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.

of American zoning law, but also present, in vivid contrast, the argument for "balancing of public good against private loss"[12] and the response (to such action adversely affecting proprietors) that the "desire to improve the public condition is not enough to warrant achieving the desire by a procedure other than the constitutional way of paying for the change."[13]

At issue was the constitutional validity of the "amortization" clause of the zoning ordinance adopted by the supervisors which stated: "(a). Any automobile wrecking or junk yard in existence in a district in which it is a nonconforming use, prior to the effective date of this ordinance, shall within (5) years from such date become a prohibited and unlawful use and shall be discontinued. . . ." The decision of the trial court, sustaining the authority of the board to prohibit, without compensation, after some "reasonable" period of time (5 years), a use of land which was lawful at the time of the adoption of the ordinance, was affirmed by an equally divided court. The constituency of the court has since changed, and thus, the validity of such ordinances remains in doubt in Iowa, as elsewhere.

The results in several other decisions are of interest in connection with the question under discussion. The nature of the "interest" protected, whether such interest is classified as proprietary by previous orthodox decisions, the value of the interest, and the kind of injury are all important in determining the degree of constitutional protection afforded.

1. *Licensee to Keep License*

In *Smith v. Iowa Liquor Control Commission*,[14] a five-to-four decision with a different division of the court from that in *Board of Supervisors of Cerro Gordo County*,[15] the court held that a liquor license could be revoked without notice or opportunity to be heard, and that the commission was not limited by the normal rules of evidence. The license was classified as a privilege (as opposed to property), citing *Walker v. City of Clinton*.[16] Considering the value of the license at stake, and the investment of the proprietor, such cavalier treatment can only be justified on the basis of a strong public policy against the use of intoxicants—a sort of "bad guy syndrome."

The constitutionality of the implied consent law as a basis for the revocations of a driver-license was sustained in *Kruger v. Fulton*.[17]

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12 *Id.* at 362.

13 Mr. Justice Holmes, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), quoted in Justice Stuart's opinion in *Board of Supervisors of Cerro Gordo County v. Miller*, at page 365.

14 169 N.W.2d 803 (Iowa 1969). The majority opinion was by Chief Justice Garfield, with whom Justices Larson, Snell, Moore and LeGrand concurred; Justice Becker wrote the dissent, in which Justices Stuart, Mason and Rawlings concurred.

15 170 N.W.2d 358 (Iowa 1969).

16 244 Iowa 1099, 59 N.W.2d 785 (1953).

17 169 N.W.2d 875 (Iowa 1969).

2. *Proprietors to Prevent Substantial Change in the Nature of the Community by Rezoning*

In *Hanna v. Rathje*[18] zoning change of a 100 acre tract in the town of Robbins, a suburb of Cedar Rapids having a population of 426, to allow a 500 unit mobile home court to be built was accomplished by amending the zoning ordinance to rezone from residential to commercial after 179 taxpayers (which must have been nearly all the taxpayers in the Town) had protested in writing an attempt to obtain a 'variance.' A 'variance' required, under the ordinance before amendment, a three-fourths vote of the council and sixty percent of the adjoining property owners approval. The supreme court opinion upholding this reorganization of the town contained no discussion of the rights of proprietors in the community to a continuation of the community in reasonably the same form, nor did it contain any discussion of spot zoning. It held that since some benefits might occur in the way of increased revenues the decision of the council was not arbitrary on the facts, and referred to the orthodox view that the prior council could not bind this council by establishing a variance procedure. The power of the council to amend being present, the ordinance was held valid. Apparently no 'right' 'vested' as a result of the variance procedure being adopted, and the court did not distinguish between political and quasi-judicial decision making by the council.

3. *Proprietors to be Taxed Equally*

Unlike the nebulous noninterest of a proprietor in community stability,[19] and the unprotected privilege to continue licensed activities,[20] the right to equality of taxation, was upheld in *Hanselman v. Humboldt County*[21] at the cost of considerable administrative difficulty. Kossuth County, but not Humboldt County, joined in an action by several counties in the Polk County District Court to enjoin the increase in taxable valuation for the year 1968 ordered by the director of the Iowa Department of Revenue. The injunction granted in January, 1969, resulted in unequal assessment for taxes in support of LuVerne Community School District, which includes lands in both Humboldt and Kossuth counties. The Iowa supreme court, citing *Raymond v. Chicago Union Traction Co.*,[22] held the constitutional right of property owners under the fourteenth amendment to taxation not systematically and intentionally discriminatory (here by one dollar per acre) overrides administrative difficulty. To protect the integrity of the school district budget, assessment on the basis of 1967 valuation was ordered.

4. *Proprietor to Prevent Adverse Action of Local Governments*

H. L. Munn Lumber Co. v. City of Ames[23] an appeal from an action in

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18 171 N.W.2d 876 (Iowa 1969).
19 Hanna v. Rathje, 171 N.W.2d 876 (Iowa 1969).
20 Smith v. Iowa Liquor Control Commission, 169 N.W.2d 803 (Iowa 1969).
21 173 N.W.2d 75 (Iowa 1969).
22 207 U.S. 20 (1907).
23 176 N.W.2d 813 (Iowa 1970).

equity by a property owner challenging a special assessment levied by the city, was decided on the basis of statute, without discussion of either constitutional rights or policy of the city's action. Iowa Code Section 398.7 provides that "When the council shall deem it necessary to acquire sites . . . purchase and improve . . . the same as public parking facilities it shall, in a proposed resolution declare it a necessity. . . ." Section 398.14 provides that; "after the passage of the resolution of necessity, the council may . . . order the acquisition of the site." The quoted provisions went into effect July 4, 1965. In May, 1965, a contract for the acquisition of the site was signed between the city and the Northwestern Railroad pursuant to prior action by the city council. The Supreme Court of Iowa discussed the contract, conditions precedent to it, the doctrine of relation back of title, and the doctrine of equitable conversion, and determined the acquisition of the site was before and not after the resolution of necessity adopted January 17, 1967, on which the special assessments were based. Strictly construing the authority of the city, delegated by the legislature under these statutes, the court reversed and remanded, ordering vacation of the special assessment.

5. *Summary*

The problem of proprietors adversely affected by action of municipal corporations exercising zoning authority, administrative bodies exercising authority affecting the taxing laws, and the multitude of similar cases where there are adverse effects on the rights of citizens—proprietary or otherwise—resulting from the exercise of police powers by agencies of local government only marginally responsive to the political process, challenges courts and legislatures to devise inexpensive and effective remedies and to require or to establish criteria which will permit meaningful judicial review.

B. *Eminent Domain*

1. *Similar Sales*

In *Socony Vacuum Oil Co. v. State*[24] the Supreme Court of Iowa first took judicial notice of a joint resolution of the Iowa legislature to establish the authority of the State Executive Council to proceed with an improvement project.[25]

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[24] 170 N.W.2d 378 (Iowa 1969).

[25] Implicit is the orthodox rule that authority for the exercise of eminent domain must come from the legislature. Iowa's legislature has delegated the power of eminent domain extensively, and the question of standards and practices in connection with the exercise of eminent domain by public utilities remains a politically viable issue. Examination of this issue and recommendations by the Iowa State Bar Association would seem in order, especially in connection with the problems of the amorphous rights of proprietors with respect to government, discussed in Part II A.

Several acts adopted by the 63rd General Assembly, First Session relate to eminent domain. e.g., Chapters 264 and 265, broadening the power of eminent domain of a county to make the authority co-extensive with the authority of the county to erect buildings and additions, and providing that the county may contract for options to purchase land necessary for the public use; Chapter 266 providing notice to lien holders in appeals to the district court under Chapter 472, Iowa Code, 1966 (with a legalizing clause); Chapter 216 section 8(11), extending authority to exercise eminent domain (in the manner pro-

And then the court addressed itself to the question of the admissibility into evidence of a property sale where the value had been enhanced by the improvement under construction. Introduction of evidence relating to sales of similar property for the purpose of establishing the value of the property taken, first permitted under the landmark decision of *Redfield v. Iowa State Highway Commission*,[26] was limited in *Jones v. Iowa State Highway Commission*[27] to exclude evidence of a condemnation sale of similarly situated property.

Socony Vacuum Oil Co. v. State,[28] carried that limitation further by excluding evidence of sales of property located where its value would be enhanced as a result of the project for which the property was being taken. Although the court divided five-to-four on this issue, the minority contending that the issue of enhancement went to the weight rather than the admissibility of the evidence, it overruled *Ranck v. City of Cedar Rapids*[29] and *Snouffer v. Chicago Northwest Railway Company*,[30] as authorities permitting the showing of enhancement. Their basis was Article I, Section 18, of the Iowa Constitution which provides that a jury assessing damages "shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."[31] The changes in the constituency of the court should not affect the authority of this decision.[32]

Although the court reversed and remanded for retrial on the basis of *Hoeft v. State*,[33] the decision of *Bellew v. Iowa State Highway Commission*[34] opened the way for extended use of evidence of similar sales. This case involved a partial taking of substantial frontage on both sides of Ashworth Road, approximately two miles west of West Des Moines, for the purpose of an interstate highway. The land was being used for agricultural purposes at the time of the taking and the proprietor asserted that the highest and best use of the land was for suburban residential subdivision. The court stated that evidence of sales of small tracts, including the prices paid, were sufficiently similar under the rule of *Redfield*[35] to be admitted for purpose of determining the highest and best use, but not the value of the subject tract and for the purpose of showing the knowledge of the expert witness testifying as to the value of the tract. The cause had been tried without a jury and there is express language in the findings reflecting limited use of the evidence thus admitted. On that basis the court distinguished

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vided for municipalities) to "aviation authorities" established pursuant to the Aviation Authority Act; Chapter 236, extending to governmental authorities exercising joint powers pursuant to that act for the use of the joint entity.

[26] 251 Iowa 332, 99 N.W.2d 413 (1959).

[27] 259 Iowa 616, 144 N.W.2d 277 (1966).

[28] 170 N.W.2d 378 (Iowa 1969).

[29] 134 Iowa 563, 111 N.W. 1027 (1907).

[30] 105 Iowa 681, 75 N.W. 501 (1898).

[31] IOWA CONST. art. 1, § 18.

[32] Majority opinion by Justice Becker in which Justices Moore, Mason, Stuart and Rawlings joined; Justice Snell dissented with Chief Justice Garfield and Justices Larson and LeGrande joining.

[33] 221 Iowa 694, 266 N.W. 571 (1936).

[34] 171 N.W.2d 284 (Iowa 1969).

[35] Redfield v. Iowa State Highway Commission, 251 Iowa 332, 99 N.W.2d 413 (1959).

the case from *Iowa Development Co. v. Iowa State Highway Commission.*[36] The court indicated that such evidence would also be admissible in a jury trial, equating the finding of fact showing limited use of the evidence with a jury instruction directing limited use of evidence.[37] The experts' information on the prices paid had been obtained from talks with parties to the sale and from an abstracter, and was admitted over an objection that it was hearsay and not the best evidence. The supreme court stated that since it was offered to show the knowledge of the expert and the highest and best use of the land in question, it was not offered to establish the truth of the matters asserted and was not therefore objectionable as hearsay or violative of the best evidence rule.

2. *Tract Subdivision*

The ruling in *Hoeft v. State*[38] prohibiting a showing on direct examination of the value of portions of the land being condemned (for the purpose of establishing the value of the entire tract by showing the value of its parts) was further explained in *Bellew.*[39] The court stated that evidence as to value of portions of the tract might be introduced on *cross examination* of a proprietor's experts to test their credibility and knowledge and to show the basis of their opinions. A summary of authorities on this subject appears in *Jones v. Iowa State Highway Commission.*[40] The court indicated that if the trial court had considered the testimony elicited on *direct* examination as to value of various parts of plaintiff's property solely on the issue of credibility or the highest and best use of the property, but not for the purpose of showing value, no reversible error would have appeared.

In *Powers v. City of Dubuque*[41] plaintiff landowner, relying on *Haines v. St. Louis, Des Moines & Northern Ry. Co.*,[42] sought to have the "before taking" and "after taking" value of his tract of land being condemned, limited to a consideration of a portion of the land that he owned. All of his tract was being used at the time of the taking as a farm, but was zoned for residence. A portion of the tract, however, held a potential for rezoning to commercial purposes and was separated from the rest of the land by the slope of the ground and a lack of sewer service. In *Haines,*[43] where subdivision of the tract owned by the condemnee for valuation purposes was permitted, a part of the tract was in the Des Moines city limits, the two portions being divided by a railroad track. A strip was taken from the portion usuable for residential purposes. The court did not define the criteria distinguishing the two cases, but held that the plaintiff was not entitled to have value predicated upon only a portion of his land,

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36 252 Iowa 978, 108 N.W.2d 487 (1961).
37 Adkins v. Brett, 184 Cal. 252, 193 P. 251 (1920) and 1 J. WIGMORE EVIDENCE § 13 (3rd ed. 1940).
38 221 Iowa 694, 266 N.W. 571 (1936).
39 171 N.W.2d 284 (Iowa 1969).
40 259 Iowa 616, 144 N.W.2d 277 (1966).
41 176 N.W.2d 135 (Iowa 1970).
42 65 Iowa 216, 21 N.W. 573 (1884).
43 *Id.*

that he had not introduced evidence as to the value of the entire tract and therefore affirmed the trial court's dismissal of his appeal.

In a "partial taking" case, *Wilkes v. Iowa State Highway Commission,*[44] the landowner contended that he owned and had the right to remove buildings located on leased premises adjoining the tract, a portion of which was being taken in the condemnation proceedings, and that he would suffer damage to that personal property as a result of the taking. On disputed facts, these issues had been resolved in his favor by the trial court, which had submitted the question of damage to the personalty (not an enhancement-of-value issue) as a matter for a separate verdict by the jury. The Iowa supreme court specifically approved the separate verdicts in an opinion in which the court pointed out that the former construction of the 1969 amendment to Iowa Code Section 472.14 in *Skaff v. Sioux City*[45] had resulted in "disapproval" by the Iowa legislature as reflected in a subsequent 1965 amendment to the same section. *Skaff* held that the language; "allowance for personal property which is damaged or destroyed or reduced in value,"[46] did not justify inclusion of moving expenses in a condemnation award. The 1965 amendment referred to above specifically permits inclusion of such expenses to the amount of $500, or for a distance of 25 miles. The court placed reliance upon *Des Moines Wet Wash Laundry v. City of Des Moines*[47] for the proposition that full compensation is not limited to the value of the res, but recognized enhancement of value where the property taken is used either separately or in conjunction with other lands for carrying on a trade or business. The court indicated that this is a case of first impression of the issue of the compensability of damage to buildings located on adjoining leased premises not only in Iowa but, perhaps, nationally.

III. Creditors, Liens and Priorities

In *Raub v. General Income Sponsors of Iowa Inc.*,[48] fraud in obtaining a deed to real property was established and the deed was set aside, but a mortgage given by the grantee under the fradulent deed was held good against the defrauded owner. At the time that the mortgage was given the grantor was in possession as a tenant of the grantee. The court discussed investigation notice, citing to *Clark v. Chapman*[49] and other cases, but held that possession of the grantor not inconsistent with the grant does not generate such notice as to deprive the mortgage of the protection of the Recording Act, citing to *Booth v. Cady.*[50] Some language of the opinion suggests that a mortgagee is regarded *the same as* a purchaser under the Recording Act, Iowa Code 558.41 (1966),[51]

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44 172 N.W.2d 790 (Iowa 1969).
45 255 Iowa 49, 120 N.W.2d 439 (1963).
46 Iowa Code § 472.14 (1962).
47 197 Iowa 1082, 198 N.W. 486 (1924).
48 176 N.W.2d 216 (Iowa 1970).
49 213 Iowa 737, 239 N.W. 797 (1931).
50 219 Iowa 439, 257 N.W. 802 (1934).
51 Brunsdon v. Brunsdon, 199 Iowa 1099, 200 N.W. 823 (1924).

and therefore takes free of non-record equities of which he has no notice.[52] This seems to reflect some doubt on the part of the court that the recording act applies directly rather than by analogy. Although Iowa follows a lien theory of mortgages rather than a title theory, it would be unfortunate if any doubt should arise that a mortgagee is a purchaser within the meaning of the recording statute. The opinion contains an excellent summary of notice generating a requirement for inquiry, and the scope of the inquiry to be pursued.[53]

In *Rouse v. Rouse*,[54] the chattel mortgagee inititated foreclosure proceedings on a security agreement against debtor, and sought to obtain a temporary injunction (ex parte) against a judgment creditor of the defendant. The judgment creditor entered the case and moved for appointment of a receiver, and the motion was granted. The receiver then sold the property in question and, on appeal, it was contended that the receiver should not have been appointed on the motion procedure, but should have only been appointed upon a petition for that purpose. The Iowa supreme court held that the parties had waived such objection, and that no prejudice had resulted.

Milwaukee Western Bank v. Cedars of Cedar Rapids, Inc.[55] presented several issues and solutions thereto, which may be summarized as follows:

(1.) A receiver appointed in connection with negotiations in a contested foreclosure proceeding retained possession during the redemption period which had been shortened by provisions of the mortgage pursuant to statute.[56] The court found the claim of a right to possession during the redemption period to be untimely and did not decide the effect of the statute when receivership is involved.

(2.) Mortgagor was an Iowa corporation wholly owned by an attorney admitted to practice in Wisconsin, who first appeared and resisted foreclosure, but subsequently withdrew his appearance and permitted appointment of the receiver. Default was entered and, without further notice to the mortgagor, the property was sold. Notice to start redemption period running was served upon the agent of the receiver in possession and by publication. It was held that the mortgagor, a corportion wholly owned by an attorney who had appeared in the case, was not in a position to claim lack of knowledge of the fact that a sale would expire. The issue of who is entitled to redemption notice is of obvious importance in light of *Mullane v. Central Hanover Bank and Trust Company*.[57]

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52 Bell v. Pierschbacher, 245 Iowa 436, 62 N.W.2d 784 (1954).

53 See, Johnson v. Chicago B. & O. R. Co., 202 Iowa 1282, 1289 N.W. 842, 846 (1927), wherein the court stated:

> It is a well established principle that notice is either knowledge or having means of knowledge, although such means may not be used. One who purchases land, with knowledge of such facts as would put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely by another, is chargeable with the actual notice that he would have received.

54 174 N.W.2d 660 (Iowa 1970).

55 170 N.W.2d 670 (Iowa 1969).

56 Iowa Code § 628.26 (1966).

57 339 U.S. 306 (1950).

(3.) Mortgagor moved for an extension of the redemption period, and coupled with it an application for a temporary injunction prohibiting the purchaser at mortgage sale from disposing of the property. The temporary injunction was granted. The court held that the mortgagor was not liable in damages for the amount of the adversary's attorney's fees incurred in the temporary injunction procedure which was ancillary to the main issue presented by the motion for extension of the time to redeem.

IV. Basic Property Interests and Concepts

A. *Civil Rights*

Although this survey is confined to the Iowa Law, it would not be complete without at least short reference to *Sullivan v. Little Hunting Park, Inc.*[58] This decision extends the coverage of the Civil Rights Act of 1866, justified under the enabling clause of the *13th Amendment* to protect the white owner of a house and his black leasee, from discrimination by refusal of the board of the defendant, Little Hunting Park, Inc., to approve assignment of a membership share in this non-stock corporation, which entitled the holder to use community park and playground facilities operated by the corporation. The refusal of approval was not shown to be for any cause other than the race of the leasee.

B. *Life Tenant and Remainderman*

Offermann v. Dickenson[59] was a law action by a remainderman against the life tenant for waste and ouster. The supreme court opinion was devoted largely to a review of facts indicating that the improvements, long in the possession of the life tenant, were in a state of dilapidation, one of them having been condemned by a public health authority. The life tenant apparently did not introduce adequate evidence to establish a basis of apportionment between repair and capital improvements, and so the trial court's denial of relief was affirmed.

Section 5 of Chapter 294, Laws of the 63rd General Assembly, First Session (1969) adds a new section(103) to the Iowa Probate Code[60] relating to allocation of corporate distributions between principal and income. A survey of the Iowa legal context against which this new statute may be interpreted is found in *In re Trust of Butler.*[61] The provision of the new statute allocating corporate distributions of a share of the distributing corporation to principal is an adoption of section 6(A) of the 1962 revision of the Uniform Principal and Income Act. The provision of the new statute allocating distribution from ordinary income by certain investment companies and trusts to income is section 6(c) of the Uniform Act. Decisions from other jurisdictions dealing with Uni-

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[58] 90 S. Ct. 38 L.W. 4059 (1960).
[59] 175 N.W.2d 423 (Iowa 1970).
[60] Iowa Code ch. 633 (1966).
[61] 261 Iowa 445, 154 N.W.2d 705 (1967). *See also* Notes and Legislation, 32 Iowa L. Rev. 521-26 (1947).

form Act Sections which Iowa has adopted will surely be relevant to interpretation of these new sections, but uniformity of interpretation cannot be expected in connection with "hunt and peck" adoption from such a statute. The situations expressly covered in the omitted portions of section 6 of the Uniform Act may make a fertile field for litigation.

C. *Realty or Personalty; Time of Vesting*

In *Linwood Stone Products Co. v. State Department of Revenue*[62] it was held that limestone rock was not sufficiently severed from the realty to qualify for tax exemptions applicable to personal property in a processing enterprise pursuant to Iowa Code Chapters 422 and 428 (1966), until it had reached the stone crusher used in the processing operation.

D. *Relation Back and Equitable Conversion*

H. L. Munn Lumber Company v. City of Ames,[63] is a taxpayer's action wherein the court upheld the equity action challenging a special assessment of the basis that the council had contracted for the improvement site before adoption of the "resolution of necessity" required in Iowa Code Section 390A.14 (1966). The opinion includes an extensive discussion of the doctrine of relation back of title and of the doctrine of equitable conversation. However, it cannot be said that this opinion is entirely clear as to the doctrines mentioned. The Court said that a condition precedent to performance of a contract to buy realty does not preclude application of this doctrine of equitable conversion. This appears to mean that equitable title vest in the vendee at the time the contract is signed, dividing the legal and equitable titles rather than converting personalty to realty. This interpretation is reinforced by citation to *In re Estate of Bernhard*,[64] and quotation of the following language: "[W]hen the title passes under the terms of the contract, it relates back to the date of the contract, and the vendor is treated as holding the legal title as trustee for the purchaser. This result is said to rest upon the principle that equity regards that as done which is agreed to be done."[65]

The court further said that delivery of the deed related back to the time of agreement. If by this the court meant that the doctrine that a deed delivered in escrow and subsequently delivered by the escrow agent to the vendee is treated as passing the legal title at the time of the first delivery is applicable to this case, the doctrine would appear to apply to every case in which a deed is subsequently delivered pursuant to an executory contract for the sale of land.[66] Thus, the interest acquired by the vendee would be equitable until the deed was actually delivered, but would become a legal interest dating from the time of the con-

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[62] 175 N.W.2d 393 (Iowa 1970).
[63] 176 N.W.2d 813 (Iowa 1970).
[64] 134 Iowa 603, 112 N.W. 86 (1907).
[65] *Id.* at 607, 112 N.W. at 87.
[66] Cases on the doctrine of relation back of title can be found at *Annot.*, 117 A.L.R. 69 (1938).

tract as soon as the deed was delivered. Such an extension of the relation back concept from the conditional delivery cases in which it originated would appear to be both unnecessary and undesirable.

E. *Options*

In *Figge v. Clark*,[67] plaintiff conveyed land to defendant pursuant to a contract reserving an option to re-purchase a portion of the land conveyed. There was a variance as to the dates during which the option could be exercised in the contract and the deed made pursuant to it. Holding the option had been exercised by the earlier date prescribed by the contract, the court did not have to reach a decision whether the contract had been merged in the deed. An oral statement by the attorney for the optionee that the optionee would give the sum stated upon receipt of a deed at any time thereafter, followed by efforts to reach the defendant, including the employment of investigators, was held a sufficient exercise, citing to *Steele v. Northup*.[68] The option is not entirely clear whether the expression of counsel for the plaintiff, which could be construed as imposing a condition precedent to the tender of the performance by the optionee even though it seems a clear manifestation of intent to exercise the option, was sufficient by itself, or binding only when further action was impeded by the difficulty of finding the optioner. It is clear that an option may be exercised orally unless the option contract prescribes another method. The intention of of the parties appearing from the contract and competent parol evidence is the determining factor. The court appears to have allowed exercise by any method which was not inconsistent with the contract, which amounts to construction of the contract in favor of the optionee.[69]

F. *Easement*

Injunctions to protect an easement of way were granted and upheld in *Schwartz v. Grossman*.[70] The Supreme Court of Iowa stated the usual rule that the owner of an easement may not change its use to cast an added burden on the owner of the servient tenement, and held that no such change had been shown in the case at bar. The permanent injunction was granted on a showing that the owner of the servient tenement and his tenant did not intend to discontinue obstruction of the easement in a case where a drive-in had been constructed with parking spaces marked so that cars would be blocking the way, with concrete wheel stops also placed in the way. The court, noting that the tenant in possession of the servient tenement had actual and constructive knowledge of the easement, held that he was bound by it. It is doubtful that in the absence of fraud or other affirmative defense a question of knowledge would be significant since the title of the leasee is derivative.

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[67] 174 N.W.2d 432 (Iowa 1970).
[68] 259 Iowa 443, 143 N.W.2d 302 (1966).
[69] *See* Breen v. Mayne, 141 Iowa 399, 118 N.W. 441 (1908); Maytag Company v. Alward, 253 Iowa 455, 112 N.W.2d 654 (1962).
[70] 173 N.W.2d 57 (Iowa 1969).

G. *Drainage and Water Law*

There was considerable action by the Iowa legislature in 1969 concerning local agencies having jurisdiction of public improvements. For example, Chapter 262, Laws of the 63rd General Assembly, First Session (1969) provided authority for the Water Pollution Control Commission to cooperate with other agencies of the state concerning themselves with agriculture, livestock, and poultry operators in respect to problems of pollution. The problem of proliferation of agencies with overlapping jurisdiction will probably command considerable attention, and large scale efforts at consolidation may be expected over the next several years.

The first session of the 63rd General Assembly undertook a considerable re-working of the law concerning drainage and levy districts in Chapter 260,[71] involving elements of consolidation, special assessment procedures, remonstrance proceedings and other matters.

In *Rosendahl Levy v. Iowa State Highway Commission*,[72] wherein the trustees of the district and proprietors within the district join in an action against the Highway Commission for protection of their drainage flow rights, the court treated the action as though it were brought by the land owners and no discussion of the authority of the trustee of the drainage district to pursue such an action against the Highway Commission is included. The supreme court allowed a mandatory injunction against the Iowa State Highway Commission protecting drainage rights pursuant to statute requiring the Commission to use "strict diligence" in draining surface water from roadways and natural channels to avoid injury to owners.[73]

VI. Conveyancing

A. *Boundaries*

In *Vestergaard v. Lawson*,[74] defendant acquired lots 5 and 6, block 32 in Meneyatta Park a subdivision in the town of Wahpeton, and unplatted adjoining land. Block 32 contains adjoining lots 1 through 6, and includes the dimensions of each lot, except lot 3, which was not rectangular due to an angle in the street. The plat contained a scale (1 inch equals 40 feet). The plat of Ebersole's Canals, an adjoining subdivision, contained a graphic of Block 32 Meneyatta Park showing a dimension for each lot; the dimension shown for Lot 3 was about 26 feet smaller than the dimension obtained by applying the scale shown in the plat of Meneyatta Park. Defendant claimed boundaries based on the graphic shown in Ebersole's Canals against the plaintiff owner of Lot 4 who claimed his boundaries based on the scale shown in the plat of Meneyatta Park. No acquiescence title was shown, and estoppel and adverse possession were not pleaded. The Iowa supreme court held that description by reference to Meneyatta Park in

71 Ch. 260 [1969] Iowa Acts.
72 171 N.W.2d 530 (Iowa 1969).
73 *Id.*
74 176 N.W.2d 149 (Iowa 1970).

the deeds of the parties properly referred to that plat and not to the graphic of Ebersole's Canals. The decision is orthodox, and constitutes a new warning against reliance upon composite plats or unofficial graphics to determine location or dimensions of land described by a reference to an official plat.

In *Ivener v. Cowan*[75] the owner of lands in Section 1, Township 89, Range 47 W. claimed a portion of land adjoining that section lying in Section 6, Township 89, Range 46 W., which was east of the Floyd River, on the basis of acquiescence and estoppel. In an opinion largely devoted to analysis of the facts in the equity appeal from the action for injunction and to quiet title, the court held that the river was a *barrier* and not a boundary, and that the owner of the portion east of the river had not acquiesced in the river as a boundary. The claim was based on an east-west fence along the north boundary to the river, occasional use as an area for cattle forage, and a contract with the Corps of Engineers permitting refuse from a river-straightening project to be burned on the land. The owner of the lands in range 46, in addition to hunting the land, paid the taxes, negotiated a pine line easement, and received compensation from the Corps of Engineers in connection with the river-straightening project. The opinion provides little assistance to lawyers concerned with problems of acquiescence boundaries except as one more factual example for comparison.

B. *Escrow and Agency*

In *Darling v. Nineteen-Eighty Corporation*,[76] a bank officer, acting as agent for plaintiff-owner, had negotiated with defendant for the sale of the subject land prior to plaintiff's contracting (for more money) with another party for the sale of the same land. Plaintiff sought to quiet title and defendant counterclaimed for specific performance. The bank officer was a trustee for plaintiff with respect to property not involved in the law suit, and had a close personal relationship with him. In the course of the negotiations, the parties formed a contract for the sale of land to the defendant, reciting payment of a deposit of $10,000 (which was not in fact paid), a deed to the subject land and a letter of transmittal, stating that "said deed will be held by us in escrow pending final payment of the contract of sale."[77] Plaintiff executed the instruments and mailed them to the bank officer, but while they were in transit he received through the bank officer a higher offer for the land, and he instructed him not to deliver the contract and deed to the defendant. The court held that the fiduciary and confidential relationship between the bank officer and the plaintiff precluded the bank officer from becoming an agent for both parties in connection with the transmittal of the contract and deed, and that mailing of the contract and deed to his own agent, not an agent of the other party or common agent, did not constitute an acceptance of the contract, and, therefore, the escrow ar-

[75] 175 N.W.2d 121 (Iowa 1970).
[76] 176 N.W.2d 765 (Iowa 1970).
[77] Id. at 769.

rangement did not come into existence.[78] The opinion distinguishes *Hayne v. Cook*,[79] a case containing a substantial summary of the Iowa law relating to delivery and acceptance of contracts.

C. *Marketable Title Legislation and Decisions*

Marketable title legislation can be dated from adoption, in Iowa, of the "Affidavit of Possession" statute[80] permitting a *possessor* under *title of record*, since a fixed date, to show possession of record by affidavit, thus barring claims inconsistent with his possession under that record title which had not been preserved by an affidavit of claim filed of record. Iowa conveyancers have not construed that statute to bar claims, in the chain of record title under which the current possessor claims, interests limited specifically by other limitation statutes (dower, mortgages), or claims reflected by current usage of the land. Legislation extending the operation of limiting and curative acts to permit shortened title search and to eliminate, without resort to quiet title or other litigation procedures, stale claims in the chain of title was recommended in Symes and Taylor, *Improving Conveyancing by Legislation*.[81] This recommendation couples the concept of improving reliability of record title with the custom of conveyancing lawyers in some jurisdictions to search the title only for a limited period prior to the time of search.[82]

In 1965 the Iowa legislature adopted the "Stale Uses and Reversions" statute[83] aimed at possibilities of reverter, rights of reentry and "use restrictions" in the chain of title originating more than 21 years prior to examination and not preserved by affidavit of claim. A review of that statute and cases considering the constitutional aspects of such legislation may be found in the Drake Law Review.[84]

The Iowa Forty Year Marketable Title Act,[85] adopted in 1969 and fully effective in 1970, resembles the model in the Symes and Taylor book and is similar to the Florida Statute interpreted in *Marshall v. Hollywood, Inc.*[86] where the supreme court of Florida said: "It is undoubtedly the most important piece of legislation dealing with real property titles enacted in the State of Florida in many years . . . . The purpose of the act is to simplify and facilitate land transactions by allowing persons interested therein to rely on a record title

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78 *Restatement of Contracts*, § 102(3) (1964); Lucas v. Western Union Tel. Co., 131 Iowa 669, 109 N.W. 191 (1906).

79 251 Iowa 1012, 109 N.W.2d 188 (1961).

80 IOWA CODE § 614.17 (1966).

81 L. SIMES & C. TAYLOR, IMPROVING CONVEYANCING BY LEGISLATION (1960).

82 *See*, Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957). *See also*, Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949); Gerard Trust Co. v. Pennsylvania R.R., 364 Pa. 576, 73 A.2d 371 (1950); Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181 (1965).

83 IOWA CODE § 614.24 (1966).

84 Ryman, *The Iowa "Stale Uses and Reversions Statute": Parameters and Constitutional Limitations*; 19 DRAKE L. REV. 56 (1969).

85 Ch. 281 [1969] Iowa Acts.

86 224 So. 2d 743 (Fla. 1969).

. . . ."[87] An article on the model act by Professor Barnett[88] was cited by the Forida court for the proposition that a forged or fradulently obtained deed forming a link in the chain of title *prior to* the "root of title" is a defect extinguished by the act. The interpretation given this legislation in other states is likely to be very persuasive though uniformity is of less consequence in real property law than in commercial transactions. The favorable attitude of the Florida court is especially persuasive in light of *Biltmore Village v. Royal*[89] wherein the Florida court held a statute[90] similar to Iowa's "Stale Uses and Reversions" statute[91] to unconstitutionally impair the obligation of a restrictive covenant.

The history and correlation of Iowa's marketability legislation is summarized here in connection with the new Forty Year Marketable Title Act. The Iowa supreme court declared that these statutes must be construed together to effectuate their purpose of facilitating title transfer as statutes *in pari materia* in *Chicago and Northwestern Railway Co. v. City of Osage.*[92]

The court held a contingent reverter interest in favor of the City of Osage derived from deeds in 1891 barred by the "Stale Uses and Reversion" statute.[93] It rejected the contention that that statute is a statute of non claim, applicable to the sovereign, but decided that a municipality is "any person" and its claim is "any claim" within the limitation of the act. The opinion points out the provisions of the Forty Year Marketable Title Act (relevant as being *in pari materia*) expressly includes governmental agencies, except the United States which it expressly excludes from the operation of the act. It would be hard to conceive an opinion reflecting a more favorable attitude to marketability legislation.

The key to understanding the Forty Year Marketable Title Act is the "root of title" concept. "Root of title" is the record conveyance of the interest under examination occurring forty years or more prior to the time of examination of title. With a few exceptions transactions or interests prior to the "root of title" need not be examined since claims based on such transactions are barred unless renewed by filing a claim affidavit of record. The exceptions are:

1. Any interest of the United States.
2. Recorded interest subsequent to the "root of title," including interests not indexed under the claimant's "root of title."
3. Any interest shown in the muniments of title during the last forty years, except that reference to interest prior to the root of title must specifically identify the transaction.
4. Reversionary interests after a lease of a term for years.
5. An interest held by one in possession for the forty years last past.
6. An interest based on adverse possession within the past forty years.

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87 *Id.* at 748.
88 Barnett, *Marketable Title Act—Panacea or Pandemonium,* 53 CORNELL L.Q. 45 (1967).
89 71 So. 2d 727 (Fla. 1954).
90 Chap. 26927, [1951] Fla. Law 1131 (declared unconstitutional in 1954).
91 IOWA CODE § 614.28 (1966).
92 176 N.W.2d 788 (Iowa 1970).
93 *Id.*

7. Any easement or interest in the nature of an easement apparent or provable by physical evidence of its use.[94]

An abstract based on a tract index should show all recorded interests, and exceptions (2) and (3) create no special problems except to check the certification of the abstractor. An investigation of possession of the land coupled with an affidavit of possession pursuant to the Iowa Code Section 614.17 (1966), will reveal or bar any claims under exceptions (4), (5), (6) and (7) with the possible exception that an interest in the nature of an easement could be shown by physical evidence of use where inspection might not discover it, as with underground lines, sewer, etc. or restrictive covenants where the "use" is negative but physical evidence of, for example, a set back line could be adduced. Custom will ultimately determine what precautions need be taken to protect against claims by the United States. Since there is very little public domain held by the United States in Iowa, requiring an abstract of the original patent may be unnecessary except where there is some basis to question the matter. The United States would not rest on its rights for forty years in any ordinary case, and it would seem an excess of caution to scan an abstract prior to the "root of title" to negative such a remote possibility. Perhaps abstractors will be willing to certify that no United States interest is reflected by any record transaction prior to the "root of title".

When an examiner is relying on this legislation his title opinion should caution the purchaser to investigate possession and use of the land, and requiring an affidavit of possession is clearly called for to protect against reversionary rights.

VII. Wills, Estates, and Fiduciaries

A. *Procedure*

Chapter 294, Acts of the 63rd General Assembly, First Session (1969), is "an Act relating to various changes in the probate law," and includes some sections dealing with probate procedure. References to sections are to sections of the enactment.

Section 11 amends the Probate Code section pertaining to the sale of property[95] by adding a definition of *persons interested* (entitled to notice) including all distributees and *persons who have requested notice* as provided by the Code. Section 12 substitutes a new section on the right of the personal respesentative to retain property as offset to debts owed by distributees to the decedent's estate.[96] This new section provides that in intestate estates the personal representative shall have the right of set-off and retainer against an heir whose ancestor was indebted to the estate. Although the term "heir" is defined by the Code[97] as including those who take by intestate succession, it has not yet been established whether this definition modifies the pre-existing Iowa law that a surviving spouse is not an heir.[98] Section 8 changes the Code provision dealing with time

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94 Chap. 281 [1969] Iowa Acts.
95 Iowa Code § 633.389 (1966).
96 Iowa Code § 633.471 (1966).
97 Iowa Code § 633.3(21) (1966).
98 McAllister v. McAllister, 183 Iowa 245, 167 N.W. 78 (1918).

for initiating contests[99] from "a petition to contest or set aside the probate of a will must be filed. . . ." to "an action . . . must be commenced . . . ." This would seem to require a timely service of original notice under the rules of civil procedure. Section 13 is a technical amendment to the probate law dealing with admission of foreign probated wills,[100] substituting the word "certificate" for "attestation". The terms are used in the statute in relationship to certification by the clerk or judge in the foreign court in which the will was admitted to probate.

The matter of proper forum was at issue in *In re Guardianship of Pappas*.[101] A creditor's claim was filed in the guardianship estate. The ward died. The claim was tried in the guardianship proceeding, an appeal was taken on the basis that pursuant to Sections 644.675, .677, and .678, Iowa Code, 1966, providing for termination of guardianship upon the death of the ward and accounting by the guardian and delivery of assets under the direction of the court, the claim should have been transferred to the decedent's estate. The supreme court held that the claim should have been tried in the decedent's estate, but that the matter was not jurisdictional, nor even divisional, and had been waived.[102]

The court held that the fact of a common law marriage was triable in equity to determine the claim of right to administer a decedent's estate pursuant to Iowa Code Section 633.33 (1966), in the case of *In re Estate of Fisher*.[103]

Chapter 273 enacted by the First Session of the 63rd General Assembly, (1969) is the new Iowa Banking Act. Included in that Act are procedures for inspection and transfer of the contents of safety Deposit Boxes at the death of the owner.

B. *Fiduciaries*

1. *Qualification, Appointment, and Authority*

The new Iowa Banking Act,[104] in addition to establishing a superintendent of banking, authorizing examination and requiring reports, includes several matters relating to trust administration. Commercial banks and existing trust companies appear to have an exclusive authorization to act as corporate trustees, and there are several provisions relating to their authorization as fiduciaries. Detailed examination of this Statute is beyond the scope of the survey.

The Iowa legislature, in the 1969 act, made several changes relative to fiduciaries. Section 1 of Chapter 294, Laws of the 63rd General Assembly, First Session (1969), amends the Probate Code provision relating to qualification of a resident fiduciary to limit the qualification of corporate fiduciaries to exclude all corporations except banks and trust companies authorized to act in

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99 IOWA CODE § 633.309 (1966).
100 IOWA CODE § 633.496 (1966).
101 174 N.W.2d 422 (Iowa 1970).
102 *Id. See also,* In re Guardianship of Dawson, 238 Iowa 570, 28 N.W.2d 48 (1947).
103 176 N.W.2d 801 (Iowa 1970).
104 IOWA BANKING ACT OF 1969.

a fiduciary capacity in Iowa.[105] This Section correlates with the new Iowa Banking Act. Section 2 makes the same change with respect to the provisions of the Probate Code pertaining to non-resident fiduciaries.[106] Section 3 provides that resident and non-resident fiduciaries submit themselves to the jurisdiction of the court by qualifying, and provides for continuing jurisdiction of the court and service of process in conjunction with the new provisions included in section 4 of the act establishing a "long arm" statute. These are new section of the Probate Code.[107] Section 6 amends the Probate Code relating to waiver of bond for fiduciaries[108] to eliminate the requirement of bond by a corporate fiduciary unless required by the instrument. This section, too, should be read in conjunction with the new Iowa Banking Act. Sections 9 and 10 amend Probate Code provisions pertaining to temporary administrators by combining former Sections 633.342 and 644.343, and adding a new Section 633.343, permitting an appointment of a temporary administrator by the court for good cause shown at any time during the administration of an estate. Chapter 126, Laws of the 63rd General Assembly, First Session (1969), empowers the Iowa Liquor Control Commission to authorize an executor or administrator of an estate to continue operation of a licensed business for a reasonable period of time.

2. *Investments*

The contention was raised in *Webster Realty Co. v. City of Fort Dodge*[109] that the provisions of the Urban Renewal Law relating to investment by executors, administrators and trustees (among others) in urban renewal bonds[110] had not been complied with. In connection with this issue the court held that, assuming for the sake of argument, that failure of compliance with the provisions of this section would prohibit a fiduciary from investing in the bonds, such failure would not effect the validity of the bonds. Although this does not constitute a decision that lack of compliance does generate a prohibition upon investment by a fiduciary, the implication is strong enough that fiduciaries investing in urban renewal bonds should take care to ascertain that the bonds are secured by an agreement between the issuer and the federal government in conformity with the statute. Some fiduciaries may fall into a trap by investing in these bonds on the assumption that the statutory authority is unqualified.

3. *Confidential relations*

A fiduciary, or quasi-fiduciary, responsibility is imposed under our law in several situations where the nature of the relationship of the parties is one of trust and confidence, or where the public interest demands it, even though no

105 Iowa Code § 633.63 (1966).
106 Iowa Code § 633.64 (1966).
107 Adding section 633.71 and 633.72 to the Iowa Code.
108 Iowa Code § 633.17 (1966).
109 174 N.W.2d 413 (Iowa 1970).
110 Iowa Code § 403.10 (1966).

formal trust or other fiduciary relationship in fact exists. Iowa Code Chapters 403 and 403A (1966), dealing with urban renewal and low rent housing were amended in 1969[111] decreasing the severity of rules pertaining to conflicts of interests and defining what constitutes a conflict of interest pursuant to those statutes.

In *Moorhead v. Miller*[112] the Supreme Court of Iowa reviewed the evidence de novo to determine whether a daughter who had received a deed to a 160 acre farm from her mother, where the daughter had been assisting the mother in the home business transactions, was in such a dominant-servient confidential relationship as to void the deed. The court cited to the landmark decision in this area, *Curtis v. Armagast*,[113] and to the decision of *Oehler v. Hoffman*,[114] which summarizes the Iowa law. The court held the evidence in the case did not establish the confidential relationship. In *North v. Manning Trust and Savings Bank*,[115] another de novo review, the court found there was no fiduciary relationship, and that a full disclosure was made such that no fiduciary relationship would have been breached had it existed. In *North*, the plaintiff sought to set aside deeds to his three farms which had been transferred to be sold to pay obligations, part of which derived from a check "kiting" scheme. The agreement to transfer the farms was entered into after extended discussion in the offices of an attorney acting on behalf of the banks. In *Darling v. The Nineteen-Eighty Corp.*,[116] the court held that a bank officer who had acted as a trustee with reference to property other than that which was involved in the case was in such a confidential and fiduciary relationship that he was under a duty not to place himself in a position of being an agent for both parties in a real estate contract situation which he negotiated as agent of the former beneficiary. In *Pride v. Peterson*,[117] an action for damages due to fraud, the court held that an attorney acting as an agent who failed to reveal information to his principal could be held to have concealed information by silence for the purpose of tolling the statute of limitations.

C. *Adoption-Inheritance*

Section 7, Chapter 294, Laws of the 63rd General Assembly, First Session (1969) amended the provisions of the probate code pertaining to inheritance rights of adoptive children, expressly extinguishing the right of an adopted person to inherit from natural parents, or natural parents to inherit from an adopted child except when the person adopted was related to the adopting parent or parents within "fourth degree of consanguinity."[118] Measuring relationship by degrees of consanguinity is ambiguous, as consanguinity is measured by

111 IOWA CODE ANN. §§ 403.16, 403A.22 (Cum. Supp. 1970).
112 171 N.W.2d 295 (Iowa 1969).
113 158 Iowa 507, 138 N.W. 873 (1912).
114 253 Iowa 631, 113 N.W.2d 254 (1962).
115 169 N.W.2d 780 (Iowa 1969).
116 176 N.W.2d 765 (Iowa 1970).
117 173 N.W.2d 549 (Iowa 1970).
118 IOWA CODE § 633.223 (1966).

different techniques in the old common law and the cannon or civil law. It is arguable that the degrees are those recognized as separate classes for inheritance purposes under the statutes governing interstate succession. It would appear that the legislature is attempting to distinguish between inter-family adoption and adoption by strangers to the parents of the adoptive child. The situations are, of course, distinguishable on facts since adoption records in nearly all states are confidential, and in a case of adoption by strangers ordinarily neither the adoptive child nor the adoptive parent will know the identity of the natural parents. It would seem, however, that a better way of distinguishing between these two classes of adoption could be found.

D. *Uniform Anatomical Gift Act*

The 1969 Iowa legislature adopted the Uniform Anatomical Gift Act,[119] which provides that an individual of majority age may make a gift of all, or any part, of his body to persons and for purposes specified in the act, and, absent objection by him or by a person with higher priority, the body of a decedent may be given for the same purposes and to the same persons or organizations by a surviving spouse, an adult son or daughter, either parent, an adult brother or sister, a guardian of the decedent, or any other person authorized or under obligation to dispose of the body in that order of priority. The act provides considerable protection to the donees in terms of non-liability unless they have actual notice of objection to the gift. The act specifies the manner in which the gift may be made, including not only a gift by will, but by a document executed *inter vivos* and either delivered or carried on the person of the donor. It must be executed in the presence of two witnesses who must sign the document in the presence of the donor. Amendment or revocation specified by the act include; (1) written or oral statements delivered or communicated to the donee, (2) a signed card or document on his person or in his effects, (3) destruction of any undelivered document and a gift by will which may be amended or revoked in the manner provided for wills, or (4) by execution and delivery to the donee of the signed statement. The time of death, and presumably the fact of death, is to be determined by a physician who attends the donor at his death, or, if there is none, the physician that certifies the death, and that physician may not participate in procedures for removal or transplantation except enucleation of eyes.

E. *Disclaimer*

The two cases decided by the Iowa supreme court during the survey period relating to disclaimer by devisees concern the effectiveness of the disclaimer in a contest with other beneficiaries, and did not reach the issue of the effect of a disclaimer by heir or devisee upon tax liability or rights of creditors of the devisee.[120] These issues are of growing concern in connection with post-mortem

119 IOWA CODE ANN. ch. 142A (Cum. Supp. 1970).

120 That creditors may be adversely affected is clearly established in Iowa. *See* Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20 (1922).

estate planning, and it is probable that the Iowa legislature will soon be called upon to examine legislative proposals in this connection.

Holsteen v. Thompson[121] was a quiet title action contested by a daughter who had been designated as a remainderman of the subject tract by the will of her father. The will left his property, presumably including the subject land, to the wife of the decedent, mother of the remaindermen for life, with authority to settle with the children their rights as remaindermen during her lifetime, and she had so settled with the claimant-daughter, who gave a release and disclaimer as to both her father's estate and any interest in her mother's estate. The language of the court seems to make the decision turn upon an estoppel, although it would appear on the facts that the doctrine of release or surrender would also apply. It is noteworthy that in this case the other children, entitled as remaindermen and plaintiffs, helped raise the money necessary to make the settlement.

In re Estate of Rohn[122] was a declaratory judgment action in probate to determine whether a renunciation (disclaimer, waiver?) of any rights under the will of the testatrix, given during the lifetime of the testatrix, was binding upon the heirs of the renouncing devisee who predeceased the testatrix. The heirs of the devisee claimed their interest pursuant to Iowa's antilapse statute.[123] The opinion contained an analysis of authorities relating to renunciation, pointing out that renunciation after probate was clearly permissible under Iowa authority,[124] that in such case the renounced devise passes by the residuary clause or, if none, to heirs of the decedent.[125] The court cited an annotation in support of their holding that renunciation or disclaimer prior to the death of the testator could be validly sustained at least where consideration was given for the renunciation or the doctrine of estoppel was applicable.[126] The court discussed estoppel on the basis that the relatives of the testatrix did care for her after she became incompetent and after the devisee, who was a stranger to her blood, had renounced. The court then determined that the rights of the heirs of the predeceased devisee rose no higher than his rights, and were, in effect, derivative.

F. *Liens and Claims of State*

In 1969 the Iowa legislature repealed the charge against the estate of a decedent for aid to the blind.[127] It established a lien against the estate of decedents for alcohol care[128] and adopted a legalizing act for sales in estates under the Old Age Assistance lien.[129] The statute also adopted a new procedure similar to that found in the Probate Code.[130]

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121 169 N.W.2d 554 (Iowa 1969).
122 175 N.W.2d 419 (Iowa 1970).
123 IOWA CODE §§ 633.273-74 (1966).
124 Citing *inter alia*, Goodsman v. Jannsen, 234 Iowa 925, 14 N.W.2d 647 (1944).
125 In re Estate of Loranz, 256 Iowa 818, 128 N.W.2d 224 (1964).
126 *Annot.*, 93 A.L.R.2d 8 (1964).
127 Ch. 170 [1969] Iowa Acts.
128 Ch. 128 [1969] Iowa Acts.
129 IOWA CODE § 249.19 (1966).
130 Ch. 170 [1969] Iowa Acts.

G. *Contest of Wills*

In re Estate of Cory[131] was a will contest tried to a jury wherein probate was vacated. The supreme court affirmed. Citing to *In re Estate of Roberts*[132] the court restated the elements necessary to establish undue influence as a ground for setting aside a will: (1) The testator was subject to being influenced; (2) that the person alleged to have influenced the testator had the opportunity to do so; (3) that the person who influenced the testator had the disposition to influence him; and (4) that the will was the result of the influence. The decedent had outlived two wives, and his third wife had signed an antenuptial agreement giving up her share as a surviving spouse. The court approved admission of the agreement into evidence for the purpose of showing her interest or disposition to influence. The will was executed while the testator was visiting children by his first marriage in California, with whom he had not been close for many years, and apparently diminished the share of a child residing in Iowa with whom he had been close and who had benefited substantially from his beneficence. The lawyer drafting the new will took precautions to avoid having it set aside on the basis of mental incompetence, including the taping of his interviews with the testator and obtaining a psychological examination. Probably for that reason, the matter of incompetence was not submitted to the jury. The Supreme Court of Iowa, construing *In re Estate of Telsrow*[133] with *In re Will of Soderland*[134] held that evidence pertaining to the competency of a testator may be relevant in establishing undue influence, but that incompetence is not an element of undue influence. The court approved the submission to the jury of the issue of undue influence without submission of the issue of competency.

H. *Construction of Wills*

1. *Repugnancy*

Two cases, *In re Estate of Lamp*[135] and *In re Estate of Roberts*,[136] pertain to the issues of construction of a will where it is alleged that two or more bequests are repugnant to each other, and therefore the second is void. The court construed the wills presented in each case in such a manner as to avoid a finding of repugnancy, and in both cases cited to *In re Estate of Larson*.[137] *Larson* contains a summary of the Iowa law pertaining to interpretation of wills which is well worth repeating:

> "It is well settled law (1) the testator's intent is the polestar and must prevail; (2) his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will, (b) his scheme of distribution, (c) the circumstances surrounding him at the time he made his will, and (d) the existing facts; and (3) technical

131 169 N.W.2d 837 (Iowa 1969).
132 258 Iowa 880, 140 N.W.2d 725 (1966).
133 237 Iowa 672, 22 N.W.2d 792 (1946).
134 239 Iowa 569, 30 N.W.2d 128 (1947).
135 172 N.W.2d 254 (Iowa 1969).
136 171 N.W.2d 269 (Iowa 1969).
137 256 Iowa 1392, 131 N.W.2d 503 (1964).

> rules or canons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain.[138]

The will in *Lamp* directed sale of the residue of the estate and establishment of a trust. Reading paragraph two of the will, it appeared that the trust was to have been made up of $2,000, entirely disposed of by a direction to pay the sum over to Iowa State University after the fund had been used as a revolving student loan fund for 20 years. The third paragraph stated that "all remaining funds in said trust" were to be used to provide a bequest to the Medical College at the University of Iowa and the Still College of Osteopathy, and included an express statement of intention to disinherit relatives. The Supreme Court of Iowa interpreted the second paragraph of the will as creating a trust of the entire proceeds of the residue of estate with specific directions as to $2,000 of it, thus avoiding a partial intestacy.[139] The court also cited to *Roberts* wherein the court expressly held that rules of construction are resorted to only when necessary to find the intent in situations were language of the will is ambiguous or conflicting or the testators intent is uncertain.[140]

In re Estate of Roberts[141] contains a summary of cases involving subsequent clauses of a will divesting an apparent prior gift in fee, distinguishing those decisions finding a repugnancy. The opinion is not entirely clear as to the basis for the distinction, although in most cases of repugnancy a specific gift of a fee in a particular res (as opposed to either a gift of a sum of money or of "all property") was followed by a gift of another interest in the res, whereas a gift in general terms was subject to subsequent explanation avoiding a repugnancy. In sequential paragraphs the will in *Roberts* provided (1) a bequest of $40,000 to the wife made up of personalty primarily, but granting her an option to choose which realty to take if any was necessary to make up the amount of the gift; (2) a life estate to the wife of "all my property" with authority to invade under court order to maintain her "station of life"; (3) directions to the executor to sell a particular 240 acre tract of land to the son for $300 per acre (generating an option); and (4) remainder to four children equally. The court overruled the contention that the choice of property was repugnant to the grant of an option to the son.

In *Roberts and Lamp*, the court pointed out that interpretation of wills necessarily must turn upon their own unique facts. These decisions present in clear perspective the classic problem of balancing between inflexible rules which may, and occasionally do, produce inequitable results against frequent and expensive litigation to apply laws stated in more general terms on the assumption that such general principles will produce inequitable results less frequently.

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138 *Id.* at 1395.

139 Citing in support of the rule of construction to avoid partial intestacy, *inter alia,* Myers v. Smith, 235 Iowa 385, 16 N.W.2d 628 (1944). *See also,* In re Estate of Fairley, 159 N.W.2d (Iowa 1968), in which a partial intestacy occurred.

140 Citing in addition to In re Estate of Larson, 256 Iowa 1392, 131 N.W.2d 503 (1964), the decision of Lytle v. Guilliams, 241 Iowa 523, 41 N.W.2d 668 (1950).

141 171 N.W.2d 269 (Iowa 1969).

2. *Lapse—Cy Pres*

The Iowa supreme court is inclined to follow a more inflexible approach in determining the testator's intention in cases concerning *cy pres* and lapse than it does in cases involving an internal repugnancy. The case of *In re Estate of Staab*[142] is interesting not only in connection with the refusal of the court to apply the doctrine of *cy pres* as requested, but also for the issue of devolution of property, upon lapse of a gift to one of several residuary legatees, to the heirs of the testator rather than to the remaining residuary devisees. By her will the decedent left equal shares of the residue of her estate to four named Catholic charitable organizations. At the time of her death one of the organizations had ceased to exist as an Iowa corporation (apparently without a successor corporation), and one had changed its corporate purpose. The trial court ordered payment of one-fourth each to the unchanged devisees, and found a lapse as to the other two, directing distribution as intestate property. Catholic Charities of Sioux City was operating organizations carrying out the functions which were similar to the purposes of the corporation whose shares were held to have lapsed by the trial court. Catholic Charities sought the application of those funds for the purposes of the organizations as they existed to the time of the will under the auspices of Catholic Charities pursuant to the doctrine of *cy pres*. The court did not find such a defined charitable intention on the part of the testatrix as to permit application of *cy pres* doctrine,[143] but, on the contrary, found an intention to benefit certain specific organizations named in the Will. The Supreme Court of Iowa reversed the determination of the trial court as to the organization which had changed its purpose, directing that it should receive a quarter share of the residue of the estate. The other one-fourth was held to lapse.

An issue not raised or discussed was the question of the disposition of a share of the residue of an estate which lapsed by reason of the non-existence of the devisee at the time the will became effective. Although the court recognizes the presumption against partial intestacy, it was held as recently as 1965[144] that lapse of a part of the residue will result in partial intestacy. That is a technical rule of construction which, according to the *Larson* case, should be resorted to only after exhausting means of ascertaining the intention of the testator. The general rule (that a lapsed gift to one of several residuary legatees passes to the heirs of the testator rather than increasing the residuary shares) does not apply, in any event, to gifts to classes.

3. *Abatement*

The 1963 Probate Code contains a new section on abatement,[145] providing

142 173 N.W.2d 866 (Iowa 1970).

143 Even though the doctrine is reinforced in the case of religious organizations by Iowa Code § 504.11 (1966), providing that property of defunct religious societies which have "ceased to support a minister or leader or regular services and work for two years or more . . ." passes to the state or the denomination's regional organization.

144 Bankers Trust Co. v. Allen, 257 Iowa 938, 135 N.W.2d 607 (1965).

145 Iowa Code § 633.437 (1966).

that if the order of abatement, provided by section 436 of the Probate Code,[146] would defeat the testamentary scheme of the testator and that the shares shall abate "in such other manner as may be found necessary to give effect to the intention of the testator". There will probably be several cases litigating the meaning of this new statute introducing the concept of intention and consistency into the order of abatement. In *In re Estate of Twedt*,[147] the Supreme Court of Iowa gave as much definition as was possible to the new rule, referring to the Committee Comment as relevant legal history, and holding that the new statute enacts the rule of *In re Estate of Hartman*.[148] The Twedt will provided for sale of a farm and gift of the proceeds to a charity with the residue of the estate to the widow. Under the order of abatement provided by section 436 of the Probate Code the residuary share to the widow would abate last, and taxes for the estate would be paid from the devisee to the charity, which would have exhausted the charitable gift. Justice Uhlenhopp was the trial judge, and the supreme court quoted from his opinion the following caution:

> ". . . [T]his section must be applied with caution, in order to reconcile it with Section 633.436. Section 633.436 provides that a widow's residium is taken for taxes after other devises. In every case in which another devise is taken for taxes, the 'express or implied purpose of the devisee' is defeated, to some extent, under Section 633.437."[149]

The *Twedt* situation was held by the court to be a proper case for amelioration of the abatement which would otherwise have entirely defeated the charitable gift.

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146 IOWA CODE § 633.436 (1966).
147 173 N.W.2d 545 (Iowa 1970).
148 233 Iowa 405, 9 N.W.2d 359 (1943).
149 In re Estate of Twede, 173 N.W.2d 545, 548 (Iowa 1970).