priators, Iowa has no priorities. This adds to the confusion among permit holders. If a shortage of water should come about, there is no way of knowing how the Natural Resources Council would allocate the remaining water among permit holders. This is just another uncertainty that tends to discourage investment.

CONCLUSION

"As the demand for water increases in this country, it is likely that many of the nearly thirty eastern states currently allocating their water resources on the basis of riparian rules will have occasion to reconsider their allocation systems. An awareness of the Iowa experience in water use regulation should provide valuable insight to any state contemplating abandonment of the riparian system . . . ."[418] Hopefully, these states can gain something from the South Dakota experience too.

At least one thing stands out from this Article. The hodge-podge of water law that has developed throughout the past 100 to 150 years makes certainty in water rights almost impossible. The new water statutes, like the marketable title statutes in land law, are designed to free water rights from stale principles of property law that are wasteful of resources. The purpose of the new statutes should be to give certainty to the law. The new statutes are certain about one thing—that the policy of the state is to apply water resources to the greatest possible beneficial use.

But too often, as in the case of Iowa's water permit statute, the new statutes are merely another hodge-podge of common law, riparian law, appropriative law, and the best of other state's statutes. This is merely replacing one evil with another. The new laws are only certain until a major dispute over water shows the weaknesses. For example, one day in the future there will be a water shortage in Iowa, and the Natural Resources Council will have to divide up what water there is among permit holders and non-regulated users. Yet the statute makes no provision for the division of a short supply.

At the very least two things can be concluded. First, states, even those with surplus water like Iowa, are recognizing potential shortages and attempting to head off the problem before it arrives. Second, these two states, South Dakota and Iowa, are building good bases from which to begin structuring better statutes while they are gaining valuable experience in water resource regulation.

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[418] HINES, *supra* note 2, at 2.

SURVEY OF IOWA LAW
IOWA TORT LAW*

Roland D. Peddicord†

I. INTENTIONAL TORTS

During the past year the Iowa supreme court decided three cases in the field of intentional torts which should be commented upon. In the only nuisance case decided by the court, the primary issue was whether a municipal sewage lagoon constituted a permanent nuisance as defined under statute,[1] thereby entitling abutting landowners to damages for the decrease in value of their property.[2] The court defined a nuisance per se as "a structure or activity which is a nuisance at all times and under any circumstances, regardless of location or surroundings."[3] In its opinion, the court admitted that a sewage disposal facility may become a nuisance because of particular circumstances, yet the court refused to classify the municipal sewage lagoon in the instant case as a nuisance. Uncontradicted evidence established that properly maintained and operated sewage lagoons are practically odorless, except for a few days in the spring. The evidence did show, however, that plaintiff's land had significantly diminished in value. Nevertheless, the court held that "[i]f the lawful use of one's property does not create a public or private nuisance . . . damages [cannot be] recovered for the diminution in value of neighboring properties . . . ."[4]

In *Allen v. Lindeman*,[5] the question presented was whether a judgment for alienation of affections falls within the purview of the "Bankruptcy Act",[6] which declares that discharge under the act does not release liability for willful and malicious injuries. The court indicated in its opinion that the elements of willfulness and malice are not required in a cause of action for alienation of affections. " 'The three essential elements of such a cause of action [for alienation of affections] are 1) wrongful conduct of the defendant, 2) loss of affection or consortium of plaintiff's spouse, and 3) a causal connection between such

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* The survey covers developments in Iowa Tort Law from January 1969 to September 1970. The survey does not cover automobile law. Also, assumption of the risk and contributory negligence are treated in the cases in which they arose.

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1 IOWA CODE § 657.2(1) (1966).

2 Bader v. Iowa Metropolitan Sewer Co., 178 N.W.2d 305 (Iowa 1970).

3 *Id.* at 306-7.

4 *Id.* at 307.

5 164 N.W.2d 346 (Iowa 1969).

6 THE BANKRUPTCY ACT § 17, 11 U.S.C. § 35 (1964).

conduct and loss.' "[7] While recognizing that alienation of affections is frequently said to be an intentional tort under the Iowa rule, the court held that no element of specific intent to harm is required rather mere wrongful association, intimacies and misconduct are sufficient. This, however, the court continued, is insufficient to bar discharge of a debt in bankruptcy. The court's analysis of the cause of action for alienation of affections presents no particular problems and properly classifies the action as an intentional tort requiring no malice or willful intent.

In the single trespass decision within the past year, the plaintiff brought an action against the defendant telephone company seeking damages for "willful trespass". The defendant had installed underground phone cables on plaintiff's land without his consent. Among the issues presented was whether plaintiff could maintain in addition to a mandamus action to compel condemnation, an action in trespass against the defendant for actual and exemplary damages. Reversing the trial court, the Iowa supreme court held that even though "a public utility is invested by law with the power to exercise right of eminent domain, it is not thereby clothed with an immunity not possessed by others who trespass upon the property or rights of private citizens, and must answer for its wrongs the same as any other trespass."[8] The court acknowledged the public utility's right of eminent domain and the aggrieved property owner's right to compel condemnation, but stated that the legislature did not intend to exclude the common law remedy for damages in trespass. Moreover, the court held that both punitive and actual damage will lie against trespassing public utilities.

II. Negligence

A. *Liability of Landowners to Those Injured Entering Their Premises*

Universally, the decisions in this area have drawn a distinction between the duty of municipal corporations and the duty of the private proprietor to those entering their premises. Seldom are "slip and fall" decisions in which municipalities are defendants cited in support of seemingly similar decisions in which private proprietors are defendants. It has been stated that municipal corporations owe a greater duty than do private proprietors.[9] Despite the obvious distinction, the courts have failed to fully explain the underlying rationale. In Iowa, a municipality's duty is predicated upon a legislative delegation that municipalities maintain their premises in a safe condition.[10] Perhaps, as two decisions have subtly suggested, it is the statutory obligation that creates the higher duty.[11] In the case of *Bauman v. City of Waverly*,[12] the Iowa supreme court reaffirmed the distinction, stating: "When a municipality undertakes to

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[7] Allen v. Lindeman, 164 N.W.2d 346, 348 (Iowa 1969).
[8] Hagenson v. United Telephone Co., 164 N.W.2d 853, 856-57 (Iowa 1969).
[9] Hovden v. City of Decorah, 261 Iowa 624, 155 N.W.2d 534 (1968); Lindstrom v. Mason City, 256 Iowa 83, 126 N.W.2d 292 (1964).
[10] Iowa Code § 389.12 (1966).
[11] See authorities cited Note 9 *supra*.
[12] 164 N.W.2d 840 (Iowa 1969).

establish accommodations for unrestricted use of the public, its position is not the same as a merchant operating a business for profit. If anything, the city's duty is higher than that owed by a private person to an invitee."[13] Despite its express recognization of the municipality's higher duty, the court was not required to apply it to the facts in the *Bauman* case. It is, however, unlikely the holding would have changed even if the tortfeasor had not been a municipal corporation. The plaintiff, visiting city-maintained rest rooms for the first time, pulled "hard two or three times" before opening the screen door leading into the rest room. When leaving, she, troubled with the door again, "pushed with considerable force," and "flew . . . out the door" missing two steps leading up to the rest room. In view of a park custodian's awareness that the door had stuck on previous occasions, the court held that the defective condition existed for sufficient time to constitute notice to the defendant city.

The Iowa supreme court again faced the question of municipal liability in the case of *Townsley v. Sioux City*.[14] The issue in the *Townsley* case was the municipality's liability for negligent maintenance of its sidewalks. Plaintiff was injured when he fell while passing over a slippery sidewalk, which he had traversed many times. He slipped as he stopped and turned to talk to his wife. Without acknowledging the higher duty of the municipality, the court upheld the trial court's determination of fact that plaintiff was contributorily negligent. Drawing analogies between *Townsley* and the often cited case of *Beach v. City of Des Moines*,[15] the court stated: "To reverse this case we would have to hold, as a matter of law, plaintiff, under these facts, was not guilty of (contributory) negligence . . . ."[16] In *Beach*, the court held a similar set of facts presented a fact question of plaintiff's contributory negligence. Similarily, in *Townsley*, the court refused to hold *as a matter of law* that the plaintiff was not contributorily negligent and held that the facts of that case did present a question of plaintiff's negligence.[17]

In *Mester v. St. Patrick's Catholic Church*,[18] a case dealing with a private proprietor, the court expressly reaffirmed the well-established rule[19] that an adjoining landowner has "no duty to keep a portion of the public sidewalk which crosses a driveway entering . . . [his] property free of ice and snow which had accumulated there as a result of . . . normal and usual use of the driveway."[20] The Court held:

> [While] [t]he municipality has a statutory duty to exercise reasonable care to keep its sidewalks reasonably safe for use by pedestrians, . . .
>
> An abutting owner or occupant is not liable under common law for injuries resulting from snow or ice coming on the sidewalks

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13 *Id.* at 843.
14 165 N.W.2d 523 (Iowa 1969).
15 238 Iowa 312, 26 N.W.2d 81 (1947).
16 Townsely v. Sioux City, 165 N.W.2d 523, 524 (Iowa 1969).
17 *Id.*
18 171 N.W.2d 866 (Iowa 1970).
19 *See* Note, *Injuries from Ice and Snow on Sidewalks*, 8 DRAKE L. REV. 149 (1959).
20 Mester v. St. Patrick's Catholic Church, 171 N.W.2d 866, 869 (Iowa 1969).

> through natural causes, or where it accumulates through no wrongful act or omission on his part; nor is he bound to guard against the risk of accident by sprinkling ashes or any like precautions.[21]

The Court made it clear, nevertheless, that where an abutting landowner negligently causes snow and ice to accumulate on the sidewalk, whether it crosses the driveway or not, he will be liable for any resulting injuries.

B. *On the Premises*

The Iowa supreme court rendered seven decisions in the past year involving the tort liability of private proprietors to those injured on their premises. Several of the decisions recited the familiar rule recently adopted from the *Restatement of Torts* by the Iowa supreme court in the decision of *Hansen v. Town & Country Shopping Center, Inc.*:[22]

> ". . . [N]egligence may exist even though a defect is, in fact, open and obvious where the circumstances are such that there is reason to believe that it would not be discovered or become obvious to the invitee or the risk of harm involved *would not be anticipated or appreciated* by the invitee. In such circumstances there may be generated a jury question as to whether the premises are reasonably safe."[23]

Accordingly, the court in *Capener v. Duin*,[24] held a fact question was present concerning the plaintiff's apprehension of danger and the defendant's exercise of reasonable care. In *Capener*, the plaintiff testified that he not only knew that the condition of his mail route was generally icy on the date of the accident, but that he knew, after delivering mail at the top, that the steps were icy. In the cases of *Weidenhaft v. Shoppers Fair, Inc.*,[25] and *Ling v. Hosts, Inc.*,[26] on the other hand, the court refused recovery where the plaintiffs were injured in the entrance ways of retail stores by falls occasioned by the accumulation of water and dirt from the shoes of other shoppers. The court in *Weidenhaft* found that a wet, dirty, asphalt tile floor extending beyond rubber doormats, normally encountered in the entrance ways of retail stores during the winter months, does not create an unreasonable risk to business invitees. The court stated that the trial court should have directed a verdict for the defendant store owners, even though the plaintiff may not have seen the water until after his fall. The court held the rule of *Hansen v. Town & Country Shopping Center, Inc.*, would not sustain plaintiff's recovery in this class of case. Whether the facts of this case can be significantly distinguished from circumstances surrounding the mail carrier's fall in *Capener*, as previously mentioned, is doubtful. A postman appraised of the icy conditions of the steps on which he fell and over which he had previously passed should not be treated

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21 *Id.*
22 259 Iowa 542, 144 N.W.2d 870 (1966).
23 *Id.* at 549, 144 N.W.2d at 875; Capener v. Duin, 173 N.W.2d 80, 84 (Iowa 1970); Weidenhaft v. Shoppers Fair of Des Moines, 165 N.W.2d 756, 759 (Iowa 1970).
24 Capener v. Duin, 173 N.W.2d 80 (Iowa 1970).
25 165 N.W.2d 756 (Iowa 1969).
26 164 N.W.2d 123 (Iowa 1969).

more favorably than a retail shopper who is unaware of the slippery conditions of the entranceway to the store which she enters for the first time. Perhaps, the better reasoned decision in this area, and a decision most consistent with *Capener,* was rendered in *Ling v. Hosts, Inc.*[27] In *Ling*, the plaintiff sought recovery for injuries received when he fell because of an accumulation of water on the floor of defendant's hotel entranceway. The court arrived at a result similar to the result in *Weidenhaft.* The court said that "plaintiff's conduct and the general conditions surrounding his fall did not merit a plaintiff's verdict." The court in *Ling*, on the other hand, held that in light of defendant's employees' testimony that a man was on duty at all times with instructions to keep the lobby spic and span, and that on snowy days the man on duty mopped every hour and sometimes every fifteen minutes, and that no fall had previously been reported by any of the 865,000 other customers. "[T]he alleged slippery condition which caused plaintiff's fall [had not] existed for such time [that] any of the defendant's employees, in the exercise of reasonable care, should have known of it prior to the occurrence."[28] In reaching its conclusion, the court cited the following language: "[Where] the presence of the [dangerous] obstacle is traceable to persons *for whom the proprietor is not responsible*, proof of his negligence requires a showing that he had actual notice . . . or that the condition existed for such a length of time that in the exercise of reasonable care he should have known of it."[29] Where, however, the defendant-landowner or his agents or servants placed the dangerous substance upon his premises, the court continued, he will be held to have knowledge of it. As a general rule, cases involving slippery conditions in the entrance ways of retail stores, ought to be resolved on the issue of the owner's notice of a dangerous condition, as it was in *Ling.*

The remaining three decisions, in which the landowner's liability to those entering upon his premises was litigated, are *Grall v. Meyer,*[30] *Sweet v. Swangel,*[31] and *Appling v. Stuck.*[32] *Sweet* will be discussed under another section,[33] and *Appling*, an attractive nuisance case, has been sufficiently discussed in a prior edition of the Drake Law Review[34] and will not be treated. In *Grall*, the plaintiff was injured while attending defendant's dance hall. Defendant had set up tables and chairs extending on to what was normally the dancing area. Plaintiff had danced only a few moments when she tripped over a chair in the dancing area. There was testimony indicating that the chair had been pushed eight feet into the dancing area a few seconds before the accident. The Iowa supreme court affirmed the trial court's verdict for the plaintiff. Though the court held the only issue raised on appeal was the suffi-

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27 173 N.W.2d 123 (Iowa 1969).
28 *Id.* at 127.
29 *Id.* at 126.
30 173 N.W.2d 61 (Iowa 1970).
31 166 N.W.2d 776 (Iowa 1969).
32 164 N.W.2d 810 (Iowa 1969).
33 See section II F, *infra.*
34 Note, *Attractive Nuisance—Factors of the Iowa Doctrine,* 19 DRAKE L. REV. 461 (1970).

ciency of the evidence to support the verdict, the court did, nonetheless, clarify the duty owed by operators of public entertainment facilities. Acknowledging that it had on occasion "said the duty of one who operates a place of entertainment or amusement is higher than that of the owner of private property . . .,"[35] the court stated:

> This, however, does not change the standard of reasonable care by which liability is measured. All it does is recognize that the greater the danger, the higher the precaution necessary to constitute reasonable care . . . .
>
> . . . .
>
> The law requires only reasonable care of the operator of such places to protect his invitees from those dangers which he can and should anticipate under those conditions.[36]

Concerning the duty of dance hall operators, the court stated: "He [the dance hall operator] knew persons sometimes danced backwards and [that they] could not be closely attentive to the conditions behind them."[37] This decision represents no departure from existing Iowa law.

C. *Malpractice*

This year, the Iowa supreme court made significant inroads into the field of malpractice litigation. In the case of *Ryan v. Kanne*,[38] the Iowa supreme court affirmed an award of damages for negligently prepared accounting statements to third parties who detrimentally relied upon an accountant's report, though they were not in privity with the accountant. This, of course, is merely an affirmance of what most accountants have long assumed to be the law. The court was unable to discover a "good reason why accountants should not accept the legal responsibility to *known* third parties who reasonably rely upon financial statements." The court did not determine whether the rule should be extended to foreseeable third parties *unknown* to the accountant. This rule, the court stated, applies to insure professional standards and should apply whether the financial statement is certified or not. "Their [accountants] liability must be dependent upon their undertaking, not their rejection of dependability. They cannot escape liability for negligence by general statement that they disclaim its reliability."[39] The court added that the accountant can, however, restrict his liability if the aggrieved party has limited the accountant's investigation or if goods or work in progress are not open to his investigation.

In the case of *Dickinson v. Mailliard*,[40] the Iowa supreme court redefined the rule by which a hospital's duty to exercise ordinary care has been measured in the past. A central issue of that case was the hospital's responsibility for the negligent acts of a doctor retained as a hospital radiologist, who

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35 Grall v. Meyer, 173 N.W.2d 61, 63 (Iowa 1970).
36 *Id.* at 63-64.
37 *Id.* at 65.
38 170 N.W.2d 395 (Iowa 1969).
39 *Id.* at 404.
40 175 N.W.2d 588 (Iowa 1970).

x-rayed the plaintiff at plaintiff's personal physician's request. The court rejected the plaintiff's contention that the doctor was an employee of the hospital. The court said: "We do not say a hospital could never be held accountable for misconduct on the part of one of its staff doctors. We only say that under ordinary circumstances—and under those here—the doctor is an independent contractor."[41] The court in reaching its decision thought significant, but not controlling, the Iowa statute[42] which provides: "[R]adiology services performed in hospitals constitute medical services which must be performed by or under the direction and supervision of a doctor, . . . [and that] technicians and other personnel employed in the radiology department, *not including doctors,* shall be employees of the hospital . . . ."[43] The court also took the opportunity to detail the hospital's duty toward its patients. Aware of the waining use of the "community standard rule" as a measure of the expertise required of a physician, the court rejected the "community standard rule" as it has been previously applied in Iowa to hospitals. In its opinion, the court stated: "It is doubtful today if there is any substantial differences from one locality to another in the type of hospital services rendered."[44] Consequently, the correct standard of care to which hospitals should be held is that which *obtains in hospitals generally* under similar circumstances. In deciding what are "similar circumstances," the jury may consider the customs and practices followed in the particular community and like communities as one element, but these are not conclusive.[45] This redefined standard of judging hospital care places Iowa in the current trend, away from the "community standard test", and adopts a more realistic approach to hospital tort liability. Moreover, the holding in *Dickinson* indicates that the court might be receptive to an argument in favor of abandoning the community standards as they have applied to Iowa physicians.

D. *Escaping Animals*

In addition to the decisions predicating municipal liability for failure to maintain its sidewalks in violation of statute, there were several other decisions rendered in which the cause of action was based upon a breach of a statutory duty. Two such cases involve the Iowa fencing statute. In the first of these two cases, the plaintiff was injured when he was knocked over by defendant's trespassing hog while chasing the hog from his farm.[46] Under an Iowa statute requiring animals to be restrained by their owner,[47] the court held an animal running at large raises a rebuttable presumption of the owner's negligence.[48] On appeal the court affirmed the trial court's determination of defendant's negli-

41 *Id.* at 594.
42 IOWA CODE ANN. § 135B.22 (Cum. Supp. 1970).
43 Dickinson v. Mailliard, 175 N.W.2d 588, 595 (Iowa 1970).
44 *Id.* at 596.
45 *Id.*
46 Leaders v. Dreher, 169 N.W.2d 570 (Iowa 1969).
47 IOWA CODE § 188.2 (1966).
48 *See* Klunnenberg v. Rottinghaus, 256 Iowa 731, 129 N.W.2d 68 (1964).

gence. In view of defendant's knowledge that his hog had escaped on previous occasions, the court stated: "Under the law defendant . . . [was] . . . responsible for the escape of his hog . . . . [D]efendant should have realized plaintiff would attempt to remove the hog from his property, such being customary, not unusual or highly extraordinary."[49] In addition, the court disagreed with the defendant's contention that plaintiff was contributorily negligent. In approving the *Restatement*'s position,[50] the court said: " 'It is not contributory negligence for a plaintiff to expose himself to danger in an effort to save . . . chattels . . . from harm, unless the effort itself is an unreasonable one, or the plaintiff acts unreasonably in the course of it.' "[51]

In the second case involving the Iowa fencing statute, the owner of a cow, who had been held liable to a motorist who struck his cow as it wandered over the highway, sought indemnity as well as compensation from the railroad for the loss of the animal.[52] Had the railroad observed the statute requiring it to maintain fences on its right-of-way to keep cattle from the tracks,[53] he argued, his cow would not have wandered on to the highway. The Iowa supreme court held the railroad fencing statute created a duty of the railroad extending to the owner of a cow, even where the cow strays through its owner's broken fence and subsequently through a railroad fence and is hit off railroad property by a non-railroad vehicle.

E. *Suppliers of Gas and Electricity*

In two cases, the Iowa supreme court determined the liability of suppliers of gas and electricity. The first case involved the death of a lineman caused by contact with high voltage lines maintained by the defendant.[54] The only evidence of what happened to the decedent was a foreman's testimony that he last saw the decedent standing in a steel tower about seven feet from two uninsulated hot wires. The next thing the foreman heard was a pop and then observed decedent falling. The evidence showed decedent was not trained to handle hot lines, but was, nonetheless, sufficiently experienced to be appraised of the danger of high voltage wires. On this evidence, the court applied an Iowa statute raising a rebuttable presumption of the power supplier's negligence when one is injured by electric transmission lines. Despite decedent's knowledge and awareness of the danger of the wire, the court affirmed the jury's verdict for the decedent. The rebuttable presumption, the court held, was itself evidence. In the second case, the Iowa supreme court held that Iowa Departmental Rules regulating the installation of domestic bottle gas[55] have uniform force and effect throughout the state when promulgated as required

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49 *Id.* Leaders v. Dreher, 169 N.W.2d 570, 576 (Iowa 1969).
50 RESTATEMENT (SECOND) OF TORTS, § 472 (1965).
51 Leaders v. Dreher, 169 N.W.2d 570 (Iowa 1969).
52 State Farm Mutual Automobile Ins. Co. v. Nelson, 166 N.W.2d 803 (Iowa 1969).
53 IOWA CODE § 188.2 (1966).
54 Neighbors v. Iowa Electric Light and Power Co., 175 N.W.2d 97 (Iowa 1970).
55 IOWA DEPARTMENTAL RULES 1.4(b) (1962).

by statute.[56] The court held that the rules not only prescribe a criminal penalty for violations but also create a duty and a breach of this duty creates an actionable tort. Accordingly, where a bottle gas system exploded two months after installation, there was a jury question of defendant's negligence.[57]

F. *Res Ipsa Loquitur*

The application of the doctrine of *res ipsa loquitur* was litigated in four Iowa decisions in the past year: *Sweet v. Swangel*,[58] *Pastour v. Kolb Hardware, Inc.*,[59] *Wagner v. Northeast Farm Service Co.*,[60] and *Wilson v. Paul*.[61] The court did not consider all the elements traditionally associated with the doctrine of *res ipsa loquitur*[62] in all the cases. The court did, however, uphold existing case law in all four decisions. Under the doctrine, the defendant must be in exclusive control of the instrumentality when the negligent act occurs. Therefore, the plaintiff must show defendant's exclusive control of the instrumentality at the time of the injury, or alternatively, the plaintiff must prove there was no substantial change in the condition of the instrumentality after it left defendant's control. Further, the occurrence must be one that common experience indicates would not have occurred in the absence of the defendant's negligence and the defendant must uniquely be possessed of the knowledge of the facts of what actually occurred.

During this last year, the court found the doctrine applicable[63] where a wobbly chair in defendant's motel room "suddenly collapsed" under the plaintiff guest as he sat next to his bed playing cards. The evidence showed plaintiff knew of the chair's "wobbly condition". The court held the case was properly submitted to the jury on the doctrine of *res ipsa loquitur*. The plaintiff met his burden of proof by showing that he had done nothing abnormal with the instrumentality causing the injury and that he used the chair in the manner and for the purpose for which it was intended.

The court also found the doctrine properly submitted to the jury in an action against the defendant gas supplier, where, fixing dinner as usual, plaintiff lit her stove burner only to have flames "shoot from the stove" and engulf her home. Conceding that natural gas is a highly dangerous commodity, the court said, " 'common experience tells us that ordinarily an explosion will not happen if due care has been exercised in the control thereof.' "[64] On the other hand, in *Wilson v. Paul*, the court found error in the trial court's refusal to submit a case on the doctrine of *res ipsa loquitur* to the jury where evidence pinpointed the origin of the fire to the inside of plaintiff's wall adjacent

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56 IOWA CODE §§ 17A, 101 (1966).
57 Wagner v. Northeast Farm Service Co., 177 N.W.2d (Iowa 1970).
58 166 N.W.2d 776 (Iowa 1969).
59 173 N.W.2d 116 (Iowa 1970).
60 177 N.W.2d 1 (Iowa 1970).
61 176 N.W.2d 807 (Iowa 1970).
62 Alan Loth, *Res Ipsa Loquitur in Iowa*, 18 DRAKE L. REV. 1 (1968).
63 Sweet v. Swangel, 166 N.W.2d 776 (Iowa 1969).
64 Pastour v. Kolb, 173 N.W.2d 116, 126 (Iowa 1970).

to a sink on which a plumber had been working with a plumber's blow torch.[65] In *Wilson*, control of the room or building by defendant was not essential to an application of the doctrine. The doctrine requires the defendant to be in *exclusive control of the instrumentality causing the injury, not in control of the property injured.* The court stated that common experience tells one that fire of this kind would not occur in the ordinary course of things, if the workman had used reasonable care.

In its most recent decision, *Wagner v. Northeast Farm Service Co.*,[66] the court upheld the trial court's determination that *res ipsa* was not applicable to a case involving an explosion which occurred several months after defendant installed a cylinder of gas behind plaintiff's home. "There is nothing in our common experience to teach us that an explosion which occurs several months after a gas cylinder was installed would not have occurred but for the negligence of the installer."[67]

III. Products Liability and Strict Liability

In a decision dealing with products liability, the Iowa supreme court struggled with the concept of "strict liability." In the important decision of *Hawkeye-Security Insurance Co. v. Ford Motor Company*,[68] the court noted that Iowa had not adopted "strict liability" in products liability cases except where unwholesome food was involved.[69] In *Hawkeye Security*, the Iowa supreme court adopted the *Restatement (Second) of Torts* definition of "strict liability" as applied to a product. " 'The purpose of such liability is to insure that the cost of the injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by injured persons who are powerless to protect themselves.' "[70] Under the *Restatement*'s definition:

> 1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition which it is
>
> 2. The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.[71]

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[65] Wilson v. Paul, 176 N.W.2d 807 (Iowa 1970).
[66] Wagner v. Northeast Farm Service Co., 177 N.W.2d 1 (Iowa 1970).
[67] *Id.* at 4.
[68] 174 N.W.2d 672 (Iowa 1970).
[69] *See* Davis v. Van Camp Pkg. Co., 189 Iowa 775, 176 N.W. 382 (1920).
[70] Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 683 (Iowa 1970). (Iowa 1970).
[71] *Id.* at 683. Restatement (Second) of Torts, § 402A (1965).

As a result, the defendant, whose Ford truck collided with the rear of plaintiff's tractor, was entitled to have his cause of action for indemnification from Ford Motor Company submitted to the jury on the basis of "strict liability", where the evidence indicated defendant's brakes were defective from the time he purchased his truck from Ford. The Iowa court has yet to encounter the collateral questions accompanying the doctrine. Precisely what is meant by "an unreasonably dangerous condition" and "substantial change" is unclear. The former, it is submitted, will universally be a jury question, while in rare circumstances the latter may be decided as a matter of law. In *Hawkeye-Security*, the court did not specifically detail the criteria necessary to present a jury question on "substantial change". The court did state, however, that its discussion of the evidence in that part of its opinion concerning the question of implied warranty of fitness indicates the question of "strict liability" in the case would be a jury question. "Time, length of use, severity of use and state of repair, are all relevant factors"[72] to the issue of breach of warranty. These same factors are equally relevant to the determination of "substantial change" of condition, as used in section 402A of the *Restatement*. Another frequent source of consternation in products liability litigation has been the meaning of the *Restatement's* term "user or consumer." Generally, other courts have refused recovery to those injured by the defective product, who are not the purchasers or who do not enjoy some special relationship with the purchaser.[73] The plaintiff in *Hawkeye-Security* was the ultimate consumer, and an application of the *Restatement's* definition to him presents no problem. To be sure, *Hawkeye-Security* does not adequately define the class of injured plaintiffs protected under the doctrine of "strict liability."

The Iowa supreme court in its other recent decision involving strict liability, repudiated the necessity of foreseeability in the application of "strict liability" to cases involving explosives.[74] Referring to "strict liability" as liability without fault, as it is often referred to, the court said:

> Inferentially, defendant asks that we now engraft upon our adopted "liability without fault" standard, the element of "foreseeability", akin to which applies with regard to the duty owing by landowners to invitees.
>
> . . .
>
> Liability, absent fault, exists when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save the defendant.
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> . . .
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> [I]t was not incumbent upon plaintiffs to show injury to their property was likely or should have been foreseen, recognized or anticipated by defendant.[75]

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72 Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 679 (Iowa 1970).

73 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [4][c] (1968). *See* Hahn v. Ford Motor Co. 256 Iowa 27, 126 N.W.2d 350 (1964).

74 Davis v. L & W Construction Co., 176 N.W.2d 223 (Iowa 1970).

75 *Id.* at 224-225.

Consequently, where plaintiffs suffered damage to their home as a result of air concussions and ground vibrations caused by defendant's mile distant use of explosives in connection with its rock quarrying operations, damage to plaintiff's home was compensable whether it was foreseeable or not.[76] The Iowa supreme court refused to make foreseeability a necessary element in strict liability for explosives. Such a holding is consistent with the traditional application of strict liability.

IV. Immunity from Liability

A. *Interspousal Immunity*

Little more can be said of the doctrine of interspousal immunity than was said in the recent Iowa case of *Wright v. Daniels.*[77] In that case, the administratrix of an estate brought an action for actual and exemplary damages against the deceased's husband. The wife died as a result of willful injuries inflicted on her by the husband. The Iowa supreme court reaffirmed its holdings in the previous case of *Fogel v. Fogel*[78] wherein the court held that the Iowa legislature did not abolish the common law doctrine of interspousal immunity. The Iowa statute allowing recovery for the wrongful death of a woman as well as the wrongful death of a man[79] did not express an intent to abrogate the doctrine. Cautiously limiting its decision to an interpretation of the Iowa statute and not a decision accepting or rejecting "interspousal immunity", the majority opinion, nevertheless, noted the survival statute for tort action,[80] case law removing married women's disabilities,[81] Iowa cases affirming the doctrine of interspousal immunity,[82] and the well-recognized split of authority throughout the country on the doctrine of interspousal immunity,[83] but again refused to repudiate the doctrine. While the majority found the interpretation of the statute the only issue presented on appeal, a perceptive dissenting opinion considered plaintiff's pleadings broad enough to merit a consideration of the interspousal immunity as it exists in Iowa. Rejecting the doctrine, notwithstanding the statute, the dissent vigorously attacked the policy reasons for perpetuating "interspousal immunity" in Iowa. The policy considerations in support of the doctrine, the dissent pointed out, are preservation of domestic tranquility, the availability of divorce and criminal remedies, the possibility of "trivial action from minor annoyances" by spouses, and the archaic concept of the family as an informal unit of government. As the dissent appropriately demonstrates, these reasons are no longer viable. To be sure, the modern family no longer enjoys the status it previously enjoyed and can scarcely be considered a gov-

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76 *Id.*
77 164 N.W.2d 180 (Iowa 1969).
78 257 Iowa 547, 133 N.W.2d 907 (1965).
79 Iowa Code Ann. § 613.15 (Cum. Supp. 1970).
80 Iowa Code § 611.22 (1966).
81 Musselman v. Galligher, 32 Iowa 383 (1871).
82 Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936); In re Estate of Dolmage, 203 Iowa 231, 212 N.W. 553 (1927).
83 *Annot.* 28 A.L.R.2d 662 (1953).

ernmental unit. In addition, after the commission of the tort, there is probably little family tranquility left to preserve. Furthermore, criminal sanctions and divorce proceedings do not place damaged spouses in the same position they were in before the tort nor do they compensate them for the damages and injuries sustained. Although the authorities generally cite the preservation of domestic tranquility as the predominent rationale in support of interspousal immunity,[84] perhaps the possibility of the deluge of litigation for "minor annoyances" poses the most formidable impediment to the abolition of interspousal immunity. Few lawyers will doubt the validity of this proposition. Dean Prosser, however, suggests a finding of consent to or an assumption of the risk of all ordinary frictions of wedlock, as an alternative to the deluge of the interspousal litigation.[85] The dissent makes a most convincing argument for the abolition of the doctrine of interspousal immunity. Wisconsin, having abandoned interspousal immunity years ago,[86] the dissent points out, has experienced "[n]one of the dire consequences often predicted . . . ."[87] Hopefully, when the court is again presented the opportunity to abandon this antiquated doctrine, it will do so with dispatch.

B. *Governmental Immunity*

In perhaps the most inopportune cases decided this year, the Iowa supreme court denied recovery both to the estate of the decedent who drowned while swimming in a county owned gravel pit[88] and to the estate of a decedent who died from injuries received when a county owned bridge collapsed under him.[89] Although Iowa law charges the county to control and maintain county roads and bridges,[90] the court, classifying the county as a quasi-corporation, held in the initial case: "The law is clear that in this jurisdiction, at the time this action was brought, a quasi-corporation such as a county or school district was not liable for injuries and damages due to dangerous conditions resulting from its own negligence in governmental matters."[91] Without discussion, the court in that case hastily dismissed the county's duty to maintain recreational areas as governmental and not proprietary. In the other case, the court failed to make any pronouncement on the nature of the county's duty and refused to make an exception to the harsh rule of governmental immunity. By the same token, the county officials were exempted from personal liability, for the court considered their duty governmental as well.[92] The importunity of both cases is lamentable. Under the recently adopted and long overdue municipal corpora-

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84 W. PROSSER, LAW OF TORTS, § 116 (3rd ed. 1964).
85 *Id.*
86 Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926). *See* Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
87 Wright v. Danials, 164 N.W.2d 180, 185 (Iowa 1969).
88 Iseminger v. Black Hawk County, 175 N.W.2d 374 (Iowa 1970).
89 Barad v. Jefferson County, 178 N.W.2d 376 (Iowa 1970).
90 IOWA CODE § 309.67 (1966).
91 Iseminger v. Black Hawk County, 175 N.W.2d 374, 378 (Iowa 1970).
92 Barad v. Jefferson County, 178 N.W.2d 376 (Iowa 1970).

tion's tort claims act,[93] the common law defense of governmental immunity is abrogated by the legislature and will no longer bar an action against the sovereign as it has in the past. Rather, the county and other governmental subdivisions will be liable "for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function."[94]

C. *Judicial Immunity*

In the novel case of *Huendling v. Jensen*,[95] the court squarely faced the issue of judicial immunity. Here, the central issue was "whether a justice of the peace who prepared a preliminary information and issued an arrest warrant as part of his regular procedure for collecting bad checks for a 20 per cent commission is protected by judicial immunity when there was no probable cause for the issuance of the warrant."[96] In a five-three decision, the court affirmed the doctrine. " 'Few doctrines' " the court stated, " 'were more solidly established at common law than the immunity of judges from [civil] liability for damages for acts committed within their judicial discretion . . . . [E]ven though . . . [they] act from impure or corrupt motives'."[97] The court set three criteria necessary to preserve the judge from civil liability: (1) the judge must be performing a judicial act as opposed to a ministerial one, (2) the court must have the prerequisite statutory jurisdiction over the subject matter, and (3) the court must have jurisdiction over the person. In the instant case, the court found issuance of an arrest warrant, though without probable cause, a judicial act. Also, the court found requisite jurisdiction over the person, since the plaintiff had voluntarily submitted to the court's jurisdiction. Despite plaintiff's forceful argument that the equities of this case should present an exception to the rule of judicial immunity, the court stated the rationale in support of the judicial immunity: "A magistrate's decision to issue a warrant for arrest should not be subjected to the possible influence of the threat of civil liability. It is essential that he be immune from liability for a good faith error in judgment which appears in retrospect to have been patently wrong."[98] The public's redress, the court continued, is through impeachment or criminal prosecution against a judge for misfeasance. The court apparently overlooked the argument that possible criminal prosecution would hinder judicial autonomy just as the threat of civil liability. While the majority clings steadfastly to the doctrine of judicial immunity, even in the light of the severest judicial corruption, the dissent, on the other hand, found the Iowa law on judicial immunity unsettled. The dissenting opinion cites the rule from the Iowa case of *Gowing v. Gowgill*:[99] "[W]here an official acting in a judicial capacity errs in his judg-

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93 IOWA CODE ANN. § 613 A (Cum. Supp. 1970).
94 IOWA CODE ANN. § 613 A.2 (Cum. Supp. 1970).
95 168 N.W.2d 745 (Iowa 1969).
96 *Id.* at 748.
97 *Id.*
98 *Id.* at 750.
99 Gowing v. Gowgill, 12 Iowa 495 (1861).

ment, he is not liable, but where he acts through favor, fraud or partiality, or knowingly commits a wrong by virtue of his office, he is liable".[100] Moreover, the dissent stated:

> Under these circumstances it is . . . evident defendant here adopted a dual position in that he, as a justice of the peace, acting officially in a criminal case, also assumed the extraneous role of private bill collector, using the former as a club to enhance the latter. Stated otherwise, defendant purposely attempted to fasten coloration of his public office to purely personal remunerative activities.[101]

The underlying rationale of the tort law seeks to compensate an injured plaintiff. The doctrine of judicial immunity thwarts that purpose. The threat of civil liability for corrupt, malicious or partial judicial acts would not only compensate injured plaintiffs but would also serve as an effective deterrent to judicial abuse.

V. Statutory Developments

The last two sessions of the General Assembly enacted three statutes bearing significantly upon Iowa tort law. The much publicized "parental responsibility act" renders parents of unemancipated minors under eighteen years liable for up to $2,000.00 of damages for the "unlawful acts" of the minor.[102] This enactment makes Iowa the forty-sixth state to have adopted the parental responsibility statute.[103] As is readily demonstrated in legal literature treating the act,[104] its imprecise language invites litigation. The meaning of "unlawful acts", for example, is not made clear. Because this act has been adequately treated in a recent Iowa Law Review,[105] it will be considered here only in passing. In the second of the recently enacted statutes bearing on Iowa tort law, "[a]ny person, who in good faith renders emergency care or assistance without compensation at the place of an emergency or accident, shall not be liable for any civil damages for acts or omissions unless such acts or omissions constitute recklessness".[106] In the view of the legislative intent to relieve the "good samaritan" of responsibility for his negligence, as evidenced in the Iowa motor vehicle guest statute, the instant statute was certainly long overdue.

The 63rd General Assembly amended the "Iowa Tort Claims Act" in two respects. The Act now excludes the State's liability for damages which "occurred as an incident to the training, operation or maintenance of national guard while not in 'active state service' . . . ."[107] "Active service" is defined as "service on behalf of the state, in case of public disaster, riot, tumult, breach of the peace, resistence of process, or whenever called upon in aid of civil authorities, or under martial law, or at encampments whether ordered by state or

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100 *Id.* at 498.
101 Huendling v. Jensen, 168 N.W. 745, 753 (1969).
102 Iowa Code Ann. § 613.16 (Cum. Supp. 1970).
103 Note, *The Iowa Parental Responsibility Act*, 55 Ia. L. Rev. 1037 (1970).
104 *Id.*
105 *Id.*
106 Acts 1969 (63 G.A.) ch. 292, § 1.
107 Iowa Code Ann. § 25A.2 as amended by Acts 1969 (63 G.A.) ch. 81, § 1, 2.

federal authority or upon any other duty requiring the entire time of the organization or person . . . .[108] This provision merely precludes a suit against the state where the guardsman is not in "active state service". A potential claimant may still seek relief under the Federal Tort Claims Act in such situations. This amendment to the statute presents one major problem; it leaves the issue of retrospectivity unsettled. The second amendment to the "Iowa Tort Claims Act" redefines "professional personnel" such as doctors who render services to patients at state institutions, as employees, whether the doctor works on a full or part-time basis.[109]

PROPRIETARY AND PROBATE LAW

Arthur E. Ryman, Jr.†

I. Scope of Survey

Included in this broad Survey of property and probate law are cases decided by the Iowa Supreme court during the year following July 1, 1969, and legislation adopted by the 63rd General Assembly, First Session (1969). With rare exception, cases decided in the courts of the United States and other states are not included. Only the statutes adopted by the 63rd General Assembly in its 1969 session having a rather direct relationship to property and probate law and of general interest are included in this survey. Legalizing acts are excluded, and the decisions of the Supreme Court of Iowa primarily of interest for matters other than proprietary or probate law will not be discussed. Cases concerned with contracts, Uniform Commercial Code, warranty and liabilities based on ownership;[1] cases dealing with construction of contracts;[2] cases decided on con-

108 Iowa Code § 29A.1 (5) (1966).
109 Iowa Code Ann. § 25A.2 (Cum. Supp. 1970).

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1 Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970) (products liability); Capner v. Gyn, 173 N.W.2d (Iowa 1970) (negligence, invitee); Berge v. Harris, 170 N.W.2d 621 (Iowa 1969) (dramshop act, strict liability and the defense of complicity); Federated Mut. Implement & Hardware Ins. Co. v. Dunkelberger, 172 N.W.2d 137 (Iowa 1969) (dramshop act); Schmitt v. Jenkins Truck Lines, 170 N.W.2d 632 (Iowa 1969) (motor vehicle owner's liability statute); Steffens v. Proehl, 171 N.W.2d 297 (Iowa 1969) (motor vehicle owner's liability statute); Schneerberg v. Grenn, 176 N.W.2d 782 (Iowa 1970) (motor vehicle owner's liability statute; non-consent shown); Johnson Machine Works, Inc. v. Parkins, 171 N.W.2d 139 (Iowa 1969) (labor safety regulation process); Leaders v. Dreker, 169 N.W.2d 570 (Iowa 1969) (trespassing hog); and Mester v. St. Patrick's Catholic Church, 171 N.W.2d 866 (Iowa 1969) (sidewalk fall case); Welkers v. Iowa State Highway Comm., 172 N.W.2d 790 (Iowa 1969) (uniform commercial code); Kaiser Aluminum and Chemical Sales v. Hurst, 176 N.W.2d 166 (Iowa 1970) (uniform commercial code); General Motors Corp. v. Keil, 176 N.W.2d 837 (Iowa 1970) (uniform commercial code).

2 Community School Dist. of Postville v. Gordon N. Peterson, Inc., 176 N.W.2d 169 (Iowa 1970).

tracts issues;[3] cases and statutes involving urban renewal and low rent housing;[4] cases concerned with the protection of proprietors against torts;[5] procedural cases;[6] evidence cases,[7] except those of immediate proprietary interests;[8] and sovereign immunity cases[9] will not be reviewed in this Survey.

II. Government, Proprietors and Policy

A. *Public Interest and Private Injury*

Despite the huge burden of reading and analysis placed upon the Iowa supreme court by de novo appeals,[10] and the inevitable factual orientation of opinions required by such cases, significant jurisprudential ferment is reflected in several decisions rendered during the survey period. The majority opinion by Justice Rawlings and dissenting opinion by Justice Stuart in *Board of Supervisors of Cerro Gordo County v. Miller*[11] present not only an excellent review

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[3] Claybing v. Whitt, 171 N.W.2d 623 (Iowa 1969) (stock transfer contract rescision due to mutual mistake).

[4] Webster Realty Co. v. City of Fort Dodge, 174 N.W.2d 413 (Iowa 1970) (urban renewal bonds). *See also* Chapters 238 and 239, Laws of the 63rd General Assembly, First Session, (1969) dealing with modification of urban renewal and low rent housing conflict of interest rules, and establishing an alternate method of initiating low rent housing projects, respectively.

[5] Markwardt v. Board of Assessment, 174 N.W.2d 396 (Iowa 1970) (real property tax assessment valuation); South Iowa Methodists Homes Inc. v. Board of Review, 173 N.W.2d 526 (Iowa 1970) (charging tenant did not disqualify nonprofit corporation from tax exemption).

[6] Davis v. L. & W. Constr., 176 N.W.2d (Iowa 1970) (strict liability for property damage by blasting) citing to Lubin v. City of Iowa City, 257 Iowa 383, 131 N.W.2d 765 (1965)).

[7] Allied Concord Financial Corp. v. Hawkeye Lumber Co., 172 N.W.2d 264 (Iowa 1969) (unsuccessful attempt to foreclose security in support of a note signed without recourse does not bar an action against assignor, on the theory that assignor's contract that the security would be a first lien was breached); Ash v. Ash, 172 N.W.2d 801 (Iowa 1969) (a refusal to modify a divorce decree requiring equal division on a basis of a two acre difference in a 160 acre tract); Heatherington Letter Co. v. O.F. Paulson Construction Co., 171 N.W.2d 264 (Iowa 1969) (discussion of specific performance, under mechanic's lien); Claeys v. Moldenschardt, 169 N.W.2d 885 (Iowa 1969) (procedural decision on action to set aside default judgment in guardian's claim to recover property acquired from ward). Wilkes v. Iowa State Highway Comm., 172 N.W.2d 790 (Iowa 1969) (supreme court compares a petition in response to an appeal by the Highway Commission to a compulsory counter claim); Boomhower v. Cerro Gordo County, 173 N.W.2d 95 (Iowa 1969) (certiorari was untimely filed from a zoning decision).

[8] Heatherington Letter Co. v. O.F. Paulson Construction Co., 171 N.W.2d 264 (Iowa 1969); Bellew v. Iowa State Highway Commission, 171 N.W.2d 284 (Iowa 1969) (limited use of heresay evidence to establish knowledge by expert in a condemnation case); Estate of Thompson v. O'Tool, 175 N.W.2d 598 (Iowa 1970) (evidentiary review in de novo appeal determining evidence insufficient to meet clear and convincing requirement to establish an oral lease contrary to a prior written lease where some evidence was excluded under the deadman's statute); In re Estate of Cory, 169 N.W.2d 837 (Iowa 1969) (will contest; Use of circumstantial evidence to establish undue influence, jury misconduct and limitation on cross examination).

[9] Peddicord, *Survey of Iowa Law*, 20 Drake L. Rev. 288 (1971).

[10] Some variant of the short paragraph asserting the duty of the court to review de novo in equity cases, giving weight to the findings of the trial court, but not being bound by them, with the appropriate citation, appeared so frequently in the cases surveyed that the court should approve a standard form and have a rubber stamp made.

[11] 170 N.W.2d 358 (Iowa 1969). Chief Justice Garfield and Justices Snell and LeGrande joined in Justice Rawlings' opinion. Justice Mason did not participate, and Justices Larson, Moore and Becker joined in the opinion of Justice Stuart—thus affirming by an equally divided court.