscript{18} Mancourt v. Wissel, 83 Ind. App. 313, 146 N.E. 423 (1925).
saying that the rule regarding leases which contemplate improvements by the lessee had been in effect in Indiana since the 1915 case of *Rader v. Barnett Co.* Confusion over the application of these rules or whether the court will look to the lease for evidence of authorization and consent may have been settled by the 1956 decision in *American Islam Society, Inc. v. Bob Ulrich Decorating.* Here the lease contemplated improvements, and the court in upholding a mechanic's lien on the lessor's interest said that it would look to the lease for evidence of the lessor's consent.

Another important question, when dealing with less than a fee simple estate, is the effect of surrender or forfeiture by the holder of the lesser interest. The statute makes an effort to meet this problem when a lease is involved by stating that so far as concerns buildings erected by the lienholder, the forfeiture of the lease for rent will not impair the lien. The lienor can have the buildings sold and removed. After a mechanic's lien has attached to an interest, the general rule is that neither voluntary surrender nor forfeiture will destroy it. In such a situation the lessor must either (1) pay the debt and extinguish the lien, or (2) accept the purchaser as a tenant when the leasehold is sold. The new tenant, however, is subject to all the terms of the lease.

In summary, the prospective lienor may attach the contractor's interest in the land, and any property interest is sufficient under the statute. The lienor may also attach the reversionary interest if he can show that the labor or materials were furnished by the reversioner's authority and direction, and with more than his mere inactive consent. When a lease is involved the lessor's interest may be attached if the lease contemplated improvements by the lessee. Once the lien has attached, voluntary surrender or forfeiture will not destroy it.

**Co-tenancies—Tenants by the Entireties, Joint Tenants, Tenants-in-Common.** The right to a mechanic's lien as a result of a contract with a co-tenant may depend upon the nature of the co-tenancy. A joint tenant or tenant-in-common both hold undivided shares in land which may be alienated or forfeited. There is an interest in the land which can be attached and sold without seriously impairing the ownership or rights of

23. Montpelier Light Co. v. Stevenson, 22 Ind. App. 175, 53 N.E. 444 (1899).
25. Ibid.
the co-tenants.

In estates by entireties, however, both husband and wife are seized of the whole estate. The interest in the land is held by a unit which in turn holds the entire estate in the land. The result is that neither husband nor wife can impair the estate with their individual debts. The prospective lienor who contracts with the husband cannot have a lien on the husband's interest in the land—the lien must attach to the whole estate or not at all.

Realizing this basic difference between estates by entireties and other forms of co-ownership of land, it is surprising that the Indiana courts apply the same rules of law in all co-tenancy problems. In Mann v. Schnarr, a brother and sister held land as tenants-in-common. The brother made the contract for the improvements, and although the sister objected to the cost, she signed several partial payments checks. The court held that if the co-tenant knows the improvement is being made and makes no objection, and does any affirmative act consistent with consent, the co-tenant's interest is subject to a mechanic's lien. Here the objections to the cost showed knowledge, and the partial payment checks showed consent, and hence the sister's interest was subject to the lien.

In Means v. Everitt, a 1960 decision concerning a mechanic's lien filed against an estate by entireties, the court cited Mann v. Schnarr as controlling and said the lienor must show that the co-tenant (1) had knowledge that the improvements were being made, (2) made no objection to those providing the material and labor, and (3) performed any act consistent with consent. This seems almost to require that once the co-tenant has knowledge that his co-tenant is improving the land, he must take affirmative action to prevent his interest from being subjected to a mechanic's lien. Clearly the second requirement—objection to those providing the labor and materials—calls for an affirmative act. But assuming the co-tenant has knowledge of the improvements, and makes no objection to the prospective lienors, his interest is still safe if no affirmative act consistent with consent is performed. The difficulty with the third requirement is that the Means opinion implies that very little is needed to show an affirmative act consistent with consent. The mere fact that the co-tenant's interest is benefited may be enough. If this is

27. Id. § 430.
28. Id. § 434.
29. Ibid.
30. 228 Ind. 654, 95 N.E.2d 138 (1950).
32. 228 Ind. 654, 95 N.E.2d 138 (1950).
true, the requirement of showing consent has little or no value, and affirmative action on the part of co-tenants is necessary to protect their interests.

This is not to imply that such a rule is inequitable when a tenancy by the entireties is involved; but it would seem to be inequitable when joint tenants or tenants-in-common are involved. The relationship of husband and wife and the peculiar nature of estates by entireties could be held to be such that the one tenant should be required to take affirmative action if he disapproves of known improvements being made by the other tenant. But it does not necessarily follow that a joint tenant or tenant-in-common, upon discovering an improvement, should be required to object to those providing the labor and materials, or face the risk of having his interest in the land attached and sold if the contracting co-tenant does not pay.\(^3\)

This problem is not easily solved. One reason is that it is not necessarily the nature of the estate that produces the inequity, but rather the relationship of the tenants. A sharper distinction among the estates would not necessarily help as husband and wife may hold land as joint-tenants or tenants-in-common.\(^3^5\) But since only husband and wife may hold as tenants by the entireties in Indiana,\(^3^6\) a step in the right direction might be to require a lesser degree of consent in estates by entireties cases. The resulting requirement of more evidence to show consent when joint-tenants or tenants-in-common are involved could be tempered by the court depending upon the relationship of the parties.

Under the current position of the Indiana courts, however, it is not difficult for the lienor to attach the interest of all the co-tenants regardless of the nature of the estate they hold. All the lienor must show is that the other co-tenants had knowledge of the improvements, made no objection to those providing the material and labor, and performed any act consistent with consent.

**Vendor-Vendee.** A vendee in possession of land under a contract of purchase often makes valuable improvements before the actual conveyance of title. When this happens the materialman or mechanic who provided the material or labor may face the problem of whose interest he may attach as security for his debt—may he file his lien against only the contracting vendee, or may he also attach the interest of the vendor?

The rule stated by Indiana courts is that a vendee in possession

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34. This assumes that the requirement of an affirmative act consistent with consent is fulfilled by the co-tenants interest being benefited by the improvements.
35. 2 TIFFANY, REAL PROPERTY §§ 425, 428 (1939).
under a contract to purchase cannot cloud the vendor’s title by causing mechanic's liens to be filed against the land.\textsuperscript{37} There is an exception to this general rule, however, where the vendor was instrumental and active in having the improvements or repairs made.\textsuperscript{38} Here again the basic test is were the materials and labor furnished by the authority and direction of the owner (vendor), and something more than mere inactive consent on his part shown.\textsuperscript{39} In applying this test the court will look to the contract of purchase to see if the improvements were required, and if so then active consent is shown, and a mechanic's lien will probably attach.\textsuperscript{40}

In \textit{Rader v. A. J. Barrett Co.},\textsuperscript{41} the contract required the vendee to expend $500 to improve the property within sixty days of the contract date. If the conveyance was not finally consummated this sum was to be forfeited. The vendee made the improvements, but failed to meet other conditions in the contract and the contract was forfeited. A lien against the vendor was upheld, the court saying that the contract showed authorization and more than mere inactive consent. In \textit{National Brick Co. v. Russell},\textsuperscript{42} the \textit{Rader} case was distinguished as there was no allegation that the vendor required more security than the bare real estate itself. In the \textit{Rader} case the improvements were required to better the vendor's security if the conveyance was not consummated. Thus, the fact that the improvements required are for the immediate use and benefit of the vendor may show sufficient consent for a mechanic's lien to attach.

It should be noted here that there is an important and major difference between the position of the prospective lienor when dealing with a vendee and when dealing with a lessee or tenant. As stated earlier, under section 43-702 of the statute,\textsuperscript{43} if a lienor erects a building for a lessee and the interest is forfeited for rent, the lienor can foreclose on the building itself—he may have it sold and removed. Although the court has generally extended this to all tenants, it does not include a vendee in possession under a contract of purchase.\textsuperscript{44} There appears to be no reason for this difference in remedy other than that the legislature omitted it in the statute. This fact was pointed out by the court in

\textsuperscript{38} Holland v. Parrier, 75 Ind. App. 368, 130 N.E. 823 (1920).
\textsuperscript{39} Robert Hixon Lumber Co. v. Rowe, 83 Ind. App. 508, 149 N.E. 92 (1925).
\textsuperscript{41} Ibid.
\textsuperscript{42} 99 Ind. App. 53, 190 N.E. 614 (1934).
\textsuperscript{43} IND. ANN. STAT. § 43-702 (Burns 1952).
\textsuperscript{44} Davis v. Elliot, 7 Ind. App. 246, 34 N.E. 591 (1893); accord, United States Lumber & Supply v. River Park Improvement Co., 85 Ind. App. 140, 151 N.E. 354 (1926); Robert Hixon Lumber Co. v. Rowe, 83 Ind. App. 508, 149 N.E. 92 (1925); Toner v. Whygrew, 50 Ind. App. 387, 98 N.E. 450 (1912).
sixteen years before the 1909 statute was enacted, but was not corrected by the legislature. Thus, the prospective lienor who erects a building for a vendee in possession of land under a contract of purchase cannot have a mechanic's lien on the building, and cannot have a lien against the real estate itself unless he can show that the materials and labor were furnished by the authority and direction of the owner (vendor), and something more than mere inactive consent on his part. If the lienor can show that the possessor is a tenant, however, he may have a lien on the building.

The question of whether the contractor is a tenant or a vendee could present an interesting problem when a lease with an option to purchase is involved. The position of the Indiana courts is that a mere option to purchase does not vest any title in the holders until the option has been exercised. In other words until the option is exercised the holder is a tenant. The difficulty is that many conditional sale of land contracts are written in the form of leases with an option to purchase. Under such an instrument the holder, on the basis of form, would be a tenant while the parties actually contemplated a sale of the land. Whether the courts will look through the form to the intent of the parties does not appear to be settled. The better view would probably be to classify the parties according to the true nature of the transaction.

Regardless of whether the contractor is considered a tenant or a vendee, the mechanic or materialman should have a remedy. If the contractor is held to be a lessee the mechanic can have a lien on the leasehold as discussed earlier. If the contractor is held to be a vendee, the mechanic can attach his lien to the vendee's interest in the land. The statute requires only that the contractor have an interest in the land, and under the doctrine of equitable conversion the vendee holds an equitable interest in the land from the moment the contract of purchase is consummated. The value of this interest would probably vary considerably, but it could be attached by a mechanic's lien.

There seems to be little doubt, however, that the prospective lienor is at a disadvantage when dealing with a vendee. This is shown in Toner v. Whybrew where the contract of purchase said the vendee was not required to make payments on the principal during years when the vendee constructed buildings on the land, the cost of which was equal to the due payments. In such a situation the payments would be extended

45. 7 Ind. App. 246, 34 N.E. 591 (1893).
46. See also Holland v. Farrier, 75 Ind. App. 368, 130 N.E. 823 (1920).
48. 50 Ind. App. 387, 90 N.E. 450 (1911).
one year. The vendee ordered a house constructed, and mechanic’s liens were filed against both the house and the real estate. The vendee then surrendered possession to the vendor. The court held that as Section 43-702 of the statute does not apply to vendees the lien against the house was not valid. In *Robert Hixon Lumber Co. v. Rowe,* the house located on the land was destroyed by fire. The vendor gave the vendee the insurance money to rebuild the house in consideration for a promissory note, which was to become void when the house was completed. The house was rebuilt, a mechanic’s lien filed against the real estate, and the court held the lien invalid. During the same year the same court upheld a mechanic’s lien on the reversionary interest of a lessor where the lease contemplated improvements.

Much of the criticism of this situation should probably be directed at the legislature, and its failure to allow mechanic’s liens on buildings constructed for vendees as it does in cases involving lessees and mortgagors. This inequity was pointed out by the court in 1893, yet the legislature failed to remedy the situation under the 1909 statute or since that time. Inclusion of vendees under the forfeiture clause of 43-702 would not completely solve the problem, however, as the remedy of sale and removal of buildings has a practical limitation depending upon the size and nature of the structure. It would be a step in the right direction, however.

Aside from this statutory condition there appears a hesitance on the part of the courts to equate the remedy applied in cases involving lessees and co-tenants to that applied when vendees are involved. There is no thought of unjust enrichment to the vendor as there is in cases of lessors or co-tenants; and a comparison of the fact situations can easily leave the impression that the lienor will have a more difficult task showing authorization, direction, and consent if he is foreclosing on a vendee, than if he is foreclosing on a lessor or a co-tenant.

Thus, under the Indiana mechanic’s lien statute, a lien may attach to all the right, title, and interest of the “owner” of the land, and, any interest in land is sufficient to support the lien. Under the statute when a building is erected for a lessee or tenant, forfeiture of the interest for failure to pay rent will not impair the lien, and it may be foreclosed on

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49. *Ind. Ann. Stat. § 43-702 (Burns 1952).*
50. 83 Ind. App. 508, 149 N.E. 92 (1925).
53. *Ind. Ann. Stat. § 43-702 (Burns 1952).*
the building itself. The materialman or mechanic may also have a lien on the reversionary interest or the interest of a co-tenant or vendor if the lienor can show that the materials and labor were furnished by the authority and direction of the owner (reversioner, co-tenant, vendor), and something more than mere inactive consent on his part. The court may look to the instrument conveying the interest for evidence of authorization and active consent. Although these rules are applied generally, the fact situations necessary to support the lien may vary depending upon whether the lienor is dealing with a lessee, a co-tenant, or a vendee.

II

THE REAL ESTATE TO WHICH A MECHANIC'S LIEN MAY ATTACH (EXTENT OF THE LIEN)

Once having determined that the debtor has an attachable interest in the land, the next matter that must be considered is the amount of real estate that the creditor may attach to insure the satisfaction of the debt. Although the current statute sets out in Section 43-701 that a mechanic's lien may be had "... separately or jointly upon the house, ... or other structure ... and, on the interest of the owner of the lot or parcel of land on which it stands or with which it is connected ...," and in Section 43-702 that "The entire land upon which any such building, erection, or other improvement is situated, including that portion not covered therewith, shall be subject to the lien. ..." this does not completely solve the problems that could arise under the statute.

Reference to judicial construction of the statute may also prove to be of little assistance. In fact, most of the opinions on mechanic's liens fail to mention that a mechanic's lien statute exists. A major source of confusion is that the courts often cite and approve decisions under the two earlier mechanic's lien statutes—those of 1853 and 1883. Perhaps the citing of cases under the 1883 statute is valid as this statute is very similar to the current statute, especially concerning the extent of liens. Section 43-702 of the current statute is a word-for-word re-enactment of Section 2 of the 1883 statute. The 1853 statute, however, is not similar to either the 1883 or the 1909 statutes; yet, many of the decisions under the 1883 statute rely upon the earlier opinions ren-

55. IND. ANN. STAT. § 43-701 (Burns 1952).
56. IND. ANN. STAT. § 43-702 (Burns 1952).
59. IND. ANN. STAT. § 43-702 (Burns 1952).
60. Ind. Laws, 1889, ch. CXXIII, § 2 at 257.
dered under the 1853 statute. The problem becomes more complex when decisions under the current statute (1909) rely upon decisions under the 1883 statute, but reject the earlier decisions under the 1853 statute. It is complex because the 1883 decisions relied upon claim to be in harmony with the 1853 decisions. The total result is that there appears to be both reliance on and rejection of earlier judicial decisions without regard to either the statute now in force or the statute in force when the decision was rendered.

It is true that under some fact situations the statute adequately covers the subject, but under others neither the statute nor the prior decisions will be of much help. To facilitate examination of this area it might be best to first examine situations where there can be no doubt that the lien would attach and as to how much real estate may be attached, and then move on to those problem areas where it is questionable whether the lien is valid and how much real estate may be attached.

A Mechanic's Lien upon One Building and the Lot or Parcel of Land on which it is Located. In this classic situation there would appear to be little doubt of the validity of the lien. The owner of a lot or parcel of land contracts for the erection or improvement of a structure, a lien is filed, and if the debt is not paid the mechanic may foreclose the lien. The lien will attach to the interest the owner holds in the land and the amount of real estate attached would be the lot or parcel on which the structure stands—the entire land, including that portion not covered by the structure. There appear to be no cases where such liens were held improper as to the extent of the property attached.61

A Mechanic's Lien Filed upon Two or More Buildings and the One Lot or Parcel on which They are Located. Under the 185362 statute such a lien would probably have been invalid.63 The court interpreted this early statute as contemplating only a single lien on a single building, not a joint lien on several buildings. This view was based upon the theory that each building was security for itself—that the credit was given for the identical building for which the material or labor were furnished.64 The only situation where a joint lien could be filed upon several buildings was where they were all erected at the same time, and without a spacing interval between them since then they could be considered as one building.65

61. See generally Crawfordsville v. Barr, 65 Ind. 367 (1879).
63. Hill v. Braden, 54 Ind. 72 (1876); McGrew v. McCarty, 78 Ind. 496 (1881); Wilkerson v. Rust, 57 Ind. 172 (1877).
64. McGrew v. McCarty, 78 Ind. 496 (1881).
65. Ibid.
The decisions under the 1883 statute, however, have not entirely followed this view. In *Premier Steel Co. v. McElwaine-Richards Co.* the land owner used the argument of separate and distinct buildings to no avail. Here the prospective lienor had supplied steam, gas, and water pipes for use in several buildings, and the Indiana Supreme Court, citing *Jones on Liens*, said, "Where the labor is performed or materials furnished under one contract upon several buildings, all situate upon one lot of land belonging to the contracting owner, the lien attaches to all the land for the whole value of the labor performed. . . ."  

*Premier Steel* is probably still good law in Indiana today. As stated earlier, the 1883 statute and the current statute are very similar with regard to the extent of the lien. Also, the courts now uphold a lien on two or more buildings even though the lienor has erected or improved less than all the buildings. This position, which will be more fully discussed immediately below, appears a fortiori to affirm the position of the courts.

*A Mechanic's Lien filed upon Two or More Buildings on a Single Lot or Parcel of Land, the Lienor Having Erected or Improved Less Than All the Buildings.* From the above discussion it seems obvious that if the courts under the 1853 statute would not accept a lien on two or more buildings when they were all erected or improved by the lienor, they would not have accepted a mechanic's lien where the lienor erected or improved less than all the buildings.

This precise issue does not seem to have been raised under the 1883 statute. The court in the *Premier Steel* case made it clear that they were not passing on such a problem stating, "We have no occasion to discuss here the rule with reference to the improvement of one of a number of buildings upon a large tract of land. . . ." The question was, however, placed squarely before the court under the 1909 statute in *Judah v. F. H. Cheyne Electric Co.* This case involved a triangular shaped parcel of land occupied by three separate and distinct buildings all erected at different times. The labor and materials for which the lien was filed was

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67. 144 *Ind. 614, 43 N.E. 876* (1895).
68. See *2 Jones, Mechanics' Liens* § 1313 (3d ed. 1894).
NOTES

provided for two of the buildings, while no work or labor was furnished to the third building located at the northernmost part of the lot. The appellant owner contended that as the buildings were separate and distinct and no labor or materials were furnished for one of the buildings, the lien on the real estate was not valid. The court rejected this position saying that it was sufficient if the labor or materials went into a building or buildings on an undivided parcel of land. Great stress was given to Section 43-701 which provides for the lien on the lot or parcel of land on which the structure stands "... or with which it is connected"; 74 and Section 43-702 which provides for a lien upon the entire land, "... including the portion not covered therewith. ..." 75 It is important to note that the court hastened to add that if the owner had sub-divided the lot or parcel of land before erecting the buildings, the court could possibly be justified in restricting the lien to the applicable subdivision.

One Mechanic’s Lien Filed upon Two or More Buildings and the Contiguous Lots or Parcels of Land on which they are Located. For such a lien to have been valid under the 1853 statute, 76 the lienor would probably have had to show that the buildings were one integral unit. In Hill v. Braden 77 one lien was filed for the construction of seven cottages on four contiguous lots. The cottages were separated by about four to six feet. The lien was not allowed, the court saying that the statute contemplated only liens upon separate pieces of property. The court noted, however, that joint liens were sometimes allowed where the several buildings were actually constructed under one roof with no open spaces of ground between them. In other words, under the 1853 statute, any interval, however small, would prevent the whole from being one continuous structure, and would require more than one lien.

A major decision under the 1883 78 statute was Premier Steel Co. v. McElwaine-Richards Co., 79 which was discussed earlier. The lienor had supplied gas, steam, and water pipes to several buildings located on what the court called a “small tract” of land within the Indianapolis city limits. Although the issue to which the court directed itself was whether one lien would suffice for all the buildings, the court cited with approval Phillips v. Gilbert, 80 a District of Columbia case, which upheld one lien

77. Hill v. Braden, 54 Ind. 72 (1876).
78. Ind. Laws 1883, ch. CXV, §§ 1-2 at 140, as amended, Ind. Laws 1889, ch. CXXIII, §§ 1-2 at 257.
79. 144 Ind. 614, 43 N.E. 876 (1895).
80. 101 U.S. 721 (1879).
filed on six houses built on six contiguous lots. The emphasis in the Phillips case was on the contract—"The contract was one and related to the row as an entirety, and not to the particular buildings separately. The whole was a building, within the meaning of the law, from having been united by the parties in one contract as one general piece of work."  

In considering how valuable the Premier Steel decision is in interpreting the statute one important factor must be kept in mind. The real issue before the court was whether one lien could suffice for labor and materials furnished to several distinct buildings. Although there were undoubtedly several lots involved, there was no mention of this or discussion of any effect it could have. The decision is of value because it shows that one lien was upheld on more than one lot of land, even though this issue was not in controversy.

West v. Dreher,82 decided under the 1909 statute,83 is probably the leading case on contiguous lots. Dreher had two separate dwelling houses constructed, one house on each of two contiguous lots. A mechanic's lien was filed, and the court held that a contractor who, under a single contract, furnishes materials and performs labor in the construction of two separate dwelling houses, one house on each of two contiguous lots, the labor and material having gone indiscriminately in both houses, may by a single notice have a lien on both houses and lots.

In reaching this decision, the court relied upon the Phillips84 case, and three earlier Indiana decisions—Premier Steel Co. v. McElwaine-Richards Co.,85 Windfall Natural Gas Co. v. Roe,86 and Judah v. J. H. Cheyne Electric Co.87 The only mention of the statute is (1) that the case must be decided under what is now Section 43-701, and (2) that the Indiana statute is similar to that of the District of Columbia. There is no discussion of the Indiana statute in general or of what language in 43-701 is involved. It is in looking at the court's foundation for the West decision in relation to the applicable statutory language that a good example is found of what was described earlier as "... both reliance on and rejection of earlier judicial decisions without regard to either the statute now in force or the statute in force when the decision was rendered."

The mechanic's lien statute under which the Phillips decision was

81. Id. at 725.
82. 73 Ind. App. 133, 126 N.E. 688 (1920).
83. IND. ANN. STAT. §§ 43-701 to 43-716 (Burns 1952).
85. 144 Ind. 614, 43 N.E. 876 (1895).
86. 42 Ind. App. 278, 85 N.E. 722 (1908).
rendered was enacted by Congress in 1859. It is similar to the Indiana statute in that Section One states that the lienor may "... have a lien upon such building and the lot of ground on which the same is situated. ...". It is dissimilar as this phrase is qualified by Section Eight which says that if the building is outside of Washington City or Georgetown the "... land upon which the same is erected, together with the space around the same not exceeding 500 square feet ..." is subject to the lien; and if the building is in Washington or Georgetown "... the ground on which the same is erected and a space of ground equal to the front of the building, and extending to the depth of the lot or lots on which it is erected ..." shall be subject to the lien. While at first glance, the statute may appear to be similar to the Indiana statute, actually the Congress had a great deal more to say about how much land could be attached by lien than the Indiana legislature did. The Washington, D. C. statute prescribed the amount of land which could be attached. The Indiana statute says only that a lien may be had upon the structure and the lot or parcel on which it stands or with which it is connected.

The major basis in Indiana law for the West decision was the Premier Steel case. As was mentioned earlier this case involved one lien filed on buildings located on more than one lot, but the court did not take this into consideration in reaching its decision. In fact the court cited a much earlier Indiana case to the effect that "If the work be done or materials furnished upon distinct premises, the lien must be against each of the several premises, according to the value of the work and materials incorporated in each, and not against both for the aggregate amount." The Windfall Natural Gas Co. case did not involve material or labor furnished to contiguous lots. In this case all the work was performed on one lot, but the lienor filed upon three lots since he was not certain on which lot he had worked. The lien was not valid, for other reasons, but the court said, "A joint lien may be had upon a number of structures, where they are built or repaired under a single contract and are thus connected in construction and ownership." Three cases were relied upon for this position—the Premier Steel case, Hill v. Braden, and

91. 144 Ind. 614, 43 N.E. 876 (1895).
92. Id. at 620.
94. Id. at 280.
95. 144 Ind. 614, 43 N.E. 876 (1895).
96. 54 Ind. 72 (1876).
Wilkerson v. Rust.\textsuperscript{97} This is interesting as the appellee in the \textit{West} case attempted to rely upon the \textit{Hill} and \textit{Wilkerson} decisions, but the court distinguished them on the facts, and said the \textit{Premier Steel} case was the better view. All this presents the anomalous situation of the \textit{West} court refusing the tenor of the \textit{Hill} and \textit{Wilkerson} decisions, and accepting the \textit{Windfall Natural Gas} decision which was based upon \textit{Hill} and \textit{Wilkerson}. In other words the \textit{Windfall Natural Gas} opinion cites \textit{Premier Steel}, \textit{Wilkerson}, and \textit{Hill} for the same proposition, while the \textit{West} opinion accepts \textit{Premier Steel} and \textit{Windfall Natural Gas}, but rejects \textit{Hill} and \textit{Wilkerson} implying that they state opposing propositions.

The third Indiana case used to support the \textit{West} decision was \textit{Judah v. J. H. Cheyne Electric Co.}\textsuperscript{98} In this case, which was also discussed earlier, the court said that one lien was sufficient if labor or materials went into a building or buildings on an undivided parcel of land. Here again the issue of contiguous lots was not before the court, and after stating the holding the court added that if the owner had subdivided the lot or parcel of land before erecting the buildings, the liens could possibly be restricted to the applicable subdivisions. What is meant by “subdividing” is not clear, but it could be assumed that it meant platting the land.

Despite any difficulty in understanding the rationale of the court in the \textit{West} case, there is little doubt that today in Indiana one lien will suffice for work or materials furnished to structures on contiguous lots. There is still one further point to be considered, however—that of the court’s interpretation of the statutory language, “... on which it (the structure) stands or with which it is connected...”\textsuperscript{99} Understanding this is important in attempting to project the court’s views to future cases where the factual situation differs from the \textit{West} case. Perhaps it would be best to suggest several feasible interpretations of this language, and then attempt to determine how the \textit{West} decision utilized this language.

One possible interpretation would be that a lien could be had on the lot or parcel on which the structure stands plus land which is physically connected; for example, a contiguous lot. Such an interpretation would certainly add to the lienor’s security if the contracting owner held more than the lot or parcel upon which the structure was situated. One of the problems of accepting this interpretation is that of deciding how much real estate the lienor may include in his claim and still be attaching “connected” land. If the owner holds an entire city block and the lienor

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\textsuperscript{97} 57 Ind. 172 (1877).  \\
\textsuperscript{98} 53 Ind. App. 476, 101 N.E. 1039 (1913).  \\
\textsuperscript{99} IND. ANN. STAT. § 43-701 (Burns 1952).
\end{flushleft}
erects a structure on a corner lot, how much of the block may he attach? Another difficulty with this interpretation is the minimum contact which will cause land to be considered as "connected." Will one square foot of land adjoining the lot on which the structure is situated suffice to bind neighboring land? Would an easement be capable of providing a sufficient physical connection to allow attachment of nearby land? These are questions which are not easily answered yet their solution would be necessary if a strictly physical interpretation of the word "connected" were adopted.

Another interpretation of this language involves use of the conjunction "or." This interpretation would be that a lien may be had upon the lot or parcel on which the structure stands OR the lot or parcel with which it is connected. To follow this view and hold that the lienor must elect which real estate he is attaching would not seem to make much sense. Even if the "or" is used in the inclusive sense—if it said the lien could attach to the lot or parcel on which the structure stands AND connecting lots or parcels—the result is not necessarily that under a fact situation such as the *West* case, *i.e.*, two houses erected, one on each of two contiguous lots, that one lien would suffice for both houses and lots. This is true because the lienor would then be alleging that the total cost of both houses was expended on one house, and the statute says that lien is to be filed upon the lot or parcel "... on which it stands ..." (Emphasis added.)

A third interpretation could be based upon reading Section 43-701100 as a whole. The first part of this section is devoted to a listing of things for which a mechanic's lien may be filed. Generally this listing can be divided into two classes—structures, *i.e.*, buildings, mills, houses, etc., and non-structures, *i.e.*, sidewalks, drains, sewers, etc. It would not appear to be doing violence to the drafting to conclude that the phrase "... on which it stands ..." refers to the first class—structures—and the phrase "... with which it is connected ..." refers to the second class—non-structure. If this is the true interpretation, Section 43-701 has nothing to say about the contiguous lot problem of the *West* case.

Mention should also be made here of that portion of Section 43-702 which states, "The entire land upon which any such building, erection, or other improvement is situated, including that portion not covered therewith, shall be subject to the lien. ..."101 This section was not mentioned in the *West* decision, and it probably is of little aid to our problem. It is not clear just how much land is included in the "entire
land," but the section would seem to mean only that the mechanic's lien is not limited to the physical area which the structure covers.

The court, in the *West* case, seems to have favored the first interpretation discussed here—that of the word "connected" meaning physical connection. Physical connection alone, however, may not be sufficient. Two additional "connections" are required: (1) that the labor and materials be furnished under a single contract and (2) that the labor and materials are used indiscriminately in the construction of both houses. The former "connection" appears to be the more critical. Great emphasis is placed on the court's statement in the *Phillips* opinion that "The whole row was a building, within the meaning of the law, from having been united by the parties in one contract, as one general piece of work." This implies that the parties must provide a "connection" by the use of a single contract. In fact, the full implication seems to be that it is the parties and the contract which are of primary importance, not the fact that the lots are contiguous.

In evaluating the *West* decision, it must be remembered that as the court does require some form of a physical "connection" it also adopts the many problems that accompany such an interpretation. The problems of the minimum contact necessary to bind neighboring land, and the maximum amount of real estate which can be attached will be difficult to solve. It remains to be seen just how the courts will use the *West* decision. It is possible that greater emphasis will be given to the contract and less to the actual physical connection of the land. Under the *West* and *Premier Steel* decisions there is certainly sufficient latitude to expand the remedial characteristics of the mechanic's lien statute.

**One Mechanic's Lien Filed upon One or More Buildings Located upon Non-Contiguous Lots.** Under the 1853 statute a mechanic's lien filed upon non-contiguous lots or parcels of land would not have been valid. In *McGrew v. McCarty*, the lienor filed a joint lien upon three distinct parcels of land. The court, in striking down the lien, said that a joint lien against separate houses on different streets, or on different sides of a street, or even on the same side of the street is a nullity.

There appear to have been no cases involving non-contiguous lots under either the 1883 or the 1909 statutes. Consequently, there is a general belief that today such liens would not be honored by the

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104. 78 *Ind. 496* (1879).
Although this may be true, there is some evidence that if the courts had to face the problem again, the decision might be different. With the passage of the 1883 statute and the 1909 statute, the courts have not hesitated to expand the remedy of the mechanic's lien. Under the 1853 \textsuperscript{108} statute the materialman or mechanic had to file a separate lien for each building erected or repaired, and for each lot or parcel of land where work was performed. As discussed earlier, this procedure of filing several liens is no longer necessary. By utilizing the tenor of the \textit{West} decision it would appear that a substantial argument could be made for allowing liens on non-contiguous lots or parcels providing (1) the labor and material was furnished under one contract, and (2) the labor and materials were used indiscriminately on both lots or parcels of land. \textit{Premier Steel} \textsuperscript{109} and the \textit{Judah} \textsuperscript{110} case would also lend support since in both of these cases the court did not seem to be concerned with the fact that more than one lot was involved. This position should have merit especially in view of the court's repeated declaration that although the statute must be strictly construed as to who is entitled to mechanic's liens, it should be liberally construed in favor of those entitled to its benefits.\textsuperscript{111} If one lien will be upheld on two contiguous lots, why should a lien be voided if the two lots are separated by a third—provided labor or materials are furnished to each lot attached.

The major roadblock to recognizing mechanic's liens on non-contiguous lots is the interpretation of the phrase "... with which it is connected. ..." \textsuperscript{112} as requiring some type of physical connection. So long as this interpretation exists, liens on non-contiguous lots or parcels will probably not be valid without legislative amendment. It is doubtful that this question will be answered in the near future as it would be foolish for a mechanic or materialman to risk losing his simple remedy by filing one lien on non-contiguous lots or parcels when he can be certain of his remedy by filing a separate lien on each.

\textit{A Mechanic's Lien Filed for Repair or Construction on an Easement.}

Filing a mechanic's lien for labor or materials furnished on an easement presents some interesting problems as to just what real estate may be attached. Neither Section 43-701 or 43-702\textsuperscript{113} mention easements as such, but many of the things listed in the former section could easily be

\textsuperscript{107} See Annot., 10 A.L.R. 1033.
\textsuperscript{109} Premier Steel Co. v. McElvaine-Richards Co., 144 Ind. 614, 43 N.E. 876 (1895).
\textsuperscript{111} See e.g., West v. Dreher, 73 Ind. App. 133, 126 N.E. 688 (1920).
\textsuperscript{112} \textit{IND. ANN. STAT.} § 43-701 (Burns 1952).
\textsuperscript{113} \textit{IND. ANN. STAT.} §§ 43-701, 43-702 (Burns 1952).
constructed upon easements—". . . walk or sidewalk, whether such walk or sidewalk be on the land or bordering thereon, stile, well, drain, drainage ditch, sewer or cistern. . . ." The mere listing of these things would seem to imply that a valid lien could be had for labor or materials furnished on an easement. Such an interpretation would also seem to follow from the earlier discussion regarding the phrase "... with which it is connected. . . ." The real difficulty arises when easements-in-gross are involved—easements which are not "connected" to a dominant tenement.

Looking to the case law, the only decision found which deals specifically with easements is *Wells v. Christian.* Here steam pipes were laid from the owner's main plant through an easement in the public streets. The lien was filed upon the main plant, and the court upheld the lien saying,

> The work which appellant performed being directly and necessarily connected with the erection of appellee's heating system . . . it was immaterial whether such work was performed upon the particular premises to which the labor lien primarily attached, or upon the street in front of the same, or at some point where the appellee owned merely an easement or were operating under a license from the city.

This position is certainly broad enough so that prospective lienors should not have to be concerned about a lack of remedy when providing labor or materials to an easement. The fact that this decision was under the 1883 statute should not detract from its force. As noted earlier, the same language was utilized by the legislature in both statutes concerning the extent of mechanic's liens.

In final evaluation, it should be noted that since the first mechanic's lien statutes appeared in the early 19th century, the area has undergone constant growth. This remedy has been expanded greatly by both the legislatures and courts so as to better correspond to the needs of our industrial society. There is some evidence that the Indiana Mechanic's Lien Statute may be altered again in the near future, as the 1961 General Assembly directed the Legislative Advisory Commission to conduct a detailed study of the current statute with a view to eliminating any injustices which now exist.

115. 165 Ind. 662, 76 N.E. 518 (1906).
116. *Id.* at 665.
The main discussion in this note, however, has centered upon just what is the status of portions of the current statute—how they operate upon various fact patterns. The major problem encountered was probably the court's refusal to clearly interpret the statute. In some cases the courts have ignored the statute's existence, while in others they have cited it without explaining its impact on the results of the cases. Undoubtedly, legislative action might be necessary to correct present inequities, but legislative action will be of little value unless it is implemented by the courts. The majority of the problems discussed here could be solved by the courts alone.