# CONTRACTS IN IOWA REVISITED—1955-1962

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Prior articles have attempted a collection and commentary on various aspects of Iowa contract law as reflected in cases decided since the publication of the volume IOWA ANNOTATIONS TO THE RESTATEMENT OF CONTRACTS in 1934.[1] With the hope of assistance to persons who may use the other articles as research tools, the following supplement of cases not included in the prior articles is offered.[2] This installment covers the first five of the prior ten articles.

## 1. Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties.[3]

The fact of an existing legal duty has again been used to prevent enforcement of several promises; this suggests that the doctrine of consideration in connection with discharge or modification of duties may not be completely ignored. In *Herb v. Herb*,[4] a proceeding on application by a husband to stay execution on, and to modify child support provisions of, a

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[1] This volume is hereinafter referred to as IOWA ANNOTATIONS.

[2] The standard treatises are still WILLISTON, CONTRACTS (Rev. ed. 1936) and CORBIN, CONTRACTS (1950). However, there is now in process of publication a third edition of WILLISTON, the first volume of which was published in 1957, and new volumes 3 and 3A and 6 and 6A of CORBIN have been published.

[3] 5 DRAKE L. REV. 3 (1955). See Note, *Principles Underlying Modification of Contracts in Iowa*, 44 IOWA L. REV. 693 (1959).

[4] 251 Iowa 957, 103 N.W.2d 361 (1960). Prior cases upholding agreements for discharge of child support obligations are referred to in Hudson, *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 70 n. 5(j) (1956). In Erwin v. Erwin, 251 Iowa 1344, 105 N.W.2d 489 (1960), proceedings by a divorced wife for garnishment of her husband's wages to collect child support payments allegedly due under a divorce decree, the Court affirmed a finding for the husband based on an oral agreement to waive child support provisions with the consideration being the husband's giving up of his right under the decree to visit the children and the giving up of a possible claim of the children as dependents for income tax purposes. As to the degree of proof, the Court stated, 251 Iowa at 1348, 105 N.W.2d at 492: "It is unnecessary that the proof of the oral contract be undisputed or be established as an absolute certainty. Reasonable certainty is sufficient . . . . Defendant contends that the trial court did not use the proper degree of proof and found plaintiff had established his case by a preponderance of the evidence, not by clear, satisfactory and convincing evidence. In re Estate of Dalmage, 204 Iowa 231, 237, 213 N.W. 380, Drake Law Review vol. 9, No. 2, page 86. Without going into a discussion as to when such degree of proof is and is not required in equity matters, we note that the short answer to that complaint is that such issue is not important here. This case is triable de novo and we must determine the question for ourselves." See, further, on difficulties with standards of proof, notes 70, 80-86, and 91-92, infra, and accompanying text, and Hudson, *Contracts in Iowa Revisited—Fraud and Misrepresentation, Duress and Undue Influence*, 9 DRAKE L. REV. 3, 6 n. 10-13, 11 n. 40 and accompanying text (1959). Also it should be noted that, in the *Erwin* case possible non-compliance with the clause of the Statute of Frauds as to oral contracts "not be to performed within the space of one year from the making thereof," IOWA CODE § 622.32(4) (1962), was raised in the brief but not referred to in the opinion.

A comment on Erwin v. Erwin, in 46 IOWA L. REV. 675 (1961), also referring to Herb v. Herb, suggests that consideration, and a "valid contract" should have little significance in determining validity of promises to release support payment obligations, either when so applied to permit a wife to recover payments when no consideration or to hold her to her promise when consideration is present; needs of the children should control.

prior divorce decree, the Supreme Court reversed the trial court's modification of the decree and held that a mutual agreement between husband and wife to reduce required child support payments, at a time when husband was in default in his payments, was unenforceable as being completely lacking in consideration because she was receiving nothing she was not already entitled to receive[5] and there was no showing of husband's inability to pay, other than statements of difficulty in meeting payments. The Court's opinion does not so articulate, but the latter part of the reason is consistent with some prior Iowa authority supporting enforcement of a promise to accept a smaller sum in satisfaction of a larger sum when the only added circumstance present is insolvency of the debtor.[6] In *Casler Electric Co. v. Carlson*[7] a company which had furnished electrical wiring as a subcontractor to the owner, and fixtures as a general contractor, attempted to support an alleged promise by the owner to pay the claim for the subcontracting which apparently failed as a lien because of filing failure, on the theory of consideration in correction of accounts and separation of accounts chargeable to defendants directly from those chargeable to the general contractor with whom defendant had dealt. The Court rebuffed this attempt, observing that defendants were entitled to a correct statement of their account as a matter of right.

The presence of an existing legal duty did not prevent the Court from enforcing a promise in several other cases. A case well supported by past authority is that which held that a promissory note, presumably negotiable, was discharged, without any further consideration, by the action of the payee in burning the note with intention to discharge it.[8] Several other cases are somewhat less strongly supported. In *Gordon Construction Co. v. Board of Supervisors*[9] the Court held a contractor liable for failure to perform satisfactorily terms of a contract even though it was conceded the contractor could have previously rescinded because of substantial failure of performance by the other party in reducing the extent of the contract. The Court described this as a waiver by the contractor of the right to rescind. It should be noted, however, there is no consideration for the so-called waiver when the contractor had no duty to proceed. The implicit promise, found in such a waiver, to continue under a modified contract, is probably consistent with prior Iowa authority referred to at page 6 of the prior

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5 In Youngberg v. Holstrom, 252 Iowa 815, 108 N.W.2d 498 (1961), action for specific performance of an alleged oral agreement between a married couple to make mutual wills, the Court, in denying enforcement, pointed out that the husband's agreement to pay for services within the scope of the marital relation (as here performing duties of farm wife such as raising poultry, hogs, and garden) is without consideration and contrary to public policy, and that giving up by wife of opportunity to receive deed to farm from husband was not consideration because she had no enforceable right to a deed. Also note the reference to necessity, in order for either maker of an alleged mutual will to be denied the right to revoke, that there appear clear and satisfactory evidence, or on the face of the wills, they were executed pursuant to such contract provisions between the makers. See also note 4, *supra*, refering to standards of proof, and notes 46, 47, *infra*, for other cases involving alleged mutual wills.

6 See cases collected and discussion in IOWA ANNOTATIONS § 78-II-H-3, p. 103.

7 249 Iowa 289, 86 N.W.2d 682 (1957).

8 *In re* Laupert's Guardianship, 247 Iowa 1352, 79 N.W.2d 187 (1956); IOWA ANNOTATIONS § 432.

9 246 Iowa 1368, 72 N.W.2d 551 (1955).

article under the classification of rescission of mutually executory contracts wherein the Iowa Court has enforced promises in modified agreements without new consideration when there is a mutually executory contract. In *Standard Oil Co. v. Board of Supervisors*[10] the Court held the Oil Company liable on a promise, contained in a petition to a drainage district for permission to cross a river, to stand the expense of relocation of the pipeline if the river were relocated, in spite of the argument that a permit had been secured from the Iowa Commerce Commission and that the drainage district had no legal privilege to attach conditions upon it. The opinion is not specifically oriented toward the problem of consideration, but it does state that: "it is a fair inference there was some advantage to appellee or expectation thereof, deemed by it sufficient to justify the condition in its offer to the trustees. A possible reason which suggests itself, was that an agreement with the drainage district would facilitate favorable action upon the application for the permit then pending before the Commerce Commission."[11] In view of the apparent lack of direct evidence in this direction, the Court, without so specifying, must be referring to the presumption of consideration in simple contracts signed by the party, found in the Iowa Code.[12]

**2. Doctrine of Consideration in Iowa Revisited—The Bargain Element.**[13]

In this article it was stated that "it is doubtful whether the case of *Miller v. Lawlor* and the doctrine of promissory estoppel [enforcement of promises without bargained-for or requested detriment but because of detriment induced by the promise] will have any impact on such 'business transaction' cases,[14] even though it would seem the elements of the doctrine are as persuasively applicable to such a case as to gift promises."[15] Several cases therein discussed refused to accept detrimental reliance or promisory estoppel as a device to support enforceability of promises where the bargained-for consideration was in some respects deficient. Several interesting federal court cases have reinforced this doubt. In *Bixby v. Wilson Co.*,[16] an action to recover damages for breach of a contract of employment, Judge Graven, in the Northern District of Iowa, on a motion for summary judgement, found for the defendant who had allegedly promised "permanent employment" to plaintiffs, hired at the time of a strike at defendant's plant but discharged after an arbitration award restoring seniority to strikers. This decision was given in spite of allegations that certain plantiffs gave up existing employment, rejected other employment, gave up farm leases, and incurred

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10 250 Iowa 952, 94 N.W.2d 312 (1959).
11 *Id.* at 964; 94 N.W.2d at 319.
12 IOWA CODE § 537.2 (1962).
13 5 DRAKE L. REV. 67 (1956).
14 Promises of gratuity, especially promises made for benefit of charity, have been enforced sometimes without any obvious bargained-for consideration or reliance. See IOWA ANNOTATIONS § 90-III. As part of an argument to support as a charitable deduction a "room endowment" promise to a charitable nursing home, the Eighth Circuit, in Wardwell's Estate v. Commissioner, 301 F.2d 632 (1962), referred to a stated Iowa position that a subscription made to charity "in consideration of the like promises to others" is a binding obligation on donor from the date of its execution.
15 5 DRAKE L. REV. 67, 82 (1956).
16 196 F. Supp. 889 (N.D. Iowa 1961). An extensive comment on this case is contained in 47 IOWA L. REV. 725 (1962).

expenses in moving families to the new place of employment. Guidance from the Iowa Supreme Court was not deemed by the court to be clear. In spite of the decision in *Miller v. Lawlor*[17] enforcing an oral promise, to a prospective property owner on a higher vantage point, of an easement of view, on the theory of promissory estoppel (reliance in purchasing the house), the court considered that a prior Iowa decision, in *Lewis v. Minnesota Mutual Life Insurance Co.*[18] refusing by a five to four vote to enforce an alleged promise of permanent employment as an insurance agent for several reasons, inter alia that such a promise of permanent employment needed consideration in addition to the services to be rendered, to be enforceable, and that the alleged factor of giving up other employment opportunities to stay with the company was insufficient, was still controlling as to Iowa law and that in principle it precluded enforceability here. That part of the *Lewis* opinion referring to the need for consideration in addition to the services is of doubtful status in Iowa as an absolute independent requirement of enforceability, because in *Thompson v. Miller*[19] the Court affirmed the submission to a jury of an alleged promise of permanent employment as a salesman with the only quotation from the *Lewis* case being that: "A contract for life will be upheld only where the intention, that the contract's duration is for life, is clearly expressed in unequivocal terms."[20] Although the opinion also observed that: "In this case more is involved than mere services. Plaintiff paid half of the advertising and sales costs and all of his traveling expenses. He thus had a capital as well as a labor investment,"[21] the opinion discusses the testimony at some length, and concludes: "The evidence is such as to generate a jury question as to what the parties intended when they entered into and modified the contract involved herein. Definitely the court cannot say as a matter of law what this partly written and partly oral contract was or how the parties understood or intended it."[22] This is not language of an absolute requirement of additional consideration or that verdict should be directed for defendant, but instead is language of need to examine the evidence to determine the intent. However, Judge Graven considered that: "while the decision in the Thompson case could be considered as indicating that the Iowa Supreme Court has departed from the views expressed by it in the majority opinion in the Lewis case, yet in the absence of further clarification by that court it would seem that it could not be said with assurance that it has so departed."[23]

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17 245 Iowa 1144, 66 N.W.2d 267 (1954).

18 240 Iowa 1249, 37 N.W.2d 316 (1948), prior opinion in 35 N.W.2d 51 (1948).

19 251 Iowa 324, 100 N.W.2d 410 (1960) (the Court affirmed overruling of motion for judgment for defendant notwithstanding the verdict, and sustained granting of motion for new trial because of excessiveness of damages awarded, in view of speculation as to future earnings).

20 240 Iowa 1249, 1257, 37 N.W.2d 316, 321 (1948), quoted in 251 Iowa at 327, 100 N.W.2d at 412 (originally taken in *Lewis* from a Missouri case).

21 251 Iowa at 327, 100 N.W.2d at 412.

22 *Id.* at 329, 100 N.W.2d at 413.

23 196 F. Supp. 889, 901 (N.D. Iowa 1961). Also, as observed in the Comment on the *Bixby* case, 47 IOWA L. REV. 725, 732 (1962), possible significant distinctions between *Lewis* and *Bixby* are that the only reliance in *Lewis* was turning down other employment while in *Bixby* there was some relinquishing of actual employment, and that *Lewis* involved an independent contractor and *Bixby* involved salaried employees.

As to the pervasive application of promissory estoppel (detrimental reliance), as the giving up of employment, expenses in moving, etc., either as the necessary additional consideration under the rule even though perhaps not bargained for, or as reason enough for enforceability, Judge Graven considered himself bound by the evaluation by the Eighth Circuit Court of Appeals in *Meredith v. John Deere Plow Co. of Moline*,[24] which in affirming the granting of an injunction against bringing of any further suits for termination of an agency to sell farm implements, refused to attach legal sigificance to allegations of substantial expenditures in reliance on the agency and of giving up handling of competitive goods, where there was no mutuality of obligation and thus no consideration for manufacturer's promise to continue the agency indefinitely. The Eighth Circuit evaluation was stated:

> There exists, however, no such sweeping and absolute principle as that 'action in reliance is sufficient support for a promise.' 1 Williston on Contracts, Rev. Ed. § 140. An obligation cannot be postulated on promissory estoppel except where 'injustice can be avoided only by the enforcement of the promise.' Restatement Contracts § 90. Such injustice must be so substantial, in relation to and in terms of the particular situation involved, as to constitute serious prejudice (not mere legal detriment as in regular contract formation) or to amount in its effect to constructive fraud or unjust enrichment within equitable concepts. Miller v. Lawlor, 245 Iowa 1144, 66 N.W. 267, 273, 48 A.L.R.2d 1058.[25]

The Circuit Court opinion emphasizes such phrases as "serious prejudice", "not mere legal detriment", and "constructive fraud or unjust enrichment", which were in the *Miller v. Lawlor* opinion only as parts of quotes from other cases. *Restatement, Contracts* § 90 does not use the words "serious prejudice" but instead uses "substantial and definite" and "where injustice can be avoided only by enforcement of the promise", which *Miller v. Lawlor* accepts. Also, in *Miller v. Lawlor,* in answer to defendant's contention the Court stated that plaintiff need not prove he acted in sole reliance on the promise but stated merely that it is sufficient that without it plantiff would not have acted and, also in response to an argument about "weighing all the equities" the Court responded that: "The question is not which party will suffer the greater detriment if the contention of the other prevails. That is not the role of promissory estoppel—*estoppel that arises when an innocent promisee relies, to his disadvantage, upon a promise intended or reasonably calculated to induce action by him.*"[26] In *Restatement* language the action, in *Bixby,* could be stated to be substantial, more than mere legal detriment—as merely standing in front of a theater to get a promised "bank night" award, which the Iowa Court thought sufficient

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[24] 261 F.2d 121 (8th Cir. 1958). Prior opinions on various attempts by the same plaintiff to get recovery for termination, all unsuccessful, were: 89 F. Supp. 787 (S.D. Iowa 1950); 185 F.2d 481 (8th Cir. 1950); 206 F.2d 196 (8th Cir. 1953); 244 F.2d 9 (8th Cir. 1957). Subsequently an action for damages in the state courts of Iowa was brought against one of the Circuit Court Judges who participated in the two most recent opinions. On removal to federal district court a summary judgment was entered in favor of the judge and affirmed, in Meredith v. Van Oosterhout, 286 F.2d 216 (1960), which referred to the proposition that judges may not be held civilly liable for acts done in exercise of judicial functions.

[25] *Id.* at 124.

[26] 245 Iowa at 1155, 66 N.W.2d at 274.

as a bargain in *St. Peter v. Pioneer Theatre Corp.*,[27] and injustice can be avoided only by enforcement of the promise, because non-recoverable expenditures or other losses were suffered by actions of "innocent promisees" done in reliance to the promise.

Therefore, because of the above stated belief that the requirement of additional consideration has been removed as a mechanical requirement for enforcement of promises of permanent employment, and because of the belief that the Eighth Circuit was too severe in its statement of the requirements of promissory estoppel, this writer believes the Iowa Supreme Court would have held the detrimental reliance or promissory estoppel argument sufficient to enforce the promise in the *Bixby* case, contrary to Judge Graven's statement: "It is the view of the court that the Iowa Supreme Court when presented with the situation here presented would probably hold that the defendant was not liable to the plaintiffs. The probability that it would so hold would seem to be greater than the probability it would not so hold."[28] However, now that Judge Graven has spoken, it will probably be more difficult to convince the Iowa Court to the contrary.

Certain other propositions within the scope of the former article are listed by brief reference only as: mere part payment of an alleged indebtedness or an oral promise is not sufficient to revive the obligation as against the objection of the statute of limitations;[29] past services rendered do not furnish consideration for a present promise when the acts were originally gratuitous and there was no antecedent legal obligation;[30] although consideration may be imported from a signed writing, this does not apply when

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27 227 Iowa 1391, 291 N.W. 164 (1940).

28 196 F. Supp. 889, 904 (N.D. Iowa 1961). Of course, even if the promise be otherwise considered to be enforceable, there may be a real question of being able to prove damages which are reasonably definite and certain and other than merely speculative. At least, elements of reliance damages should be recoverable, even though expectation damages (as loss of future salary) may not be recoverable as speculative.

29 *In re* Brook's Estate, 250 Iowa 662, 95 N.W.2d 287 (1959). In Monona County v. Schoenherr, 251 Iowa 1301, 105 N.W.2d 91 (1960), action by judgment creditor to set aside conveyance by judgment debtors to son, the Court held there was good and valid consideration for deed even as to payment of prior obligations barred by statute of limitations, because debtor could choose to reject defense.

30 Youngberg v. Holstrom, 252 Iowa 815, 108 N.W.2d 498 (1961) (use of wife's inheritance to pay note owed by husband and performance of usual duties of farm wife not sufficient consideration to support granting specific performance of agreement to make mutual wills, in absence of legal obligation to pay); Dullard v. Schaefer, 251 Iowa 274, 100 N.W.2d 422 (1960) (in suit in equity by trustee in bankruptcy to recover assets in estate of bankrupt's father pursuant to written instrument executed by father, his intended wife, and bankrupt, providing that father was to leave all his property to son, Court held recited consideration that son had deported self as a dutiful and loving son and had contributed to father's acquistion and maintenance of property was not adequate because no showing of antecedent obligation to pay; as additional reasons for not holding for trustee the Court refers to the propositions that a court of equity will not decree specific execution unless the contract is fair [see Hudson, *Contracts in Iowa Revisited—Performance, Breach and Remedies*, 9 DRAKE L. REV. 66, 87 (1960)], and that even a valid contract to make a will creates no present interest in the devisee (against changing of will by father) which would pass to a trustee under the Brankruptcy Act, citing *In re* Lage, 19 F.2d 153 (N.D. Iowa 1927), in which, on objections to discharge as a voluntary bankrupt, the court concluded a valid binding covenant not to revoke a will found out of joint will of parents did not result in present interest in property before surviving parent died).

a consideration is set forth in the written instrument which is insufficient;[31] the same consideration may support several promises;[32] consideration for a promise need not move from the promisee;[33] the Court may not enter a consent judgment on an oral stipulation reached in open court if either party has repudiated it.[34]

### 3. Contracts in Iowa Revisited—Third Party Beneficiaries and Assignments.[35]

In the prior discussion of third party beneficiary contracts reference was made to the problem of determining if the beneficiary was in a protected class who could sue on the contract to which he was not a party or was only an incidental beneficiary who could not sue. The statement was made that the Iowa Supreme Court in prevailing opinions had not referred to the *Restatement of Contracts* classification of creditor and donee beneficiaries who could sue and incidental beneficiaries who could not. However, in *Olney v. Hutt,* while denying recovery the Court stated: "In order for plaintiffs to recover they must show that they are either donee or creditor beneficiaries under the terms of the contract. For proper definitions we refer to Section 133, Restatement of the Law of Contract."[36] This case was an action by present property owners to recover the cost of special assessments for paving. The alleged basis for the suit was a contract between a prior owner of a forty-acre undeveloped tract (including the present property owner's interests) and a school district for dedication of a strip to make a street, "each to pay one half the cost of construction", and a contract between the prior owner and the present defendant to assume the obligation in that contract. Defendant platted the land he bought from the prior owner, and apparently constructed what was essentially a dirt road. Defendant then sold lots to builders, one of which later was purchased by plantiffs. The trial court allowed an award for cost of grading and resurfacing with four inches of rock. The Supreme Court reversed, holding

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31 Dullard v. Schaefer, 251 Iowa 274, 100 N.W.2d 422 (1960).

32 Knapp v. Knapp, 251 Iowa 44, 99 N.W.2d 396 (1959).

33 Test v. Heaberlin, ..... Iowa ....., ..... N.W.2d ..... (Iowa #50677, November 13, 1962) (notes to attorney for wife of defendant in prior divorce, to pay for prior services rendered, supported by consideration moving from wife, her interest in real estate conveyed to defendant; directed verdict for plaintiff affirmed); IOWA ANNOTATIONS § 75-IV-C.

34 Van Donselaar v. Van Donselaar, 249 Iowa 504, 87 N.W.2d 311 (1958) (the Court apparently, in reversing trial court, also believed there was insufficient evidence of any agreement; opinion overrules Burnett v. Poage, 239 Iowa 31, 29 N.W.2d 431 (1947), referred to at note 42 of prior article, as to entering consent judgment; the opinion states. 249 Iowa at 509, 87 N.W.2d at 314, that until judgment is entered; "the matter being a question of contract between the parties either one may repudiate the agreement because of actual or supposed defenses thereto—lack of consideration, fraud, duress, and the like—such as would be available against any other contract." RESTATEMENT, CONTRACTS § 94 (1932) says stipulations need no consideration. See IOWA ANNOTATIONS § 94.

35 6 DRAKE L. REV. 3 (1956). The cases referred to in note 3(e) of this article enforcing interest of a survivor in so-called joint bank account on contract theory were supplemented by Williams v. Williams, 251 Iowa 260, 100 N.W.2d 185 (1959), and Burns v. Nemo, 252 Iowa 306, 105 N.W.2d 217 (1960), and it was repeated that parol evidence was not permitted to vary agreement except where ambiguity existed, which in *Williams* was found as to one account.

36 251 Iowa 1379, 1385, 105 N.W.2d 515, 519 (1960).

the plantiffs were only incidental beneficiaries and that the word "construct" as to a road did not require any more than to build a dirt road. As to the third party beneficiary argument the Court, after quoting a variety of tests from treatises and cases using varied words such as "directly or primarily for the benefit of", "must have clearly intended the contract to be for the benefit of the third person", "sole exclusive interest" is required, "condition is that contract was made for his express benefit", approved the *Restatement of Contracts* tests, which as discussed in the prior article are not necessarily coextensive with the phrases above used, and stated simply without discussion: "It is quite clear that it is not the purpose of the promisee Summerwills to make a gift to the plantiffs or to confer upon them any rights against the promissor, Hutt, so it cannot be said they were donee beneficiaries. The promisee owed no duty to the plaintiffs so the latter were not creditor beneficiaries."[37] The Court in its opinion disposes of two cases cited by the plantiff, *Reeves v. Better Taste Popcorn Co.*,[38] and *Chicago & North Western Ry. v. Kramme*,[39] with the simple statement that "none of these cases sustain appellee's position, the intention in each case to contract for the benefit of named or sufficiently designated third party beneficiaries being clear."[40] At page 6 of the writer's prior article considerable space was devoted to a discussion towards the proposition that these two cases were not consistent with the *Restatement* position now adopted openly by the Court nor with prior Iowa cases. It is believed that the intention to benefit the parties was no more clear in those two cases than in the current case.

There were other cases also finding no right of action by a third party: one decided that an insured could not recover directly from a reinsurer;[41] the United States was not permitted to maintain action directly against a surety on a statutory bond of warehouseman of Commodity Credit Corporation grain because of the conclusion that a special Iowa statute concerning the matter, which excluded the United States from action, controlled over any general common-law argument;[42] subcontractor could not recover against surety on contractor's performance bond because it was obviously for benefit of owner only, especially in view of a special clause in the bond that no right of action shall accrue for anyone except the owner;[43] employee could not recover additional compensation for injuries beyond that provided by workmen's compensation law even though employer, in contract with company which engaged employer, promised to take out employer liability insurance to certain amount, which was held to insure protection to the extent of the statute.[44]

Vesting of rights in third parties, even assuming a contract with rights in third parties, was referred to in *Winchester v. Sipp*[45] when, in an action

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[37] *Id.* at 1386, 105 N.W.2d at 520.
[38] 246 Iowa 508, 66 N.W.2d 853 (1954).
[39] 244 Iowa 944, 59 N.W.2d 204 (1953).
[40] 251 Iowa at 1384, 105 N.W.2d at 518.
[41] Crozier v. Lenox Mut. Ins. Ass'n, 252 Iowa 1176, 110 N.W.2d 403 (1961) (windstorm insurance policy).
[42] United States v. West View Grain Co., 189 F. Supp. 482 (N.D. Iowa 1960).
[43] Bourrett v. Bride Construction Co., 248 Iowa 1080, 84 N.W.2d 4 (1957).
[44] Bridgmon v. Kirby Oil Industries, Inc., 250 Iowa 229, 93 N.W.2d 771 (1958).
[45] 252 Iowa 156, 106 N.W.2d 55 (1960).

for wrongful death against, among others, a lessee corporation of an automotive tractor which after a breakdown was being towed by a wrecker operated by an employee of the owner of the tractor, the Court concluded that although the lease agreement provided that the lessee corporation should carry liability insurance and such a contract may be for the benefit of unidentified third parties in the public, the agreement could be modified before rights attach and was so modified here by return of the tractor to the owner.

Footnotes in the prior article contained references to rights claimed by third parties under contracts found in execution of wills.[46] There have been many additional cases involving claims of third parties but the problems have mostly been those of determining if the joint or reciprocal will resulted in a contract for a certain disposition of property.[47]

In the area of assignments, the Court in *Perkins v. City National Bank of Clinton*[48] gave priority to an assignment to an Old Peoples Home of all property, which would include a checking account, over a subsequent claimed joint tenancy interest in that account, allegedly given to a niece by the same person,[49] on the theory that an assignment first in time prevails.[50] Assign-

[46] Hudson, *Contracts in Iowa Revisited—Third Party Beneficiaries and Assignments*, 6 DRAKE L. REV. 3, 4 note 3(d) and 16 note 33 (1956).

[47] Cases subsequent to prior article are: *In re* Logan's Estate, ..... Iowa ....., 115 N.W.2d 701 (1962) (action to construe joint will in which Court affirmed finding of mutual will executed pursuant to contract because of plain provision in will of mutual agreement to dispose in certain manner, although greater quantum of proof than execution of wills is necessary, substantial evidence, extrinsic evidence, or on face of wills; further problem of interpretation was involved); Tiemann v. Kampmeier, 252 Iowa 587, 107 N.W.2d 689 (1961) (in equity action to construe a joint will the Court affirmed finding of joint and mutual will that was executed pursuant to agreement to dispose of property in a certain manner; interpretation problems principally); Father Flanagan Boy's Home v. Turpin, 252 Iowa 603, 106 N.W.2d 637 (1960) (must appear by clear and satisfactory evidence apart from the execution of the wills themselves, or on the face of the wills, that they were executed pursuant to a contract, to preclude survivor from revoking will; insufficient evidence found; opinion contains extensive discussion of prior usage of words "joint," "reciprocal," and "mutual wills" limiting first two to matters of form and last to case where is established contract); Levis v. Hammond, 251 Iowa 567, 100 N.W.2d 638 (1960) (in suit for specific performance of alleged oral agreement by husband and wife to execute wills in which plaintiff was to be beneficiary the majority found mutual wills, those pursuant to agreement, by clear, satisfactory and convincing evidence, but Court refused specific performance because it was not fair and reasonable in view of inequality of consideration in that when wills were made wife had no property and no prospect of any; three judges dissented as to the fair and reasonable argument; query, would a suit for damages be upheld); Barron v. Pigman, 250 Iowa 968, 95 N.W.2d 726 (1959) (beneficiaries of reciprocal wills were entitled to maintain action for specific performance of oral contract for disposition of property in certain manner, even though will was revoked by testatrix who survived husband; evidence was clear, satisfactory and convincing); *In re* Ramthun's Estate, 249 Iowa 790, 89 N.W.2d 337 (1958) (insufficient evidence to justify inference of agreement not to dispose of property execept as provided for intestate property; need clear, satisfactory and convincing evidence, more than mere preponderance).

[48] ..... Iowa ....., 114 N.W.2d 45 (1962) (suit against bank by claimant of joint bank account, in which Old Peoples' Home, claimed prior assignee of account, intervened).

[49] The claimed interest in the bank account, according to the opinion, arose out of a document signed by a niece, who never deposited any money in the account, and by decedent, reciting an agreement between them. There is no showing that the Bank ever agreed to this, even though it was mentioned in the document and the document delivered to the Bank.

ability was referred to in *Dahl v. Zabriskie*[51] which held an option to buy real estate assignable, and in *McWilliams v. Farm & City Mutual Insurance Association of Iowa*[52] which, in an action by contract purchaser of land who had paid money and taken a conveyance but permitted grantor to remain in possession at time of loss, pointed out that a contract for fire insurance is a contract of indemnity and personal and does not run with the property, and affirmed a decision holding limitation of recovery by buyer to value of possessory interest of grantor, in spite of clause in the land contract for "pro rata" on insurance.

**4. Contracts in Iowa Revisited—Statute of Frauds**[53]

Several cases involved that portion of the Statute of Frauds which concerns a promise to answer for the debt, default or miscarriage of another person[54] and attempts to hold agents on oral promises. In *Wheeler Lumber Bridge & Supply Co. v. Anderson*[55] the Court affirmed a judgment against a defendant for the sale price of lumber delivered to a company of which defendant was a representative, as a direct debt of defendant and not collateral. The evidence apparently was that plaintiff had refused to extend credit to the company but had delivered the lumber to the company after defendant had said, inter alia: "I will pay for this car of lumber or you may look up my credit", and the lumber was invoiced to the company and statements of account were sent to it. The decision is supportable on the notion that this may be a jury finding that no obligation was incurred by the company so that there really was *no other debt* for which defendant was to be responsible. Caution should be observed, however, in using other portions of the opinion. The reference is to statements in the opinion that the promise was "made *before* the debt arises", and that there was some "new and original consideration of benefit or harm moving between the newly contracting parties".[56] These are not a basis for stating that the promise is "original rather than collateral" or that the Statute should not apply, because the fact that a promise was made before the debt arose and that harm was suffered by the creditor are marks of almost every surety or guaranty situation.[57] Similar caution should be used in connection with language in *Miller v. Hartford Fire Insurance Co.*,[58] in which the Court affirmed the trial court's action in directing a verdict for defendant insured and in upholding a verdict against an adjustment company sent out by the insurer, in an action by the repairman against the company and the insurer for repairs done pursuant to an alleged oral promise by the adjustment company's representative. The directed verdict was affirmed on the basis of no evidence of authority in the adjuster to make such promise on behalf

50 See IOWA ANNOTATIONS § 173.
51 249 Iowa 584, 88 N.W. 2d 66 (1958).
52 248 Iowa 233, 80 N.W.2d 320 (1957).
53 6 DRAKE L. REV. 63 (1957).
54 IOWA CODE § 622.32(2) (1962); IOWA ANNOTATIONS §§ 180-191.
55 249 Iowa 689, 86 N.W.2d 912 (1957).
56 *Id.* at 693, 86 N.W.2d at 913, 914.
57 See comments made in CORBIN, CONTRACTS § 349 (1962 pocket parts, n. 60).
58 251 Iowa 665, 102 N.W.2d 368 (1960). An argument was also made that the "sales of goods section", IOWA CODE § 554.4 (1962), applied, but this was answered on the theory of part payment of purchase price and delivery.

of the insurer. The verdict against the adjustment company was affirmed, in spite of the objection of the Statute of Frauds, on the basis that as agent it acted without authority. As indicated above this would be a sufficient answer because there would then be no other debt for which to answer.[59] However, an additional comment is made which is questionable, that: "If it was a debt of the insurer, it was also an obligation of appellant, and the Statute of Frauds is not available to it as an exclusionary rule";[60] the surety relationship should be considered to be present so long as there is another indebtedness, even though both parties promised.[61]

Even if the agreement is of a type included within the statutory categories, there are various ways of satisfying the Statute. One is to have a "note or memorandum signed by the party to be charged." *Wescott & Winks Hatchery v. F. M. Stamper Co.*[62] contains a rather novel way of presenting the problem. In this case, allegedly, an order for purchase of turkey poults was submitted to a representative of an Iowa company which, although apparently separately operated, was a wholly owned subsidiary of a Missouri corporation. The representative allegedly orally promised that the order would be filled, and on a printed order blank, with apparently the printed name "F. M. Stamper Co. Hatchery, Centralia, Missouri", filled in terms including a statement "sold to Wescott & Winks", sent the original to the Missouri office and a copy to the buyer. The Court's opinion says this document was unsigned. A week later the buyer, plantiff, received a letter signed by a representative of the Missouri corporation telling buyer it would be unable to fill the order. The Supreme Court affirmed a directed verdict for the Iowa corporation, which was sued for failure to supply poults, stating, in part,[63] that there was not sufficient compliance with the Statute, that there was no evidence to suggest the Missouri corporation or its representative was the agent of the Iowa corporation other than the ownership of stock (which was not enough), and that the Court would not disregard the corporate entity except to circumvent fraud and there was no such circumstance present.

This result is not in line with the generally strict attitude of the Iowa Statute against asserting the defense of the Statute of Frauds.[64] It could be argued that, even though the corporate entity should not ordinarily be disregarded, a letter sent directly to a buyer, bypassing a subsidiary corporation, would indicate that the parent corporation was taking over the activities of the subsidiary and thus acting as its agent. Also it could be argued that the use of a printed form of the parent corporation, which was occasionally used by the subsidiary, even though it was not "signed", in the language

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[59] CORBIN, CONTRACTS § 359 (1950). The Court says that "By its verdict the jury found appellant and not Schario (the insured) owed the plaintiff." It may be true that Schario was not indebted to plaintiff, but it is not certain that the jury so found, just because it found against the adjustment company; it does not appear Schario was a party to the action.

[60] 251 Iowa 665, 671, 102 N.W.2d 368, 372 (1960).

[61] CORBIN, CONTRACTS §§ 348-355, 358-360 (1950); WILLISTON, CONTRACTS §§ 454, 461-65, 469, 471-72, 475 (3d ed. 1960).

[62] 249 Iowa 30, 85 N.W.2d 603 (1957).

[63] The opinion also indicates the Court would be reluctant to hold there was a firm contract.

[64] See general discussion in prior article.

of the Court, was actually signed within the language of the Statute by using the printed name of the parent, because a signature need not be in any particular form, and it has been held that the use of printed name with intent to authenticate may be a signature.[65] In this case the filling in of the form with words like "sold to", etc., and sending a copy to buyer would seem to indicate an intention to adopt it as a memorandum, especially when the name used by the Missouri corporation was similar to the Iowa corporation's name.

Dispensing with the need for a writing under the Iowa Statute in land cases is fairly easy.[66] However, several cases illustrate some difficulties. In *Brandt v. Schucha*[67] an attempt by a long-time tenant in possession of an Iowa farm to claim the farm as against collateral heirs, on the theory, among others,[68] of an oral promise to convey the land, failed because of the notion that no contract was intended until a writing was drawn up[69] and because the statutory provisions dispensing with a writing are that he must have "taken and held possession of the premises under and by virtue of the contract," and not merely that he remain in possession. This case also refers to the rule that specific performance of an oral contract to convey land will not be granted, especially against the estate of a decedent, unless proof of the contract is clear, satisfactory, and convincing.[70]

Also we were reminded in *Snater v. Walters*,[71] an equitable action to enforce an alleged oral limestone and gravel lease, that the provision as to taking possession and payment of rent does not take the case out of the

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[65] RESTATEMENT, CONTRACTS § 210 (1932); CORBIN, CONTRACTS §§ 520-22, especially n. 66 to § 521 (1950); WILLISTON, CONTRACTS § 585 (3d ed. 1961); IOWA ANNOTATIONS § 210.

[66] IOWA CODE § 622.33 (1962). See prior article, 6 DRAKE L. REV. 63, at 68 (1957), and Note, *The 'Other Circumstance' Exception to the Iowa Statute of Frauds*, 44 IOWA L. REV. 750 (1959).

A deed delivered with name of grantee blank transfers equitable title. Kindred v. Crosby, 251 Iowa 199, 100 N.W.2d 20 (1959), and note 41 of prior article.

In Butler v. Butler, ..... Iowa ....., 114 N.W.2d 595 (1962), an equity action to establish a trust, concerned with IOWA CODE §§ 557.10 and 622.32 (1962), the Court found compliance apparently on theory of part performance of trust and on theory of sufficient memorandum.

[67] 250 Iowa 679, 96 N.W.2d 179 (1959).

[68] The arguments of an interest by deed in escrow and of holographic will also failed.

[69] See discussion of this point in Hudson, *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91, 95 (1959).

[70] Citing Vrba v. Mason City Production Credit Ass'n, 248 Iowa 264, 268, 80 N.W.2d 495, 498 (1957), which states this does not mean the proof must be undisputed or to an absolute certainty but reasonable certainty is sufficient. On standards of proof further see Hudson, *Contracts in Iowa Revisited—Performance, Breach and Remedies*, 9 DRAKE L. REV. 66, 86 (1960), and note 4, *supra*. Compare this statement of the standard of proof to that referred to in new R.C.P. 344(f), added September 17, 1962, which states that: "The following propositions are deemed so well established that authorities need not be cited in support of any of them." . . . 6. In civil cases the burden of proof is measured by the test of preponderance of the evidence." The only other relevant references in the new Rule are in part 11, about reformation of written instruments by clear satisfactory and convincing evidence of fraud, deceit, duress or mutual mistake, and in part 12 that written instruments affecting real estate may be set aside only upon evidence that is clear, satisfactory and convincing.

[71] 250 Iowa 1189, 98 N.W.2d 302 (1959) (also refers to rule that alleged oral contracts must be proved by clear, convincing and satisfactory evidence, and that mere preponderance is not enough; see note 70, *supra*).

Statute, as to a lease for more than a year, because the statutory provision that purchase money or possession dispense with the need for a writing has been held to apply only to other contracts for sale of an interest in land, and not to leases.[72] We are also reminded by In re *Cline's Estate*[73] that circumstances offered under the Statute must be exclusively referable to the alleged oral promise; the Court in that case found that the dismissal by one child of a suit against the mother was exclusively referable to an alleged oral promise to dispose of property at death in a certain way. However, it is interesting to observe that the Court did not have the same difficulty in considering that "not doing something", may be "purchase money received by the vendor", as the Court experienced in *Vrba v. Mason City Production Credit Association.*[74] The Court here does not even refer to that aspect of the problem.

There were several additional cases about determining boundary lines to land without a writing, relying either upon the general doctrine of boundary line by acquiescence, requiring a ten-year period, or boundry line by estoppel.[75]

### 5. Contracts in Iowa Revisited—Mistake[76]

In the prior article attention was paid to three functional presentations of a mistake argument. In one the party claims that the writing does not conform to a prior oral agreement and asks that the written document be reformed to conform. In another the party admits that he consented to a particular promise but insists that if he had known then what he knows now he would not have so consented. In the third the party claims that he should not be bound to some term in a written document to which he manifested consent, not because there was any prior oral agreement but simply because he was not aware of this clause and should not be held to have consented to it. During the intervening period there have been cases illustrating all three cries of mistake.

As to reformation there is sometimes the objection that the mistake is only unilateral and not mutual. *Baldwin v. Equitable Life Assurance So-*

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72 IOWA ANNOTATIONS § 197-II-A.

73 250 Iowa 265, 93 N.W.2d 708 (1958).

74 248 Iowa 264, 80 N.W.2d 495 (1957).

75 Boyle v. D-X Sunray Oil Co., 191 F. Supp. 263 (N.D. Iowa 1961) (insufficient "clear" proof, as required by Iowa law, of mutual acquiescence; adverse possession claim not good because must claim disputed strip to a particular line even though it might not be true one; contains extensive discussion of doctrine of mutual acquiescence for ten years as referred to in IOWA CODE §§ 650.6, 650.14 (1962) and cases); Pruhs v. Stanlake, ..... Iowa ....., 113 N.W.2d 300 (1962) (finding of boundary line by mutual acquiescence for ten years as recognized by Code, affirmed); Schaulard v. Schmaltz, 252 Iowa 426, 107 N.W.2d 68 (1961) (in action to enjoin owners of adjoining lot from constructing a garage, Court thought line was fixed by acquiescence, but also refers to rule of practical location in fixing boundaries, that when a practical location is made of a boundary line by common grantor of land, followed by conveyance to grantee, grantor and those in privity with him are estopped, with no particular time needed to establish this line; Miller v. Lawlor, note 17, *supra*, considered somewhat in point); Kennedy v. Olesen, 251 Iowa 418, 100 N.W.2d 894 (1960) (defenses of acquiescence, adverse possession and estoppel as to boundary line against survey line, not sustained; affirmative defenses must be maintained by clear proof). See note 41 of prior article, and Hudson, *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67, 78 note 37 (1956).

76 7(2) DRAKE L. REV. 3 (1958).

*ciety of United States*[77] is an interesting example of this. In this case, apparently, the wife of insured one day realized they had been paying premiums longer than the twenty years referred to in the twenty-payment life policy form they possessed. The insurer countered with the claim that it should have been an ordinary life policy form, pointing to the premium which was on the form and had been paid, a premium charged only for ordinary life policies and not for twenty-payment life. The insured sought a declaratory judgment of rights, having continued payments to avoid lapse, and the insurance company, in answer, sought reformation to conform to its ideas. The trial court found a twenty-payment life policy was intended, so instead of changing that part, reformed the part referring to premiums to that chargeable for a twenty-payment life policy. On appeal the Court affirmed the trial court's finding as to intent and the reformation as to premiums but, in view of the hardship this might entail, offered insured a choice of twenty-pay life and payment of additional premiums, or of continuing with an ordinary life policy. The *Restatement of Contracts*[78] provides that, except for cases of mutual mistake, there may be reformation only where one party knows that the writing does not accurately express the intention of the other party. It is not clear from the opinion just what the rationale of the Court is.[79] Part of the time in the opinion the Court is merely saying that they believe (or support the trial judge in so believing) that all the facts and circumstances support an inference that insured did know the amount on the policy did not correspond to the intended premium for a twenty-pay policy. At other times they are saying that so long as the insured had reason to know of the mistake this is the equivalent of mutual mistake.

Another hurdle is the oft-repeated statement that clear, satisfactory and convincing evidence is required, which is stated to be more than a mere preponderance.[80] In several cases the action failed because of evidentiary insufficiency. One was where the plaintiff tried to reform insurance policies to include general liability coverage as well as motor vehicle liability coverage so as to cover liability for injuries sustained by a person on plaintiff's loading dock.[81] Another attempted to reform an agreement settling accounts of plaintiff with share tenants.[82] Yet in spite of this stated standard relief has been

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77 252 Iowa 639, 108 N.W.2d 66 (1961). An excellent commentary on this case is contained in 47 IOWA L. REV. 191 (1961).

78 RESTATEMENT, CONTRACTS §§ 504-05 (1932).

79 See Comment, 47 IOWA L. REV. 191 (1961), which quotes from various portions of the opinion to support this.

80 RESTATEMENT, CONTRACTS § 511 (1932); CORBIN, CONTRACTS § 615 (1960); WILLISTON, CONTRACTS § 1597 (rev. ed. 1937); IOWA ANNOTATIONS § 511; note 9 of prior article.

81 Conard v. Auto-Owners (Mut.) Ins. Co., ..... Iowa ....., 117 N.W.2d 53 (1962) (also involved, in equity, unsuccessful action against insurance agents for alleged misrepresentations as to coverage, as to which Court stated plaintiff must show elements of fraud, representation, falsity, scienter, deception and injury, and that scienter could be established by proof one was in a position to know or was in a position that it was his duty to know the truth or falsity, by representations recklessly made; as to action for damages, see Hudson, *Contracts in Iowa Revisited—Fraud and Misrepresentation, Duress and Undue Influence*, 9 DRAKE L. REV. 3, 6 and note 14 (1959); also note the opinion states the proof must be by clear, satisfactory and concincing evidence for reformation or damages).

82 Blake v. Huffman, 248 Iowa 938, 83 N.W.2d 460 (1957) (at page 465 of 83

granted, as reforming an estate settlement to include a particular claim against the estate,[83] and in the life insurance case discussed above. In the life insurance case the opinion even stated that in reformation matters involving insurance contracts against the insured, as well as in his favor, "less actual proof is required than in contract cases generally."[84] This problem of proof becomes even more confused when there is brought out the idea that when the action is at law and reformation is asked as an answer, all matters go to the jury presumably with a preponderance rule.[85] This occurred in one case where, in a law action by a holder of a judgment for personal injuries against the insurer of the automobile, the insurer asked for reformation of the policies, stating that the dates on the policies, the date of the accident, were wrong and should have been subsequent to the accident, and the Court sustained a motion to strike the petition for reformation, stating that reformation was unnecessary because the same facts that would support reformation would defeat recovery on the policy, so equity would not interfere.[86]

Sometimes parties want to rescind, as in *Reed v. Harvey*,[87] an action for injuries resulting from an attack by defendant's dog, in which plaintiff wanted to rescind a purported release, asserted as a defense, in which for $16.42 and medical expenses plaintiff purported to release all claims known and unknown. The reasons for the attempted avoidance of the release were that she later had to have an operation on her knee for a condition existing at the time of execution of the release (a torn meniscus) but of which neither party was aware. The Court affirmed submission to the jury of the mutual mistake claim and sustained judgment for the plaintiff. Almost as an afterthought, with the phrase that "this aspect may be somewhat technical", the Court pointed out that the release could have been interpreted not to cover this part of the claim because the release referred to injuries "resulting and to result from a dog bite", when the evidence indicated that this operation was to correct a condition not resulting from the bite but from other actions

N.W.2d the Court quotes from prior cases that clear, satisfactory and convincing means: "there must be such a degree of proof as will produce, in an unprejudiced mind, the belief and conviction of the truth of the fact asserted, taking into consideration all the surrounding facts and circumstances", and "courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty or error.").

[83] *In re* Swebakken's Estate, 251 Iowa 1358, 105 N.W.2d 610 (1960). It is a matter of interest that litigation resulted here and in the case in note 82, *supra*, in spite of the participation of lawyers in the drafting.

[84] Baldwin v. Equitable Life Assur. Soc. of U. S., 252 Iowa 639, 645, 108 N.W.2d 66, 70 (1961).

[85] See the statements in Crandall v. Banker's Life Co., 245 Iowa 540, 62 N.W.2d 169 (1954), involving the defense of fraud to a suit on an insurance policy, and Lungren v. Lamoni Provision Co., 248 Iowa 887, 82 N.W.2d 755 (1957), an action at law for damages for claimed loss because of alleged misrepresentations in sale of stock, that questions of fact submitted to a jury in civil cases are to be determined by preponderance of evidence rather than by a test of clear, satisfactory and convincing. See statement of standard of proof approved by the Iowa Court in connection with rescission for mistake when used to attempt to upset settlement agreements, infra, note 91, and accompanying text.

[86] Dohse v. Market Men's Mut. Ins. Co., ..... Iowa ....., 115 N.W.2d 844 (1962).

[87] ..... Iowa ....., 110 N.W.2d 442 (1961). An extensive annotation on avoidance of releases of personal injury claims on ground of mistake as to the extent or nature of the injuries is contained in 71 A.L.R.2d 82 (1960). See also Havighurst, *Problems Concerning Settlement Agreements*, 53 Nw. U. L. Rev. 283 (1958).

of the dog. This does not seem to this writer to be "technical", but seems strong enough to support the judgment without an extended discussion of avoidance for mistake. Instead, though, the principal portion of the opinion is devoted to supporting avoidance of the release because of mutual mistake and to again attempting to reconcile prior cases. The arguments against avoiding releases, especially where more extensive damages materialize, are that the parties purport, by documents at least, to release all present and future claims, that future developments of an injury are not in the category of present facts, the desire to settle disputed claims, and the arguments that there really is no mistake when there is a dispute and compromise. As indicated in the prior article the statement in *Jordan v. Brady Transfer & Storage Co.*,[88] involving a case of alleged mistake as to the extent of injuries, that compromise cases should be treated as all other cases and permitting rescission for mutual mistake when both parties were mistaken as to the facts of present physical condition of insured at time of execution of release, seems preferable. However, subsequently, in *Wieland v. Cedar Rapids & Iowa City Railway*,[89] the Court stated, in support of an opinion upholding a release, that compromises would not be upset for ordinary mistake but only if fraud, misrepresentation or concealment, or other misleading incidents are present. Attempts were made in the *Wieland* case, also involving an alleged mistake as to the extent of injuries and an alleged mistake as to present physical condition, to distinguish the *Jordan* case on the facts, although as discussed in the prior article this distinction does not seem valid. The presence in the *Jordan* case of an amount more directly calculated by giving an amount, sufficient to cover loss of wages and expenses and the basis of facts as they saw them, and the presence in *Wieland* of a lump sum not so directly related does not seem such a significant difference as to intent to cover future developments[90] as to call for a different conclusion on the issue of compromise regarding the extent of injuries. Now in *Reed v. Harvey* the Court again considers that this compromise, paying $19 for doctor bills and $16.42 for $10 worth of clothes and the "trouble you went through and transportation", is more like the facts in *Jordan* while apparently still not disapproving of *Wieland*. If the Court felt called upon to discuss the problem of mistake, considering that "dog bite" referred to in the release does not necessarily cover, by interpretation, other injuries to the knee incurred in the incident, it would have seemed more appropriate to do more than just equate the facts in this case with *Jordan;* the Court should have specifically overruled the statement in *Wieland* as to the approach to be used in compromise and release cases. Leaving such a statement, of course, permits the Court at some future time an opportunity to call on precedent to uphold a release when it otherwise desires to do so, in spite of the mistake claim. In passing it should be noted that the Court approved submission of the mistake claim to the jury with a standard of proof that is difficult to understand, although supported by prior Iowa case authority: "proof of mutual mistake by a preponderance of evi-

[88] 226 Iowa 137, 284 N.W. 73 (1939).
[89] 242 Iowa 583, 46 N.W.2d 916 (1951).
[90] See prior article, pp. 16-19, for expanded discussion of compromise cases and "mistake".

dence and in a clear and convincing manner."[91] Does this means that the proof must be more than a preponderance, as referred to above in connection with mistake and reformation, or does it mean that clear and convincing is merely another way of defining "preponderance"?[92]

The concept that one who manifests his consent to a document by a signature is bound by all the terms that appear therein whether he reads it or not was illustrated in *Schlosser v. Van Dussledorp*,[93] a quiet title action, in which the lessee of a gravel lease claimed he did not know that a lease contained a limitation to "north of the Skunk River", when a prior version of the lease referred to both north and south of the river, and he was held to the terms of the subsequent lease.

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[91] 110 N.W.2d 442, at 449. Reddington v. Blue, 168 Iowa 34, 149 N.W. 933 (1914), approved submission to the jury of the question of avoidance of release on the ground of mutual mistake, and at p. 44, 149 N.W. at 936, appears a portion of the instruction: "ordinarily in a civil action, such as this, the parties on whom the burden of proof is cast is only required to make proof by a fair preponderance of the evidence. In this case, the plaintiff must prove the foregoing matters by a preponderance of the evidence, and the character of the evidence must be clear, convincing, and satisfactory concerning the above-mentioned matters so necessary to be proven." This was approved with the statement that it "announced correct principles of law, unless it be in putting too great a burden upon plaintiff." Jordan v. Brady Transfer & Storage Co., 226 Iowa 137, 284 N.W. 73 (1939), seems generally to approve of the instruction in *Reddington*, and approved submission to the jury of the mistake claim, but does not quote or discuss the degree of proof except from *Reddington*.

[92] In Hall v. Crow, 240 Iowa 81, 34 N.W.2d 195 (1949), a suit for damages in tort for fraud and deceit, the Court, on complaint by defendant did not find error in instructions stating that plaintiff must prove fraud by preponderance and must prove by "clear, satisfactory and convincing" evidence; found no prejudicial error, observing that defendant could not object because it placed *additional* burdens on plaintiff and that "clear, satisfactory and convincing" was not a degree of preponderance but referred to character of evidence necessary to preponderate, not to quantum of proof. This writer finds it difficult to understand this distinction between quantum and character of proof. Note also the discussion, note 85 *supra*, that in law actions proof is by a preponderance.

[93] 251 Iowa 521, 101 N.W.2d 715 (1960).