properly designed such that it causes accidents and thus armed with such knowledge, the State has the duty to rebuild the interchange in such a manner as to eliminate its hazardous features. While the State may have a minimum duty to warn of this hazard, it would certainly seem that the decision to rebuild an existing interchange at a cost of great sums of money must necessarily involve discretion just as discretion was involved in the intial decision to construct the interchange.

Similarly, such decisions as whether a particular road should be resurfaced, or whether a bridge should be widened or whether a road should be widened must involve discretion. To hold that the State of Iowa is negligent in having roadways eighteen feet in width is to enable a person by use of a damage suit to force the Highway Commission to stop a sufficient amount of other activities to enable it to rid the State of all such roads with the resources available at once instead of during a gradual period as part of a general plan of priorities. Neither Congress nor the Iowa Legislature intended that such be accomplished by use of the respective Tort Claims Acts.

THE IOWA "STALE USES AND REVERSIONS STATUTE": PARAMETERS AND CONSTITUTIONAL LIMITATIONS

Arthur E. Ryman, Jr.†

I. INTRODUCTION

A. *The Record Title Problem in Iowa*

Record title in Iowa, as in most states, is becoming more cumbersome each year. Not only do the number of transactions from patent to date increase, but the volume of transactions is increasing as a result of subdivision and multiple usage of the same land. Land use regulation, not only by public law, but also by private action affecting proprietary rights, generates further complexity in land title examination.

The foundation of Iowa title law is a "notice" recording statute,[1] coupled with notice generating statutes.[2] Since title insurance may not be written by a corporation organized or licensed in Iowa[3] title security depends on abstract examination. However, Iowa conveyancing lawyers have a substantial arsenal of weapons to establish marketable title of record. In addition to published title opinions[4] and the Iowa Land Title Standards[5] promulgated by the Iowa Bar Association, the Legislature has contributed extensively. Legislative tools include: the basic statute of limitations;[6] legalizing acts;[7] a statute permitting errors of record to be cured by affidavit, errors which could only be cleared by litigation in many jurisdictions;[8] and marketable title statutes.[9]

In 1965 the Iowa Legislature added an act relating to limitations of actions in regard to restrictions and reversions on real estate which has been called the stale uses and reversions statute.[10] In 1969 the Forty Year Marketable Title Act was adopted.[11] Both of these statutes are of the marketable title type but

---

† Professor of Law, Drake University Law School. LL.B. Denver University; LL.M. Yale University.

1 IOWA CODE § 558.41 (1966).

2 *E.g.*, IOWA CODE §§ 617.10-.15 (1966).

3 IOWA CODE § 515.48(10) (1966). Bar association title insurance patterned on the Florida experience has been discussed, but not adopted. The statute does not specifically apply to unincorporated associations.

4 *E.g.*, J. MARSHALL, IOWA TITLE OPINIONS AND STANDARDS ANNOTATED (1963); IOWA LAND TITLE NEWS.

5 The Iowa supreme court has declared, "[W]e are disposed to give serious consideration to these standards." Tesdell v. Hanes, 248 Iowa 742, 750, 82 N.W.2d 119, 124 (1957).

6 IOWA CODE § 614.1(6) (1966).

7 IOWA CODE § 589 (1966).

8 IOWA CODE § 558.8 (1966).

9 *E.g.*, IOWA CODE § 614.17 (1966).

10 IOWA CODE § 614.24 (1966).

11 S.F. 271, 63d G.A., 1st. Sess. (1969).

nomenclature has been somewhat confused by legislative designation of the 1969 statute as the Forty Year Marketable Title Act. Iowa has had a half century of experience with an earlier marketable title statute hereinafter referred to as the affidavit of possession statute.[12]

The Forty Year Marketable Title Act and the stale uses and reversions statute, the latter being the particular subject of this paper, have some common aspects. The former is a much more detailed and precise handling of the non-possessory interests and constitutional problems presented by the stale uses and reversions statute. The Forty Year Marketable Title Act, which will not be further discussed herein, should be separately analyzed with particular attention to the problems of notice and impairment of the obligations of existing contracts as they pertain to section five of that act.

B. *Development of Marketability of Title by Limitation*

1. *Adverse Possession*

Title by disseizin is generated by limitation of a proprietary action. A limitation statute bars not only the proprietary cause of action, but also the proprietary right on which it rests. The common law gloss circumscribing acquisition of title by adverse possession prevents any serious question of fairness (due process of law) if the philosophical-legal premise is accepted that a competent proprietor shall, at his peril, take timely action to prevent encroachment. That premise is founded on a norm of attention to and utilization of proprietary rights and has several centuries of precedent for its support. In Iowa the possession to generate title by disseizin must be open, notorious, adverse, continuous, exclusive, and under color of title or claim of right in good faith for a period of ten years.[13] Since any of these so called *elements* of adverse possession may be subject to litigation, a title by adverse possession is not marketable unless and until judicially established.[14]

2. *Affidavit of Possession Statute*

Although an affidavit pursuant to Code section 558.8[15] may not be used to forge a link in the chain of title and does not serve to render adverse possession generated title marketable, the affidavit of possession statute[16] is designed to permit some possession based title to be made marketable without

---

[12] IOWA CODE § 614.17 (1966) is the current enactment of this periodically updated legislation.

[13] Prymek v. Washington County, 229 Iowa 1249, 296 N.W. 467 (1941); Arnd v. Harrington, 227 Iowa 43, 287 N.W. 292 (1939); Montgomery County v. Case, 212 Iowa 73, 232 N.W. 150 (1930); Belding v. Huttenlocher, 177 Iowa 440, 159 N.W. 191 (1916); Booth v. Small, 25 Iowa 177 (1868).

[14] The affidavit statute, now IOWA CODE § 558.8 (1966), may not be used to establish title by adverse possession of record. Such title is unmarketable of record. Fagan v. Hook, 134 Iowa 381, 105 N.W. 155 (1905).

[15] IOWA CODE § 558.8 (1966).

[16] IOWA CODE § 614.17 (1966).

litigation. If a possessor holds by chain of *record* title since prior to 1950[17] and an adverse claim based on pre-1950 title affecting the same tract of land was not preserved by affidavit filed of record before July 4, 1964,[18] the possessor may file an *affidavit of possession* barring such claim, thereby making his title marketable of record as against non-preserved proprietary rights. Thus, the effect of the affidavit of possession statute is to require periodic re-recording (by an affidavit of claim) of some proprietary interests to prevent loss by disseizin to the holder of record title. There are four major questions which may be raised concerning the statute: Must the possession be adverse; Must the possession extend from 1950 to date, or for any particular duration; What effect has legal disability, if any; What proprietary interests are affected?

The Iowa supreme court has said by way of dictum that the affidavit of possession statute requires neither an allegation of adversity within the affidavit[19] nor any particular duration of possession.[20] Bar association forms[21] and customary practice have required allegation of the elements of *adverse* possession *since* 1950 in the affidavit of possession. Whether rooted in lawyer conservatism, the analogy to title by adverse possession, or constitutional concept, the practice is sound and the Iowa court dictum should not be given undue weight in light of the subsequent United States Supreme Court decision in *Mullane v. Central Hanover Bank and Trust Co.*[22] The *Mullane* decision and other authorities bearing directly on the constitutionality of marketable title legislation are discussed in section III, B. Caution will counsel careful conveyancers to allege adversity and duration of possession at least *legally sufficient* to generate *notice* to the party whose interest will be barred by an affidavit of possession.

Common law or statutory tolling of the statute of limitations permitting persons under legal disability or their successors in interest to assert proprietary rights is an established part of the law pertaining to adverse possession. The affidavit of possession statute is *not* subject to the statutory tolling applicable to the adverse possession statute,[23] but federal rights of persons tolling limitations statutes or generating legal disability are, of course, not superseded by Iowa legislation.[24] No common law tolling claim appears to have been asserted in Iowa, and it is reasonable to conclude that the state field is pre-empted by the statutes relating to tolling. In *Lane v. Travelers Ins. Co.*[25] the Iowa supreme court suggested that minor remaindermen could be protected by a natural or

---

17 In IOWA CODE § 614.17 (1966), 1950 is the date provided by the statute currently in force, a re-enactment of several prior statutes which had earlier cut-off dates.

18 The date in the current statute. IOWA CODE § 614.17 (1966).

19 Tesdell v. Hanes, 248 Iowa 742, 746, 82 N.W.2d 119, 121 (1957).

20 Lane v. Travelers Ins. Co., 230 Iowa 973, 977, 299 N.W. 553, 555 (1941).

21 Iowa State Bar Ass'n, Official Form No. 27 B, Affidavit of Possession, May 17, 1967.

22 339 U.S. 306 (1950).

23 IOWA CODE § 614.27 (1966).

24 *E.g.*, Soldiers' and Sailors' Civil Relief Act of 1940, § 590, 50 App. U.S.C.A. § 590 (1968).

25 230 Iowa 973, 299 N.W. 553 (1941).

legal guardian and sustained the affidavit of possession statute as applied to bar such remaindermen. Caution is warranted in applying the *Lane* concept in any situation in which it can be shown that there was no actual legal representative of the person to be barred who could have preserved his claim.[26]

The affidavit of possession statute has not been used by Iowa conveyancers to bar interests outside the chain of title of the possessor or to bar non-possessory interests. This position can be supported on the ground of legislative intention since there is a separate statute of long standing limiting ancient mortgages,[27] and the more recent enactment of the stale uses and reversions statute reaffirms the position. Reading the affidavit of possession statute in context with adverse possession requirements will produce the same result. Constitutional doubt is avoided by interpreting the statute as applying only to interests adversely affected by the possession of the record title holder.[28]

3. *Interests in the Chain of Title and Non-possessory Interests*

The affidavit of possession statute defines the holder by chain of record title as one whose title derives from sources enumerated in the statute, including one who holds by sheriff's deed. The sheriff's deed and other muniments of title enumerated in the affidavit of possession statute are treated as generating a new source of title. To that extent the statute is a curative statute in addition to being a marketable title statute. In *Lane v. Travelers Ins. Co.*[29] a sheriff's deed issued in a proceeding foreclosing a mortgage given by a life tenant in excess of his authority. The life tenant derived his title from the same source as the contingent remaindermen whose claims were held barred in *Lane*. Although the interest barred by application of the affidavit of possession statute was in the chain of title of the mortgagor, they were not in the chain of title of the grantee by sheriff's deed. Because of the statutory definition of muniments of title sufficient to make one the record title holder, the sheriff's deed generates new title. Presumably other qualified muniments of title would be given the same effect. *Lane* was a harsh case raising the spectre of destructible remainders through fraud of a life tenant, lessee, or mere tenant at will. Any individual whose interest is of record and who is not made a party to a judicial proceeding should not be foreclosed, by reason of a sheriff's deed or other muniment of title as defined in the affidavit of possession statute, from asserting his claim against one who has actual or constructive notice of the claim (including notice by recordation). Not only to prevent fraud, but also to preserve the constitutional security of the statute, the "new title" aspect of the decision should be re-examined.[30]

Minnesota has a statute very similar to the Iowa affidavit of possession

---

[26] *See* discussion pt. III, § B, *infra.*
[27] IOWA CODE § 614.21 (1966).
[28] *See* pt. III, § B, *infra.*
[29] 230 Iowa 973, 299 N.W. 553 (1941).
[30] *See* pt. III, *infra.*

statute.[31] In *Wichelman v. Messner*[32] the Supreme Court of Minnesota made the Minnesota statute applicable to bar an interest in the chain of title of the possessor. The interest in issue was a *condition* limiting the granted premises to use as a school house site. In *Board of Education v. Miles*[33] the Court of Appeals of New York noted that *Wichelman* has been criticized by proponents of marketable title legislation,[34] and construed the decision very narrowly pointing out that the school house condition had been breached for more than five years before action commenced, and no preservative claim was filed. Although criticized and narrowly construed, the opinion in *Wichelman* is tightly reasoned and presents less problem than *Lane*. While holding the marketable title statute applicable to powers of termination in the chain of title (in fee simple absolute or fee simple determinable) of the possessor, the opinion expressly excludes:

Supporting wall agreements and *utility easements*, because the statute exempts persons in possession from filing renewal claims (and the court suggests that occupancy of an easement is such possession);[35]

Mineral rights, because they generate a separate fee title of which the mineral owner is the record owner;[36]

Mortgages are "implicitly exempt" because of "active relationship with the fee owner" but old mortgages should be protected by claim;

Remainders (and *reversions*) after terms of years or life estates, because the statute only operates to perfect title of owners of a fee simple of record.[37]

The foregoing express exclusions, coupled with the holding applying the Minnesota statute to a power of termination in the chain of title of the record holder, leave unresolved whether the statute can be applied to bar executory limitations or rights generated by covenants which are in the chain of title.

II. Stale Uses and Reversions Statute, Provisions

Covenants, especially neighborhood planning covenants, generating proprietary rights in equity frequently outlive their utility and if unlimited as to

---

31 Minn. Stat. § 541.023 (1965).

32 250 Minn. 88, 83 N.W.2d 800 (1957); *see* Annot., 71 A.L.R.2d 846 (1960).

33 15 N.Y.2d 364, 207 N.E.2d 181 (1965) (two judges dissenting, one not participating).

34 For excellent discussions of marketability legislation *see* Basye, *Trends and Progress—The Marketable Title Acts*, 47 Iowa L. Rev. 261 (1962); Aigler, *Constitutionality of Marketable Title Acts*, 50 Mich. L. Rev. 185 (1951); Aigler, *A Supplement to "Constitutionality of Marketable Title Acts"—1951-1957*, 56 Mich. L. Rev. 225 (1957). A careful analysis of model legislation appears in L. Simes & C. Taylor, Improving Conveyancing by Legislation (1960).

35 The stale uses and reversions statute applies to "use restrictions" and will require interpretation to avoid barring interests in the same class, without benefit of statutory language exempting possessors from filing renewal claims.

36 Iowa Code § 84.18 (1966) provides separate taxation of several mineral interests and would justify the same rationale.

37 The Minnesota court cited Lytle v. Guilliams, 241 Iowa 523, 41 N.W.2d 668 (1950), but the dictum in *Wichelman* is contrary to the Iowa outcome in Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941). The Lane holding, however, depends on the title by sheriff's deed not being a derivitive title.

time, become mere clogs on title.[38] Such interests are ordinarily beneficial either to the land affected or to adjacent lands, facilitating the highest and best use, when created, and may remain beneficial for more than a century. Possibilities of reverter and rights of reentry may be utilized *in terrorem* for private land use control beneficial at the time of the instrument, as are neighborhood planning covenants. However, these powers of termination are frequently used to effectuate personal purposes of the grantor, unrelated, or only remotely related, to land utilization.[39] In either case, powers of termination are, or at least generate upon the breach of the condition limiting the fee, legal rather than equitable rights not subject to equitable defenses to terminate the restriction.[40] Limitations on land use running in perpetuity may well become not only clogs on title, but clogs on alienation and utilization of land. Several states have taken legislative action to place limits on such interests.[41] The problem is to provide protection for valuable rights while limiting stale ones, by a scheme which will pass muster constitutionally.[42] Since the Affidavit of Possession statute will not ordinarily reach such interests, Iowa enacted the stale uses and reversions statute in 1965.

Comparison of the stale uses and reversions statute with *Wichelman*, or with the more recent Forty Year Marketable Title Act, demonstrates the first major problem. The stale uses and reversions statute does not define, in terms sufficiently clear to permit certainty, what interests are within its scope. By its terms the statute bars "action" on a "claim" rooted in provisions of "deed or

---

[38] *E.g.*, Thodos v. Shirk, 248 Iowa 172, 79 N.W.2d 733 (1956); Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956).

[39] Jacobs v. Miller, 253 Iowa 213, 111 N.W.2d 673 (1961); Reichard v. Chicago, B. & Q. Ry., 231 Iowa 563, 1 N.W.2d 721 (1942); Strothers v. Woodcox, 142 Iowa 648, 121 N.W. 51 (1909).

[40] *See* Note, *Possibility of Reverter in Iowa*, 12 DRAKE L. REV. 99 (1963) for an excellent discussion of Iowa powers of termination.

[41] The interpretation of the Minnesota Act in *Wichelman*, discussed text accompanying notes 31-37 *supra*, has that effect. Cases dealing with such statutes in Florida, Illinois and New York, together with the broader acts of Kansas and Pennsylvania are discussed in pt. III, *infra*.

[42] The problem may well require separate treatment of covenants and powers of termination. There is good reason to consider powers of termination debasing the fee simple as contrary to good public policy. It has been argued that these interests should be treated as a type of subinfeudation, contrary to Quia Emptores. J. GRAY, THE RULE AGAINST PERPETUITIES §§ 31-41.1 (4th ed. 1942). An attempt to make Colorado a dry state by means of appending powers of termination to the fee simple was given short shrift in Union Colony Co. v. Gallie, 104 Colo. 46, 88 P.2d 120 (1939). Iowa has a "suspension" language statute against perpetuities. IOWA CODE § 588.68 (1966). Although Professor Swenson points out that this statute has been interpreted as a legislative enactment of the orthodox common law rule against remoteness of vesting, and suggests that ruling should not be disturbed (Swenson, *Possessory Estates and Future Interests in Iowa*, 36 IOWA CODE ANN. 73 (1959)), the disadvantages are plain, and there is no apparent reason why that rule should not be applied to powers of termination, since the Iowa court has given to possibilities of reverter and rights of reentry the same characteristics of descendability and alienability as executory limitations. *See* Jacobs v. Miller, 253 Iowa 213, 111 N.W.2d 673 (1961); Reichard v. Chicago B. & Q. Ry., 231 Iowa 563, 1 N.W.2d 721 (1942). *But see* Strothers v. Woodcox, 142 Iowa 648, 121 N.W. 51 (1909) limiting such an interest in the orthodox way which was not cited in *Reichard* or *Jacobs*. It should be remembered that the rule against perptuities is court-made common law in origin, designed to keep the death hand of past generations from dominating present land utilization. Spectres should not govern.

conveyance or contract or will reserving or providing for any *reversion, reverted interests* or *use restrictions*" (emphasis added) at law or in equity "to recover or establish any interest" against the holder of the record title in possession after twenty-one years from admission of will to probate or recordation of other instrument in which the claim is rooted, unless a verified claim is filed within the said twenty-one year period (or one year after the statute in the case of claims more than twenty years old on July 4, 1965). A claimant is, "any person . . . claiming any interest in and to said land or in and to such *reversion, reverter interest* or *use restriction*, whether the same is a present interest or an interest which would come into existence if the happening or contingency provided in said *deed* or *will* were to happen at once. Said claimant further shall include any member of a class of persons entitled to or claiming such rights or interest." (Emphasis added). The statute permits claims to be filed in behalf of claimants by agent, attorney, and, in case of minority or legal disability, guardian, trustee, either parent or next friend.

Since the statute may apply to bar rights of a claimant who is unborn or undetermined, the fiduciary filing provisions may be inadequate. The provisions seem to exclude, by the reference to minority or legal disability, preservation of claim by a guardian in behalf of an absentee. The language of the statute also presents some technical drafting problems.[43]

If an effort is made to interpret the statute by assuming that the record title to be protected means the record title *in fee simple*, as the Supreme Court of Minnesota did in *Wichelman*, the term reversion must be construed to relate only to an interest outside the chain of title, or the reversion arising on breach of condition limiting a fee simple and generating a possibility of reverter. That interpretation would avoid such anomalies as barring a reversioner after a term for years in favor of the tenant, or barring the settlor's reversion in favor of a trustee. On the same hypothesis, "reverted interests" as the term is used in the statute would refer to the chose in action generated by breach of a condition subsequent limiting the fee simple.

On that construction the stale uses and reversions statute would not be

---

[43] IOWA CODE § 614.24 (1966) provides in part:

> No action based upon any claim arising or existing by reason of the provisions of any deed or conveyance or contract or will reserving or providing for any *reversion, reverted interests* or *use restrictions* in and to the land therein described shall be maintained either at law or in equity in any court . . . . For the purposes of this section, the claimant shall be any person or persons claiming any interest in and to said land or in and to such reversion, reverter interest and use restriction, whether the same is a present interest or an interest which would come into existence if the happening or contingency provided in said *deed* or *will* were to happen at once. [Emphasis added].

The singular, "reversion", and the plural, "reverted interests or use restrictions", must include both the singular and plural. It surely is not intended that a claim rooted in an instrument creating only one reverted interest or use restriction could not be barred. A claimant is defined as one whose claim is founded in deed or will; certainly it is not intended to exclude from the definition of those who can preserve their claims, those whose claims are founded on contract or conveyance. The statute is unclear as to the effect of a preservative claim filed by one member of a class. Are the rights of the entire class preserved or only the claim of the individual?

effective to bar a possibility of reverter or right of reentry prior to condition broken (a construction consistent with the New York court of appeals' narrow view in *Miles* of the decision of the Minnesota court in *Wichelman*) unless the reverter language in the claims definition section of the statute, or the term use restriction, were taken to include powers of termination before condition broken. The same hypothesis would appear to exclude from the operation of the statute horizontal property rights severed and granted in fee simple, and mineral estates reserved or granted, if severed mineral rights are treated as fee simple estates.

Every interest in the land of another generates a restriction on the use of that land. The term use restriction in the stale uses and reversions statute is unmodified, creating serious problems. In response to a letter questioning the shadow cast by the stale uses and reversions statute on commercial easements in gross for pipeline purposes, a member of the Iowa Bar Association Committee on Title Standards stated that: "[T]he law as passed refers only to a 'reversion, reverted interest or use restriction' and is not intended to affect an affirmative grant of a right to use the property of another or a reservation of a permanent right in the property of the grantor."[44] He recommends, however, preservation by claim until the Iowa supreme court clarifies the matter. Speaking of rights of way, sewer and utility easements and mineral rights reserved or granted he said:

> I can say, however, that it was not the intent of those who prepared the bill to include such rights within the ambit of the limitation act. What we were trying to do was to limit stale uses and reversions and not to bar interest in land granted or reserved. We are trying to distinguish a *negative* easement or a perpetual right of reentry. An "easement" providing for use and occupancy of land is an entirely different class from a restriction on use imposed on a grantee of the land.

He again advises filing a preserving claim, nonetheless.

The affirmative-negative distinction is somewhat difficult. Is an easement of view granted or reserved distinguishable from a covenant not to impair view? Does affirmative imply quasi-possessory, and if it does, does that include an easement or servitude for drainage purposes? Is a covenant in a mortgage or contract of sale restricting use by the mortgagor or vendee a negative use restriction within the statute? The statute provides no criteria for distinguishing between various rights in the land of another. If the statute is taken to bar use restrictions which are only that and do not generate proprietary rights beneficial to the claimant, it will be of little or no value to conveyancers.

III. Constitutional Issues

A. *Retrospectivity*

The problem of a retrospective statute creating a limitation which divests

---

[44] Iowa Land Title News, Nov., 1965, at 5-6.

a proprietary right has received considerable attention from proponents of marketability statutes.[45] It is clear that an act of a state which divests a proprietary interest without compensation is unconstitutional.[46] It is equally clear that regulation affecting proprietary rights under the police power, if not confiscatory, is valid though it diminishes value.[47] Zoning cases, cases upholding acts shortening statutes of limitations, and a case dealing with distribution of an absentee estate,[48] are often cited as supporting regulatory authority adversely affecting proprietary interests.

When governmental policy requires action divesting proprietary rights but the government is not in a position to pay compensation, the distinction between the police power and eminent domain is strained.[49] Even in emergency situations American courts have not permitted destruction of proprietary rights by retrospective legislation. The Burnt Record Act[50] cases from Illinois and California are clear examples.[51] The California Act permitted a *possessor* to quiet title on notice to known claimants and publication to unknown claimants. The United States Supreme Court, in *American Land Company v. Zeiss*,[52] quoting from *Bertrand v. Taylor* said, "It was not calculated to take any reasonable being by surprise."[53] The Mortgage Moratorium Cases are similar.[54] It would be most unwise to apply emergency precedents to situations where the public interest is not compelled by crisis, especially since our courts have displayed a clear intention to preserve and maintain proprietary rights even under most extreme conditions.

The principle that a vested proprietary right may not be divested by

---

[45] *See* note 34 *supra.*

[46] Griggs v. Allegheny County, 369 U.S. 84 (1962); Grahm v. City of Sioux City, 219 Iowa 594, 258 N.W. 902 (1935); Brown v. Davis County, 196 Iowa 1341, 195 N.W. 363 (1923).

[47] City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); *compare* Grant v. Baltimore, 212 Md. 301, 129 A.2d 363 (1957) *with* City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953).

[48] Blinn v. Nelson, 222 U.S. 1 (1911) (Holmes, J.).

[49] Section 1, Paragraph 4, of the U.N. declaration entitled "Permanent Sovereignty Over Natural Resources" reads:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.

The language "appropriate compensation" is a product of the diverse positions of the United States and the Russian groups. The United States suggests that the language adopts by reference the international law "prompt, adequate and effective" while the communist view is that the capacity of the State to pay affects what is "appropriate." Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A.J. 463, 464 (1963).

[50] CAL. CIV. PRO. CODE § 751.01 (West 1954); ILL. ANN. STAT. ch. 116, § 5 (Smith-Hurd 1954).

[51] American Land Co. v. Zeiss, 219 U.S. 47 (1911); Bertrand v. Taylor, 87 Ill. 235 (1877).

[52] 219 U.S. 47, 62 (1911).

[53] 87 Ill. 235, 238 (1877).

[54] *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

retrospective legislation[55] has been attacked, and a new concept that retrospective legislation must be tested by balancing the public interest with the extent of deprivation has been propounded. The first concept is overstated if taken to mean that a proprietor may not be *burdened* by reasonable regulation, or have the *value* of his interest diminished thereby. There is no basis in the decided cases dealing with marketability legislation for the new concept as it applies to contracts, although a balancing of regulation against the burden on a proprietary interest is clearly sustained by those cases.

Lane impliedly supports requiring a dispossessed owner to file an affidavit of claim as required by the affidavit of possession statute (retrospectively with respect to the vesting of the right, but not with respect to the time for filing the claim).[56] *Wichelman* expressly so holds.

Zoning law requiring a proprietor to conform his land utilization to new restrictions within a specified time has been adopted where it has become apparent that nonconforming uses do not fade away but may in fact be reinforced by a quasi monopoly resulting from zoning law. The thesis propounded in support of such regulation is that the owner can "amortize" his capital investment in improvements and is, therefore, not deprived of property without due process if the period of permitted nonconformity is reasonable on the facts. The Iowa supreme court affirmed the constitutionality of such a zoning law *by an equally divided court* in *Board of Supervisors of Cerro Gordo County v. Miller.* The affirming opinion held that the test of constitutionality was based upon a balancing of public good against private loss. The dissenting opinion powerfully points out the constitutional dilemmas:[57]

> [Z]oning advocates say eminent domain has not worked because the cost to the public is so great. If this is true, why should the individual property owner be forced to stand a substantial loss when the public is unwilling to pay for the gain it achieves at his loss?
>
> . . . Monetary loss should go to the amount of compensation to be paid, not the determination of the right to compensation.

In *Murrison v. Fenstermacher,*[58] the Supreme Court of Kansas held unconstitutional a 1945 statute raising a conclusive presumption that deeds of record more than 25 years rooted in a plat "conveyed perfect title notwithstanding any defect in the title of the grantor therein or the failure of the grantor's spouse to join therein" and providing that the presumption would not apply in any action brought within one year after the enactment.[59]

Holding the act unconstitutional *on its face,* rather than as applied, the Kansas Court denied specific performance of a contract of sale. Vendor had

---

55 Derived from 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 762-63 (8th ed. 1927).

56 The Constitutional prohibitions are not absolute. In each case, the public interest to be advanced by a statute is balanced against the extent and importance of the deprivation of property or the impairment of contract rights." L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 255 (1960). *See also* Grand Lodge v. Fischer, 70 S.D. 562, 21 N.W.2d 213 (1945).

57 170 N.W.2d 358, 368 (Iowa 1969).

58 166 Kan. 568, 203 P.2d 160 (1949).

59 KAN. STAT. ANN. § 58-2612a (1964).

tendered an abstract reflecting a patent from the United States to Daniel Lennon in 1865, a plat by Patrick Sheeran in 1893, and consecutive conveyances from Sheeran to vendor. If the act were valid and foreclosed the rights of potential claimants rooted in instruments between 1865 and 1893, the tender was sufficient. The Kansas court quoted from Cooley's *Constitutional Limitations*,[60] "[O]ne who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no other steps to enforce."[61] However, the Kansas court confined its decision to the specific statute involved, stating, "We are not here concerned with the validity of curative, remedial or limitation statutes in general which have . . . long been recognized by this court as valid when properly enacted."[62]

The Iowa supreme court has recognized that retrospective legislation divesting proprietary rights may well be unconstitutional. In *Jacobs v. Miller*[63] it was contended in behalf of owners of lands abutting abandoned railroad right-of-way that the right-of-way reverted to them by reason of Section 471.3 of the Iowa Code, which provides for "reversion" of such right of way to the owners of the lands from which it was granted. The land had been granted to the railroad subject to a power of termination providing for reversion to the grantor and his heirs unless used for railroad purposes. The grant predated the statute. The court refused to give the statute retrospective effect *to avoid constitutional doubt*. The decision implies that the possibility of reverter or right of reentry is "property" entitled to due process protection.

Contrary to Iowa, Illinois has treated the possibility of reverter and right of reentry as inalienable non-interests so long as the condition limiting the base fee simple remains unbroken.[64] In *Trustees of Schools of Township No. 1 v. Batdorf*,[65] the Supreme Court of Illinois sustained the Reverter Act of 1947,[66] which applied retrospectively to bar powers of termination more than fifty years old where the condition limiting the fee had remained unbroken. Noting that such interests are inalienable and mere expectancies in Illinois, the court held them not to be property for due process purposes, citing to *McNeer v. McNeer*[67] which held valid a retrospective statute abolishing *inchoate* dower, and other cases sustaining legislative power to vary intestate succession adversely affecting expectant heirs. *McNeer* contains an extensive discussion of statutory inchoate dower and overruled an earlier Illinois decision, concluding that the inchoate dower was an expectancy as opposed to a vested interest. *McNeer*

---

60 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 762-63 (8th ed. 1927).

61 Murrison v. Fenstermacher, 166 Kan. 568, 575, 203 P.2d 160, 165 (1949). This has a direct bearing on § 5 of the Forty Year Marketable Title Statute. This section purports to bar effected claims without preservation opportunity and could be characterized as a curative statute rather than a marketable limitation.

62 *Id.* at 572, 203 P.2d at 163.

63 253 Iowa 213, 111 N.W.2d 673 (1961).

64 *See* note 42 *supra*. (discussion of possibilities of reverter in Iowa).

65 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

66 ILL. ANN. STAT. ch. 30, § 37 b-h (Smith-Hurd 1969).

67 142 Ill. 388, 32 N.E.2d 681 (1892).

cites Cooley's *Constitutional Limitations*[68] for the proposition that a mere expectation of a property right is not vested and is subject to change, modification or abolition.

In *Lucas v. Sawyer*[69] the Iowa supreme court held dower to be subject to legislative control prior to the husband's death vesting the interest. Citing to *Lucas*, the United States Supreme Court, in *Randall v. Kreiger*,[70] held constitutionally valid a territorial statute of Minnesota retrospectively curing defects in title arising from married women releasing dower by power of attorney.[71] *Randall* is cited in support of *McNeer*. *Lucas* seems to be the foundation case for the doctrine that "vested" non-interests may be retrospectively divested. Cases sustaining the constitutionality of legislation restricting, or barring expectancies is counterpoised by decisions holding unconstitutional enactments divesting established rights.[72]

In summary, retrospective legislation divesting an established interest violates constitutional due process requirements. Legislative authority with respect to expectancies (non-interests) is uninhibited by due process requirements, and regulatory legislation affecting or burdening proprietary rights meeting due process fairness standards is valid. Iowa's affidavit of possession statute, requiring one who has a proprietary claim *inconsistent with* the title of owner in possession to assert his claim by filing an affidavit of record generates a minimal burden and does not deny due process of law because the proprietor adversely affected has a real opportunity to protect his interest. If the proprietor does not have a real opportunity to protect his claim, or if the method by which a statute requires his claim to be asserted is too burdensome, the enactment so applied denies due process.

It has been asserted that legislation converting a right in rem to a chose in action to bar the right by limitation is unconstitutional.[73] Cases in at least eight states show support for this view with at least one, Wisconsin, holding the reverse. Those cases deal with statutes requiring a proprietor to initiate a law suit in order to protect his right. They also deal with statutory conversion of the right into a chose in action without notice to the proprietor adversely affected other than the enactment of the statute. The concept, that a right in rem may not be converted retrospectively to a chose in action by statute for the purpose of barring the right, combines, and thereby obscures, the two basic due process questions involved. Such a statute may be unduly burdensome since it requires the proprietor to initiate litigation involving not only affirmative action, but also significant cost. A proprietary right may be barred by such legislation

---

68 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 438-40 (8th ed. 1927).
69 17 Iowa 517 (1864) (Wright, C. J.).
70 90 U.S. 137 (1847).
71 *Randall* citing *Lucas* was cited as authority in *McNeer*, which in turn was cited in Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955).
72 Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949). *See also* Jenkins v. Jenkins, 219 Ark. 219, 242 S.W.2d 124 (1951); Annot., 7 A.L.R.2d 1366 (1949).
73 Annot., 7 A.L.R.2d 1366 (1949).

without the proprietor being aware of the requirements that he assert his claim, thereby denying him due process for lack of notice.

B. *Notice*

Since the Iowa supreme court decisions in *Lane* and *Tesdell* cast doubt on the quality and duration required, or required to be alleged, by the affidavit of possession statute, the importance of adequate notice to a party whose rights are in jeopardy has been re-emphasized. In *Mullane v. Central Hanover Bank and Trust Co.*[74] the United States Supreme Court held unconstitutional a New York statute designed to facilitate administration of small trusts, permitting notification by publication to beneficiaries in cases wherein the trustee sought instructions or court approval. The Court held that where the trustee was in a position to give notice designed to reach the party adversely affected by mail, notice by publication was inadequate.

The Court of Appeals of New York, two judges dissenting, held a New York statute[75] to be unconstitutional *as applied* to bar reverter rights flowing from an 1854 grant conditioned for school house purposes in *Board of Education v. Miles.*[76] The school house condition had not been breached. The holding of the court leaves the New York statute in force prospectively, and may permit retrospective application to bar rights accruing after breach of condition which are inconsistent with the title and possession of the owner in possession. Implicit in the decision is the proposition that powers of termination in New York are "property" entitled to due process protection. The opinion notes a significant distinction between affidavit of possession statutes and acts requiring rerecordation of powers of termination, and distinguishes *Wichelman* on the ground that in the Minnesota case the condition was breached more than five years before the action to enforce the reverter, no preservative claim having been filed. Citing to *Mullane* the court said: "Under the circumstances of the case at bar, section 345 cannot be sustained as a Statute of Limitations since it purports to bar the remedy before the right to enforce it has matured . . . ."[77] It appears that the mere enactment of the statute does not generate sufficient notice to a proprietor adversely affected that his rights are in jeopardy to meet due process requirements in the absence of factual circumstances giving warning of the jeopardy.

In *Wichelman* the Minnesota court took pains to point out that the Minnesota statute was well known to the bar, and that notice was not an issue. *Trustees of Schools of Township No. 1 v. Batdorf,*[78] sustaining the Illinois Reverter Act on the non-property theory, is not inconsistent with *Miles* on the constitutional issue. The pre-*Mullane* decision by the Iowa court in *Lane* leaves some ques-

---

[74] 339 U.S. 306 (1949).
[75] N.Y. REAL PROP. LAW § 345 (McKinney 1968).
[76] 15 N.Y.2d 364, 207 N.E.2d 181 (1965).
[77] *Id.* at 374, 207 N.E.2d at 187.
[78] 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

tion as to the Iowa position, but in light of *Jacobs*[79] it seems not to be inconsistent with the New York decision. An affidavit of possession pursuant to Iowa's affidavit of possession statute should reflect adversity and duration *legally sufficient to generate notice.*

C. *Impairment of Obligation of Contract*

The foundational case on the contracts clause of the United States Constitution is *Sturges v. Crowninshield*,[80] argued by Daniel Webster to the United States Supreme Court. A bankruptcy statute adopted by New York prior to federal pre-emption of the bankruptcy field had been applied to bar contract rights. Webster argued that the contract clause prohibited discharge in bankruptcy under the state law, but the court held that the statute was part of the law of New York at the time the contract was entered into, was therefore in the contemplation of the parties, and the law of New York, including its bankruptcy act, determined what the *obligations* of the contract were. Chief Justice Marshall held, however, that since under conflicts of laws rules, New York law was not the law governing the contract, and was therefore not in the contemplation of the parties, the New York statute was unconstitutional as applied to the contract.[81] Thus law not in the contemplation of the parties when a contract is made, including retrospective statutes, may not be applied to diminish contract remedies.

Citing to *Sturges*,[82] the Supreme Court of Florida, in *Biltmore Village v. Royal*,[83] struck down a Florida statute significantly different from the Iowa stale uses and reversions statute only in that it required litigation to preserve the rights effected where the Iowa statute requires mere recordation of an affidavit of claim, on the ground that the statute impaired the obligation of contracts. There were two dissents. One was grounded solely on the basis that a tax title had issued after the deed in which the use restricting covenant and reservation of a reverter were created, and the other asserted that the tax title should extinguish the reverter—on theory that the tax title generated new, rather than derivative, title. The outcome of the case could be justified on due process grounds, either on the theory that the right in rem may not be converted into a chose in action for the purpose of barring it, or on the ground that requiring litigation as opposed to rerecording to preserve the claim is excessively burdensome, but the *court* placed its decision on the *contract clause.*

Because of the contract clause, it is possible that a statute which will pass muster with respect to due process will be unconstitutional as applied to bar proprietary rights generated by covenant. However, proprietary rights are generated by convenant because the covenant is enforceable in equity, and equitable defenses, including laches, obsolescence, change of circumstances rendering en-

---

79 Jacobs v. Miller, 253 Iowa 213, 111 N.W.2d 673 (1961).
80 14 U.S. (4 Wheat.) 122 (1819).
81 *Id.* at 208.
82 *Id.* at 197.
83 71 So. 2d 727, 728 (1954).

forcement inequitable, etc., may be interposed to defeat the proprietary right generated by the covenant. A proprietor whose land is burdened by covenant enforceable in equity may initiate action to terminate the proprietary interest. Thus, retrospective legislation shifting the burden of affirmative action from the proprietor of the land burdened to the beneficiary of the covenant is less necessary to clear land titles than similar legislation barring legal interests. It is possible that the classification of the rights generated by covenant as proprietary (as opposed to contractual) will permit a court to sustain retrospective application of a statute, otherwise unconstitutional, requiring rerecordation of such interests periodically. The theory would be that what is barred by the statute is the proprietary right, not the contract obligation.

D. *Vagueness*

In 1949 the legislature of Pennsylvania adopted a statute designed to bar mortgages more than forty years old and to bar claims based on a break in the chain of title or unrecorded instrument more than forty years old, unless action was brought pursuant to the statute within a year after such period.[84] The language was somewhat clumsy. In *Girard Trust Co. v. Pennsylvania R.R.*,[85] the Pennsylvanian supreme court held, per curiam, that the state was too confused to be enforced and was contrary to the due process requirements of the state and federal constitutions.

Lack of clarity in a statute designed to facilitate title examination, also thereby subjecting it to constitutional doubt, defeats the purpose of the statute since careful title examiners will not rely on it until clarified, as well as subjecting the act to constitutional attack for vagueness.

IV. Constitutionality of Iowa's Stale Uses and Reversions Statute

A. *Retrospectivity*

The stale uses and reversions statute, providing a one year period of grace after enactment of the statute to preserve, by recordation of an affidavit of claim, interests more than twenty years old at the time of enactment of the statute, is designed to have retrospective effect and contains no constitutional severability clause. The Supreme Court of Kansas[86] held such a statute unconstitutional on the grounds that it converted a right in rem to a chose in action for the purpose of barring it. That case is distinguishable on the basis that the means (litigation within one year) for preserving affected claims provided by the Kansas legislation was excessively burdensome, while the Iowa statute, providing for recordation of an affidavit of claim, is not. The notice aspect incorporated in the prohibition against conversion of a right in rem to a chose in action for the purpose of barring it, however, is not as easily disposed of. The decision sus-

---

84 No. 512 [1949] Pa. Acts 1692.
85 364 Pa. 576, 73 A.2d 371 (1950).
86 Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949).

taining the Illinois reverter act[87] and the decision extending Minnesota's affidavit of possession act[88] to include reverters are authority for constitutionality of a retrospective statute of limitations to bar possibilities of reverter and rights of reentry, *if* powers of termination are non-property for due process purposes, *or if* the condition on which the power of termination is to become effective has been met and an interest inconsistent with the record title has vested. In the one case the due process clause is not applicable and in the other the possession is adverse to the interest, giving notice sufficient to meet customary standards of fairness.

Jacobs v. Miller[89] suggests that the Iowa court takes the orthodox view toward retrospectivity and that powers of termination are property for due process purposes.[90] Thus, there is serious doubt whether the stale uses and reversions statute is constitutional if it is construed to affect the possibility of reverter or right of reentry *before* condition broken. Since the statute is not designed to date a period of limitations from *breach of condition*, there seems no reasonable construction which will avoid this problem.

B. *Notice*

The decision of the Court of Appeals of New York in *Board of Education v. Miles*,[91] citing to *Mullane*, held unconstitutional *as applied* a statute not distinguishable from the Iowa stale uses and reversions statute, but appeared to leave the statute prospectively valid. In *Wichelman*,[92] the Minnesota court pointed out that the affidavit of possession statute was well known to the bar and that notice was not an issue. That a statute is well known to the bar may be significant for notice purposes if that knowledge will generate a fair opportunity to preserve the interest. Unfortunately the Iowa stale uses and reversions statute will operate to bar interests of individuals who will have no occasion to consult counsel and no notice of the peril to their interests other than enactment of the statute itself. In *Miles* the Court of Appeals of New York said the enactment of the statute was not sufficient for constitutional notice. The court distinguished *Wichelman* because notice was not therein an issue on the facts. Even the Iowa decision in *Lane*[93] sustaining the affidavit of possession statute as applied to bar minor remaindermen pointed out that the interest of the minors could have been preserved by a claim filed in their behalf by parent or guardian and provides little support for the constitutionality of the stale uses and reversions statute.

---

87 Trustee of Schools of Township No. 1 v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

88 Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957).

89 253 Iowa 213, 111 N.W.2d 673 (1961). *See* note 42 *supra* concerning possibilities of reverter in Iowa.

90 Waddel v. Board of Directors, 190 Iowa 400, 125 N.W. 65 (1919) (dictum) to the effect that a contingent reversionary interest *generated by statute* was defeasible by later legislation.

91 15 N.Y.2d 364, 374, 207 N.E.2d 181, 187 (1965).

92 Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957).

93 Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941).

C. *Impairment of the Obligation of Contracts*

A primary target of the stale uses and reversions statute is covenant-generated proprietary interests. The stale uses and reversions statute applies only to interests rooted in contract, deed, will or conveyance, and there is some doubt whether neighborhood planning restrictions generating reciprocal rights are within the purview of the statute. The reciprocal relationship among owners in a neighborhood may be the source of the use restriction rather than any specific contract. Certainly such restrictions have been enforced against persons having notice of the restrictions where there were no covenants in his chain of title.[94] It is, of course, arguable that enforcement against one who has not contracted on the ground that he took with notice of the restriction and derives its benefit, is a product of contract supportive of the general neighborhood plan. The statute does not specify what the affect of an affidavit of claim filed by one landowner in a tract subject to reciprocal covenants will be. Reciprocity is the keystone for equitable enforcement, yet in such a situation reciprocity would be destroyed unless a single renewal kept the restrictions in force with respect to the entire neighborhood. If a renewal claim does renew the restriction for the entire neighborhood, an abstracting problem of significant proportions may be presented to the party filing a renewal claim to ascertain precisely the legal description of all tracts of land then subject to the neighborhood restriction. Although the Florida statute,[95] held unconstitutional for impairment of the obligation of contract in *Biltmore Village v. Royal*,[96] can be distinguished from the Iowa statute on the basis of the degree of burden being less under the Iowa statute, *Biltmore* is direct authority that a retrospective statute adversely affecting the remedy on a contract is unconstitutional. In light of the potential abstracting burden to preserve a neighborhood claim and the degree of burden implicit in filing preservative claims whenever the claimant has interests in multiple tracts of land (pipeline easements, power company easements, covenant-based servitude or easements for drainage purposes, etc.), the burden distinction, even if relevant, is not persuasive. Only if, *as applied*, the burden is negligible can such regulation be valid for due process purposes. The distinction is irrelevant unless the court holds that the statute bars the property right, not the contractual obligation, a questionable distinction.

D. *Vagueness*

The parameters of Iowa's stale uses and reversions statute are ill defined, casting a shadow on valuable proprietary rights, and leaving real doubt as to what interests are within its ambit. It is to be hoped that if the statute is not amended or repealed the Iowa supreme court will follow the approach of the Pennsylvania court in *Girard*[97] and hold the statute void for vagueness or will

---

[94] Hegna v. Peters, 199 Iowa 259, 201 N.W. 803 (1925).
[95] Ch. 26927, [1951] Fla. Laws 1131 (unconstitutional 1954).
[96] 71 So. 2d 727 (1954).
[97] Girard Trust Co. v. Pennsylvania R.R., 364 Pa. 576, 73 A.2d 371 (1950).

undertake the task of defining its limits. Until those limits are defined, and the constitutional doubt resolved, reliance on the stale uses and reversions statute entails considerable risk.

V. Conclusion

The number of states that have undertaken marketability legislation and the problems discussed in part I attest to the importance of legislation to facilitate conveyancing, just as the constitutional decisions reflect the necessity for legislation which carefully discriminates between stale and viable interests. As was pointed out by the Court of Appeals of New York in *Board of Education v. Miles*,[98] there is a kinship between marketability legislation and title registry statutes. Both are designed to make the public record of land title a certain indication of the actual title and to avoid extensive search of the records. Changing over to a registry system, however, is an expensive process which will not solve all the problems. Marketability legislation can be designed to solve most of the problems confronted by conveyancers, without threatening valuable property rights. Even when applied retrospectively, if the degree of burden is limited and adequate notice to the proprietor adversely affected is given (and such notice could perhaps be provided by a publicity plan funded by the legislature at the time of enactment), legislation extending to interests in the chain of title and non-possessory interests will meet due process requirements. Immediate prospective legislation regulating the duration of rights generated by covenants restricting the use of land will ease the problem presented by the impairments clause. If the court adopts the view that the rights generated by equitable enforcement of contracts affecting land are proprietary rights rather than contract obligations, retrospective legislation meeting due process requirements would be valid. Even the most carefully designed legislation, however, may *as applied* in a rare case divest an established viable right without extending to the proprietor a reasonable opportunity to preserve it. Such a proprietor should be compensated. The public interest is served by marketability legislation, and it would be appropriate to provide compensation from public funds, thus exercising the police power and the power of eminent domain together and achieving a desirable, fair and constitutional result.[99]

---

[98] 15 N.Y.2d 364, 207 N.E.2d 181 (1965).
[99] Tennessee v. United States, 256 F.2d 244 (6th Cir. 1958).

APPELLATE PROCEDURE AND PRACTICE

Douglas Rendleman†
Paul Edward Pfeffer††

> The so-called technicalities of the law are not always what they seem. When they establish an orderly process of procedure, they serve a definite purpose and are more than technical; they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done, and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass.[1]

The purpose of this article is to present a quick overview of appellate procedure and practice before the Supreme Court of Iowa, and will not concern appeals to district court from inferior courts or administrative agencies. The jurisdiction of the supreme court has been almost completely appellate in the past; and the original jurisdiction added by a recent constitutional amendment does not alter the overwhelming appellate nature of the tribunal.[2]

The treatment here is designed as a general summary of supreme court procedure and practice, not an exhaustive treatment. On a specific point there is no substitute for the rule or statute itself and the decided cases. Where precision is imperative a form book should be consulted.[3] Most of the rules which govern appeals are collected in the back of Volume II of the Iowa Code and consist of statutes, applicable rules of civil procedure and court rules.[4] Other provisions are scattered throughout the Code.[5] The effect of the rules varies with their nature; some are jurisdictional and if not followed specifically the appeal will be dismissed;[6] breach of others will result in extra costs[7] or per-

---

† Member of the Iowa Bar. B.A., M.A., J.D. University of Iowa. Law clerk to Justice Becker of the Supreme Court of Iowa.

†† Member of the Iowa Bar. B.B.A., J.D. University of Iowa. Law clerk to Chief Justice Garfield of the Supreme Court of Iowa.

The authors desire it to be known that the views expressed in this article are their own and are not intended to reflect the opinions of any organization or other individuals. —Ed.

1 Esterdahl v. Wilson, 252 Iowa 1199, 1208, 110 N.W.2d 241, 246 (1961).

2 Ch. 463, § 36, [1967] Iowa Acts 857. The first action under this provision was filed in the summer of 1969.

3 *See* 5 A. Loth, Iowa Forms, Civil Procedure and Practice §§ 821-34 (1957); 1 D. McCarty, Iowa Pleading §§ 436-47 (2d ed. 1953).

4 *See* Iowa Code 2997-3007 (1966). For more recent rules *see also* Iowa Code Ann., vol. 58 (Supp. 1969); 4 W. Cook & A. Loth, Iowa Rules Civil Procedure (1951, Supp. 1966); The News Bulletin (Iowa State Bar Ass'n.).

5 *See, e.g.*, appeals from municipal court, Iowa Code § 602.44 (1966); bail bond appeals, Iowa Code § 763.9 (1966).

6 Sandler v. Pomerantz, 257 Iowa 163, 131 N.W.2d 814 (1964).

7 Baker v. Wolfe, 164 N.W.2d 835, 840 (Iowa 1969).